

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60759; File No. SR-BATS-2009-030)

October 1, 2009

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend BATS Rule 11.17, entitled “Clearly Erroneous Executions.”

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 28, 2009, BATS Exchange, Inc. (“Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. BATS has designated the proposed rule change as constituting a 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 11.17, entitled “Clearly Erroneous Executions,” to modify the Exchange’s rule regarding clearly erroneous executions.

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.

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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).

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 Exchange proposes to amend BATS Rule 11.17 in order to modify the Exchange’s rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. The proposed changes are more fully discussed below.

Definition

The Exchange will maintain the meaning of the definition of a clearly erroneous execution, but proposes to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in clearly erroneous error and agreed to be canceled by both parties or determined by the Exchange to be clearly erroneous will be removed “from the

Consolidated Tape.”<sup>4</sup> A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

#### Member Initiated Review Requests

The Exchange proposes to amend BATS Rule 11.17 to update the procedures for requesting a review of a clearly erroneous transaction. The Exchange currently requires requests for review of a clearly erroneous execution to be made both by electronic mail (“email”) and telephone. The proposed amended rule would require that requests for review be made by email or “other electronic means specified from time to time by the Exchange.” Requiring requests for review to be made via email creates a standard format that can easily be logged and tracked. Due to the evolution of electronic systems, however, it is possible that the Exchange will develop a more efficient means of electronic submission, and thus, has proposed language with a broader scope. The Exchange will publish the email address or other electronic means to be used for all clearly erroneous filings in a circular distributed to Members.<sup>5</sup>

In order to be consistent with the clearly erroneous execution rules of other exchanges, the language of the proposed rule slightly differs from the current rule with respect to the information that must be included with a request for review. The only substantive difference between the current rule and proposed rule in this regard, however, is that the Exchange will no longer request that a Member indicate a requested resolution of the matter (i.e., break or adjust) and will require a Member to include the factual basis for the request.

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<sup>4</sup> For purposes of this Rule, “removed from the Consolidate Tape” means that a subsequent message will be sent to the Consolidated Tape indicating that a previously executed trade has been cancelled.

<sup>5</sup> BATS Rule 1.5(n) defines a Member as “any registered broker or dealer that has been admitted to membership in the Exchange.”

The proposed rule also requires the Exchange to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule (the “Numerical Guidelines”). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on the Exchange of notifying the counterparty when a request for review does not merit a ruling.

The Exchange proposes to amend BATS Rule 11.17 to allow an Officer of the Exchange or such other employee designee (“Officer”) of the Exchange to request additional information from each party to a transaction under review. Parties to the review will have 30 minutes from the time of the request to provide additional supporting information.

#### Routed Executions

The Exchange proposes to give other market centers an additional thirty (30) minutes from the receipt of their participant’s timely filing to request a ruling, but no longer than sixty (60) minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to the Exchange. For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to BATS where the order is executed at a price outside of the Numerical Guidelines. This provision generally requires Market Center A to file with the Exchange within 30 minutes from the time it receives its participant’s timely filed request for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

### Threshold Factors

Currently, the Exchange's Clearly Erroneous Execution rule does not identify specific numeric guidelines for determining what constitutes a clearly erroneous transaction. The current rule simply provides that an Exchange Official "shall review the transaction under dispute and determine whether it is clearly erroneous, with a view toward maintaining a fair and orderly market and the protection of investors and the public interest."<sup>6</sup> The Exchange proposes adding certain numerical thresholds to the Rule that explicitly state what constitutes a clearly erroneous execution.

### Numerical Guidelines

The proposed numerical guidelines state that a transaction executed during Regular Trading Hours<sup>7</sup> or the Pre-Opening<sup>8</sup> and After Hours Trading Sessions<sup>9</sup> may be found to be clearly erroneous only if the price of the transaction to buy is greater, or less in the case of a sale, than the reference price by an amount that equals or exceeds the numerical guidelines for a particular transaction category. The execution time of the transaction under review determines whether the guidance threshold is Regular Trading Hours or Pre-Opening or After Hours Trading Sessions (which occur before and after the Regular Trading Hours). The Reference Price shall be equal to the Consolidated Last Sale immediately prior to the execution under review, unless unusual circumstances are present. The proposed guidelines for sales greater than \$0.00 up to and including \$25.00 are 10% for Regular Trading Hours and 20% for the Pre-Opening and After Hours Trading Sessions. The proposed guidelines for sales greater than \$25.00 up to and including

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<sup>6</sup> BATS Rule 11.17(b).

