

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62885; File No. SR-FINRA-2010-032)

September 10, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to Clearly Erroneous Transactions

I. Introduction

On June 17, 2010, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), and Rule 19b-4 thereunder, a proposed rule change to amend its rules to set forth clearer standards and curtail its discretion with respect to breaking erroneous trades.¹ The proposed rule change was published for comment in the Federal Register on June 28, 2010.² The Commission received nine comment letters on the proposal.³ BATS

¹ Also, on June 17, 2010, each of BATS Exchange, Inc. (“BATS”), NASDAQ OMX BX, Inc. (“BX”), Chicago Board Options Exchange, Incorporated (“CBOE”), Chicago Stock Exchange, Inc. (“CHX”), EDGA Exchange, Inc. (“EDGA”), EDGX Exchange, Inc. (“EDGX”), International Securities Exchange LLC (“ISE”), The NASDAQ Stock Market LLC (“Nasdaq”), National Stock Exchange, Inc. (“NSX”), New York Stock Exchange LLC (“NYSE”), NYSE Amex LLC (“NYSE Amex”), NYSE Arca, Inc. (“NYSE Arca”) (collectively, the “Exchanges”) filed similar proposed rule changes with respect to breaking erroneous trades. See Securities Exchange Act Release Nos. 62330 (June 21, 2010), 75 FR 36725; 62331 (June 21, 2010), 75 FR 36746; 62332 (June 21, 2010), 75 FR 36749; 62333 (June 21, 2010), 75 FR 36759; 62334 (June 21, 2010), 75 FR 36732; 62335 (June 21, 2010), 75 FR 37494; 62336 (June 21, 2010), 75 FR 36743; 62337 (June 21, 2010), 75 FR 36739; 62338 (June 21, 2010), 75 FR 36762; 62339 (June 21, 2010), 75 FR 36765; 62340 (June 21, 2010), 75 FR 36768; and 62342 (June 21, 2010), 75 FR 36752. These proposals also were approved today. See Securities Exchange Act Release No. 62886 (Sept. 10, 2010).

² See Securities Exchange Act Release No. 62341 (June 21, 2010), 75 FR 36756.

³ See letter from Peter Ianello, Partner, CSS, LLC, to Elizabeth Murphy, Secretary, Commission, dated July 15, 2010 (“CSS Letter”); letter from Gary DeWaal, Senior Managing Director and Group General Counsel, Newedge USA, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 (“Newedge Letter”); letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 (“ICI Letter”); David C. Cushing, Director of Global Equity Trading, Wellington Management Company, LLP, to Elizabeth

responded to the comments in a letter dated August 16, 2010.⁴ This order approves the proposed rule change.

II. Background and Description of the Proposal

On May 6, 2010, the U.S. equity markets experienced a severe disruption.⁵ Among other things, the prices of a large number of individual securities suddenly declined by significant amounts in a very short time period, before suddenly reversing to prices consistent with their pre-decline levels. This severe price volatility led to a large number of trades being executed at temporarily depressed prices, including many that occurred at prices dramatically away from pre-decline levels. In response, the Exchanges and FINRA exercised their authority under their clearly erroneous execution rules to break trades that were effected at prices 60% or more away from pre-decline prices, using a process that was not sufficiently clear or transparent to market participants. There are reports that the lack of clear guidelines for dealing with clearly erroneous transactions under circumstances such as occurred on May 6, and the lack of transparency

M. Murphy, Secretary, Commission, dated July 19, 2010 (“Wellington Letter”); letter from John A. McCarthy, General Counsel, GETCO, to Elizabeth Murphy, Secretary, Commission, dated July 20, 2010 (“GETCO Letter”); letter from Ira P. Shapiro, Managing Director, BlackRock, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 20, 2010 (“BlackRock Letter”); and letter from Manisha Kimmel, Executive Director, Financial Information Forum, On behalf of the FIF Front Office Committee, to Elizabeth M. Murphy, Secretary, Commission, dated July 21, 2010 (“FIF Letter”); letter from Ann Vlcek, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission, dated July 26, 2010 (“SIFMA Letter”); and letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 27, 2010 (“Knight Letter”).

⁴ See letter from Eric J. Swanson, SVP and General Counsel, BATS, to Elizabeth M. Murphy, Secretary, Commission, dated August 16, 2010 (“BATS Letter”).

