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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68643; File No. SR-BATS-2012-039)

January 11, 2013

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Amendment Nos. 2 and 3, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1, 2 and 3, to Amend the Listing Rules for Compensation Committees to Comply with Securities Exchange Act Rule 10C-1 and Make Other Related Changes

I. Introduction

On September 25, 2012, BATS Exchange, Inc. (“Exchange” or “BATS”) 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 modify the Exchange’s rules for compensation committees of listed issuers to comply with Rule 10C-1 under the Act and make other related changes. On October 9, 2012, BATS filed Amendment No. 1 to the proposed rule change.³ The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on October 15, 2012.⁴ The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.⁵ The Commission received no

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the proposed rule change in full.

⁴ See Securities Exchange Act Release No. 68022 (October 9, 2012), 77 FR 62572 (“Notice”).

⁵ See Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

comment letters on the proposed rule change.⁶ On January 10, 2013, the Exchange filed Amendment No. 2 to the proposed rule change.⁷ On January 11, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.⁸ This order approves the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C-1 under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),⁹ the

⁶ The Commission notes that comments were received on substantially similar proposals filed by New York Stock Exchange, LLC and Nasdaq Stock Market LLC. For a synopsis of these comments see Securities Exchange Act Release Nos. 68011 (October 9, 2012) (“NYSE Notice”) (File No. SR-NYSE-2012-49); 68013 (October 9, 2012) (“Nasdaq Notice”) (File No. SR-NASDAQ-2012-109); 68639 (January 11, 2013), (“NYSE Approval Order”); 68640 (January 11, 2013), (“Nasdaq Approval Order”).

⁷ In Amendment No. 2 to SR-BATS-2012-039, BATS proposes to: (1) add additional language to further outline the responsibilities of the compensation committee, as well as to make certain clarifying changes to the compensation committee’s responsibilities and authority; (2) increase the cure period for meeting compensation committee requirements where the annual shareholders meeting occurs no later than 180 days following the event that cause the failure to comply, as well as make several clarifying changes to the cure period rule; (3) amend language from the proposal in order to create full exemptions from Rule 14.10(c)(4) for limited partnerships, management investment companies, and companies in bankruptcy proceedings; (4) move the effective date of the proposal from June 1, 2013 to July 1, 2013; and (5) make several non-substantive clarifying changes, as well as correcting certain rule references within the proposal.

⁸ In Amendment No. 3 to SR-BATS-2012-039, BATS added language to make clear that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing, as BATS is only exempting Smaller Reporting Companies from the newly proposed enhanced independence standards as well as the new compensation adviser standards. Therefore, the Exchange amended its exemption for Smaller Reporting Companies to state that executive compensation must be determined either by a compensation committee comprised of Independent Directors meeting the definition of independent in Rule 14.10(c)(1)(B), or by a majority of the Board’s Independent Directors in a vote in which only Independent Directors meeting the definition of Independent Director in Rule 14.10(c)(1)(B) participate.

⁹ Pub. L. 111-203, 124 Stat. 1900 (2010).

Commission proposed Rule 10C-1 under the Act,¹⁰ which directs each national securities exchange (hereinafter, “exchange”) to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule’s requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C-1.¹¹

Rule 10C-1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee¹² of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.¹³ In determining the independence standards for members of compensation committees of listed issuers, Rule 10C-1 requires the exchanges to consider relevant factors, including, but not limited to: (a) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the “Fees Factor”); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the “Affiliation Factor”).¹⁴

In addition, Rule 10C-1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation

¹⁰ See Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (“Rule 10C-1 Proposing Release”).

¹¹ See Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (“Rule 10C-1 Adopting Release”).

¹² For a definition of the term “compensation committee” for purposes of Rule 10C-1, see Rule 10C-1(c)(2)(i)-(iii).

¹³ See Rule 10C-1(a) and (b)(1).

¹⁴ See Rule 10C-1(b)(1)(ii). See also Rule 10C-1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. See Rule 10C-1(b)(1)(iii)(B).

adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.¹⁵ The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.¹⁶ Finally, among other things, Rule 10C-1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C-1,¹⁷ as well as any other factors identified by the relevant exchange in its listing standards.¹⁸

B. BATS Proposed Rule Change, as Amended

To comply with Rule 10C-1, BATS proposes to amend several provisions of Exchange BATS Rule 14.10, “Corporate Governance Requirements.” Specifically, BATS proposes to amend BATS Rule 14.10(c)(4), “Independent Director Oversight of Executive Officer Compensation,” and BATS Rule 14.10(e), “Exemptions from Certain Corporate Governance Requirements.”

