

Proposed Rule Change by **BATS Exchange**  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

<b>Initial</b> <input checked="" type="checkbox"/>	<b>Amendment</b> <input type="checkbox"/>	<b>Withdrawal</b> <input type="checkbox"/>	<b>Section 19(b)(2)</b> <input type="checkbox"/>	<b>Section 19(b)(3)(A)</b> <input checked="" type="checkbox"/>	<b>Section 19(b)(3)(B)</b> <input type="checkbox"/>
			<b>Rule</b>		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
Provide a brief description of the proposed rule change (limit 250 characters).

Amendment to Rule 14.1 (Unlisted Trading Privileges) to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to unlisted trading privileges.

**Contact Information**  
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	<input type="text" value="Eric"/>	Last Name	<input type="text" value="Swanson"/>
Title	<input type="text" value="SVP &amp; General Counsel"/>		
E-mail	<input type="text" value="eswanson@batstrading.com"/>		
Telephone	<input type="text" value="(212) 378-8523"/>	Fax	<input type="text" value="(212) 378-8550"/>

**Signature**  
Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date

By

(Name) (Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> BATS Exchange, Inc. (“BATS” or the “Exchange”) proposes to amend BATS Rule 14.1, entitled “Unlisted Trading Privileges,” to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to unlisted trading privileges (“UTP”) in a manner similar to the UTP rule consolidations enacted by the National Stock Exchange, Inc., the Philadelphia Stock Exchange, Inc. and the International Securities Exchange, LLC, which the Securities and Exchange Commission (“Commission”) previously has approved. BATS has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) of the Act.<sup>3</sup>

(a) The text of the proposed rule change is attached as Exhibit 5. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The Board of Directors of the Exchange approved this proposed rule change on September 9, 2008. This action constitutes requisite approval under the Exchange’s By-Laws.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6)(iii).

(b) Comments and questions regarding this rule filing may be directed to Eric Swanson, Senior Vice President and General Counsel of the Exchange at (212) 378-8523.

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

(a) Purpose

The purpose of the proposed rule change is to amend the Exchange's rules to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to UTP that have been established in various new product proposals previously approved by the Commission. The Exchange proposes to amend BATS Rule 14.1 to set forth rules regarding the extension of UTP to a security that is listed on another national securities exchange. Any such security will be subject to all Exchange trading rules applicable to equity securities, unless otherwise noted. The Exchange will file with the Commission a Form 19b-4(e) with respect to any such security that is a "new derivative securities product" as defined in Rule 19b-4(e) under the Act.<sup>4</sup> In addition, any new derivative securities product traded on the Exchange pursuant to the proposed Rule 14.1 will be subject to the following criteria.

Proposed BATS Rule 14.1(c)(2) provides that the Exchange will distribute an information circular prior to the commencement of trading in such new derivative securities products, which generally will include the same information as the information circular provided by the listing exchange, including: (1) the special risks of trading the new derivative securities product; (2) the Exchange's rules that will apply to the new

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<sup>4</sup> 17 CFR 240.19b-4(e).

derivative securities product, including the suitability rule;<sup>5</sup> (3) information about the dissemination of the value of the underlying assets or indexes; and (4) the risk of trading during the Exchange's pre-opening session due to the lack of calculation or dissemination of the intraday indicative value or a similar value.<sup>6</sup>

Proposed BATS Rule 14.1(c)(3)(A) reminds Members<sup>7</sup> that they are subject to the prospectus delivery requirements under the Securities Act of 1933, as amended ("Securities Act"), unless the new derivative securities product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 ("1940 Act")<sup>8</sup> and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. The Exchange will inform its Members of the application of the provisions of this subparagraph to a particular new securities derivative product governed by the 1940 Act by means of an information circular.

