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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

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COVERED SECURITIES OF BATS EXCHANGE, INC.

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“SEC” or “Commission”) is adopting an amendment to Rule 146 under Section 18 of the Securities Act of 1933, as amended, (“Securities Act”) to designate certain securities listed, or authorized for listing, on BATS Exchange, Inc. (“BATS” or “Exchange”) as covered securities for purposes of Section 18 of the Securities Act. Covered securities under Section 18 of the Securities Act are exempt from state law registration requirements. The Commission also is making corrections to the rule text to reflect name changes.

EFFECTIVE DATE: [Insert date that is 30 days from the date of publication in the Federal Register]

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SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC (“NYSE”), the American Stock Exchange LLC (“Amex”) (now known as NYSE Amex LLC),¹ or the National Market System of The NASDAQ Stock Market LLC (“Nasdaq/NGM”)² (collectively, the “Named Markets”), or any national securities exchange designated by the Commission to have substantially similar listing standards to those of the Named Markets.³ More specifically, Section 18(a) of the Securities Act provides that “no law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that – (A) is a covered security.”⁴ Covered securities are defined in Section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or

¹ On October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the “Merger”). In connection with the Merger, NYSE Amex’s predecessor, the Amex, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC (“NYSE Alternext”). See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger). In 2009, the Exchange changed its name from NYSE Alternext to NYSE Amex LLC (“NYSE Amex”). See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR-NYSEALTR-2009-24) (approving the name change).

² As of July 1, 2006, the National Market System of The NASDAQ Stock Market LLC is known as the Nasdaq Global Market (“NGM”). See Securities Exchange Act Release Nos. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) and 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006).

³ See National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (October 11, 1996).

⁴ 15 U.S.C. 77r(a).

securities listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are “substantially similar” to those of the Named Markets (“Covered Securities”).⁵

Pursuant to Section 18(b)(1)(B) of the Securities Act, the Commission adopted Rule 146.⁶ Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards substantially similar to those of the Named Markets and thus securities listed on such exchanges are deemed Covered Securities.⁷ BATS has petitioned the Commission to amend Rule 146(b) to designate certain securities listed on BATS⁸ as Covered Securities for the

⁵ 15 U.S.C. 77r(b)(1)(A) and (B). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of Section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

⁶ Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998) (determining that the listing standards of the Chicago Board Options Exchange, Incorporated (“CBOE”), Tier 1 of the Pacific Exchange, Inc. (“PCX”) (now known as NYSE Arca, Inc.), and Tier 1 of the Philadelphia Stock Exchange, Inc. (“Phlx”) (now known as NASDAQ OMX PHLX LLC) were substantially similar to those of the Named Markets and that securities listed pursuant to those standards would be deemed Covered Securities for purposes of Section 18 of the Securities Act). In 2004, the Commission amended Rule 146(b) to designate options listed on the International Securities Exchange, Inc. (“ISE”) (now known as the International Securities Exchange, LLC) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (July 20, 2004). In 2007, the Commission amended Rule 146(b) to designate securities listed on the Nasdaq Capital Market (“NCM”) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007).

⁷ 17 CFR 230.146(b).

⁸ BATS recently filed an immediately effective rule change to amend Rule 14.1 of its listing standards to include all securities listed on the Exchange pursuant to Rule 14.11 as Tier I securities. Exchange Rule 14.11 sets forth the criteria for listing certain exchange traded products, including exchange traded funds,

purpose of Section 18 of the Securities Act.⁹

On August 8, 2011, the Commission issued a release proposing to amend Rule 146(b) to designate certain securities listed, or authorized for listing, on BATS as covered securities for purposes of Section 18(a) of the Securities Act.¹⁰ The Commission also proposed to update certain references in the rule. The Commission received one comment letter,¹¹ which favored amending Rule 146(b) to reflect the name change of Phlx, as proposed by the Commission. In connection with its petition, BATS filed a

portfolio depository receipts, index fund shares and various other types of securities (collectively, “ETPs”). ETPs were not designated as either Tier I or Tier II securities prior to this amendment. The Exchange’s recent filing modifies the definitions of “Tier I” in Rule 14.1(a)(29), and “Tier I security” in Rule 14.1(a)(30), to make clear that ETPs are considered Tier I securities for purposes of the Exchange’s rules. See Exchange Act Release No. 65809 (November 23, 2011), 76 FR 74079 (November 30, 2011). The Commission notes that this is only a definitional change. It does not result in any substantive changes to the Exchange’s existing listing standards that are the subject of this rule amendment.

⁹ See letter from Eric Swanson, Senior Vice President and General Counsel, BATS, to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2011 (File No. 4-632) (“BATS Petition”).

¹⁰ Securities Act Release No. 9251 (August 8, 2011), 76 FR 46698 (August 11, 2011) (“Proposing Release”).

¹¹ See letter to Elizabeth M. Murphy, Secretary, Commission, from Keith Paul Bishop, former California Commissioner of Corporations, dated August 23, 2011 (“Bishop Letter”). The commenter concurred with the Commission that Rule 146(b)(1)(iv) should be updated to reflect the term “NASDAQ OMX PHLX LLC” instead of “the Philadelphia Stock Exchange, Inc.” The commenter also requested that the Commission review the current standards of the PHLX with respect to the listing and trading of securities to determine whether the current listing standards of PHLX are substantially similar to standards of Named Market. The Commission has carefully considered the comment letter, and believes that the request of the commenter with regard to the listing standards of Phlx is beyond the scope of the Commission’s proposed rule. However, the Commission notes that, via its oversight, inspection and enforcement functions, it regularly monitors the operations of registered exchanges and their compliance with the securities laws and rules applicable to them.

proposed rule change to establish standards for the listing of securities on BATS.¹² On August 30, 2011, the Commission approved this proposed rule change.¹³

Based on the approved BATS listing standards and after careful comparison, the Commission has determined that BATS' listing standards for Tier I and Tier II securities are substantially similar to the listing standards of the Named Markets. Accordingly, the Commission today is amending Rule 146(b) to designate securities listed, or authorized for listing, on Tier I and Tier II of BATS as Covered Securities under Section 18(b)(1) of the Securities Act.¹⁴ Amending Rule 146(b) to include these securities as Covered Securities will exempt those securities from state registration requirements as set forth under Section 18(a) of the Securities Act.¹⁵ The Commission also is adopting, as proposed, updated references in the rule.