1. Compensation Committee Composition and Independence Standards

Current BATS Rule 14.10(c)(4) provides that compensation of the executive officers of a listed company must be determined, or recommended to the company’s board for determination,

¹⁵ See Rule 10C-1(b)(2).

¹⁶ See Rule 10C-1(b)(3).

¹⁷ See Rule 10C-1(b)(4). The six factors, which BATS proposes to set forth explicitly in its rules, are specified in the text accompanying note 34, infra.

¹⁸ Other provisions in Rule 10C-1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C-1, to prohibit the issuer’s listing.

either by a compensation committee comprised solely of “Independent Directors,” as defined in the Exchange’s rules,¹⁹ or, as an alternative, by a vote of such Independent Directors constituting a majority of the board’s Independent Directors in a vote in which only Independent Directors participate (“Alternative Option”).²⁰

BATS is retaining the requirement that executive compensation be determined by individuals who qualify as Independent Directors, but, in compliance with Rule 10C-1, is proposing to require the board to consider two additional factors in evaluating the independence of these individuals. Specifically, the Exchange proposes to amend BATS Rule 14.10(c)(4) to require the board to consider: (i) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to such director; and (ii) whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company.²¹

¹⁹ “Independent Directors,” as defined in BATS Rule 14.10(c)(1)(B) and used herein, includes a two-part test for independence. The definition sets forth seven specific categories of directors who cannot be considered independent because of certain discrete relationships (“the bright-line tests”). In addition, an Independent Director may not have a relationship which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities. The board must make an affirmative determination that an individual serving as an Independent Director does not have a relationship with the company that would impair the individual’s independence. See Interpretation and Policy .01 to BATS Rule 14.10(c)(1)(B).

²⁰ Current BATS Rule 14.10(c)(4)(A) sets forth the two alternatives (formal committee or majority of Independent Directors) with respect to determining compensation of the chief executive officer (“CEO”) of the company, and provides that the CEO may not be present during voting or deliberations regarding the CEO’s own compensation. Current BATS Rule 14.10(c)(4)(B) sets forth the same two alternatives with respect to determining compensation of all other executive officers. Under the proposed rule change, these provisions will be renumbered. See infra note 21.

²¹ See Notice, supra note 4. Under the proposal, the new requirement to consider the additional independence factors will be set forth as BATS Rule 14.10(c)(4)(A), and current BATS Rule 14.10(c)(4)(A) and (B) will be renumbered as BATS Rule 14.10(c)(B)(i) and (ii), respectively.

In discussing the proposed rule change, BATS stated that the adoption of this new requirement, along with its existing bright-line tests for director independence, will bring the Exchange into compliance with Rule 10C-1(b)(1).²² The Exchange stated that, after reviewing its current and proposed listing rules, it concluded that these rules are sufficient to ensure the independence of a company's directors who determine or recommend to the board for determination executive compensation. The Exchange believes that its existing bright-line standards are "sufficiently broad to encompass the types of relationships which would generally be material to a director's independence" for these purposes, and therefore determined not to propose independence requirements in addition to the specific ones it is proposing.²³ After

²² See Notice, supra note 4 and supra note 12 and accompanying text.

²³ See BATS Rule 14.10(c)(1)(b) specifying the bright line tests: The following persons shall not be considered independent: (i) a director who is, or at any time during the past three years was, employed by the Company; (ii) a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (a) compensation for board or board committee service; (b) compensation paid to a Family Member who is an employee (other than an Executive Officer) of the Company; or (c) benefits under a tax-qualified retirement plan, or non-discretionary compensation. Provided, however, that in addition to the requirements contained in this paragraph (ii), audit committee members are also subject to additional, more stringent requirements under Rule 14.10(c)(3)(B). (iii) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company as an Executive Officer; (iv) a director who is, or has a Family Member who is, a partner in, or a controlling Shareholder or an Executive Officer of, any organization to which the Company made, or from which the Company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following: (a) payments arising solely from investments in the Company's securities; or (b) payments under non-discretionary charitable contribution matching programs.; (v) a director of the Company who is, or has a Family Member who is, employed as an Executive Officer of another entity where at any time during the past three years any of the Executive Officers of the Company serve on the compensation committee of such other entity; or (vi) a director who is, or has a Family Member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor who worked on the Company's audit at any time during any of the past three years. (vii) in the case of an

considering the factors set forth in Rule 10C-1(b)(1)(ii) and evaluating how the factors could impact the ability of a director to act independently in determining executive compensation, the Exchange further stated, it believes that it can best comply with Rule 10C-1 by adopting those factors in its rules.²⁴