Proposed BATS Rule 14.1(c)(4) addresses trading halts in new derivative securities products traded on the Exchange pursuant to UTP. Proposed BATS Rule 14.1(c)(4)(A) provides that the Exchange, upon notification by the listing market of a halt due to a temporary interruption in the calculation or wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument, will

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<sup>5</sup> See BATS Rule 3.7.

<sup>6</sup> BATS's pre-opening session is from 8:00 a.m. to 9:30 a.m. Eastern Time. BATS does not currently have a post market trading session.

<sup>7</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>8</sup> 15 U.S.C. 80a-24(d).

immediately halt trading in that product on the Exchange. If the intraday indicative value (or a similar value) or the value of the underlying index or instrument continues not to be calculated or widely available at the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product on that day. If an interruption in the calculation or wide dissemination of the intraday indicative value (or a similar value) or the value of the underlying index or instrument of a series continues, the Exchange may resume trading in the product only if calculation and wide dissemination of the intraday interactive value (or a similar value) or the value of the underlying index or instrument resumes or trading in such series resumes in the listing market.<sup>9</sup>

Additionally, proposed BATS Rule 14.1(c)(4)(B) provides that, for a new derivative securities product where a net asset value (and, in the case of managed fund shares or actively managed exchange-traded funds, a “disclosed portfolio”) is disseminated, the Exchange will immediately halt trading in such security upon notification by the listing market that the net asset value, and, if applicable, such disclosed portfolio, is not being disseminated to all market participants at the same time. The Exchange may resume trading in the new derivative securities product only when trading in such security resumes on the listing market.

Proposed BATS Rule 14.1(c)(5) provides for restrictions for any Member registered as a Market Maker (“Restricted Market Maker”) in a new derivative securities product that derives its value from one or more currencies, commodities, or derivatives

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<sup>9</sup> The Exchange also has authority to suspend or halt trading under BATS Rule 11.1.

based on one or more currencies or commodities, or is based on a basket or index comprised of currencies or commodities (collectively, "Reference Assets"). Specifically, proposed BATS Rule 14.1(c)(5)(A) provides that a Restricted Market Maker in a new derivative securities product is prohibited from acting or registering as a market maker in any Reference Asset of that new derivative securities product or any derivative instrument based on a Reference Asset of that new derivative securities product (collectively, with Reference Assets, "Related Instruments"). Proposed BATS Rule 14.1(c)(5)(B) provides that a Restricted Market Maker shall, in a manner prescribed by the Exchange, file with the Exchange and keep current a list identifying any accounts ("Related Instrument Trading Accounts") for which Related Instruments are traded: (1) in which the Restricted Market Maker holds an interest; (2) over which it has investment discretion; or (3) in which it shares in the profits and/or losses. In addition, a Restricted Market Maker may not have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account which has not been reported to the Exchange as required by this rule. Proposed BATS Rule 14.1(c)(5)(C) provides that, in addition to the existing obligations under Exchange rules regarding the production of books and records, a Restricted Market Maker shall, upon request by the Exchange, make available to the Exchange any books, records, or other information pertaining to any Related Instrument Trading Account or to the account of any registered or non-registered employee affiliated with the Restricted Market Maker for which Related Instruments are traded. Finally, proposed BATS Rule 14.1(c)(5)(D) provides

that a Restricted Market Maker shall not use any material nonpublic information in connection with trading a Related Instrument.<sup>10</sup>

Lastly, BATS represents that the Exchange's surveillance procedures for new derivative securities products traded on the Exchange pursuant to UTP will be similar to the procedures used for equity securities traded on the Exchange and will incorporate and rely upon existing Exchange surveillance systems. The Exchange will closely monitor activity in new derivative securities products traded on the Exchange pursuant to UTP to deter any improper trading activity. The proposed rule change also provides that the Exchange will enter into a comprehensive surveillance sharing agreement ("CSSA") with a market trading components of the index or portfolio on which the new derivative securities product is based to the same extent as the listing exchange's rule require the listing market to enter into a CSSA with such market.

