

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-74740; File No. SR-BYX-2015-23)

April 16, 2015

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Exchange Rule 3.5 (Advertising Practices) and Repeal Exchange Rule 3.20 (Initial or Partial Payments)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 1, 2015, BATS Y-Exchange, Inc. (“Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated this proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to: (i) amend Exchange Rule 3.5 (Advertising Practices); and (ii) repeal Exchange Rule 3.20 (Initial or Partial Payments) to conform with the rules of the Financial Industry Regulatory Authority, Inc. (“FINRA”) for purposes of an agreement between the Exchange and FINRA pursuant to Rule 17d-2 under the Act.⁵ The proposed rule change is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ 17 CFR 240.17d-2.

identical to proposed rule changes submitted by the EDGX Exchange, Inc. (“EDGX”) and the EDGA Exchange, Inc. (“EDGA”) that were published by the Commission.⁶

The text of the proposed rule change is available at the Exchange’s website at www.batstrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Rule 17d-2 under the Act,⁷ the Exchange and FINRA entered into an agreement to allocate regulatory responsibility for common rules (“17d-2 Agreement”). The 17d-2 Agreement covers common members of the Exchange and FINRA (“Common Members”) and allocates to FINRA regulatory responsibility, with respect to Common Members, for the

⁶ See Securities Exchange Act Release Nos. 70837 (Nov. 8, 2013), 78 FR 68889 (Nov. 15, 2013) (SR-EDGA-2013-32) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend EDGA Rule 3.5 (Advertising Practices) and to Repeal Rule 3.20 (Initial or Partial Payments) to Conform with the Rules of the Financial Industry Regulatory Authority); and 70836 (Nov. 8, 2013), 78 FR 68897 (Nov. 15, 2013) (SR-EDGX-2013-40) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend EDGX Rule 3.5 (Advertising Practices) and to Repeal Rule 3.20 (Initial or Partial Payments) to Conform with the Rules of the Financial Industry Regulatory Authority).

⁷ 17 CFR 240.17d-2.

following: (i) examination of Common Members for compliance with federal securities laws, rules, and regulations, and rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules; (ii) investigation of Common Members for violations of federal securities laws, rules, and regulations, and Exchange rules that the Exchange has certified as identical or substantially identical to FINRA rules; and (iii) enforcement of compliance by Common Members with the federal securities laws, rules, and regulations, and the rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules.⁸

The 17d-2 Agreement included a certification by the Exchange that states that the requirements contained in certain Exchange rules are identical to, or substantially similar to, certain FINRA rules that have been identified as comparable. To conform with comparable FINRA rules for purposes of the 17d-2 Agreement, the Exchange proposes to: (i) amend Exchange Rule 3.5 (Advertising Practices); and (ii) repeal Exchange Rule 3.20 (Initial or Partial Payments).

Rule 3.5 (Advertising Practices)

The Exchange proposes to delete the current text of Rule 3.5 and adopt text that would require Exchange members⁹ (“Members”) to comply with FINRA Rule 2210 as if this Rule was part of the Exchange’s rules and to rename Rule 3.5 “Communications with the Public.”¹⁰ The

⁸ See Securities and Exchange Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (approving File No. 10-196).

⁹ “Member” is defined as “any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a ‘member’ of the Exchange as that term is defined in Section 3(a)(3) of the Act.” Exchange Rule 1.5(n).

¹⁰ The Exchange does not propose to require that Members comply with FINRA Rule 2210(c). FINRA Rule 2210(c) generally requires that FINRA members file certain communications with FINRA. The Exchange believes that it is inappropriate for its rules to require Members to file

proposed rule text is substantially the same as Rule 2210(a) of the Nasdaq Stock Market LLC (“Nasdaq”), which has been approved by the Commission.¹¹

Currently, Exchange Rule 3.5(d) and (f) are excluded from the 17d-2 Agreement because they are not identical to, or substantially similar to, certain FINRA rules. First, Exchange Rule 3.5(d) requires that advertising and sales literature be pre-approved and signed or initialed by a supervisor while FINRA Rule 2210(b) only requires supervisory pre-approval for retail communication, and different supervisory review standards for institutional communication, and correspondence. Second, Rule 3.5(f) and FINRA Rule 2210(d)(6) also contain different content requirements for testimonials. Exchange Rule 3.5(d) and (f) were, therefore, excluded from the 17d-2 Agreement because their requirements were not identical or substantially similar to those required under FINRA Rule 2210(b) and (d)(6) respectively. To harmonize its rules with FINRA, the Exchange proposes to delete the current text of Rule 3.5 and adopt text that would require Members to comply with FINRA Rule 2210 as if such Rule were part of the Exchange’s rules so that Rule 3.5 may be incorporated into the 17d-2 Agreement in its entirety.

