

appropriate and waived annual fees.<sup>5</sup> In 2006, FINRA wrote to the staff again, this time recommending a two-year waiver of all fees to continue to reduce the surplus. The Commission agreed and issued another order waiving all IARD fees.<sup>6</sup> As a result of these two waivers, the surplus was reduced from • million in 2005 to \$5 million.

FINRA has again written to Commission staff, recommending that the waiver of annual IARD fees and the waiver of initial IARD filing fees for SEC-registered advisers be extended for an additional nine months to July 31, 2009.<sup>7</sup> Based on projections of expected SEC-associated IARD revenues and SEC-associated IARD expenses for the next nine months, the Commission believes that the current SEC-associated surplus exceeds the amount needed for operations and system enhancements during this period, and accordingly believes that an extension of the current waiver of both annual and initial filing fees through July 31, 2009 is appropriate in order to continue reducing the SEC-associated surplus. This action is expected to waive approximately \$4 million in IARD system fees that SEC-registered advisers would incur, and should reduce the SEC-associated surplus to approximately \$3.7 million. The fee waiver will apply to all annual updating amendments filed by SEC-registered advisers from November 1, 2008 through July 31, 2009 and to all initial applications for registration filed by advisers applying for SEC registration from November 1, 2008 through July 31, 2009.

*It is therefore ordered*, pursuant to sections 204(b) and 206(A) of the Investment Advisers Act of 1940, that:

For annual updating amendments to Form ADV filed from November 1, 2008 through July 31, 2009, the fee otherwise due from SEC-registered advisers is waived, and for initial applications to register as an investment adviser with the SEC filed from November 1, 2008 through July 31, 2009, the fee otherwise due from the applicant is waived.

By the Commission.

Dated: October 30, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-26307 Filed 11-4-08; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>5</sup> Approval of Investment Adviser Registration Depository Filing Fees, Investment Advisers Act Release No. 2439 (Oct. 7, 2005)

<sup>6</sup> Approval of Investment Adviser Registration Depository Filing Fees, Investment Advisers Act Release No. 2564 (Oct. 26, 2006).

<sup>7</sup> The recommendation to waive fees through July 2009 corresponds to the expiration of the SEC's contract with FINRA to operate the IARD.

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58872; File No. SR-BATS-2008-008]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Limitation of Liability

October 28, 2008.

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 October 20, 2008, BATS Exchange, Inc. (“BATS” or “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. BATS has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. BATS has requested that the Commission waive the 5-day notice requirement and the 30-day pre-operative waiting period contained in Rule 19b-4(f)(6)(iii) under the Act.<sup>4</sup> If such waivers are granted by the Commission, the Exchange will implement this rule proposal immediately upon commencement of its operations as a national securities exchange. 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 11.16, entitled “LIMITATION OF LIABILITY,” to codify that it may provide a form of compensation for losses sustained in relation to an Exchange system failure or a negligent act or omission of an Exchange employee.

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.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> *Id.*

#### 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 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 Exchange proposes to amend Rule 11.16 to establish a procedure to compensate Members <sup>5</sup> in relation to Exchange systems failures or a negligent act or omission of an Exchange employee. The Exchange recognizes that the current industry practice of exchanges that function as SROs is to provide a form of compensation for losses sustained in relation to the use of the exchanges' systems, and that some exchanges also provide a form of compensation for negligence by the exchanges' employees. As such, the Exchange seeks to amend BATS Rule 11.16 to conform to current industry practice.

Pursuant to the proposed amendment to Rule 11.16, the Exchange would compensate Members for losses resulting directly from: (i) The malfunction of the Exchange's physical equipment, devices, and/or programming, or (ii) the negligent acts or omissions of the Exchange's employees.<sup>6</sup> Under this proposed rule change, for such malfunctions or negligence, the Exchange would cap its liability: (i) To a single Member at the greater of \$100,000 or the amount recovered under any applicable insurance policy on a single trading day, (ii) to all Members at the greater of \$250,000 or the amount recovered under any applicable insurance policy on a single trading day, and (iii) to all Members at the greater of \$500,000 or the amount recovered under any

<sup>5</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>6</sup> The Exchange represents that the determination as to whether a Member is compensated or not will be made on an equitable and non-discriminatory basis without regard to the status of that Member, e.g., regardless of whether that Member is registered as a Market Maker with the Exchange.

applicable insurance policy in a single calendar month.