(b) Statutory Basis

Approval of the rule changes proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, specifically, with the requirements of Section 6(b) of the Act<sup>11</sup>. In particular, the proposed changes are consistent with Section 6(b)(5) of the Act,<sup>12</sup> because they would promote just and equitable principles of trade, remove

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<sup>10</sup> As of the date of this filing, the Exchange does not have a market maker classification. However, the Exchange intends to amend its rules to adopt a market maker classification. Accordingly, the Exchange has incorporated the market maker prohibition set forth in proposed Rule 14.1(c)(5) in anticipation of that rule filing.

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).



impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by providing for the trading of securities, including new derivative securities products, on BATS pursuant to UTP, subject to consistent and reasonable standards.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

5. 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 proposed rule change.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act<sup>13</sup> and paragraph (f)(6) of Rule 19b-4 thereunder.<sup>14</sup> The Exchange believes that the proposed rule change should take effect immediately upon filing because it will effect a change that (1) does not significantly affect the protection of investors or the public interest, (2) does not impose any significant burden on competition and, (3) does not become operative for 30 days after the date of this filing. Furthermore, as

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4.

described below, the proposed rule change is substantially similar to rule changes of other self-regulatory organizations previously approved by the Commission.<sup>15</sup> In accordance with Rule 19b-4, the Exchange submitted 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.

8. Proposed Rule Change Based on Rule of Another Self-Regulatory Organization or of the Commission

This proposed rule change is based on Rule 15.9 of the National Stock Exchange (“NSX”). There are no material differences between NSX Rule 15.9, as approved by the Commission, and the additional language that BATS proposes to add to existing BATS Rule 14.1.<sup>16</sup> The proposed rule change is also similar to rules of other self-regulatory organizations that have been approved by the Commission, in particular, Rule 803(o) of the rules of the Philadelphia Stock Exchange, Inc.<sup>17</sup> and Rule 2101 of the rules of the International Securities Exchange, LLC.<sup>18</sup>

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<sup>15</sup> See Securities Act Release No. 58092 (July 3, 2008), 73 FR 40143, 40149 (July 11, 2008) (where the Commission stated that a rule change proposal may be designated as immediately effective if “each policy issue raised by the proposed rule (i) has been considered previously by the Commission when the Commission approved another exchange’s rule (that was subject to notice and comment), and (ii) the rule change resolves such policy issue in a manner consistent with such prior approval.”)

<sup>16</sup> Securities Exchange Act Release No. 57448 (March 6, 2008), 73 FR 13597 (March 13, 2008) (SR-NSX-2008-05).

<sup>17</sup> Securities Exchange Act Release No. 57806 (May 9, 2008), 73 FR 28541 (May 16, 2008) (SR-Phlx-2008-34).

<sup>18</sup> Securities Exchange Act Release No. 57387 (February 27, 2008), 73 FR 11965 (March 5, 2008) (SR-ISE-2007-99).

9. Exhibits

Exhibit 1: Completed Notice of the Proposed Rule Change for publication in the Federal Register.

Exhibit 2 – 4: Not applicable.

Exhibit 5: Text of Proposed Rule Change.

EXHIBIT 1

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-\_\_\_\_\_; File No. SR-BATS-2008-004)

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend BATS Rule 14.1, entitled “Unlisted Trading Privileges,” to Consolidate into a Single Rule Certain Requirements for Trading Products on the Exchange Pursuant to Unlisted Trading Privileges.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 17, 2008, BATS Exchange, Inc. (“BATS” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal 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 is proposing to amend BATS Rule 14.1, entitled “Unlisted Trading Privileges” to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to unlisted trading privileges (“UTP”) that have been established in various new product proposals previously approved by the Commission.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available at the Exchange's Web site at <http://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

The purpose of the proposed rule change is to amend the Exchange's rules to consolidate into a single rule certain requirements for trading products on the Exchange pursuant to UTP that have been established in various new product proposals previously approved by the Commission. The Exchange proposes to amend BATS Rule 14.1 to set forth rules regarding the extension of UTP to a security that is listed on another national securities exchange. Any such security will be subject to all Exchange trading rules applicable to equity securities, unless otherwise noted. The Exchange will file with the Commission a Form 19b-4(e) with respect to any such security that is a "new derivative securities product" as defined in Rule 19b-4(e) under the Act.<sup>4</sup> In addition, any new

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<sup>4</sup> 17 CFR 240.19b-4(e).

derivative securities product traded on the Exchange pursuant to the proposed Rule 14.1 will be subject to the following criteria.