The Exchange believes that these changes would help to avoid confusion among Common Members by further aligning Exchange Rules 3.5 with FINRA Rule 2210. The proposed changes to Rule 3.5 are designed to enable the Exchange to incorporate Rule 3.5 into the 17d-2 Agreement, further reducing duplicative regulation of Common Members.

Summary of FINRA Rule 2210

certain communications with FINRA as such filing requirements under FINRA rules are between FINRA and its members.

¹¹ See Securities Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550 (Jan. 23, 2006) (order approving Nasdaq’s application for registration as a national securities exchange); see also Securities Exchange Act Release No. 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-Nasdaq-2008-054) (Notice of Filing and Immediate Effectiveness).

FINRA Rule 2210 generally sets forth the content, filing, supervisory review, and record retention requirements for FINRA member's communications with the public. A summary of FINRA Rule 2210 is below. A more complete description of FINRA Rule 2210 is provided in FINRA's Regulatory Notice 12-29¹² and Regulatory Notice 14-30.¹³

FINRA Rule 2210 divides a Member's communications with the public into the following three categories:

- Institutional communication. FINRA Rule 2210(a)(3) defines "institutional communication" as "any written (including electronic) communication that is distributed or made available only to institutional investors, but does not include a member's internal communications."
- Retail communication. FINRA Rule 2210(a)(5) defines "retail communication" as "any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30-day calendar period." FINRA Rule 2210(a)(6) defines "Retail investor" as "any person other than an institutional investor, regardless of whether the person has an account with the member." Communications that are considered advertisements and sales literature fall under the definition of "retail communication."
- Correspondence. FINRA Rule 2210(a)(2) defines "correspondence" as "any written (including electronic) communication that is distributed or made available to fewer than 25 retail investors within any 30-day calendar period."

¹² See FINRA Regulatory Notice 12-29 (June 2012) available at http://finra.complinet.com/net_file_store/new_rulebooks/f/i/FINRANotice12_29.pdf.

¹³ See FINRA Regulatory Notice 14-30 (July 2014) available at http://finra.complinet.com/net_file_store/new_rulebooks/f/i/FINRANotice_14_30.pdf.

Supervisory Review. To comply with the supervisory requirements of FINRA Rule 2210(b), Common Members must obtain supervisory pre-approval of all retail communications, while institutional communications and correspondence would be subject to supervisory review, but not pre-approval.

Under FINRA Rule 2210(b)(1), all retail communications must be approved by a supervisor prior to their first use or filing with FINRA under FINRA Rule 2210(c). FINRA's Rule 2210(b)(1)'s supervisory requirements do not apply to a retail communication if, at the time that a member intends to publish or distribute it: (i) another member has filed it with FINRA and has received a letter from FINRA stating that it appears to be consistent with applicable standards; and (ii) the member has not materially altered it and will not use it in a manner that is inconsistent with the conditions of FINRA's letter. The rule's supervisory review requirements also do not apply to the following retail communications, provided that the member supervises and reviews such communications in the same manner as required for supervising and reviewing correspondence pursuant to FINRA Rule 3110(b) and Supplemental Material 3110.06 through .09: (i) any retail communication that is excepted from the definition of "research report" pursuant to NASD Rule 2711(a)(9)(A), unless the communication makes any financial or investment recommendation; (ii) any retail communication that is posted on an online interactive electronic forum; and (iii) any retail communication that does not make any financial or investment recommendation or otherwise promote a product or service of the member.

For institutional communications, FINRA Rule 2210(b)(3) requires that members establish written procedures that are appropriate to its business, size, structure, and customers for the review by an appropriately qualified registered principal of institutional communications used by the member and its associated persons. These procedures must be reasonably designed

to ensure that institutional communications comply with applicable standards. When these procedures do not require review of all institutional communications prior to first use or distribution, they must include provisions for: (i) the education and training of associated persons as to the firm's procedures governing institutional communications; (ii) the documentation of their education and training; and (iii) surveillance and follow-up to ensure that these procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

FINRA Rule 2210(b)(2) states that correspondence is subject to the supervision and review requirements of FINRA Rule 3110(b) and Supplemental Material 3110.06 through .09. Under FINRA Rule 3110(b)(4), each member shall develop written procedures that are appropriate to its business, size, structure, and customers for reviewing incoming and outgoing written (including electronic) correspondence with the public relating to its investment banking or securities business, including procedures for reviewing incoming written correspondence directed to registered representatives, and related to the member's investment banking or securities business, to properly identify and handle customer complaints and to ensure that customer funds and securities are handled in accordance with firm procedures. Where these procedures for the review of correspondence do not require review of all correspondence prior to use or distribution, they must include provisions for: (i) the education and training of associated persons as to the firm's procedures governing correspondence; (ii) the documentation of their education and training; and (iii) surveillance and follow-up to ensure that these procedures are implemented and adhered to.