The Commission notes that the proposed rule text would have designated any security listed, or authorized for listing, on BATS as a Covered Security. In light of BATS recent rule amendment defining "Tier I" and "Tier I securities" to include ETPs,¹⁶ the Commission is refining the rule text adopted today to designate those securities listed on Tier I and Tier II of the Exchange as Covered Securities. This designation is substantively identical to the proposed rule text, as the same securities that the Commission proposed to be designated as Covered Securities in the Proposing Release

¹² See Securities Exchange Act Release No. 64546 (May 25, 2011), 76 FR 31660 (June 1, 2011) (proposing qualitative and quantitative listing requirements and standards for securities).

¹³ Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011).

¹⁴ 15 U.S.C. 77r(b)(1).

¹⁵ 15 U.S.C. 77r(a).

¹⁶ See supra note 8.

will be so designated.

II. Amendment to Rule 146(b) to Include BATS Securities

Under Section 18(b)(1)(B) of the Securities Act,¹⁷ the Commission has the authority to determine that the listing standards of an exchange, or tier or segment thereof, are substantially similar with those of the NYSE, NYSE Amex, or Nasdaq/NGM. The Commission initially compared BATS' listing standards for Tier I and Tier II securities with those of one of the Named Markets. If the listing standards in a particular category were not substantially similar to the standards of that market, the Commission compared BATS' standards to one of the other two markets.¹⁸ In addition, as it has done previously, the Commission interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the Named Markets.¹⁹ If BATS' listing standards were higher than those of the Named Markets, then the Commission still determined that BATS' listing standards are substantially similar to those of the Named Markets.²⁰ Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that BATS' listing standards are not substantially similar to those of any Named Market.²¹

The Commission has reviewed BATS' listing standards for securities to be listed and traded on BATS and, for the reasons discussed below, has determined that the

¹⁷ 15 U.S.C. 77r(b)(1)(B).

¹⁸ This approach is consistent with the approach that the Commission has previously taken. See, e.g., Securities Act Release No. 7494 (January 13, 1998), 63 FR 3032 (January 21, 1998).

¹⁹ See id.

²⁰ See Securities Act Release No. 8791, supra note 6.

²¹ Id.

standards are substantially similar to those of a Named Market.²² Accordingly, the Commission is amending Rule 146(b) to include securities listed, or authorized for listing, on Tier I and Tier II of BATS. Because the Commission has determined BATS' qualitative listing standards for BATS' Tier I and Tier II securities, Tier I quantitative listing standards are substantively identical to the listing standards for Nasdaq/NGM securities (and, therefore, are "substantially similar" to a Named Market as required by Section 18(b)(1)(B)),²³ the discussion below focuses on BATS' Tier II quantitative listing standards. The Commission included in the Proposing Release its preliminary view that the Tier I and Tier II qualitative listing standards and Tier I quantitative listing standards were substantively identical to the listing standards for Nasdaq/NGM securities and received no comments on that view.²⁴

A. Primary Equity Securities

As discussed in the Proposing Release, the Commission preliminarily believed that BATS' initial listing standards for primary equity securities listed on Tier II of the Exchange were substantially similar to those of NYSE Amex's common stock listing

²² See generally BATS Chapter XIV; Securities Exchange Act Release No. 64546, supra note 8, 76 FR 31660. In making its determination of substantial similarity, as discussed in detail below, the Commission generally compared BATS' proposed qualitative listing standards for both Tier I and Tier II securities with Nasdaq/NGM's qualitative listing standards, BATS' proposed quantitative listing standards for Tier I securities with Nasdaq/NGM's quantitative listing standards, and BATS' proposed quantitative listing standards for Tier II securities with NYSE Amex's quantitative listing standards.

²³ See infra notes 42-49.

²⁴ See Proposing Release at 49699 to 49700 and n. 25 to n. 26. See id. at 49703 (discussing ETPs).

standards.²⁵ The Commission has determined that BATS' initial listing standards for primary equity securities are substantially similar to those of NYSE Amex. BATS' requirements relating to bid price,²⁶ round lot holders,²⁷ shares held by the public,²⁸ and

²⁵ See Proposing Release at 49700. BATS' use of "primary equity securities" and NYSE Amex's use of "common stock" is simply a difference in nomenclature, as BATS' listing standards define "primary equity security" as a company's first class of common stock. See BATS Rule 14.1(a)(21).

²⁶ BATS' listing standards require a minimum bid price of \$4 per share for initial listing and \$1 per share for continued listing while NYSE Amex requires a minimum bid price of \$2-3 per share depending on the issuer for initial listing and will consider delisting if the price per share is "low." Compare BATS Rule 14.9(b)(1)(A) with Section 102 of the NYSE Amex Company Guide. The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets; the Commission may determine that a petitioner's standards are substantially similar if they are higher, and differences in language or approach of the listing standards are not dispositive. See *supra* notes 19-21 and accompanying text.

²⁷ While BATS' listing standards require at least 300 round lot holders, NYSE Amex's listing standards require 400 or 800 public shareholders (depending upon the number of shares held by the public), or 300 or 600 public shareholders for its alternate listing standards. The Commission does not believe this difference precludes a determination of substantial similarity between the standards. Additionally, BATS' listing standards are identical to the listing standards of NCM, which the Commission previously found to be substantially similar to a Named Market. See Securities Act Release 8791, *supra* note 6 (determining that NCM listing standards, which are identical to BATS' listing standards for primary equity securities on Tier II of the Exchange, are substantially similar to these same Amex standards). With respect to NCM having alternative listing standards for the number of round lot holders, the Commission noted that this difference did not preclude a determination of substantial similarity between the standards. See Securities Act Release 8791, *supra* note 6, 72 FR at 20412; Securities Act Release No. 8754 (November 22, 2006), 71 FR 67762 (November 22, 2006) (proposing that the Commission amend Rule 146(b) to designate securities listed on the NCM as covered securities for purposes of Section 18(b) of the Securities Act).

²⁸ BATS' listing standards require a minimum of 1,000,000 publicly held shares while NYSE Amex requires a minimum of 500,000. Compare BATS Rule 14.9(b)(1)(B) with Section 102(a) of the NYSE Amex Company Guide. The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets; the Commission may determine that a petitioner's standards are substantially similar

required number of registered and active market makers²⁹ are substantially similar to NYSE Amex requirements. Additionally, BATS' proposed equity,³⁰ market value,³¹ and net income³² standards are substantially similar to NYSE Amex standards.