Proposed BATS Rule 14.1(c)(2) provides that the Exchange will distribute an information circular prior to the commencement of trading in such new derivative securities products, which generally will include the same information as the information circular provided by the listing exchange, including: (1) the special risks of trading the new derivative securities product; (2) the Exchange's rules that will apply to the new derivative securities product, including the suitability rule;<sup>5</sup> (3) information about the dissemination of the value of the underlying assets or indexes; and (4) the risk of trading during the Exchange's pre-opening session due to the lack of calculation or dissemination of the intraday indicative value or a similar value.<sup>6</sup>

Proposed BATS Rule 14.1(c)(3)(A) reminds Members<sup>7</sup> that they are subject to the prospectus delivery requirements under the Securities Act of 1933, as amended ("Securities Act"), unless the new derivative securities product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 ("1940 Act")<sup>8</sup> and the product is not otherwise subject to prospectus delivery requirements under the Securities Act. The Exchange will inform its Members of the application of the provisions of this

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<sup>5</sup> See BATS Rule 3.7.

<sup>6</sup> BATS's pre-opening session is from 8:00 a.m. to 9:30 a.m. Eastern Time. BATS does not currently have a post market trading session.

<sup>7</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>8</sup> 15 U.S.C. § 80a-24(d).

subparagraph to a particular new securities derivative product governed by the 1940 Act by means of an information circular.

Proposed BATS Rule 14.1(c)(4) addresses trading halts in new derivative securities products traded on the Exchange pursuant to UTP. Proposed BATS Rule 14.1(c)(4)(A) provides that the Exchange, upon notification by the listing market of a halt due to a temporary interruption in the calculation or wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument, will immediately halt trading in that product on the Exchange. If the intraday indicative value (or a similar value) or the value of the underlying index or instrument continues not to be calculated or widely available at the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product on that day. If an interruption in the calculation or wide dissemination of the intraday indicative value (or a similar value) or the value of the underlying index or instrument of a series continues, the Exchange may resume trading in the product only if calculation and wide dissemination of the intraday interactive value (or a similar value) or the value of the underlying index or instrument resumes or trading in such series resumes in the listing market.<sup>9</sup>

Additionally, proposed BATS Rule 14.1(c)(4)(B) provides that, for a new derivative securities product where a net asset value (and, in the case of managed fund shares or actively managed exchange-traded funds, a “disclosed portfolio”) is disseminated, the Exchange will immediately halt trading in such security upon

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<sup>9</sup> The Exchange also has authority to suspend or halt trading under BATS Rule 11.1.

notification by the listing market that the net asset value, and, if applicable, such disclosed portfolio, is not being disseminated to all market participants at the same time. The Exchange may resume trading in the new derivative securities product only when trading in such security resumes on the listing market.