⁵ The events of May 6 are described more fully in the report of the staffs of the Commodity Futures Trading Commission (“CFTC”) and the Commission, titled Report of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues, “Preliminary Findings Regarding the Market Events of May 6, 2010,” dated May 18, 2010.

surrounding the Exchanges' and FINRA's decision to break only trades at least 60% away from the market, added to the confusion and uncertainty faced by investors on May 6.⁶

The Commission is concerned that events such as those that occurred on May 6 can undermine the integrity of the U.S. securities markets. Accordingly, it is working on a variety of fronts to assess the causes and contributing factors of the May 6 market disruption and to fashion policy responses that will help prevent a recurrence. The Commission also recognizes the importance of moving quickly to implement steps that could help limit potential harm from extreme price volatility. On June 10, 2010, the Commission approved rules, on a pilot basis, that require the Exchanges to pause trading in securities included in the S&P 500 Index if the price moves 10% or more in a five-minute period.⁷ By establishing circuit breakers that uniformly pause trading in these securities across all markets, the new rules are designed to facilitate coordinated price discovery and provide time for investors to trade at rational prices. In addition to the individual stock trading pause rules, FINRA worked with the Exchanges to develop proposed amendments to their clearly erroneous execution rules to provide greater transparency and certainty to the process of breaking trades.

The current clearly erroneous execution rule sets forth procedures FINRA must use to break trades. Specifically, the current rule provides that FINRA will break trades in Exchange-listed stocks only if the price of the trades exceeds a specified "Reference Price" – usually the consolidated last sale – by an amount that equals or exceeds specified "Numerical Guidelines."

⁶ See, e.g., Written Statement of Leonard J. Amoruso, Senior Managing Director and General Counsel, Knight Capital Group, Inc., Submitted before the CFTC-SEC Advisory Committee on Emerging Regulatory Issues, Panel Discussion, "The events of May 6 – views and observations regarding liquidity, trading and the apparent breakdown of an orderly market," dated June 22, 2010.

⁷ See Securities Exchange Act Release Nos. 62251; 75 FR 34183 (June 10, 2010); and 62252, 75 FR 34186 (June 16, 2010).

The Numerical Guidelines vary depending on the price of the stock and during the regular trading session are 10% if the consolidated last sale is \$25.00 or less, 5% if the consolidated last sale is more than \$25 and up to and including \$50, and 3% if the consolidated last sale is more than \$50. These percentages double during pre-open and post-close trading sessions. For events involving five or more securities, the Numerical Guidelines currently are 10% during pre-open, regular, and post-close trading sessions.

While the current rule does not give FINRA discretion to break trades that do not exceed the Numerical Guidelines, it does permit FINRA discretion to select a percentage threshold at which trades will be broken that is higher than the Numerical Guidelines. As noted above, on May 6 the Exchanges selected 60% as the threshold for breaking trades in a process that, from the perspective of market participants, was not clear or transparent, and led to further uncertainty and confusion in the market. Thus, the events of May 6 highlight the need to clarify the clearly erroneous execution review process across all markets, and reduce the discretion of FINRA to deviate from the objective standards in its rule when dealing with clearly erroneous transactions.

Under the proposed rule change, FINRA will no longer have the discretion to deviate from the specified percentage threshold at which trades will be broken in many situations, including those where the single-stock circuit breakers are applicable and in other larger “Multi-Stock Events” involving five or more securities. Under the proposed rule, a Multi-Stock Event is determined by looking at the number of securities with potentially erroneous executions occurring within a period of five minutes or less.

When an individual stock trading pause is triggered, transactions could occur before the trading pause is fully implemented on all of the Exchanges and in the over-the-counter (OTC) market. In such event, FINRA proposes to review, on its own motion, all transactions triggering

an individual stock trading pause and subsequent transactions that may occur before the trading pause is in effect.⁸ FINRA would use the price that triggered the trading pause (the “Trading Pause Trigger Price”)⁹ as the Reference Price and break trades that are 10% or more away from the Reference Price for stocks priced \$25 or less, 5% or more away from the Reference Price for stocks priced from \$25 to \$50, and 3% or more away from the Reference Price for stocks priced more than \$50. If the security is a leveraged exchange-traded fund (ETF) or exchange-traded note (ETN), these percentage thresholds would be multiplied by the leverage multiplier.

For situations in which a stock is not subject to an individual stock trading pause (e.g., because the stock is not in the circuit breaker pilot program, or when the stock is part of the pilot program but the circuit breaker does not apply because it is the beginning or end of the day), the trade break rules will differ based on the number of stocks involved. In the event of Multi-Stock Events involving 20 or more securities, FINRA proposes to review on its own motion and break all transactions at prices equal to or greater than 30% away from the Reference Price in each affected security during the review period selected. In such event, FINRA may use a Reference Price other than the consolidated last sale. To ensure consistent application across markets,

⁸ Such reviews would be limited to transactions that executed at a price lower than the Trading Pause Trigger Price in the event of a price decline and higher than the Trading Pause Trigger Price in the event of a price rise. Where a trading pause was triggered by a price decline (rise), FINRA shall deem as clearly erroneous all such transactions that occurred at a price lower (higher) than the Trading Pause Trigger Price but only if such prices exceeded the Trading Pause Trigger Price by an amount equal to or exceeding the Numerical Guidelines.

