

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58818; File No. 4-569)

October 20, 2008

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d-2; Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Between the Financial Industry Regulatory Authority, Inc. and BATS Exchange, Inc.

On August 27, 2008, BATS Exchange, Inc. (“BATS”) and the Financial Industry Regulatory Authority, Inc. (“FINRA”) (together with BATS, the “Parties”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 17(d) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 17d-2 thereunder,<sup>2</sup> a plan for the allocation of regulatory responsibilities, dated August 25, 2008 (“17d-2 Plan” or the “Plan”).

The Plan was published for comment on September 24, 2008.<sup>3</sup> The Commission received no comments on the Plan. This order approves and declares effective the Plan.

I. Introduction

Section 19(g)(1) of the Act,<sup>4</sup> among other things, requires every self-regulatory organization (“SRO”) registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.<sup>5</sup> Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO

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<sup>1</sup> 15 U.S.C. 78q(d).

<sup>2</sup> 17 CFR 240.17d-2.

<sup>3</sup> See Securities Exchange Act Release No. 58563 (September 17, 2008), 73 FR 55180.

<sup>4</sup> 15 U.S.C. 78s(g)(1).

<sup>5</sup> 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

(“common members”). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act<sup>6</sup> was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.<sup>7</sup> With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d-1 and Rule 17d-2 under the Act.<sup>8</sup> Rule 17d-1 authorizes the Commission to name a single SRO as the designated examining authority (“DEA”) to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.<sup>9</sup> When an SRO has been named as a common member’s DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d-1 deals only with an SRO’s obligations to enforce member compliance with financial responsibility requirements. Rule 17d-1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

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<sup>6</sup> 15 U.S.C. 78q(d)(1).

<sup>7</sup> See Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94-75, 94th Cong., 1st Session 32 (1975).

<sup>8</sup> 17 CFR 240.17d-1 and 17 CFR 240.17d-2, respectively.

<sup>9</sup> See Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d-2 under the Act.<sup>10</sup> Rule 17d-2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d-2, the Commission may declare such a plan effective if, after providing for appropriate notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors; to foster cooperation and coordination among the SROs; to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system; and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d-2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

## II. Proposed Plan

The proposed 17d-2 Plan is intended to reduce regulatory duplication for firms that are common members of both BATS and FINRA. Pursuant to the proposed 17d-2 Plan, FINRA would assume certain examination and enforcement responsibilities for those BATS members that are also members of FINRA and the associated persons therewith (“Dual Members”) with respect to certain applicable laws, rules, and regulations.<sup>11</sup>

The text of the Plan delineates the proposed regulatory responsibilities with respect to the Parties. Included in the proposed Plan is an exhibit (the “BATS Exchange Rules Certification for 17d-2 Agreement with FINFA,” referred to herein as the “Certification”) that lists every BATS rule, and select federal securities laws, rules, and regulations, for which FINRA would bear responsibility under the Plan for overseeing and enforcing with respect to Dual Members.

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<sup>10</sup> See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

<sup>11</sup> See Paragraph 1(c) of the proposed 17d-2 Plan (defining “Dual Members”).

Specifically, under the 17d-2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Dual Members with the rules of BATS that are substantially similar to the applicable rules of FINRA, as well as any provisions of the federal securities laws and the rules and regulations thereunder delineated in the Certification (“Common Rules”). Common Rules would not include the application of any BATS rule or FINRA rule, or any rule or regulation under the Act, to the extent that it pertains to violations of insider trading activities, because such matters are covered by a separate multiparty agreement under Rule 17d-2.<sup>12</sup> In the event that a Dual Member is the subject of an investigation relating to a transaction on BATS, the plan acknowledges that BATS may, in its discretion, exercise concurrent jurisdiction and responsibility for such matter.<sup>13</sup>

Under the Plan, BATS would retain full responsibility for surveillance and enforcement with respect to trading activities or practices involving BATS’ own marketplace, including, without limitation, registration pursuant to its applicable rules of associated persons (*i.e.*, registration rules that are not Common Rules); its duties as a DEA pursuant to Rule 17d-1 under the Act; and any BATS rules that are not Common Rules, except for BATS rules for any broker-dealer subsidiary of BATS Holding, Inc.<sup>14</sup> Apparent violations of any BATS rules by any

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<sup>12</sup> See paragraph 1(b) of the proposed 17d-2 Plan. See also Securities Exchange Act Release Nos. 58350 (August 13, 2008), 73 FR 48247 (August 18, 2008) (File No. 4-566) (notice of filing of proposed plan); and 58536 (September 12, 2008) 73 FR 54646 (September 22, 2008) (File No. 4-566) (order approving and declaring effective the plan). The Certification identifies several Common Rules that may also be addressed in the context of regulating insider trading activities pursuant to the proposed separate multiparty agreement.

<sup>13</sup> See paragraph 6 of the proposed 17d-2 Plan.

<sup>14</sup> See paragraph 2 of the proposed 17d-2 Plan.

broker-dealer subsidiary of BATS Holdings, Inc. will be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA.<sup>15</sup>

### III. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act<sup>16</sup> and Rule 17d-2(c) thereunder<sup>17</sup> in that the proposed Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the proposed Plan should reduce unnecessary regulatory duplication by allocating to FINRA certain examination and enforcement responsibilities for Dual Members that would otherwise be performed by both BATS and FINRA. Accordingly, the proposed Plan promotes efficiency by reducing costs to Dual Members. Furthermore, because BATS and FINRA will coordinate their regulatory functions in accordance with the Plan, the Plan should promote investor protection.