Record Retention. Under FINRA Rule 2210(b)(4)(A), members must maintain all retail

communications and institutional communications for the retention period required by Rule 17a-4(b) under the Act and in a format and media that comply with Rule 17a-4 under the Act. The records must include:

- a copy of the communication and the dates of first and (if applicable) last use of such communication;
- the name of any registered principal who approved the communication and the date that approval was given;
- in the case of a retail communication or an institutional communication that is not approved prior to first use by a registered principal, the name of the person who prepared or distributed the communication;
- information concerning the source of any statistical table, chart, graph, or other illustration used in the communication; and
- for any retail communication for which principal approval is not required pursuant to FINRA Rule (b)(1)(C), the name of the member that filed the retail communication with the FINRA Advertising Regulation Department, and a copy of the corresponding review letter from the Department.

Filing Requirements. Like Nasdaq Rule 2210(a), Exchange Rule 3.5 would expressly state that Members would not be required to comply with FINRA Rule 2210(c). FINRA Rule 2210(c) generally requires FINRA members to file certain retail communications with FINRA prior to first use. Exchange members who are also FINRA members would continue to be subject to FINRA Rule 2210(c).

Content Standards. FINRA Rule 2210(d) sets forth general content standards for all communications. All member communications must be based on principles of fair dealing and

good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communications to be misleading. No member may make any false, exaggerated, unwarranted, promissory, or misleading statement or claim in any communication. No member may publish, circulate, or distribute any communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading. Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication. Members must ensure that statements are clear and not misleading within the context in which they are made, and that they provide balanced treatment of risks and potential benefits. Communications must be consistent with the risks of fluctuating prices and the uncertainty of dividends, rates of return, and yield inherent to investments. Members must consider the nature of the audience to which the communication will be directed and must provide details and explanations appropriate to the audience.

Communications may also not predict or project performance, imply that past performance will recur, or make any exaggerated or unwarranted claim, opinion, or forecast; provided, however, communications may include: (i) a hypothetical illustration of mathematical principles, provided that it does not predict or project the performance of an investment or investment strategy; (ii) an investment analysis tool, or a written report produced by an investment analysis tool, that meets the requirements of FINRA Rule 2214; and (iii) a price target contained in a research report on debt or equity securities, provided that the price target has a reasonable basis, the report discloses the valuation methods used to determine the price

target, and the price target is accompanied by disclosure concerning the risks that may impede achievement of the price target.

Testimonials. To comply with FINRA Rule 2210(d)(6): (i) if a testimonial includes a technical aspect of investing, the person making the testimonial must have the knowledge and expertise to form a valid opinion; and (ii) retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose that the testimonial: (a) may not be representative of the experience of other customers; (b) is no guarantee of future performance or success; and (c) is a paid testimonial, if more than \$100 in value has been paid.

Recommendations. FINRA Rule 2210(d)(7)(A) requires that retail communications that include a recommendation of securities must have a reasonable basis for the recommendation and must disclose, if applicable, the following: (i) that at the time the communication was published or distributed, the member was making a market in the security being recommended, or in the underlying security if the recommended security is an option or security future, or that the member or associated persons will sell to or buy from customers on a principal basis; (ii) that the member or any associated person that is directly and materially involved in the preparation of the content of the communication has a financial interest in any of the securities of the issuer whose securities are recommended, and the nature of the financial interest (including, without limitation, whether it consists of any option, right, warrant, future, long or short position), unless the extent of the financial interest is nominal; and (iii) that the member was manager or co-manager of a public offering of any securities of the issuer whose securities are recommended within the past 12 months. Members must provide, or offer to furnish upon request, available investment information supporting the recommendation. When a member recommends a

corporate equity security, the member must provide the price at the time the recommendation is made.