To the extent that all claims resulting from systems failures or negligence by Exchange employees cannot be fully satisfied because in the aggregate they exceed the applicable maximum amount of liability provided for, then the Exchange proposes to allocate the maximum amount among all such claims arising on a single trading day or during a single calendar month, as applicable, based on the proportion that each such claim bears to the sum of all such claims.

In order for a Member to be eligible to receive payment, claims must be made in writing and must be submitted no later than the opening of trading on the next business day following the day on which the use of the Exchange gave rise to such claims. Once in receipt of a claim, the Exchange will verify that: (i) A valid order was accepted into the Exchange's systems; and (ii) an Exchange system failure or a negligent act or omission of an Exchange employee occurred during the execution or handling of that order. If all the criteria for submitting a claim have been met, the claim will be qualified for processing with all other claims at the end of the calendar month in which the incident occurred.

## 2. Statutory Basis

The Exchange believes the proposal 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).<sup>7</sup> In particular, for the reasons described above, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>8</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 providing more certainty as to the Exchange's potential liability resulting from systems problems and negligence by Exchange employees.

### 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

Because the foregoing proposed 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 from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. The Exchange requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay<sup>11</sup> is consistent with the protection of investors and the public interest. Given that the Exchange's proposed rule change is substantially similar to the rules of other exchanges previously approved by the Commission,<sup>12</sup> the proposal does not appear to present any novel regulatory issues. Moreover, the proposal would make more certain the Exchange's potential liability for such losses upon commencement of its operation as an exchange. Therefore, the Commission designates the proposal operative upon filing.

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

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written 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>11</sup> For 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>12</sup> See NYSE Arca Equities Rule 13.2, NASDAQ Rule 4626, and ISE Rule 705.

### 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-2008-008 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number *SR-BATS-2008-008*. 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 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-2008-008* and should be submitted on or before November 26, 2008.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-26278 Filed 11-4-08; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58868; File No. SR-ISE-2008-79]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Changes

October 28, 2008.

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 October 21, 2008, the International Securities Exchange, LLC (the "Exchange" or the "ISE") 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 self-regulatory organization. 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 ISE is proposing to amend its Schedule of Fees to establish fees for transactions in options on 4 Premium Products.<sup>3</sup> The text of the proposed rule change is available on the ISE's Web site (<http://www.ise.com>), at the principal office of the ISE, 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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*—The Exchange is proposing to amend its Schedule of Fees to establish fees for transactions in options on the iShares Dow Jones U.S. Medical Devices Index Fund ("IHI"), the iShares Dow Jones U.S. Oil & Gas Exploration & Production Index Fund ("IEO"), the iShares Dow Jones U.S. Regional Banks Index Fund ("IAT"),<sup>4</sup> and the SPDR® S&P Oil & Gas Exploration & Production ETF ("XOP").<sup>5</sup> The Exchange represents that IHI, IEO, IAT, and XOP are eligible for options trading because they constitute "Exchange-Traded Fund Shares," as defined by ISE Rule 502(h).