⁹ FINRA proposes to use the Trading Pause Trigger Price as the Reference Price for such clearly erroneous execution reviews of a transaction triggering a trading pause and the transactions that occur immediately after such transactions but before the trading pause is in effect. The Trading Pause Trigger Price reflects a price calculated by the primary listing market over a rolling five-minute period and may differ from the execution price of a transaction that triggered a trading pause. The primary listing market that issued an individual stock trading pause will determine and communicate to FINRA the Trading Pause Trigger Price for such stock.

FINRA will consult with the Exchanges to determine the appropriate review period, which may be greater than the period (of five minutes or less) that triggered the application of this provision, as well as select one or more specific points in time prior to the transactions in question and use transaction prices at or immediately prior to the time(s) selected as the Reference Price(s).

Similarly, in the event of Multi-Stock Events involving five or more, but less than twenty, securities, FINRA proposes to review on its own motion and break all transactions at prices equal to or greater than 10% away from the Reference Price. In such event, the Reference Price will generally be the consolidated last sale immediately prior to the execution(s) under review. However, if there is relevant news impacting a security, periods of extreme volatility, sustained illiquidity, or widespread systems issues, FINRA may use a different Reference Price, where necessary for the maintenance of a fair and orderly market and the protection of investors, and where it is in the public interest.

The current rule provides that FINRA may consider “Additional Factors”¹⁰ in determining whether to break trades. The proposed rule change limits the circumstances during which FINRA may consider those Additional Factors. Specifically, under the proposed rule, FINRA would only be permitted to consider Additional Factors in the context of clearly erroneous reviews that do not involve Multi-Stock Events involving five or more securities or individual stock trading pauses, as described above. In such event, FINRA would consider the

¹⁰ Additional Factors that FINRA may consider 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 or resumed, whether the security is an IPO, whether the security was subject to a stock split, reorganization, or other corporate action, overall market conditions, pre-opening and post-closing session executions, validity of consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock.

Additional Factors with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.

FINRA has proposed that this rule change be implemented as a pilot that would end on December 10, 2010.

III. Discussion of Comment Letters and Commission Findings

The Commission received nine comment letters on the proposed rule changes filed by FINRA and the Exchanges. Five commenters were generally supportive of the principles underlying the proposed rule change, to provide greater transparency and certainty to investors, market participants, and the public regarding the handling of clearly erroneous transactions.¹¹ However, these commenters also believed that the proposed rule change should go further, and offered a number of suggestions as discussed below. Two commenters generally did not oppose the proposed rule change, but believed it was “overly complex and opaque”¹² and does “not adequately address the most significant flaws in the current rules.”¹³ One commenter believed that trades should only be cancelled in extraordinary circumstances, stating that the Commission and the SROs should instead consider alternatives that would prevent the execution of erroneous trades rather than canceling them after the fact.¹⁴ Another commenter supported a “principles-based approach” to handling clearly erroneous trades instead of numerical thresholds,

¹¹ See ICI Letter, at 1, FIF Letter, at 1, Newedge Letter, at 1-2, GETCO Letter, at 2, and SIFMA Letter, at 1-2 (also stating its belief that it is “critical for the options markets to achieve consistency in their existing clearly erroneous execution rules before additional rule changes are implemented...”). See also BlackRock Letter at 1 (supporting amendments to rules that contribute to market volatility).

¹² See CSS Letter, at 1.

¹³ See BlackRock Letter, at 1.

¹⁴ See Wellington Letter, at 3-4. See also FIF Letter, at 1-2 (supporting trade validation and rejection mechanisms) and GETCO Letter, at 3 (supporting protections designed to reject clearly erroneous orders that reach market centers).

particularly with respect to transactions involving illiquid stocks and the dissemination of news or a fundamental change that requires a significant reevaluation of underlying business conditions.¹⁵ Additionally, BATS responded to the comments on the similar proposal by the Exchanges.¹⁶ These comments are discussed in greater detail below.

