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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69883; File No. SR-BATS-2013-024)

June 27, 2013

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Granting Approval to Proposed Rule Change Amending and Restating the Amended and Restated By-Laws of BATS Exchange, Inc.

I. Introduction

On April 29, 2013, BATS Exchange, Inc. (the “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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend and restate the Amended and Restated By-Laws of BATS Exchange. The proposed rule change was published for comment in the Federal Register on May 15, 2013.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange has proposed to amend and restate its Amended and Restated By-Laws (the “Current By-Laws”) and adopt these changes as its Second Amended and Restated By-Laws (the “New By-Laws”). The Exchange’s proposed amendments to the Current By-Laws include: (i) providing that the Board of Directors will consist of four (4) or more directors, with the board fixing the actual number of directors from time to time by resolution of the Board of Directors rather than fixing the number of directors in the by-laws; (ii) clarifying that the existing

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

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

<sup>3</sup> See Securities Exchange Act Release No. 69540 (May 8, 2013), 78 FR 28663 (May 15, 2013) (“Notice”).

procedures for filling vacancies on the Board of Directors apply only for non-Member Director Representative Director positions; (iii) clarifying separate procedures for filling vacancies on the Board of Directors for Member Representative Director positions; and (iv) adding a new requirement that the processes for filling any director vacancies apply to vacancies created as a result of an increase in the size of the board.

A. Number of Directors

Article III, Section 2(a) of the Exchange's Current By-Laws fixes the number of directors of the Exchange at ten (10) directors. Article III, Section 2(a) of the New By-Laws would amend Article III, Section 2(a) to state that the Board of Directors of the Exchange shall consist of four (4) or more members, the number thereof to be determined from time to time by resolution of the Board of Directors, subject to the compositional requirements of the board set forth in Article III, Section 2(b).

The Current By-Laws and the New By-Laws require that the Board of Directors consist of the following: (i) one (1) director who is the Chief Executive Officer of the Company; (ii) representation by Member Representative Directors of at least twenty percent (20%) of the board;<sup>4</sup> and (iii) representation by Non-Industry Directors (including at least one (1) Independent Director) that equals or exceeds the sum of the number of Industry Directors and Member Representative Directors.<sup>5</sup> Under the Current By-Laws and the New By-Laws, the Chief Executive Officer is considered to be an Industry Director.<sup>6</sup> Additionally, under the Current By-

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<sup>4</sup> The Exchange noted that because the number of Member Representative Directors must be at least twenty percent (20%) of the board, it is required under the Current By-Laws and the New By-Laws that if twenty percent (20%) of the directors then serving on the board is not a whole number, such number of Member Representative Directors must be rounded up to the next whole number.

<sup>5</sup> See Article III, Section 2(b) of the Current By-Laws.

<sup>6</sup> See id.

Laws and New By-Laws, the Member Representative Director requirement of twenty percent (20%) would require the board to include at least one (1) Member Representative Director.<sup>7</sup>

Thus, under the proposal, the minimum requisite sum of the number of Industry Directors and Member Representative Directors would equal two (2) directors. As such, under the composition requirements, the board would also have to include at least two (2) Non-Industry Directors, bringing the total minimum size of the board to four (4) directors.

B. Member Representative Director Vacancies

A Member Representative Director is defined in relevant part in Article I of the Current By-Laws as a Director “elected by the stockholders after having been nominated by the Member Nominating Committee<sup>8</sup> or by an Exchange Member pursuant to these By-Laws.” Article III, Section 4 of the Current By-Laws in turn specifies the precise process the Member Nominating Committee is required to follow with the respect to the election and nomination of Member Representative Directors.<sup>9</sup>

As distinguished from the nomination and election of directors as part of the Exchange’s annual stockholders meeting, Article III, Section 6 of the Current By-Laws specifies the procedures for filling vacancies on the board when a director position becomes vacant prior to the election of a successor at the end of such director’s term, whether because of death, disability, disqualification, removal, or resignation. Under these circumstances, the Nominating

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<sup>7</sup> Id.

<sup>8</sup> See Article VI, Section 3 of the Current By-Laws for a detailed description of the Member Nominating Committee and its responsibilities.

<sup>9</sup> See Article III Section 4(c) of the Current By-Laws for detailed provisions relating to the Member Representative Director nomination and election process.

Committee<sup>10</sup> must nominate, and the stockholders must elect, a person satisfying the classification for the directorship in compliance with the board compositional requirements of Article III, Section 2(b) of the Current By-Laws to fill such vacancy; provided, however, that if the remaining term of office of a Member Representative Director at the time of such director's termination is not more than six (6) months, during the period of vacancy the board is not deemed to be in violation of the board compositional requirements because of such vacancy.

The Exchange has proposed, in Article III, Section 6(a) of the New By-Laws, to clarify that the procedures therein for filling director vacancies would apply only to non-Member Representative Director positions. The Exchange also has proposed in new Section 6(b) of the New By-Laws to clarify separate procedures for filling Member Representative Director vacancies on the board, which procedures would require that the Member Nominating Committee shall either (i) recommend an individual to the stockholders to be elected to fill such vacancy or (ii) provide a list of recommended individuals to the stockholders from which the stockholders shall elect the individual to fill such vacancy.