The Exchange is also proposing to delete existing BATS Rule 14.10(c)(4)(C). Current BATS Rule 14.10(c)(4)(C) provides that, notwithstanding the Exchanges independence requirements for compensation committees, if such a committee is comprised of at least three members, one director who is not independent and is not a current officer or employee or a family member of an officer or employee may be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership is required by the best interest of the company and its shareholders.²⁵ The Exchange notes that no such exception exists under Rule 10C-1, and states that, after considering the factors relevant to compensation committee independence under Rule 10C-1, it believes that the deletion of the exception under its rules would comply with Rule 10C-1.

BATS further proposes to add a cure period provision for a failure of a listed company to meet its compensation committee composition requirements.²⁶ Under the provision, a company that fails to comply with the compensation committee independence requirements due to one committee member ceasing to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of its next annual

investment company, in lieu of paragraphs (i)-(vi), a director who is an "interested person" of the Company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

²⁴ See id.

²⁵ See current BATS Rule 14.10(c)(4)(C).

²⁶ See proposed BATS Rule 14.10(c)(4)(D).

shareholders meeting or one year from the occurrence of the event that caused the failure to comply.²⁷ However, if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply, the company will be allowed 180 days from the event to regain compliance.²⁸ A company relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstances that caused the noncompliance. BATS's proposal expressly limits the availability of this cure period to companies with formal compensation committees.²⁹

2. Authority of Committees to Retain Compensation Advisers;
Funding; and
Independence of Compensation Advisers

In its proposed rule change, BATS proposes to fulfill the requirements imposed by Rule 10C-1(b)(2)-(4) under the Act – regarding the authority of compensation committees to retain compensation advisers, the funding of such advisers, and assessment of their independence – by setting forth those requirements in its own rules. Thus, proposed BATS Rule 14.10(c)(4)(C), as amended by Amendment Nos. 1, 2 and 3, sets forth the following requirements relating to compensation committees of listed companies, which, for these purposes, includes Independent

²⁷ See Proposed BATS Rule 14.10(c)(4)(D). If the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the company shall instead have 180 days from such event to regain compliance. Id.

²⁸ See Amendment No. 2 to the proposed rule change.

²⁹ BATS does not otherwise propose any new procedures for an issuer to have an opportunity to cure defects with respect to its proposed requirements, but BATS does have existing delisting procedures that provide issuers with notice, opportunity for a hearing, opportunity for appeals, and an opportunity to cure defects before an issuer's securities are delisted. See Rules of BATS Exchange, Rule 14.12 Failure to Meet Listing Standards. For example, Rule 14.12(c) provides procedures for providing deficient companies with notice, Rule 14.12(h) provides procedures for an issuer to request the review of a hearing panel, and Rule 14.12(i) provides procedures for issuers to appeal to BATS' Listing Council.

Directors overseeing compensation pursuant to the Alternative Option:

- The committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel,³⁰ or other adviser;³¹
- The committee shall be directly responsible for the appointment, compensation and oversight of the work of any retained compensation consultant, legal counsel, or other adviser retained by the compensation committee;³² and
- The company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, legal counsel, or any other adviser retained by the compensation committee.³³

The committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C-1(b)(4) regarding independence assessments of compensation advisers.³⁴ The six factors, which are set forth in full in the proposed rule, are: (i) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel

³⁰ Rule 10C-1(b)(4) does not include the word “independent” before “legal counsel” and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In setting forth the requirements of Rule 10C-1(b)(2) and (3), BATS has deleted the word “independent” prior to “legal counsel” so as to avoid confusion.

³¹ See proposed BATS Rule 14.10(c)(4)(C)(i).

³² See proposed BATS Rule 14.10(c)(4)(C)(ii).

³³ See proposed BATS Rule 14.10(c)(4)(C)(iii).

³⁴ See proposed BATS Rule 14.10(c)(4)(C)(iv), setting forth the factors listed in Rule 10C-1(b)(4)(i)-(vi) under the Act.

or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (v) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the issuer. The Exchange stated that it believes this list of factors is comprehensive. Therefore, the Exchange did not include any specific additional factors for consideration by compensation committees in making the required independence assessment.