In addition to the above initial listing requirements, BATS requires that American Depositary Receipts (“ADRs”) comply with an additional criterion. Specifically, BATS requires there be at least 400,000 ADRs issued for such securities to be initially listed on BATS.³³ However, NYSE Amex does not have specific requirements for ADRs in

if they are higher, and differences in language or approach of the listing standards are not dispositive. See supra notes 17-19 and accompanying text.

²⁹ BATS' listing requirements require at least three registered and active market makers while NYSE Amex requires one specialist to be assigned. Compare BATS Rule 14.9(b)(1)(D) with Section 202(e) of the NYSE Amex Company Guide. The Commission may still determine that the petitioner's listing standards are substantially similar to those of the Named Markets if a petitioner's listing standards are higher than the Named Markets. See Securities Act Release No. 8791, supra note 6.

³⁰ BATS' listing standards require a company to have stockholder equity of at least \$5 million, a market value of publicly held shares of at least \$15 million, and a two-year operating history. See BATS Rule 14.9(b)(2)(A). NYSE Amex requires stockholder equity of at least \$4 million, a market value of publicly held shares of at least \$15 million, and a two-year operating history.

³¹ BATS' listing standards require a market value of listed securities of at least \$50 million and a market value of publicly held shares of at least \$15 million, which is the same as required by NYSE Amex. Compare BATS Rule 14.9(b)(2)(B) with Section 101(c)(2)-(3) of the NYSE Amex Company Guide.

³² BATS' listing standards require net income from continuing operations of at least \$750,000, which is the same as required by NYSE Amex. Compare BATS Rule 14.9(b)(2)(C) with Section 101(d)(1) of the NYSE Amex Company Guide.

³³ See BATS Rule 14.9(b)(1)(E). This requirement is identical to NCM. See Nasdaq Rule 5505(a)(5); see generally Securities Act Release 8791, supra note 6 (determining that NCM listing standards, which are identical to BATS' standards for primary equity securities on Tier II of the Exchange, are substantially similar to the Amex standards).

addition to its initial listing standards for primary equity securities.³⁴ As noted above, the Commission may still determine that the petitioner's listing standards are substantially similar to those of the Named Markets if BATS' listing standards are higher than the Named Markets.³⁵ Further, as noted above, differences in language or approach of listing standards are not dispositive.³⁶ The Commission has determined that the quantitative initial listing standards for primary equity securities on Tier II of the Exchange are substantially similar to those of NYSE Amex.

The Commission has determined that the continued listing requirements for primary equity securities listed on Tier II of the Exchange, while not identical, are substantially similar to those of NYSE Amex.³⁷ NYSE Amex's delisting criteria are triggered by poor financial conditions or operating results of the issuer.³⁸ Specifically, NYSE Amex will consider delisting an equity issue if: (i) stockholders' equity is less than \$2 million and such issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years; (ii) stockholders' equity is less than \$4 million and such issuer has sustained losses from continuing operations and/or net losses in three of its four most recent fiscal years; (iii) stockholders' equity is less than \$6 million if such issuer has sustained losses from continuing operations and/or net losses in

³⁴ See Section 102 of the NYSE Amex Company Guide. See also Section 110 of the NYSE Amex Company Guide.

³⁵ See Securities Act Release No. 8791, supra note 6.

³⁶ See id.

³⁷ See generally Securities Act Release 8791, supra note 6 (determining that NCM continued listing standards, which are identical to BATS' continued listing standards for primary equity securities on Tier II of the Exchange, were substantially similar to the Amex standards).

³⁸ See generally Sections 1001 through 1006 of the NYSE Amex Company Guide.

its five most recent fiscal years; or (iv) the issuer has sustained losses which are so substantial in relation to its overall operations or its existing financial resources, or its financial condition has become so impaired that it appears questionable, in the opinion of the exchange, as to whether such company will be able to continue operations and/or meet its obligations as they mature.³⁹

Although BATS does not have the same continued listing provisions for Tier II, BATS also looks at the financial condition and operating results of the issuer in order to determine whether to delist an issuer. BATS' continued listing standards for Tier II securities require compliance with either a (1) shareholder equity, (2) market value of listed securities or (3) net income standard. Specifically, for continued listing, BATS requires shareholder's equity of at least \$2.5 million, market value of listed securities of at least \$35 million, or net income of \$500,000 from continuing operations in the past fiscal year or two out of three past fiscal years.⁴⁰ Further, BATS requires an issuer to

³⁹ See Section 1003(a) of the NYSE Amex Company Guide. While not identical to NYSE Amex, BATS, as noted below, also has a shareholder equity standard. See infra note 37 and accompanying text. NYSE Amex, however, will not normally consider suspending dealing in (i) through (iii) noted above if the issuer is in compliance with the following: (1) total market value of market capitalization of at least \$50,000,000; or total assets and revenue of \$50,000,000 each in its last fiscal year, or in tow of its last three fiscal years; and (2) the issuer has at least 1,100,000 shares publicly held, a value of publicly held shares of at least \$15,000,000 and 400 round lot holders. Id.

NYSE Amex also will consider delisting if: (i) an issuer has sold or otherwise disposed of its principal operating assets or has ceased to be an operating company or has discontinued a substantial portion of its operations or business; (ii) if substantial liquidation of the issuer has been made; or (iii) if advice has been received, deemed by the Exchange to be authoritative, that the security is without value, or in the case of a common stock, such stock has been selling for a substantial period of time at a low price. See Section 1003(c) and (f)(v) of the NYSE Amex Company Guide.

⁴⁰ BATS Rule 14.9(e)(2)(A)-(C). NYSE Amex focuses on a shareholder equity standard for continued listing. BATS' shareholder equity standard requires at

have (i) a minimum bid price for continued listing of \$1 per share,⁴¹ (ii) at least two registered and active market makers, (iii) 300 public holders, and (iv) a minimum number of publicly held shares of at least 500,000 shares with a market value of at least \$1 million.⁴² The Commission has determined that the differences in the maintenance criteria for primary equity securities on BATS for Tier II Securities and common stock listed on NYSE Amex are not significant and that, taken as a whole, the criteria are substantially similar.⁴³

B. Preferred Stock and Secondary Classes of Common Stock

The Commission compared the listing standards of preferred stock and secondary classes⁴⁴ of common stock on Tier II of the Exchange to the Nasdaq/NGM standards. As

least \$2.5 million shareholders' equity compared to NYSE Amex's lowest shareholder equity standard of \$2 million, if the NYSE Amex issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years. Compare BATS Rule 14.9(e)(2)(A)-(C) with Section 1003(a) of the NYSE Amex Company Guide.