Proposed BATS Rule 14.1(c)(5) provides for restrictions for any Member registered as a Market Maker (“Restricted Market Maker”) in a new derivative securities product that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index comprised of currencies or commodities (collectively, “Reference Assets”). Specifically, proposed BATS Rule 14.1(c)(5)(A) provides that a Restricted Market Maker in a new derivative securities product is prohibited from acting or registering as a market maker in any Reference Asset of that new derivative securities product or any derivative instrument based on a Reference Asset of that new derivative securities product (collectively, with Reference Assets, “Related Instruments”). Proposed BATS Rule 14.1(c)(5)(B) provides that a Restricted Market Maker shall, in a manner prescribed by the Exchange, file with the Exchange and keep current a list identifying any accounts (“Related Instrument Trading Accounts”) for which Related Instruments are traded: (1) in which the Restricted Market Maker holds an interest; (2) over which it has investment discretion; or (3) in which it shares in the profits and/or losses. In addition, a Restricted Market Maker may not have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account which has not been reported to the Exchange as required by this rule. Proposed BATS Rule 14.1(c)(5)(C) provides that, in addition to the existing obligations under Exchange rules regarding the



production of books and records, a Restricted Market Maker shall, upon request by the Exchange, make available to the Exchange any books, records, or other information pertaining to any Related Instrument Trading Account or to the account of any registered or non-registered employee affiliated with the Restricted Market Maker for which Related Instruments are traded. Finally, proposed BATS Rule 14.1(c)(5)(D) provides that a Restricted Market Maker shall not use any material nonpublic information in connection with trading a Related Instrument.<sup>10</sup>

Lastly, BATS represents that the Exchange's surveillance procedures for new derivative securities products traded on the Exchange pursuant to UTP will be similar to the procedures used for equity securities traded on the Exchange and will incorporate and rely upon existing Exchange surveillance systems. The Exchange will closely monitor activity in new derivative securities products traded on the Exchange pursuant to UTP to deter any improper trading activity. The proposed rule change also provides that the Exchange will enter into a comprehensive surveillance sharing agreement ("CSSA") with a market trading components of the index or portfolio on which the new derivative securities product is based to the same extent as the listing exchange's rule require the listing market to enter into a CSSA with such market.

## 2. Statutory Basis

Approval of the rule changes proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a

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<sup>10</sup> As of the date of this filing, the Exchange does not have a market maker classification. However, the Exchange intends to amend its rules to adopt a market maker classification. Accordingly, the Exchange has incorporated the market maker prohibition set forth in proposed Rule 14.1(c)(5) in anticipation of that rule filing.

national securities exchange, and, specifically, with the requirements of Section 6(b) of the Act.<sup>11</sup> In particular, for the reasons described above, the proposed changes are consistent with Section 6(b)(5) of the Act,<sup>12</sup> because they would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest by providing for the trading of securities, including new derivative securities products, on BATS pursuant to UTP, subject to consistent and reasonable standards.

(B) Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule changes impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received from Members, Participants or Others

No written comments were solicited or received.

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

This proposal would consolidate into a single rule various provisions related to UTP that have been established in other new products proposals previously approved by the Commission.<sup>13</sup> Because the foregoing proposed rule change is non-controversial and

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> See NSX Rule 15.9 and Securities Exchange Act Release No. 57448 (March 6, 2008), 73 FR 13597 (March 13, 2008) (SR-NSX-2008-05); Phlx Rule 803(o) and Securities Exchange Act Release No. 57806 (May 9, 2008), 73 FR 28541 (May 16, 2008) (SR-Phlx-2008-34); ISE Rule 2101 and Securities Exchange Act Release No. 57387 (February 27, 2008), 73 FR 11965 (March 5, 2008) (SR-ISE-2007-99).

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 from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6) thereunder.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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](mailto:rule-comments@sec.gov). Please include File No. SR-BATS-2008-004 on the subject line.

##### Paper Comments:

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

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6).

All submissions should refer to File No. SR-BATS-2008-004. 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 Web site (<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 changes 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. Copies of such 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-BATS-2008-004 and should be submitted on or before [\_\_\_\_\_21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Florence E. Harmon  
Acting Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Proposed new language is underlined. Proposed deletions are enclosed in [brackets].