<sup>7</sup> Regular Trading Hours last from 9:30 a.m. until 4:00 p.m. (Eastern Time). BATS Rule 1.5(w).

<sup>8</sup> The Pre-Opening Session begins at 8:00 a.m. and concludes 9:30 a.m. (Eastern Time). BATS Rule 1.5(r).

<sup>9</sup> The After Hours Trading Session begins at 4:00 p.m. and concludes at 5:00 p.m. (Eastern Time). BATS Rule 1.5(c).

\$50.00 are 5% for Regular Trading Hours and 10% for the Pre-Opening and After Hours Trading Sessions. The proposed guidelines for sales greater than \$50.00 are 3% for Regular Trading Hours and 6% for the Pre-Opening and After Hours Trading Sessions. A filing involving five or more securities by the same Member will be aggregated into a single filing called a “Multi-Stock Event.” In the case of a Multi-Stock Event, the proposed guidelines are 10% for Regular Trading Hours and 10% for the Pre-Opening and After Hours Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible for review under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference Price	Regular Trading Hours Numerical Guidelines (Subject transaction’s % difference from the Reference Price):	Pre-Opening and After Hours Trading Session Numerical Guidelines (Subject transaction’s % difference from the Reference Price):
Greater than \$0.00 up to and including \$25.00	10%	20%
Greater than \$25.00 up to and including \$50.00	5%	10%
Greater than \$50.00	3%	6%
Multi-Stock Event – Filings involving five or more securities by	10%	10%

the same Member will be aggregated into a single filing		
Leveraged ETF/ETN securities	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier ( <i>i.e.</i> , 2x)	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier ( <i>i.e.</i> , 2x)

Establishing Numerical Guidelines within the Rule brings regulatory transparency and consistency in the application of the rules of the Exchange. These Numerical Guidelines represent the general consensus approach and were developed based on the collective experiences of a market-wide group. The Exchange believes that the Thresholds established are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

The Exchange further proposes that in Unusual Circumstances the Exchange may, in its discretion and with a view toward maintaining a fair and orderly market and the protection of investors and the public interest, use a Reference Price other than the consolidated last sale. Unusual Circumstances may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that the Exchange may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

The following example explains the use of a Reference Price equal to the consolidated last sale prior to a series of executions.

ABC has a consolidated last sale of \$10.00. During Regular Trading Hours Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order sweeps the BATS Book, which reflects 1,000 shares of liquidity offered at each of following prices. Executions occur, moving through the depth of Book, as follows:

Trade #1 – 1000 shares @ \$10.00 (9000 remaining)

Trade #2 – 1000 shares @ \$10.20 (8000 remaining)

Trade #3 – 1000 shares @ \$10.40 (7000 remaining)

Trade #4 – 1000 shares @ \$10.60 (6000 remaining)

Trade #5 – 1000 shares @ \$10.80 (5000 remaining)

Trade #6 – 1000 shares @ \$11.00 (4000 remaining)

Trade #7 – 1000 shares @ \$11.20 (3000 remaining)

Trade #8 – 1000 shares @ \$11.40 (2000 remaining)

Trade #9 – 1000 shares @ \$11.60 (1000 remaining)

Trade #10 – 1000 shares @ \$11.80 (complete)

Thus, to be eligible for review, a transaction must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Customer A could request a ruling for trades #6 through #10, priced at \$11.00 and above, but trades #1 through #5 would not be eligible for review.

Under the proposed rule the Exchange may also use a higher numerical guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

### Joint Market Rulings

In the interest of achieving consistency across markets, the Exchange proposes that, in events that involve other markets, the Exchange would have the ability to use a different Reference Price and/or Numerical Guideline. In these instances the Reference Price would be determined based on a consensus among the Exchanges where the transactions occurred. Furthermore, when a ruling is made across markets, the Exchange may determine that the ruling is not eligible for appeal because immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

### Additional Factors

The proposed amendments to BATS Rule 11.17 also enumerate some additional factors that an Officer may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an initial public offering, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Pre-Opening or After Hours Trading Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest.

### Numerical Guidelines Applicable to Volatile Market Opens

The proposed Rule would give the Exchange the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10:00 a.m. based on the

disseminated value of the S&P 500 Futures at 9:15 a.m. When the S&P Futures are up or down from 3% up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S&P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. The Exchange believes that the S&P 500 Futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, the Exchange is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

#### Outlier Transactions

The proposed amendments to BATS Rule 11.17 provide that an Officer may consider requests for review received after 30 minutes, but not longer than 60 minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where the execution price of the security is greater than three times the current Numerical Guidelines. In addition, if the execution price of the security breaches the 52-week high or low, then the Exchange may consider Additional Factors to determine if the transaction qualifies for review or if the Exchange shall decline to act.