⁴¹ See BATS Rule 14.9(e)(1)(B). Amex will consider delisting if the price per share is "low." See Section 1003(f)(v) of the Amex Company Guide. See also Securities Act Release 8791, supra note 6 (noting the same regarding the NCM and Amex bid price standards).

⁴² BATS Rule 14.9(e)(1)(A)-(E). NYSE Amex will consider delisting the common stock of an issuer if the aggregate market value of such publicly held shares is less than \$1 million for more than 90 consecutive days, the number of publicly held shares is less than 200,000 shares, or the number of its public stockholders is less than 300. See Section 1003(b) of the NYSE Amex Company Guide.

⁴³ The Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets, and differences in language or approach of the listing standards are not dispositive. See supra notes 17-19 and accompanying text. See also Securities Act Release 8791, supra note 6 (determining that NCM continued listing standards, which are identical to BATS' continued listing standards for primary equity securities on Tier II of the Exchange, are substantially similar to the Amex standards).

⁴⁴ A secondary class of common stock is a class of common stock of an issuer that has another class of common stock listed on an exchange. See Securities Act Release No. 8791, supra note 6, at 20411.

discussed in the Proposing Release,⁴⁵ the Commission preliminarily believed that BATS' standards were substantially similar to those of Nasdaq/NGM. BATS' initial and continued listing standards with respect to the number of round lot holders,⁴⁶ bid price,⁴⁷ number of publicly held shares,⁴⁸ market value of publicly held shares,⁴⁹ and number of market makers⁵⁰ are substantially similar to the Nasdaq/NGM standards.⁵¹ As such, the

⁴⁵ See Proposing Release at 49701 to 49702.

⁴⁶ BATS' initial and continued listing standards require 100 round lot holders, as Nasdaq/NGM requires. Compare BATS Rule 14.9(c) with Nasdaq Rule 5510; compare BATS Rule 14.9(f) with Nasdaq Rule 5460(a)(4).

⁴⁷ While BATS' bid price requirement for initial listing is \$4 and the Nasdaq/NGM requirement is \$5, the Commission does not believe this difference is significant. Compare BATS Rule 14.9(c)(1)(A) with Nasdaq Rule 5510(a)(1). See also Securities Act Release No. 8791, *supra* note 6, at 20412 n. 28 (determining that an NCM bid requirement, which is identical to BATS' bid requirement, was substantially similar to the Nasdaq/NGM requirement). Both BATS' standard and Nasdaq/NGM's existing standard require a \$1 bid price for continued listing. Compare BATS Rule 14.9(f)(1) with Nasdaq Rule 5460(a)(3).

⁴⁸ BATS' standard requires 200,000 publicly held shares for initial listing, and 100,000 publicly held shares for continued listing, which is the same as Nasdaq/NGM requires. Compare BATS Rule 14.9(c)(1)(C) and 14.9(f)(1)(c) with Nasdaq Rules 5415(a)(1) and 5460(a)(1).

⁴⁹ BATS' standard for initial listing of preferred stock or a secondary class of common stock requires a market value of publicly held shares of at least \$3.5 million. Nasdaq/NGM requires a market value of publicly held shares of at least \$4 million. Compare BATS Rule 14.9(c)(1)(D) with Nasdaq Rule 5415(a)(2). BATS standard for continued listing requires a market value of publicly held shares of at least \$1 million. Nasdaq/NGM requires a market value of publicly held shares of at least \$1 million for continued listing. Compare BATS Rule 14.9(f)(1)(D) with Nasdaq Rule 5460(a)(1). The Commission believes BATS' initial and continued listing standards for preferred stock and secondary classes of common stock are substantially similar to Nasdaq/NGM. See also Securities Act Release No. 8791, *supra* note 6, at 20411-12 (determining that NCM listing standards, which are identical to BATS' listing standards for preferred stock and secondary classes of common stock, are substantially similar to the Nasdaq/NGM standards).

⁵⁰ BATS' standards for initial listing require at least three registered and active market makers, while its continued listing standards require at least two registered

Commission has determined that BATS' quantitative listing standards for preferred stock and secondary classes of common stock are substantially similar to those of Nasdaq/NGM.

C. Warrants

The Commission compared BATS' listing standards for warrants to Nasdaq/NGM's standards. In the Proposing Release, the Commission stated that it preliminarily believed that the BATS' standards were substantially similar to the Nasdaq/NGM standards.⁵² BATS' initial listing standards require that 400,000 warrants be outstanding for initial listing, and that there be at least three registered and active market makers and 400 round lot holders.⁵³ Nasdaq/NGM's standards are identical except that Nasdaq/NGM requires 450,000 warrants to be outstanding.⁵⁴ Though not identical with respect to the number of warrants outstanding standard, the Commission believes that the Nasdaq/NGM higher listing standards do not preclude a finding of substantial similarity. BATS' initial listing standards also require the issuer's underlying security to be listed on the Exchange or be a Covered Security.⁵⁵ The Commission notes

and active market makers. Nasdaq/NGM requires the same. Compare BATS Rule 14.9(c)(1)(E) with Nasdaq Rule 5415(a)(2).

⁵¹ The Commission notes that these requirements apply to instances when the common stock or common stock equivalent security of the issuer is listed on BATS as a Tier II Security or otherwise is a Covered Security. If the common stock or common stock equivalent is not listed as a Tier II Security or is a Covered Security, then the security would be required to meet the initial primary equity listing requirements for Tier II noted above. Nasdaq/NGM contains a similar requirement. Compare BATS Rule 14.9(f)(2) with Nasdaq Rule 5460(b).

⁵² See Proposing Release at 49702.

⁵³ See BATS Rule 14.9(d)(1)(A), (C) and (D).

⁵⁴ See Nasdaq Rule 5410(a), (c) and (d).

⁵⁵ See BATS Rule 14.9(d)(1)(B).

that Nasdaq/NGM has a similar standard that the underlying security be listed on Nasdaq/NGM or be a Covered Security and believes BATS' standard is substantially similar to Nasdaq/NGM.⁵⁶ Therefore, the Commission has determined that BATS' initial listing standards for warrants are substantially similar to those of Nasdaq/NGM.⁵⁷

As discussed in the Proposing Release, the Commission also preliminarily believed that BATS' continued listing requirements for warrants that there be two registered and active market makers (one of which may be a market maker entering a stabilizing bid) and that the underlying security remain listed on the Exchange or be a Covered Security were substantially similar to that of Nasdaq/NGM.⁵⁸ The Commission has determined that BATS' continued listing standards for warrants are substantially similar to those of Nasdaq/NGM.