Retail communication or correspondence may not refer, directly or indirectly, to past specific recommendations of the member that were or would have been profitable to any person; provided, however, that a retail communication or correspondence may set out or offer to furnish a list of all recommendations as to the same type, kind, grade, or classification of securities made by the member within the immediately preceding period of not less than one year, if the communication or list: (i) states the name of each security recommended, the date and nature of each recommendation (e.g., whether to buy, sell, or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each security as of the most recent practicable date; and (ii) contains the following cautionary legend, which must appear prominently within the communication or list: “it should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list.”

Rule 3.20 (Initial or Partial Payments)

The Exchange also proposes to delete Exchange Rule 3.20 (Initial or Partial Payments). In January 2010, FINRA repealed NASD Rule 2450 (Initial or Partial Payments) and does not currently include a comparable rule in its rule book.¹⁴ Like NASD Rule 2450, Exchange Rule 3.20 prohibits any arrangement whereby the customer of a Member submits partial or installment payments for the purchase of a security with the following exceptions: (i) if a Member is acting as agent or broker in the transaction, then the Member must immediately make an actual

¹⁴ See Securities Exchange Act Release No. 61542 (Feb. 18, 2010), 75 FR 8768 (Feb. 25, 2010) (SR-FINRA-2009-093) (order approving proposal to repeal NASD Rule 2450).

purchase of the security for the account of the customer, and immediately take possession or control of the security and maintain possession or control of the security as long as the Member is under the obligation to deliver the security to the customer; (ii) if a Member is acting as principal in the transaction, the Member must, at the time of the transaction, own the security and maintain possession or control of the security as long as the Member is under the obligation to deliver the security to the customer; and (iii) if applicable to a Member, the provisions of Regulation T of the Federal Reserve Board¹⁵ are satisfied. The rule also prohibits a Member, whether acting as principal or agent, in connection with any installment or partial sales transaction, from making any agreement with the customer whereby the Member would be allowed to pledge or hypothecate any security involved in such transaction for any amount in excess of the indebtedness of the customer to the Member.

Section 220.8 of Regulation T permits the purchase of a security in a cash account predicated on either: (i) there being sufficient funds in the account; or (ii) the Member accepts in good faith the customer's agreement that full cash payment will be made.¹⁶ The rule further stipulates that payment must be made within a specified payment period.¹⁷ Regulation T also allows the purchase of a security in a margin account, whereby a customer must deposit an initial requirement, based upon the amount of the transaction, within the specified payment period.

The Exchange proposes to repeal Exchange Rule 3.20 in light of the explicit provisions in Regulation T requiring the deposit of sufficient funds within the specified payment period. The

¹⁵ Federal Reserve Board, Regulation T (Credit by Brokers and Dealers), 12 CFR 220 et seq.

¹⁶ See Section 220.8(a)(1) of Regulation T.

¹⁷ According to Section 220.2 of Regulation T, "payment period" means the number of business days in the standard securities settlement cycle in the United States, as defined in Rule 15c6-1(a) under the Act (17 CFR 240.15c6-1(a)), plus two business days.

Exchange also believes that the hypothecation prohibition in Exchange Rule 3.20 would no longer be relevant because it is predicated on a partial or installment payment under the rule. The Exchange notes that, notwithstanding the repeal of Exchange Rule 3.20, Members are required to comply with all applicable federal securities laws, including Regulation T.

2. Statutory Basis

The Exchange believes that proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁸ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change would further these requirements by eliminating duplicative and unnecessary rules and advancing the development of a more efficient and effective Exchange Rulebook. The Exchange believes that the proposed rule change would provide greater harmonization between Exchange and FINRA rules of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. Accordingly, the Exchange believes that the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

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

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

¹⁸ 15 U.S.C. 78f(b)(5).

Exchange believes that the proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among Exchange and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for Common Members and facilitating FINRA's performance of its regulatory functions under the 17d-2 Agreement.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as non-controversial under Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6)²⁰ thereunder. Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.²¹

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily temporarily suspend the proposed rule change if it appears to the Commission that this action is: (i) necessary or appropriate in the public interest; (ii) for the protection of

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 C.F.R. 240.19b-4.

²¹ Rule 19b-4(f)(6) also requires that the Exchange give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange satisfied this requirement.

investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes this action, it shall institute proceedings under Section 19(b)(2)(B) of the Act²² to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-BYX-2015-23 on the subject line.

Paper Comments:

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

All submissions should refer to File No. SR-BYX-2015-23. 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

²² 15 U.S.C. 78s(b)(2)(B).

and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BYX-2015-23 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Brent J. Fields
Secretary

²³ 17 CFR 200.30-3(a)(12).