The amended proposed rule change also states that nothing in the rule shall be construed to require the compensation committee to implement or act consistently with the advice or recommendations of the retained compensation adviser or to affect the ability or obligation of the committee to exercise its own judgment in fulfilling its duties.³⁵ In Amendment No. 2, the Exchange modified the proposed rule change to state that the committee is required to conduct the independence assessment outlined in the rule with respect to any compensation consultant, legal counsel or other adviser that provides advice to the committee, other than in-house counsel.³⁶ Amendment No. 2 also provides that a compensation committee is not required to conduct the independence assessment with respect to any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K, including: consulting on any broad-based

³⁵ See id., based on Rule 10C-1(b)(2)(iii).

³⁶ See id., based on Instruction to paragraph (b)(4) of Rule 10C-1.

plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.³⁷

Proposed BATS Rule 14.10(c)(4)(C)(iv), as amended, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.³⁸ It further clarifies that compensation committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth above.³⁹

3. Application to Smaller Reporting Companies

Rule 10C-1 includes an exemption for smaller reporting companies from all the requirements included within the rule.⁴⁰ Consistent with this Rule 10C-1 provision, BATS proposes that a smaller reporting company, as defined in Rule 12b-2 under the Act (hereinafter, a “Smaller Reporting Company”), be exempt from the compensation-related rules added by the proposed rule change. Thus, Smaller Reporting Companies will not be required to comply with the enhanced independence standards for members of compensation committees relating to

³⁷ See proposed BATS Rule 14.10(c)(4)(C)(iv) and Amendment Nos. 2 and 3, supra notes 7 and 8, respectively.

³⁸ See id.

³⁹ See id.

⁴⁰ See supra Section II.A; see also Rule 10C-1(b)(5)(ii).

compensatory fees and affiliation and the requirements relating to compensation advisers.⁴¹

4. Exemptions

Rule 10C-1 permits the national securities exchanges to exempt from the listing rules adopted pursuant to Rule 10C-1 certain categories of issuers, as the national securities exchange determines is appropriate, taking into consideration, among other relevant factors, the potential impact of the listing rules on smaller reporting issuers.⁴² As modified by Amendment No. 2, the proposed rule change would leave the existing exemptions from the compensation-related listing standards in the Exchange's current rules generally unchanged. These include exemptions for asset-backed issuers and other passive issuers,⁴³ cooperatives,⁴⁴ limited partnerships,⁴⁵ and

⁴¹ See proposed BATS Rule 14.10(e)(1)(F), as amended by Amendment No. 3 which makes clear that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing. Therefore, the Exchange amended its exemption for Smaller Reporting Companies to state that executive compensation must be determined either by a compensation committee comprised of Independent Directors meeting the definition of independent in Rule 14.10(c)(1)(B), or by a majority of the Board's Independent Directors in a vote in which only Independent Directors meeting the definition of Independent Director in Rule 14.10(c)(1)(B) participate.

⁴² See 17 CFR 240.10C-1(b)(5).

⁴³ See BATS Rule 14.10(e)(1)(A). Asset-backed issuers and other passive issuers have traditionally been exempt from the Exchange's compensation-related listing rules because these issuers do not have a board of directors or persons acting in a similar capacity and their activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral, or other assets on behalf of or for the benefit of the holders of the listed securities.

⁴⁴ See BATS Rule 14.10(e)(1)(B). Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. As BATS stated in its proposal, these entities have traditionally been exempt from the Exchange's compensation-related listing rules because of their unique structure and the fact that they do not have a publicly traded class of common stock.

⁴⁵ See BATS Rule 14.10(e)(1)(D). The Exchange's compensation-related listing rules historically have not been applied to limited partnerships because, according to the Exchange, the structure of these entities requires that public investors have limited rights and that the general partners make all significant decisions about the operation of the

management investment companies.⁴⁶ For the same reasons that these categories of companies have traditionally been exempt from the Exchange's compensation-related listing rules, the Exchange proposes that they continue to be exempt from its revised listing rules relating to compensation committees.