D. Index Warrants

For index warrants traded on BATS, BATS has the same standards (both initial and continuing) that apply to index warrants traded on Nasdaq/NGM.⁵⁹ Therefore, the Commission has determined that the listing standards for index warrants traded on BATS are substantially similar to the standards applicable to index warrants traded on the Nasdaq/NGM market.

E. Convertible Debt

⁵⁶ See Nasdaq Rule 5410(b).

⁵⁷ See also Securities Act Release 8791, supra note 6 (determining that NCM initial listing standards, which are identical to BATS' standards for warrants on Tier II of the Exchange, are substantially similar to the Amex standards).

⁵⁸ See Proposing Release at 49702. Compare proposed BATS' Rule 14.9(g)(1) with Nasdaq Rule 5455(1) and (2).

⁵⁹ Compare BATS Rule 14.9(d)(3) with Nasdaq Rule 5725.

The Commission has compared BATS' listing standards for convertible debt to NYSE Amex's listing standards for debt, and preliminarily believed that BATS' initial listing standards for convertible debt were substantially similar to those of NYSE Amex. BATS' listing standards for convertible debt, regarding the threshold principal amount outstanding,⁶⁰ the availability of current last sale information,⁶¹ and number of market

⁶⁰ BATS' rule requires a principal amount outstanding of at least \$10 million for initial listing and \$5 million for continued listing. See BATS Rule 14.9(d)(2)(A) and 14.9(g)(2)(A). NYSE Amex requires a principal amount outstanding of at least \$5 million for initial listing and will consider delisting if the principal amount outstanding is less than \$400,000 or if the issuer is not able to meet its obligations on the listed debt security. See Sections 104 and 1003 of the NYSE Amex Company Guide. As the Commission noted in a prior release, while these requirements are not identical, the Commission believes that both standards are designed to ensure the continued liquidity of the debt security, and, thus, are substantially similar. See Securities Act Release 8791, supra note 6, at 20412 (finding that an identical NCM listing standard was substantially similar to the Amex standard).

⁶¹ Both BATS and NYSE Amex include an initial listing requirement that there be current last sale information available in the United States with respect to the underlying security into which the bond or debenture is convertible. Compare BATS Rule 14.9(d)(2)(B) with Section 104 of the NYSE Amex Company Guide. Additionally, Section 1003(e) of the NYSE Amex Company Guide states that convertible bonds will be reviewed when the underlying security is delisted and will be delisted when the underlying security is no longer the subject of real-time reporting in the United States. BATS' continued listing standards for a convertible debt security also require that current last sale information be available in the United States with respect to the underlying security, whereas NYSE Amex does not. Compare BATS Rule 14.9(g)(2)(C) with Section 1003(e) of the NYSE Amex Company Guide.

makers⁶² are substantially similar to NYSE Amex standards.⁶³ In addition to the requirements noted above, BATS' listing standards require that one of four additional conditions be met for listing of convertible debt. Specifically, BATS will not list a convertible debt security unless one of the following conditions is met: (i) the issuer of the debt security also has equity securities listed on the Exchange, NYSE Amex, the NYSE, or Nasdaq/NGM; (ii) an issuer of equity securities listed on the Exchange, NYSE Amex, the NYSE, or Nasdaq/NGM directly or indirectly owns a majority interest in, or is under common control with, the issuer of the debt security, or has guaranteed the debt security; (iii) a nationally recognized securities rating organization (an "NRSRO") has assigned a current rating to the debt security that is no lower than an S&P Corporation "B" rating or equivalent rating by another NRSRO; or (iv) if no NRSRO has assigned a rating to the issue, an NRSRO has currently assigned an investment grade rating to an immediately senior issue or a rating that is no lower than an S&P Corporation "B" rating, or an equivalent rating by another NRSRO, to a pari passu or junior issue.⁶⁴ Therefore,

⁶² BATS' standard requires at least three registered and active market makers for initial listing and two registered and active market makers for continued listing (one of which may be a market maker entering a stabilizing bid), whereas NYSE Amex requires one specialist to be assigned. Compare BATS Rule 14.9(d)(1)(C) with NYSE Amex Rule 104.

⁶³ NYSE Amex will not list a convertible debt issue containing a provision which gives an issuer discretion to reduce the conversion price unless the issuer establishes a minimum 10-day period within which such price reduction will be in effect. See Section 104 of the NYSE Amex Company Guide. The Commission believes that omission of such a provision does not impact its determination. See Securities Act Release Nos. 39542, supra note 6 (finding PCX listing standards to be substantially similar to Amex even with the absence of this provision); 8791, supra note 6, at 20412 (finding NCM's listing standard, which is identical to BATS' listing standard for convertible debt, was substantially similar to Amex even with the absence of this provision).

⁶⁴ These standards are identical to the initial listing standards for convertible debt securities on NYSE Amex and NCM). Compare BATS Rule 14.9(d)(2)(D)(iv)

the Commission has determined that BATS' listing standards for convertible debt are substantially similar to those of NYSE Amex.

F. Units

The listing requirements for units on Tier II of the Exchange, NYSE Amex, and Nasdaq/NGM are all the same, as each evaluates the initial and continued listing of a unit by looking to its components.⁶⁵ If all of the components of a unit individually meet the standards for listing, then the unit would meet the standards for listing.⁶⁶ Because the components for units proposed by BATS are substantially similar to those of a Named Market, as discussed above, the Commission has determined that BATS' listing standards for units to be listed on Tier II of the Exchange are substantially similar to a Named Market.⁶⁷

The Commission is amending Rule 146(b) as proposed to reflect the following name changes:

- Sections (b)(1) and (b)(2) of Rule 146 use the term "Amex" to refer to the American Stock Exchange LLC. As noted above, on October 1, 2008,

with Section 104(A)-(E) of the NYSE Amex Company Guide and Nasdaq Rule 5515(b)(4).

⁶⁵ A unit is a type of security consisting of two or more different types of securities (e.g., a combination of common stocks and warrants). See, e.g., Securities Exchange Act Release No. 48464 (September 9, 2003), 68 FR 54250 (September 16, 2003) (order approving NYSE Amex proposed rule change to amend Sections 101 and 1003 of the NYSE Amex Company Guide to clarify the listing requirements applicable to units).

⁶⁶ See generally BATS Rule 14.4, Section 101(f) of the NYSE Amex Company Guide, and Nasdaq Rule 5225.