The Commission notes that when it granted the application of BATS for registration as a national securities exchange, the Commission conditioned the operation of the BATS exchange on the satisfaction of several requirements.<sup>18</sup> One of those requirements was the effectiveness of an agreement pursuant to Rule 17d-2 between FINRA and BATS that allocates to FINRA regulatory responsibility for certain specified matters, or, alternatively, the demonstration by BATS that it

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<sup>15</sup> See paragraph 6 of the proposed 17d-2 Plan.

<sup>16</sup> 15 U.S.C. 78q(d).

<sup>17</sup> 17 CFR 240.17d-2(c).

<sup>18</sup> See Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182).

independently has the ability to fulfill all of its regulatory obligations.<sup>19</sup> The proposed 17d-2 Plan represents BATS' effort to satisfy that prerequisite.

The Commission notes that, under the Plan, BATS and FINRA have allocated regulatory responsibility for those BATS rules, set forth on the Certification, that are substantially similar to the applicable FINRA rules in that examination for compliance with such provisions and rules would not require FINRA to develop one or more new examination standards, modules, procedures, or criteria in order to analyze the application of the rule, or a Dual Member's activity, conduct, or output in relation to such rule. In addition, under the Plan, FINRA would assume regulatory responsibility for certain provisions of the federal securities laws and the rules and regulations thereunder that are set forth in the Certification. The Common Rules covered by the Plan are specifically listed in the Certification, as may be amended by the Parties from time to time.

Under the Plan, BATS would retain full responsibility for surveillance and enforcement with respect to trading activities or practices involving BATS' own marketplace, including, without limitation, registration pursuant to its applicable rules of associated persons (i.e., registration rules that are not Common Rules); its duties as a DEA pursuant to Rule 17d-1 under the Act; and any BATS rules that are not Common Rules, except for BATS rules for any broker-dealer subsidiary of BATS Holding, Inc.<sup>20</sup> Apparent violations of any BATS rules by any broker-dealer subsidiary of BATS Holdings, Inc. will be processed by, and enforcement proceedings in respect thereto will be conducted by, FINRA.<sup>21</sup> The effect of these provisions is

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<sup>19</sup> See Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498, 49507 (August 21, 2008) (File No. 10-182).

<sup>20</sup> See paragraph 2 of the proposed 17d-2 Plan.

<sup>21</sup> See paragraph 6 of the proposed 17d-2 Plan.

that regulatory oversight and enforcement responsibilities for any broker-dealer subsidiary of BATS Holdings, Inc., which is the parent company of BATS, will be vested with FINRA. These provisions should help avoid any potential conflicts of interest that could arise if BATS was primarily responsible for regulating its affiliated broker-dealers.

According to the Plan, BATS will review the Certification, at least annually, or more frequently if required by changes in either the rules of BATS or FINRA, and, if necessary, submit to FINRA an updated list of Common Rules to add BATS rules not included on the then-current list of Common Rules that are substantially similar to FINRA rules; delete BATS rules included in the then-current list of Common Rules that are no longer substantially similar to FINRA rules; and confirm that the remaining rules on the list of Common Rules continue to be BATS rules that are substantially similar to FINRA rules.<sup>22</sup> FINRA will then confirm in writing whether the rules listed in any updated list are Common Rules as defined in the Plan. Under the Plan, BATS will also provide FINRA with a current list of Dual Members and shall update the list no less frequently than once each quarter.<sup>23</sup>

The Commission is hereby declaring effective a plan that, among other things, allocates regulatory responsibility to FINRA for the oversight and enforcement of all BATS rules that are substantially similar to the rules of FINRA for Dual Members of BATS and FINRA. Therefore, modifications to the Certification need not be filed with the Commission as an amendment to the Plan, provided that the Parties are only adding to, deleting from, or confirming changes to BATS rules in the Certification in conformance with the definition of Common Rules provided in the Plan. However, should the Parties decide to add a BATS rule to the Certification that is not substantially similar to a FINRA rule; delete a BATS rule from the Certification that is

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<sup>22</sup> See paragraph 2 of the proposed 17d-2 Plan.

<sup>23</sup> See paragraph 3 of the proposed 17d-2 Plan.

substantially similar to a FINRA rule; or leave on the Certification a BATS rule that is no longer substantially similar to a FINRA rule, then such a change would constitute an amendment to the Plan, which must be filed with the Commission pursuant to Rule 17d-2 under the Act and noticed for public comment.<sup>24</sup>

The Plan also permits BATS and FINRA to terminate the Plan, subject to notice.<sup>25</sup> The Commission notes, however, that while the Plan permits the Parties to terminate the Plan, the Parties cannot by themselves reallocate the regulatory responsibilities set forth in the Plan, since Rule 17d-2 under the Act requires that any allocation or re-allocation of regulatory responsibilities be filed with the Commission.<sup>26</sup>

#### IV. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4-569. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

IT IS THEREFORE ORDERED, pursuant to Section 17(d) of the Act, that the Plan in File No. 4-569, between FINRA and BATS, filed pursuant to Rule 17d-2 under the Act, is approved and declared effective.

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<sup>24</sup> The Commission also notes that the addition to or deletion from the Certification of any federal securities laws, rules, and regulations for which FINRA would bear responsibility under the Plan for examining, and enforcing compliance by, Dual Members, also would constitute an amendment to the Plan.

<sup>25</sup> See paragraph 12 of the proposed 17d-2 Plan.

<sup>26</sup> The Commission notes that paragraph 12 of the Plan reflects the fact that FINRA's responsibilities under the Plan will continue in effect until the Commission approves any termination of the Plan.



IT IS THEREFORE ORDERED that BATS is relieved of those responsibilities allocated to FINRA under the Plan in File No. 4-569.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

Florence E. Harmon  
Acting Secretary

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<sup>27</sup> 17 CFR 200.30-3(a)(34).