In addition, the Exchange's current listing rules provide that a foreign private issuer may follow its home country practice in lieu of the Exchange's compensation-related listing rules if the foreign private issuer discloses in its annual reports filed with the Commission each requirement that it does not follow and describes the home country practice followed by the company in lieu of such requirements.⁴⁷ Under the proposed rule change as modified by Amendment No. 2, this allowance will continue to apply generally to the Exchange's compensation committee rules as revised, on the same condition, namely that the issuer discloses each requirement it does not follow and describes the home country practice it follows in lieu of such requirement. However, with respect, specifically, to the enhanced standards of independence for compensation committees (concerning the Fees and Affiliation Factors), if a listed company follows its home country practice, it will be required additionally disclose in its

limited partnership. As such, BATS notes that limited partners do not expect to have a voice in the operations of the partnership.

⁴⁶ See BATS Rule 14.10(e)(1)(E). According to BATS, management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance, and, as a result, these entities have traditionally been exempt from the Exchange's compensation-related listing rules.

⁴⁷ See BATS Rule 14.10(e)(1)(C). Alternatively, a foreign private issuer that is not required to file its annual report with the Commission on Form 20-F may make this disclosure only on its website. Id. The Exchange's listing rules have traditionally provided qualified exemptions for Foreign Private Issuers so that such issuers are not required to do any act that is contrary to a law, rule, or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile.

annual report filed with the Commission the reasons why it does not have an independent compensation committee as set forth in these standards.⁴⁸

Lastly, in Amendment No. 2, the Exchange proposes to leave the requirements relating to compensation committee composition for companies in bankruptcy proceeding generally unchanged. Because companies in bankruptcy proceedings are not currently required to have a compensation committee, the Exchange is proposing to continue to rely on the existing schedule to phase in compliance with the compensation committee composition requirement for companies emerging from bankruptcy.⁴⁹

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change, as amended, provides that certain of the new requirements for companies listed prior to July 1, 2013. A company listed on the Exchange prior to July 1, 2013 will be permitted, commencing on July 1, to phase-in compliance with the Independent Director Oversight of Executive Officer Compensation requirements on the same schedule as Companies listing in conjunction with their initial public offering.⁵⁰ The phase-in period for companies listing in conjunction with the initial public offering is discussed in section II.B.6 below.

6. Phase-In Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

BATS proposes to amend BATS Rule 14.10(e)(2)(A) to allow a company listing in connection with its initial public offering to phase-in the compensation committee independence rules, as revised, as follows: (1) one independent member at the time of listing; (2) a majority of

⁴⁸ As explained by the Exchange, Amendment No. 2 adopts the requirements of Rule 10C-1(b)(1)(iii)(A)(4), which provides an exemption from the independence requirements of Rule 10C-1 for foreign private issuers.

⁴⁹ See BATS Rule 14.10(e)(2)(C).

⁵⁰ See BATS Rule 14.10(e)(2)(D).

independent members within 90 days of listing; and (3) all independent members within one year of listing.⁵¹ Since companies listing in connection with an initial public offering may not have previously had an independent compensation committee, the Exchange believes that allowing such companies to phase in compliance with these requirements will reasonably provide these companies with a window identical to the phase-in schedule for the Exchange's rules regarding Independent Director Oversight of Director Nominations under BATS Rule 14.10(c)(4) and the independent audit committee requirements of Rule 10A-3(b)(1)(iv)(A) under the Act. The Exchange states that, as noted above, the proposed rule would require that the company have at least one independent member at the time of listing, meaning that even though it is described as a "phase-in period," the company would never actually be without at least one independent member.

7. Conforming Changes and Correction of Typographical Errors

The Exchange is also proposing to amend BATS Rule 14.10(c)(4)(B) to add a title to and adjust the numbering of the Rule. The changes are being proposed in order to remain consistent with existing rule structure and to ensure that the rules are well-organized and understandable.

III. Discussion

After careful review, the Commission finds that the BATS proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵² In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,⁵³ as well as with Section

⁵¹ See Proposed BATS Rule 14.10(e)(2)(A); Exhibit 5 to Amendment No. 2, supra note 6.

⁵² In approving the BATS proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁵³ 15 U.S.C. 78f(b).

10C of the Act⁵⁴ and Rule 10C-1 thereunder.⁵⁵ Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,⁵⁶ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; 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, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the BATS proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,⁵⁷ Congress resolved to require that “board committees that set compensation policy will consist

⁵⁴ 15 U.S.C. 78j-3.

⁵⁵ 17 CFR 240.10C-1.

⁵⁶ 15 U.S.C. 78f(b)(5).