⁶⁷ See Securities Exchange Act Release No. 64546, supra note 11, 76 FR 31660 at 31664.

NYSE Euronext acquired Amex and renamed it NYSE Alternext.⁶⁸

Further, in 2009, NYSE Alternext was renamed NYSE Amex LLC.⁶⁹ The Commission is making a conforming change to Rule 146(b).

- Section (b)(1) of Rule 146 refers to “the Philadelphia Stock Exchange, Inc.”⁷⁰ On July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC.”⁷¹ The Commission is making a conforming change to Rule 146(b).

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 et seq.

IV. Economic Analysis

A. Introduction

Section 2(b) of the Securities Act⁷² requires us, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. We have

⁶⁸ See Securities Exchange Act Release No. 58673, supra note 1.

⁶⁹ See Securities Exchange Act Release No. 59575, supra note 1.

⁷⁰ See supra note 10.

⁷¹ On July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC.” See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035).

⁷² 15 U.S.C. 77b(b).

considered, and discuss below, the effects of the amendment to Securities Act Rule 146, with regard to BATS' listing standards to designate certain securities that will be listed, or authorized for listing, on BATS as Covered Securities, on efficiency, competition, and capital formation, as well as the benefits and costs associated with the rulemaking.

Congress amended Section 18 of the Securities Act to exempt covered securities from state registration requirements. These securities are listed on the Named Markets or any other national securities exchange determined by the Commission to have “substantially similar” listing standards to those of the Named Markets (“Designated Markets”).⁷³ Consistent with statutory authority, the Commission has determined that the listing standards for securities listed, or authorized for listing, on BATS are substantially similar to those of a Named Market, specifically Nasdaq/NGM or NYSE Amex. Securities listed, or authorized for listing, on BATS, therefore, will be exempt from state law registration requirements.

There are three Named Markets (NYSE, NYSE Amex, and Nasdaq/NGM) and currently five Designated Markets (Tier I of NYSE Arca, Tier I of the Philadelphia Stock Exchange, CBOE, ISE, and Nasdaq/NCM). NYSE and Nasdaq/NGM are currently the largest exchanges in terms of number of securities listed. As of April 19, 2011, in terms of securities listed, NYSE lists 3,255, Nasdaq/NGM lists 2,854, NYSE Arca lists 1,213, and NYSE Amex lists 544.⁷⁴

The direct economic effect of the rule amendment will be to exempt issuers that list, or are authorized to list, on BATS from the requirements of state registration.

⁷³ See 15 U.S.C. 77r(b)(1)(B).

⁷⁴ These listed securities include exchange traded funds and multiple securities from the same issuer.

Instead, these issuers will be required to comply with BATS' listing standards and the federal securities laws, rules and regulations with respect to the registration and sale of securities. The requirements of state registration typically include: (i) paperwork and labor hours necessary to comply with state registration requirements, (ii) meeting the disclosure standards, and (iii) in some states, meeting certain minimum merit requirements to make public offerings.⁷⁵ The Commission solicited comments concerning the costs and benefits associated with the proposal, but received none.

The Commission believes that an indirect effect of the rule amendment will be that, by removing the requirements of state registration for issuers that list, or are authorized to list, on BATS – the same privilege granted to other Covered Securities – the rule can improve BATS' ability to compete effectively with other exchanges. Therefore, the Commission believes an important economic effect of the rule amendment can be to engender greater competition in the market for listing services.

Exchanges generally compete in multiple areas, which include the market for listing, the market for trading, and the market for order-flow. This rule amendment and BATS' listing standards⁷⁶ relate primarily to the market for listing, although the rule amendment and the entry of a new participant in the listings market could impact other

⁷⁵ It has been noted that the purpose of such review is “to prevent ‘unfair’ and ‘oppressive’ offerings of securities,” and, as of 2011, merit review is employed in about 30 states. See Jeffrey B. Bartell & A.A. Sommer, Jr., Blue Sky Registration, SECURITIES LAW TECHNIQUES (Matthew Bender ed., 2011). Typical elements of merit review include: offering expenses, including underwriter's compensation, rights of security holders, historical ability to service debt or pay dividends, financial condition of the issuer, cheap stock held by insiders, the quantity of securities subject to options and warrants, self-dealing and other conflicts of interest, and the price at which the securities will be offered. See id. Some merit regulation would be imposed on these issuers through application of exchange listing standards.

⁷⁶ See Securities Exchange Act Release No. 64546, supra note 11.

markets as well.⁷⁷ In the market for listing, exchanges compete for issuers to list on their exchanges, so that the exchange may collect listing fees. Domestic exchanges face listing competition from other domestic exchanges and from foreign exchanges.⁷⁸ The benefit of listing for issuers generally is to gain greater access to capital through measures designed to help promote quality certification and visibility to public investors, which will generally result in a reduction in the cost of raising capital for these issuers. This access to capital may be further enhanced through listing on particular exchanges, which could affect the level of investors' trust in a listed company's governance structure and the fairness of trading in the company's securities (through the perceived effectiveness of exchanges' conduct rules and surveillance of trading as well as other services and regulatory functions).

Exchanges may try to compete for issuers by reducing listing fees or by improving the quality of services they offer, or both. The cost of listing for an issuer includes listing fees and the cost of complying with listing standards. In principle, this

⁷⁷ See, e.g., Thierry Foucault and Christine A. Parlour, Competition for Listing, 35 RAND J. ECON. 329 (2004) (describing how listing fees and trading costs both affect firms' incentives to list with one exchange versus another).

⁷⁸ It has been noted that NYSE and the London Stock Exchange, for example, compete for listings of firms in third countries, in particular from emerging economies. See Thomas J. Chemmanur & Paolo Fulghieri, Competition and Cooperation Among Exchanges: A Theory of Cross-Listing and Endogenous Listing Standards, 82 J. FIN. ECON. 455, 456 (2006). See generally Craig Doidge, Andrew Karolyi, and René Stulz, Has New York Become Less Competitive than London in Global Markets? Evaluating Foreign Listing Choices Over Time, JOURNAL OF FINANCIAL ECONOMICS 91, 253-277 (2009); Craig Doidge, Andrew Karolyi, and René Stulz, Why Do Foreign Firms Leave U.S. Equity Markets?, JOURNAL OF FINANCE 65, 1507-1553 (2010); Caglio, Cecilia, Hanley, Kathleen Weiss and Marietta-Westberg, Jennifer, Going Public Abroad: The Role of International Markets for IPOs (March 16, 2010), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572949. Additionally, differences in regulatory regimes may impact listing decisions.