In addition, the Exchange has proposed, in Article III, Section 6(a) and (b) of the New By-Laws, to add the requirement that the process for filling vacancies described therein would be followed in the circumstance where such vacancy is created as a result of an increase in the size of the board. Under the New By-Laws, in the case of a director filling a vacancy not resulting from a newly-created directorship, the new director would serve until the expiration of the remaining term. However, in the case of a director filling a vacancy resulting from a newly-created directorship, the new director would serve until the expiration of such person's designated term. In all cases, however, if the remaining term of office of a director at the time of

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<sup>10</sup> See Article VI, Section 2 of the Current By-Laws for a detailed description of the Nominating Committee and its responsibilities.

such director's vacancy is not more than six (6) months, during the period of vacancy the board would not be deemed to be in violation of Article III, Section 2(b) because of such vacancy.

Under the Current By-Laws, this six-month grace period applies only to Member Representative Director vacancies. Under the New By-Laws, this six-month grace period would be expanded to apply to any director vacancy, which the Exchange notes is consistent with precedent from other exchanges.<sup>11</sup>

### III. Comment Letter and the Exchange's Response

The Commission received no comment letters on the proposed rule change.

### IV. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.<sup>12</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>13</sup> which requires, among other things, that an exchange be so organized and have the capacity to carry out the purposes of the Act and to comply, and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

The Commission notes that the proposed rule change would provide a minimum number of directors for the Board of Directors of the Exchange, rather than a fixed number of directors.

As such, the Exchange has noted that the New By-Laws would provide the board with the

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<sup>11</sup> See Notice supra note 3, 78 FR at 28665 n. 7.

<sup>12</sup> In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(1).

flexibility to increase or decrease the size of the board by resolution, rather than amending the by-laws each time the board seeks to increase or decrease the size of the board.<sup>14</sup> The Commission notes that the Exchange has represented that it is not proposing to amend any of the compositional requirements of the board, which are set forth in Article III, Section 2(b) of the Current By-Laws and the New By-Laws.<sup>15</sup>

The proposed rule change would clarify that the Current By-Laws' existing procedures for filling director positions on its Board of Directors apply only to non-Member Representative Director positions and would clarify a specific process for filling vacancies for Member Representative Director positions. The Exchange has represented that the lack of such a specific process in the Current By-Laws for filling a Member Representative Director position that becomes vacant prior to the election of a successor at the end of such director's term has led to some confusion regarding the exact process to follow.<sup>16</sup> In particular, the Exchange has noted that the Current By-Laws would appear to require that a Member Representative Director vacancy be filled by the Nominating Committee; however, the Exchange has stated that such a requirement would conflict with the Current By-Laws' definition of a Member Representative Director, which requires in all cases that such person be nominated by the Member Nominating Committee or by an Exchange Member. The Exchange has represented that it intended that its Current By-Laws would require that the Member Nominating Committee nominate one or more candidates to fill Member Representative Director vacancies, which is consistent with precedent from other exchanges.<sup>17</sup> The Commission notes that the proposed rule change would make such

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<sup>14</sup> See Notice supra note 3, 78 FR at 28664.

<sup>15</sup> See id.

<sup>16</sup> Id.

<sup>17</sup> Id.

intended process for filling vacancies for Member Representative Director positions explicit in the New By-Laws.

The proposed rule change would also clarify that the procedures for filling any vacancies would also apply to vacancies created as a result of an increase in the size of the board. The Exchange has represented that generally, if the board has determined to increase the size of the board, it is creating the new directorship seat(s) because it has identified a qualified candidate(s) who would improve the overall quality of the board.<sup>18</sup> The Exchange has stated that, under these circumstances, time is of the essence and waiting to elect a director(s) to fill a newly created directorship seat(s) at the next scheduled annual stockholder meeting is not in the best interests of the Exchange or its stockholders. Consequently, the Exchange has stated that it is necessary that the New By-Laws provide a more streamlined process to fill a vacancy created by increasing the size of the board.<sup>19</sup> The Commission notes that Exchange has represented that any vacancies filled pursuant to the New By-Laws would be required to continue to comply with its existing compositional requirements.

Finally, the proposed rule change would also provide that if the remaining term of office of any director at the time of the director's vacancy is not more than six months, during the period of such vacancy the board will not be deemed to be in violation of the compositional requirements of Article III, Section 2(b) because of such vacancy. The Exchange notes that applying the six month grace period to any director vacancy, rather than just a Member Representative Director vacancy, is consistent with precedent from other exchanges. Further, the Exchange notes that this would be less disruptive to the director election process by permitting

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<sup>18</sup> See Notice supra note 3, 78 FR at 28665.

<sup>19</sup> See id.

any vacancy to be filled at the next scheduled annual stockholder meeting, rather than through an earlier-held special stockholder meeting.

For the reasons stated above, the Commission believes that the proposal is consistent with the requirements of the Act and is designed to enable the Exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply with, and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (SR-BATS-2013-024) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).