⁵⁷ See supra note 9.

only of directors who are independent.”⁵⁸ In June 2012, as required by this legislation, the Commission adopted Rule 10C-1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule’s requirements regarding issuer compensation committees and compensation advisers.

In response, BATS submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C-1 and additional provisions designed to strengthen the Exchange’s listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C-1 and otherwise will promote effective oversight of its listed issuers’ executive compensation practices.

The Commission believes that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3, appropriately revises BATS’s rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C-1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting advisory or other compensatory fee paid by the issuer to the director as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C-1 leaves it to each exchange to formulate a final

⁵⁸ See H.R. Rep. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E “Accountability and Executive Compensation,” at 872-873 (Conf. Rep.) (June 29, 2010).

definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act. As the Commission stated in the Rule 10C-1 Adopting Release, “given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C-1(b)(1).”⁵⁹

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, BATS has enhanced its listing requirements regarding compensation committees. Under BATS’s current rules, each member of a listed issuer’s compensation committee – or each individual participating under the Alternative Option – must be a member of the board and independent. The enhanced listing requirements proposed by BATS specifically require that when evaluating the independence of a director responsible for determining executive compensation, a company’s board of directors consider the following factors: (i) the source of compensation of the director, including consulting, advisory or other compensatory fee paid by the company to the director; and (ii) whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in accordance with the requirements of Rule 10C-1(b)(1).

⁵⁹ As explained further in the Rule 10C-1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges’ proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

The Commission believes that by incorporating these independence standards, the Exchange has complied with the independence requirements of Rule 10C-1(b)(1), and that the proposed independence requirements, which are designed to protect investors and the public interest, are consistent with the requirements of Section 6(b)(5) of the Act. The Commission believes that the enhanced standards, in conjunction with the Exchange's existing "bright line" independence standards set forth in BATS Rule 14.10(c)(1)(B), are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for determining executive compensation.

As to whether BATS should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in the light of Rule 10C-1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence.⁶⁰ Further, BATS stated it believes it can best comply with Rule 10C-1 by adopting in its Rules the factors set forth in Rule 10C-1(b)(1)(ii).⁶¹ The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to the fees and affiliation factors in determining its definition of independence for compensation committee members. The Commission notes that Rule 10C-1 requires each exchange to consider relevant factors, but does not require the exchange's proposal to reflect any such additional factors.

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

As discussed above, BATS proposes to set forth explicitly in its rules the requirements of Rule 10C-1 regarding a compensation committee's authority to retain compensation advisers, its

⁶⁰ See Notice, supra note 4.

⁶¹ See id.

responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C-1 and are consistent with the Act.

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, BATS has proposed, in Amendment No. 2, to add language to the provision regarding the independence assessment of compensation advisers⁶² to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S-K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. BATS states that this exception is based on Item 407(e)(3)(iii) of Regulation S-K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.⁶³

The Commission views BATS' proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item

⁶² See proposed Rule 14.10(c)(4)(C)(iv), as amended by Amendment No. 2.

⁶³ See 17 CFR 229.407(e)(3)(iii).

407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.⁶⁴ The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C-1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters to other filings regarding the scope of the independence assessment requirement.⁶⁵ Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

C. Compensation Adviser Independence Factors

As noted above, the compensation committee may select, or receive advice from, a compensation consultant, legal counsel, or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C-1⁶⁶ regarding independence assessments of compensation advisers, which will be set forth in BATS Rule 14.10(c)(4)(C)(ii). Codifying the comprehensive list of factors, as set forth in Rule 10C-1, into its own Rules will ensure that issuers adequately assess the independence of potential compensation advisers.

BATS Rules require an independence assessment to be performed on every potential compensation adviser, other than in-house counsel.⁶⁷ The Commission notes that Rule 10C-1

⁶⁴ See Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (“We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.”).

⁶⁵ See NYSE Approval Order and Nasdaq Approval Order, supra note 6.

⁶⁶ See Rule 10C-1(b)(4).