means exchanges can compete by reducing listing fees, by relaxing the listing standards issuers must meet, or by offering several trading segments with different listing standards on each, though such standards must be determined to be substantially similar to a Named Market in order to get the benefit of the Securities Act Section 18(b)(1)(B) exemption from state registration requirements. The Commission believes that any concern that exchanges may try to compete by lowering the listing standards to attract issuers (and hence enter in a “race-to-the-bottom”) is mitigated by the fact that (1) listing standards affect exchanges’ reputations among investors, which, in turn, impacts their attractiveness to issuers, (2) any proposed listing standards or proposed changes to existing listing standards must be filed with the Commission pursuant to Section 19(b) of the Exchange Act and must meet its requirements to become effective,⁷⁹ and (3) lower listing standards that are not substantially similar to those of a Named Market will not have the benefit of the exemption from state registration requirements.⁸⁰

The competition among exchanges for listings is only partially based on price. Exchanges also compete in various other areas, which contribute to the quality of the services listed issuers receive, including, but not limited to, provision of trade statistics, regulatory and surveillance services, access to new technology, attractive trading mechanisms, and marketing services.

⁷⁹ Any revision to exchange listing standards must be done in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. Any Commission approval of a listing standard revision is conditioned upon a finding by the Commission that the revision is consistent with the requirements of the Exchange Act and rules thereunder. See 15 U.S.C. 78s.

⁸⁰ See Chemmanur & Fulghieri, supra note 74, at 458.

One important dimension of competition is brand name.⁸¹ Issuers place high value on being listed on certain exchanges because investors may more readily trust those exchanges, which may, in turn, reduce the cost of raising capital for those issuers. As a result, NYSE and Nasdaq/NGM, which are already the two largest exchanges in terms of securities listed, may be able to charge listing fees that are above marginal cost—that is, what it would cost them to list additional issuers—and higher than other competing exchanges; therefore, certain exchanges may earn economic rent from these higher listing premiums (the amount of fee difference certain exchanges can charge, above a competitor’s price, because of its brand name). In addition to brand name recognition, the market for listing exhibits positive network externalities: issuers may prefer to be listed on exchanges where many other issuers are listed and where there are more intermediaries trading because of increased liquidity and visibility.⁸² This indicates that, all else being equal, large exchanges (in terms of listings) will tend to be favored over smaller ones. In theory, this preference may persist to some extent even if large exchanges were to offer slightly inferior services than their smaller counterparts because the advantages of being listed on a large exchange, where there are many issuers and intermediaries, might outweigh the cost of being offered slightly inferior services.

⁸¹ See generally Clement G. Krouse, Brand Name as a Barrier to Entry: The Real Lemon Case, 51 SOUTHERN ECON. J. 495 (1984) (describing the effect of brand name on competition in markets with incomplete information); see also Tibor Scitovsky, Ignorance as a Source of Oligopoly Power, 40 AMER. ECON. REV. 48, 49 (1950) (“An ignorant buyer . . . is unable to judge the quality of the products he buys by their intrinsic merit. Unable to appraise products by objective standards, he is forced to base his judgment on indices of quality, such as . . . general reputation of the producing firms.”).

⁸² See, e.g., Carmine Di Nola, Competition and Integration Among Stock Exchanges in Europe: Network Effects, Implicit Mergers and Remote Access, 7 EUROPEAN FIN. MAN. 39 (2001) (“Firms may derive more utility in being listed on exchanges where there are more intermediaries as they give more liquidity to the market.”).

Because of these brand name effects and positive externalities, the Commission believes that the market for listings, to some extent, exhibits certain barriers to entry for new entrants to the listing markets, such as BATS.⁸³

B. Benefits, Including the Impact on Efficiency, Competition, and Capital Formation

By exempting securities listed, or authorized for listing, on BATS from state law registration requirements, the Commission believes that issuers seeking to list securities on BATS could have the benefit of reduced regulatory compliance burdens, as compliance with state blue sky law requirements will not be required. One benefit of this amendment will be to eliminate these compliance burdens with respect to securities listed, or authorized for listing, on BATS. The Commission expects that the rule amendment can improve efficiency by eliminating duplicative registration costs for issuers and improving liquidity by allowing for greater market access to issuers who have not been listed previously.

To the extent that state merit reviews may have inhibited certain smaller businesses from making public offerings,⁸⁴ the Commission believes an exemption from

⁸³ Brand name recognition is frequently recognized as a barrier to entry mainly because consumers do not have all the information regarding product quality and thus tend to rely on brand names as a proxy for quality. See, e.g., Brand Name as a Barrier to Entry: The Rea Lemon Case, 51 S. ECON. J. 495 (1984); Tibor Scitovsky, Ignorance as a Source of Oligopoly Power, 40 AMER. ECON. REV. 48 (1950). Network externalities are also recognized as a barrier to entry. See, e.g., Gregory J. Weden, Network Effects and Conditions of Entry: Lessons from the Microsoft Case, 69 Antitrust L.J. 87 (2001); Douglas A. Melamed, Network Industries and Antitrust, 23 HARV. J. L. & PUB. POL'Y 147 (1999).

⁸⁴ A number of scholarly articles have expressed concerns over the possibility for blue sky merit regulation to hinder capital formation. See, e.g., Martin Fojas, Ay Dios NSMIA!: Proof of a Private Offering Exemption Should Not Be a Precondition for Preempting Blue Sky Law Under the National Securities Markets Improvement Act, 74 BROOKLYN L. REV. 477 (2009); Rutheford B. Campbell, Jr.,

state registration requirements will facilitate capital formation.

The Commission believes that the amendment to Rule 146(b) should permit BATS to better compete for listings with other markets whose listed securities already are exempt from state law registration requirements, and the Commission believes that this result can enhance competition, thus benefiting market participants and the public. Specifically, BATS currently intends to enter the listing market with generally lower fees than incumbent exchanges in order to compete with them.⁸⁵ In response to BATS' entry, although recognizing the significant barriers to entry noted above, the incumbent exchanges might choose to reduce their listing fees to match or come closer to those proposed by BATS. Incumbent exchanges might also enhance the other services they provide to their currently listed issuers (e.g., regulatory and surveillance services, access to new technology, attractive trading mechanisms, marketing services) as a way to counteract BATS' lower listing fees.