#### Review Procedures

*Initial Determination:* The Exchange proposes removing language that currently allows an Officer to modify one or more of the terms of a transaction under review. Under the proposed rule, the Officer of the Exchange will only have the authority to break the trades or rule to let the trades stand. This change attempts to remove the subjectivity from the rule that is necessitated by an adjustment. The Exchange also proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of

Regular Trading Hours on the following trading day. Rulings made outside of 30 minutes by an Officer will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes, and in no case later than the start of Regular Trading Hours on the following trading day.

*Appeals:* The Exchange proposes to amend the appeals procedure for trades that are deemed to be clearly erroneous. First, the Exchange will no longer accept appeal requests via facsimile. Similar to the proposed language for an initial request for a ruling, all appeal requests must be made via email or other electronic means specified by the Exchange.

The current rule provides that the Exchange shall review and render a decision upon an appeal within a timeframe prescribed by the Exchange. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the Exchange to review appeals as soon as practicable, but generally on the same day as the executions under review. Appeals received between 3:00 Eastern Time and the close of trading of the After Hours Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. Appeals will not fail for lack of timeliness. This revised provision provides participants a reasonable expectation of when a ruling on appeal will generally be made.

Further, the proposed rule declares that any determination made by an Officer or by the CEE Panel shall be rendered without prejudice as to the right of the parties to the transaction to submit their dispute to arbitration. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

### System Disruption and Malfunctions

Within the System Disruptions and Malfunctions section of current BATS Rule 11.17, after an Officer determines that a trade was clearly erroneous he may declare the transaction null and void or modify the trade to attempt to achieve and equitable rectification of the error. The proposed Rule eliminates the Exchange's ability to modify a clearly erroneous execution. The Exchange must either uphold or nullify the execution based upon the findings of the Officer reviewing the execution. The proposed Rule provides that, in the event of a disruption or a malfunction, an Officer of the Corporation or other senior level employee designee will rely on the proposed Numerical Guidelines in determining whether an execution is clearly erroneous. However, the Officer or senior level employee may also use a lower Numerical Guideline if necessary to maintain a fair and orderly market, protect investors, and protect the public interest. The proposed rule also adds that actions taken under these circumstances must be taken within 30 minutes of detection of the erroneous transaction in the ordinary case, and by no later than the start of Regular Trading Hours on the day following the date of the execution under review when extraordinary circumstances exist.

### Officers Acting on Their Own Motion

The Exchange proposes to add a section to the Rule that will grant an Officer of the Exchange or other senior level employee designee the ability to act on his or her own motion to review potentially erroneous executions. Under the current rule, an Officer of the Exchange or other senior level employee designee has the ability to act upon his or her own motion only in the event of a system disruption or malfunction. The proposed rule would allow an Officer of the Corporation or other senior level employee designee to review executions and rely on the Numerical Guidelines, under any circumstance. In extraordinary circumstances an Officer or

senior level employee designee may apply a lower Numerical Guideline if it is determined that such action is necessary to maintain a fair and orderly market or protect investors and the public interest. In some instances the Exchange may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives the Exchange the ability to review such executions. Additionally, in practice, clearly erroneous executions commonly involve multiple parties and multiple executions. In such instances, all affected parties may not request a ruling. The Exchange proposes this provision to permit an Officer of the Exchange or other senior level employee designee to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

As noted above, the proposed rule is the result of a market-wide effort to harmonize the clearly erroneous rules of U.S. equities exchanges so that market participants receive more uniform rulings regarding their executions on different exchanges. To best achieve such harmonization, the Exchange believes that the rules those national securities exchanges that are amending their rules should be amended as of the same date, and such implementation is currently planned for October 5, 2009.

## 2. Statutory Basis

The rule change 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, in particular, with the requirements of Section 6(b) of the Act.<sup>10</sup> Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>11</sup> because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and

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<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

open market and a national market system. The proposed rule change provides transparency and finality for participants and creates consistent results across U.S. equities exchanges with respect to clearly erroneous executions. This proposed change further promotes the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

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

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>14</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

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

protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.<sup>16</sup> Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.<sup>17</sup> For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

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 proposed rule change 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 Number SR-BATS-2009-030 on the subject line.

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<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> See Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca-2009-36).

Paper comments:

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

All submissions should refer to File Number SR-BATS-2009-030. 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 change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will 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 publicly available. All submissions should refer to File Number SR-BATS-2009-030 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).