⁶⁷ See BATS Rule 14.10(c)(4)(C)(iv).

includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to “any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.” To avoid any confusion, BATS, in Amendment No. 2, added rule text that reflects this instruction in its own rules.⁶⁸

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. Finally, one commenter on the New York Stock Exchange’s proposal requested guidance “on how often the required independence assessment should occur.”⁶⁹ This commenter observed that it “will be extremely burdensome and disruptive if prior to each compensation committee meeting, the committee had to conduct a new assessment.” The Commission anticipates that compensation committees will conduct such an independent assessment at least annually.⁷⁰

D. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other BATS-listed companies, to have a compensation committee, composed solely of independent directors or compensation determined by a majority of the independent directors, is reasonable and consistent with the protection of investors. The Commission notes that BATS’

⁶⁸ See supra note 38 and accompanying text.

⁶⁹ See Comment to NYSE Notice by Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (“Corporate Secretaries Letter”).

⁷⁰ See NYSE Approval Order and Nasdaq Approval Order, supra note 6, for a discussion of comments.

rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C-1, the Exchange has decided not to require Smaller Reporting Companies to meet its proposed new independence requirements as to compensatory fees and affiliation as well as the requirements concerning compensation advisers.⁷¹

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for BATS to provide some flexibility to Smaller Reporting Companies. Further, in view of the potential additional costs, it is reasonable not to require a Smaller Reporting Company to comply with these additional compensation adviser requirements.⁷²

E. Opportunity to Cure Defects

The Commission notes that the cure period that BATS proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C-1 is not exactly the same as the cure period suggested under Rule 10C-1.⁷³ The BATS proposal adds the proviso that, if the annual shareholders meeting occurs no later than 180 days following the

⁷¹ See Amendment No. 3, supra note 8, regarding proposed BATS Rule 14.10(e)(i).

⁷² As discussed supra notes 40-41 and accompanying text, under BATS' proposal, Smaller Reporting Companies are exempted from all of the compensation adviser requirements, including the requirement that specified independence factors be considered before selecting such advisers.

⁷³ Rule 10C-1 allows a cure period of until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. The BATS proposal adds that, if the annual shareholders' meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. As explained by BATS, this provides a company at least 180 days to cure noncompliance and would typically allow a company to regain compliance in connection with its next annual meeting. See supra notes 28-29 and accompanying text.

event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. The Commission believes that, although the cure period proposed by BATS gives a company more leeway in certain circumstances than the cure period suggested under Rule 10C-1, the accommodation is fair and reasonable. As a general matter, it allows all companies at least 180 days to cure noncompliance. To give a specific example, the proposal would afford a company additional time to comply, than the Rule 10C-1 option, where a member of the compensation committee ceases to be independent two weeks before the company's next annual meeting.

The Commission believes that it is reasonable for BATS not to provide this cure period when the listed company has no formal compensation committee and executive compensation is determined under the Alternative Option. The Commission notes that under this option, only a majority – not all – of the board's Independent Directors who also meet the enhanced requirements are required for determining, or recommending to the board for determination, executive compensation. In addition, as the Exchange notes, its general rules include delisting procedures that provide issuers with notice, opportunity for a hearing, opportunity for appeals, and an opportunity to cure defects before an issuer's securities are delisted.

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for compensation committees failing to meet the new independence standards, adequately meet the mandate of Rule 10C-1 and also are consistent with investor protection and the public interest since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.

F. Exemptions

As discussed above, asset-backed issuers and other passive issuers, cooperatives, limited partnerships, registered management investment companies, and controlled companies are exempt from BATS's existing rules relating to compensation, and BATS proposes to extend the exemptions for these entities to the new requirements of the proposed rule change. The Commission notes that Rule 10C-1 allows exchanges to exempt from the listing rules adopted pursuant to Rule 10C-1 certain categories of issuers, as the national securities exchange determines is appropriate.⁷⁴ The Commission believes that, given the specific characteristics of the aforementioned types of issuers,⁷⁵ it is reasonable and consistent with Section 6(b)(5) of the Act for the Exchange to exempt them from the new requirements.

The Commission notes that BATS proposes, however, to amend its current rule for foreign private issuers, which allows such issuers to follow their home country practice in lieu of the Exchange's standards regarding a company's compensation decision-making process. The current rule includes the proviso that the issuer must disclose its reliance on the exemption. BATS proposes to conform its rules in this regard with the provision of Rule 10C-1 permitting a foreign private issuer to follow home country practice only when it meets the additional condition that the issuer disclose the reasons why it does not have an independent compensation committee.

G. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes,

⁷⁴ The Commission notes, moreover, that, in the case of limited partnerships and open-end registered management investment companies, Rule 10C-1 itself provides exemptions from the independence requirements of the Rule. The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C-1 by Rule 10C-1(b)(5).