**RULES  
OF  
BATS EXCHANGE, INC.**

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**Chapter XIV. SECURITIES TRADED**

Rule 14.1 Unlisted Trading Privileges

(a) UTP Securities. [The Exchange will trade securities only pursuant to unlisted trading privileges (“UTP”) in accordance with Section 12(f) of the Exchange Act and the rules and regulations promulgated thereunder. Any security traded on the Exchange must be registered under the Exchange Act and must be listed on the New York Stock Exchange, NYSE Arca, the American Stock Exchange, or the NASDAQ Stock Market. The Exchange will cease trading any Equity Security (as defined below) admitted to UTP if such security no longer is either listed on the New York Stock Exchange, NYSE Arca, the American Stock Exchange, or the NASDAQ Stock Market.]Notwithstanding the requirements for listing set forth in these Rules, the Exchange may extend unlisted trading privileges (“UTP”) to any Equity Security (as defined below) that is listed on another national securities exchange or with respect to which unlisted trading privileges may otherwise be extended in accordance with Section 12(f) of the Exchange Act. Any such security will be subject to all Exchange trading rules applicable to equity securities, unless otherwise noted. The Exchange will not list any Equity Securities. Therefore, the provisions of Rules 14.2 through 14.9 that permit the listing of Equity Securities other than common stock, secondary classes of common stock, preferred stock and similar issues, shares or certificates of beneficial interest of trusts, notes, limited partnership interests, warrants, certificates of deposit for common stock, convertible debt securities, American Depositary Receipts (“ADRs”), and contingent value rights (“CVRs”) will not be effective until the Exchange files a proposed rule change under Section 19(b)(2) under the Exchange Act to amend its rules to comply with Rule 10A-3 under the Exchange Act and to incorporate qualitative listing criteria, and such proposed rule change is approved by the Commission. For purposes of this Chapter XIV, the term “Equity Security” means, but is not limited to, common stock, secondary classes of common stock, preferred stock and similar issues, shares or certificates of beneficial interest of trusts, notes, limited partnership interests, warrants, certificates of deposit for common stock, convertible debt securities, ADRs, CVRs, Investment Company Units, Trust Issued Receipts (including those based on Investment Shares), Commodity-Based Trust Shares, Currency Trust Shares, Partnership Units, Equity-Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Portfolio Depositary Receipts and Equity-Linked Debt Securities.

(b) (No change.)

(c) UTP Derivative Securities. Any UTP Security that is a “new derivative securities product” as defined in Rule 19b-4(e) under the Exchange Act (a “UTP Derivative Security”) and traded pursuant to Rule 19b-4(e) under the Exchange Act shall be subject to the additional following rules:

(1) Form 19b-4(e). The Exchange shall file with the Securities and Exchange Commission a Form 19b-4(e) with respect to each UTP Derivative Security.

(2) Information Circular. The Exchange shall distribute an information circular prior to the commencement of trading in each such UTP Derivative Security that generally includes the same information as contained in the information circular provided by the listing exchange, including: (a) the special risks of trading new derivative securities product; (b) the Exchange Rules that will apply to the new derivative securities product, including Rule 3.7; (c) information about the dissemination of value of the underlying assets or indexes; and (d) the risk of trading during the Pre-Opening Session (9:00 a.m. – 9:30 a.m. Eastern Time) due to the lack of calculation or dissemination of the intra-day indicative value or a similar value.

(3) Product Description.

(A) Prospectus Delivery Requirements. Members are subject to the prospectus delivery requirements under the Securities Act of 1933, unless UTP Derivative Security that is the subject of an order by the Securities and Exchange Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 and the product is not otherwise subject to prospectus delivery requirements under the Securities Act of 1933.

(B) Written Description of Terms and Conditions. The Exchange shall inform Members of the application of the provisions of this subparagraph to UTP Derivative Securities by means of an information circular. The Exchange requires that Members provide all purchasers of UTP Derivative Securities a written description of the terms and characteristics of those securities, in a form approved by the Exchange or prepared by the open-ended management company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, Members shall include a written description with any sales material relating to UTP Derivative Securities that is provided to customers or the public. Any other written materials provided by a Member to customers or the public making specific reference to the UTP Derivative Securities as an investment vehicle must include a statement substantially in the following form:

“A circular describing the terms and characteristics of [*the UTP Derivative Securities*] has been prepared by the [*open-ended management investment*

company name] and is available from your broker. It is recommended that you obtain and review such circular before purchasing [the UTP Derivative Securities].”