Blue Sky Laws and the Recent Congressional Preemption Failure, 22 J. CORP. L. 175 (1997); Brian J. Fahrney, State Blue Sky Laws: A Stronger Case for Federal Pre-Emption Due to Increasing Internationalization of Securities Markets, Comment, 86 NW. U. L. REV. 753 (1991-92); Roberta S. Karmel, Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce, 53 BROOK. L. REV. 106 (1987-88). While the concerns are numerous, other studies have shown some positive effect of merit regulation. See Jay T. Brandi, The Silverlining in Blue Sky Laws: The Effect of Merit Regulation on Common Stock Returns and Market Efficiency, 12 J. Corp. L. 713 (1986-87) (reporting that merit regulation can have a positive effect on investor returns); Ashwini K. Agrawal, "The Impact of Investor Protection Law on Corporate Policy: Evidence from the Blue Sky Laws," working paper (2009) (reporting that the passage of investor protection statutes causes firms to pay out greater dividends, issue more equity, and grow in size), available at <http://ssrn.com/abstract=1442224>. Some merit regulation would be imposed on these issuers through application of exchange listing standards.

⁸⁵ See Securities Exchange Act Release No. 64546, supra note 11, 76 FR at 31666 & n. 27-28 (representing that BATS' pricing, while not necessarily cheaper for all issuers at all other markets, is roughly equivalent to or less than the price issuers would pay at other exchanges, including NGM and NCM).

The Commission believes that additional competition in the market for listings can enable some issuers, both public and private, that have (1) either not listed on any exchange or (2) have listed on an exchange but have chosen not to list on certain exchanges because of the costs of listing there, to list on any Named or Designated Market due to the potential for lower listing fees across all exchanges. The Commission further believes that this will result in a lower cost of capital for those issuers that previously had not listed on an exchange and could benefit the current investors in such issuers in the form of higher company value arising from the reduced cost of capital and increased liquidity. Since currently unlisted firms may be able to list because of lower listing fees, the Commission believes this may improve efficiency and capital formation since future investors in these issuers would have easier access to invest in them and to further diversify their investment portfolios.

The Commission believes that those issuers that are currently listed on an exchange, including the Named Markets, and that remain listed there, can potentially benefit from any reduced listing fees; however, because any such benefit will come at the expense of the exchange on which they are listed in the form of potentially reduced profit, this aggregate effect would be a transfer from one group of investors (exchange shareholders) to another group of investors (listed issuer shareholders).

Additionally, the Commission believes that some issuers currently listed on other Named or Designated Markets could potentially switch their listings to BATS, thus potentially lowering their listing costs (provided the Named or Designated Markets do not reduce their listing fees). The size of any such potential benefit will depend on how large any cost savings due to listing on BATS would be in comparison to the cost of

giving up any valuable services that the other exchanges might provide that BATS might not. In addition, the behavior of these issuers will depend heavily on the extent to which these other exchanges respond to BATS' entry by making themselves more competitive to the issuers.

C. Costs, Including the Impact on Efficiency, Competition, and Capital Formation

The rule amendment will eliminate state registration requirements for securities listed, or authorized for listing, on BATS. The Commission notes that there may be certain economic costs to investors through the loss of benefits of state registration and oversight. For example, by listing on BATS, issuers will no longer be required to comply with certain states' blue sky laws, which could mandate more detailed disclosure than BATS' listing standards and the requirements imposed pursuant to the federal securities laws, rules, and regulations. In such circumstances, investors could lose the benefit of the additional information. Additionally, to the extent blue sky laws result in additional enforcement protections in the form of another regulator policing issuer activity, then investors from these states could incur costs when issuers choose to list on BATS. Some researchers have also expressed a concern that the exemption from blue sky laws could prompt riskier public offerings.⁸⁶

From the perspective of competition in the market for listing, the Commission notes that there could be a concern that, to the extent the market for exchange services exhibits network effects, as explained above, there could be a loss in efficiency as a result of having a greater number of networks, if one or more of the existing large exchanges (in terms of listings) shrinks in size. However, the Commission also notes that the

⁸⁶ See, e.g., Brandi, *supra* note 84.

overall efficiency effect will depend on the precise fragmentation of the exchanges. It is possible, for instance, that, through specialization of exchanges, there could be an efficiency gain from having more distinct exchanges, each of which specializes in listing issuers from certain types of industries.

The Commission acknowledges that these costs are difficult to quantify. The Commission believes that Congress contemplated these costs in relation to the economic benefits of exempting Covered Securities from state regulation. The rule amendment otherwise imposes no recordkeeping or compliance burdens, but will provide a limited purpose exemption under the federal securities laws. The Commission solicited comments on the rule amendment's effect on competition, efficiency, and capital formation, but received none. Thus, the Commission believes that the amendment to Rule 146(b) should not impair efficiency, competition, and capital formation.

V. Regulatory Flexibility Act Certification

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act,⁸⁷ that the amendment to Rule 146 will not have a significant economic impact on a substantial number of small entities. This certification was included in the Proposing Release.⁸⁸ The Commission solicited comments as to the nature of any impact on small entities, and generally on whether the amendment to Rule 146(b) could have an effect that has not been considered. No comments on these issues were received.

VI. Statutory Authority and Text of the Rule

The Commission is adopting an amendment to Rule 146 pursuant to the authority

⁸⁷ 5 U.S.C. 605(b).

⁸⁸ See Proposing Release at 49706.

of Section 19(a) of the Securities Act of 1933⁸⁹ particularly Sections 18(b)(1)(B) and 19(a).⁹⁰

List of Subjects in 17 CFR Part 230

Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 111-203, § 939A, 124 Stat. 1376, (2010) unless otherwise noted.

* * * * *

2. Section 230.146 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 230.146 Rules under section 18 of the Act.

* * * * *

(b) * * *

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange

⁸⁹ 15 U.S.C. 77a et seq.

⁹⁰ 15 U.S.C. 77r(b)(1)(B) and 77s(a).

(“NYSE”), the NYSE Amex LLC (“NYSE Amex”), or the National Market System of the Nasdaq Stock Market (“Nasdaq/NGM”), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the NASDAQ OMX PHLX LLC;
- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on the International Securities Exchange, LLC;
- (v) The Nasdaq Capital Market; and
- (vi) Tier I and Tier II of BATS Exchange, Inc..

(2) The designation of securities in paragraphs (b)(1)(i) through (vi) of this section as covered securities is conditioned on such exchanges’ listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE Amex, or Nasdaq/NGM.

* * * * *

By the Commission.

Elizabeth M. Murphy
Secretary

January 20, 2012

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