⁷⁵ See supra Section II.B.4.

if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut and matches the NYSE deadline and the revised deadline set forth by The NASDAQ Stock Market.⁷⁶ Additionally, the Commission believes that the BATS compliance dates and transition periods associated with the new independence standards relating to the compensation committee are consistent with Rule 10C-1 and provide for ease of implementation. Accordingly, issuers will be expected to begin complying with the new compensation committee independence standards commencing on July 1, 2013, from which time issuers will be required to have one independent compensation committee member at that time, a majority of independent members within 90 days from July 1, 2013, and all independent members within one year of July 1, 2013.

H. Phase-In Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

The Commission believes that it is reasonable for BATS to allow, with respect to IPOs, companies listing in conjunction with a carve-out or spin-off transaction, companies emerging from bankruptcy, companies ceasing to be controlled companies, companies ceasing to qualify as a foreign private issuer, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules. In the Commission's view, the implementation schedule offers such companies clarity in determining when they will be subject to the heightened requirements.

IV. Accelerated Approval of Amendment Nos. 2 and 3 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁷⁷ for approving the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, prior to the

⁷⁶ See NYSE Approval Order and Nasdaq Approval Order, supra note 6.

⁷⁷ 15 U.S.C. 78s(b)(2).

30th day after the date of publication of notice in the Federal Register.

The changes made to the proposal by Amendment No. 2 that clarified the responsibilities and authority of Independent Directors responsible for determining executive compensation and the requirement that listed companies provide appropriate funding for compensation advisers merely set forth in detail the relevant requirements of Rule 10C-1(b)(2)-(4) explicitly in the Exchange's rules. Moreover, the changes improve the proposal because they bring together the full set of the Exchange's rules on compensation committees in one place, thereby easing compliance for listed companies and benefiting investors seeking an understanding of an issuer's obligations with regard to determining executive compensation.

The inclusion in Amendment No. 2 of language in BATS's rules that requires a compensation committee to conduct the independence assessment with respect to "any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel" merely reflects an instruction in Rule 10C-1 itself. The addition of further guidance by Amendment No. 2 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser,⁷⁸ and is not a substantive change. Regarding the provision added by Amendment No. 2 to exclude advisers that provide certain types of services from the independence assessment, as discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S-K because these types of services do not raise conflict of interest concerns.

The change made by Amendment No. 1 to require companies currently listed on BATS to

⁷⁸ See supra note 38 and accompanying text.

comply with certain of the new rules by July 1, 2013 brings BATS's effective date in line with that of other exchanges.⁷⁹ The addition of exemptions that were not originally proposed for specific types of entities, including limited partnerships, cooperatives, foreign private issuers, management investment companies registered under the Investment company Act of 1940 continue exemptions available under the current rules and are appropriate exercises of BATS's exemptive authority under Rule 10C-1. The revision in Amendment No. 2 to adopt a cure period for companies to comply with the rule's requirements in the event a director ceases to be independent for reasons outside his or her control is suggested by Rule 10C-1 itself, and the additional proviso to allow companies at least 180 days has been approved by the Commission in other contexts.

The change made by Amendment No. 3 regarding the exemption for Smaller Reporting Companies merely clarifies that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing, as BATS is only exempting Smaller Reporting Companies from the newly proposed enhanced independence standards, not all the independence standards. Thus, Smaller reporting Companies will continue to be required to comply with existing oversight of executive compensation rules.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes as made by Amendment Nos. 2 and 3.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment Nos. 2 and 3 are consistent with the Act. Comments may be submitted by any of the following methods:

⁷⁹ See NYSE Approval Order and Nasdaq Approval Order, supra note 6.

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. Please include File Number SR-BATS-2012-039 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-2012-039. 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 website (<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 website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 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 Number SR-BATS-2012-039, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by BATS, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. BATS' new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

BATS' rules also, consistent with Rule 10C-1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of BATS-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of BATS' standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR-BATS-2012-039, as modified by Amendment Nos. 1, 2 and 3, is consistent with the Exchange

Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.⁸⁰

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁸¹ that the proposed rule change, SR-BATS-2012-039, as amended, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸²

Kevin M. O'Neill
Deputy Secretary

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⁸⁰ 15 U.S.C. 78f(b)(5).

⁸¹ 15 U.S.C. 78s(b)(2).

⁸² 17 CFR 200.30-3(a)(12).