All of the applicable fees covered by this filing are identical to fees charged

<sup>4</sup> iShares® is a registered trademark of Barclays Global Investors, N.A. ("BGI"), a wholly owned subsidiary of Barclays Bank PLC. "Dow Jones," "Dow Jones U.S. Select Medical Equipment Index," "Dow Jones U.S. Select Oil Exploration & Production Index," and "Dow Jones U.S. Select Regional Banks Index" are service marks of Dow Jones & Company, Inc. ("Dow Jones") and have been licensed for use for certain purposes by BGI. All other trademarks and service marks are the property of their respective owners. The iShares Dow Jones U.S. Medical Devices Index Fund ("IHI"), the iShares Dow Jones U.S. Oil & Gas Exploration & Production Index Fund ("IEO"), and the iShares Dow Jones U.S. Regional Banks Index Fund ("IAT") are not sponsored, endorsed, sold, or promoted by Dow Jones. BGI and Dow Jones have not licensed or authorized ISE to (i) engage in the creation, listing, provision of a market for trading, marketing, and promotion of options on IHI, IEO, and IAT or (ii) to use and refer to any of their trademarks or service marks in connection with the listing, provision of a market for trading, marketing, and promotion of options on IHI, IEO, and IAT or with making disclosures concerning options on IHI, IEO, and IAT under any applicable federal or state laws, rules or regulations. BGI and Dow Jones do not sponsor, endorse, or promote such activity by ISE, and are not affiliated in any manner with ISE.

<sup>5</sup> "Standard & Poor's®," "S&P®," "S&P 500®," "Select Sector SPDR®," "Select Sector SPDRs®," and "the S&P® Oil & Gas Exploration & Production Select Industry Index" are trademarks of The McGraw-Hill Companies, Inc. ("McGraw-Hill"), and have been licensed for use by State Street Bank and Trust Company ("State Street") in connection with the listing and trading of SPDR® S&P Oil & Gas Exploration & Production ETF ("XOP"). State Street and Standard & Poor's, ("S&P"), a division of McGraw-Hill, do not sponsor, endorse, or promote XOP. State Street, McGraw-Hill, and S&P have not licensed or authorized ISE to (i) engage in the creation, listing, provision of a market for trading, marketing, and promotion of options on XOP or (ii) to use and refer to any of their trademarks or service marks in connection with the listing, provision of a market for trading, marketing, and promotion of options on XOP or with making disclosures concerning options on XOP under any applicable federal or state laws, rules or regulations. State Street, McGraw-Hill, and S&P do not sponsor, endorse, or promote such activity by ISE and are not affiliated in any manner with ISE.

by the Exchange for all other Premium Products. Specifically, the Exchange is proposing to adopt an execution fee for all transactions in options on IHI, IEO, IAT, and XOP.<sup>6</sup> The amount of the execution fee for products covered by this filing shall be \$0.18 per contract for all Public Customer Orders<sup>7</sup> and \$0.20 per contract for all Firm Proprietary orders. The amount of the execution fee for all ISE Market Maker transactions shall be equal to the execution fee currently charged by the Exchange for ISE Market Maker transactions in equity options.<sup>8</sup> Finally, the amount of the execution fee for all non-ISE Market Maker transactions shall be \$0.45 per contract.<sup>9</sup> Further, since options on IHI, IEO, IAT, and XOP are multiply-listed, the Exchange's Payment for Order Flow fee shall apply to all these products. The Exchange believes the proposed rule change will further the Exchange's goal of introducing new products to the marketplace that are competitively priced.

2. *Basis*—The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>11</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

<sup>6</sup> These fees will be charged only to Exchange members. Under a pilot program that is set to expire on July 31, 2009, these fees will also be charged to Linkage Principal Orders ("Linkage P Orders") and Linkage Principal Acting as Agent Orders ("Linkage P/A Orders"). The amount of the execution fee charged by the Exchange for Linkage P Orders and Linkage P/A Orders is \$0.24 per contract side and \$0.15 per contract side, respectively. See Securities Exchange Act Release No. 58143 (July 11, 2008), 73 FR 41388 (July 18, 2008) (SR-ISE-2008-52).

<sup>7</sup> Public Customer Order is defined in Exchange Rule 100(a)(39) as an order for the account of a Public Customer. Public Customer is defined in Exchange Rule 100(a)(38) as a person or entity that is not a broker or dealer in securities.

<sup>8</sup> The Exchange applies a sliding scale, between \$0.01 and \$0.18 per contract side, based on the number of contracts an ISE market maker trades in a month.

<sup>9</sup> The amount of the execution fee for non-ISE Market Maker transactions executed in the Exchange's Facilitation and Solicitation Mechanisms is \$0.19 per contract.

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

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>13</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> Premium Products is defined in the Schedule of Fees as the products enumerated therein.