A Member carrying an omnibus account for a non-Member is required to inform such non-Member that execution of an order to purchase UTP Derivative Securities for such omnibus account will be deemed to constitute an agreement by the non-Member to make such written description available to its customers on the same terms as are directly applicable to the Member under this Rule.

(C) Customer Requests for a Prospectus. Upon request of a customer, a Member shall also provide a prospectus for the particular UTP Derivative Securities.

(4) Trading Halts.

(A) If a temporary interruption occurs in the calculation or wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument and the listing market halts trading in the product, the Exchange, upon notification by the listing market of such halt due to such temporary interruption, also shall immediately halt trading in that product on the Exchange. If the intraday indicative value (or similar value) or the value of the underlying index or instrument continues not to be calculated or widely available as of the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product that day. If an interruption in the calculation or wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument continues, the Exchange may resume trading in the product only if calculation and wide dissemination of the intraday indicative value (or similar value) or the value of the underlying index or instrument resumes or trading in such series resumes in the listing market. Nothing in this rule shall limit the power of the Exchange under the By-Laws, Rules (including without limitation Rule 11.1) or procedures of the Exchange with respect to the Exchange’s ability to suspend trading in any securities if such suspension is necessary for the protection of investors or in the public interest.

(B) For a UTP Derivative Security where a net asset value (and, in the case of managed fund shares or actively managed exchange-traded funds, a “disclosed portfolio”) is disseminated, the Exchange will immediately halt trading in such security upon notification by the listing market that the net asset value and, if applicable, such disclosed portfolio, is not being disseminated to all market participants at the same time. The Exchange may resume trading in the UTP Derivative Security only when trading in the UTP Derivative Security resumes on the listing market.

(5) Market Maker Restrictions. The following restrictions shall apply to each Member registered as a Market Maker (“Restricted Market Maker”) in a UTP Derivative Security that derives its value from one or more currencies, commodities, or derivatives based on one or more currencies or commodities, or is based on a basket or index comprised of currencies or commodities (collectively, “Reference Assets”):

(A) A Restricted Market Maker in an UTP Derivative Security is prohibited from acting or registering as a market maker in any Reference Asset of that UTP Derivative Security or any derivative instrument based on a Reference Asset of that UTP Derivative Security (collectively, with Reference Assets, “Related Instruments”).

(B) A Restricted Market Maker shall, in a manner prescribed by the Exchange, file with the Exchange and keep current a list identifying any accounts (“Related Instrument Trading Accounts”) for which Related Instruments are traded:

(i) in which the Restricted Market Maker holds an interest;

(ii) over which it has investment discretion; or

(iii) in which it shares in the profits and/or losses.

A Restricted Market Maker may not have an interest in, exercise investment discretion over, or share in the profits and/or losses of a Related Instrument Trading Account which has not been reported to the Exchange as required by this Rule.

(C) In addition to the existing obligations under Exchange rules regarding the production of books and records, a Restricted Market Maker shall, upon request by the Exchange, make available to the Exchange any books, records, or other information pertaining to any Related Instrument Trading Account or to the account of any registered or non-registered employee affiliated with the Restricted Market Maker for which Related Instruments are traded.

(D) A Restricted Market Maker shall not use any material nonpublic information in connection with trading a Related Instrument.

(6) Surveillance. The Exchange shall enter into a comprehensive surveillance sharing agreement with markets trading components of the index or portfolio on which the UTP Derivative Security is based to the same extent as the listing exchange’s rules require the listing exchange to enter into a comprehensive surveillance sharing agreement with such markets.