A. Comments Recommending Other Comprehensive Approaches

Some commenters believed that FINRA’s rule relating to clearly erroneous trades should be more definitive, and expressed the view that the proposed rule change was not sufficiently clear in all cases when trades would actually be cancelled.¹⁷ For example, one commenter noted that FINRA “appear[s] to be able to cancel trades for many reasons other than significant price discrepancies – including, for example, systems malfunctions, news released regarding a security, whether a security was subject to a stock split or reorganization.”¹⁸ This commenter believed FINRA should adopt “no-bust” zones for transactions executed within specified price ranges, and cancel trades outside of the “no-bust” zones absent a compelling public interest to the contrary.¹⁹

Two commenters questioned whether the proposed rule change would achieve its stated goals of making the erroneous trade execution review process more transparent and less arbitrary.²⁰ Specifically, these commenters were concerned that the proposed rule change did

¹⁵ See Knight Letter, at 3.

¹⁶ See BATS Letter. The response from BATS is discussed in this Order because FINRA’s proposed clearly erroneous rule is similar to those of the Exchanges.

¹⁷ See Newedge Letter, at 4-5, and BlackRock Letter, at 2.

¹⁸ See Newedge Letter, at 4

¹⁹ Id.

²⁰ See BlackRock Letter, at 2, and CSS Letter, at 1-2.

not clearly establish a reference price upon which the Numerical Guidelines would be based.²¹ They noted that FINRA retains the flexibility in certain circumstances to use a Reference Price other than the consolidated last sale, as well as to determine the review period for Multi-Stock Events involving twenty or more securities.²² These commenters believed that if FINRA retained discretion in these areas, the proposed rule change may not achieve the goal of making the trade break process more transparent and less arbitrary,²³ or could create mass confusion.²⁴

In response to comments made on similar proposals made by the Exchanges, BATS acknowledged that the proposals do not “in all circumstances provide 100% advanced certainty with respect to whether a particular execution will be deemed to be clearly erroneous,” but stated its belief that “its proposal reflects a significant improvement . . . over its existing rule.”²⁵ Specifically, BATS noted that its discretion to utilize “additional factors” would now be limited to instances involving less than five securities under review and further limited to securities that are not subject to a single stock circuit breaker.²⁶ BATS believed its limited discretion in this regard is necessary and appropriate for maintaining fair and orderly markets.²⁷

With respect to the concern expressed by some commenters that the proposed rule change does not clearly establish a reference price upon which the Numerical Guidelines would be based, BATS, which proposed similar discretionary provisions, stated that it is “critical” for it to retain some limited discretion to use a different reference price when applying the clearly

²¹ Id.
²² Id.
²³ See BlackRock Letter, at 2.
²⁴ See CSS Letter, at 1-2.
²⁵ See BATS Letter, at 1.
²⁶ Id. at 5.
²⁷ Id.

erroneous thresholds because “there are circumstances under which last sale would be an inappropriate reference price. . . .”²⁸ BATS noted, however, that this discretion is limited because its “rule is designed to generally guide BATS to look at the last sale as the reference price” for those securities not subject to a circuit breaker and its proposal tries to be “abundantly clear and objective that if a security is subject to a single stock circuit breaker, the reference price will be the circuit breaker trigger price.”²⁹ BATS also noted that the determination of the point in time from which to derive the reference price on May 6 had “nothing to do” with the delay in announcing which trades would be broken on May 6; rather, the delay was attributable to the time it took the Exchanges and FINRA to determine the appropriate percentage at which trades would be broken.³⁰

The Commission appreciates the suggestions and responses offered by these commenters to make the process by which FINRA addresses clearly erroneous executions more certain and transparent by reducing its discretion. The Commission intends to continue working with FINRA to further clarify, as appropriate, its process for breaking erroneous trades that arise in contexts not covered by the proposed rule change, as well as to continue to evaluate the operations of and potential refinements to such processes in contexts covered by the proposed rule change. Nevertheless, the Commission believes that the proposed rule change represents a productive first step by FINRA in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of further changes.

²⁸ Id. at 3-4.

²⁹ Id.

³⁰ Id.

B. Comments Recommending Alternative Approaches

Four commenters were of the view that, rather than breaking erroneous trades, FINRA should allow the trades to stand and adjust the price in line with the market.³¹ These commenters were particularly concerned about the risk, when trades are broken, that market participants suddenly may find themselves exposed on one side of the market when they thought they had a hedged position.³² As one commenter stated, “[t]his uncertainty is even more problematic during periods of heightened volatility in the markets, when liquidity may be reduced as some market participants limit their trading until they are able to determine their positions, or volatility may increase further because of speculative hedging in an attempt to protect unknown positions.”³³ These commenters believed that a price adjustment process would substantially reduce the uncertainty created by the potential for broken trades, and thus would be a better way to address erroneous executions.³⁴

Other commenters urged alternatives to clearly erroneous execution rules. For example, one commenter believed that the proposed rule would “provide market participants more certainty as to whether or not their trades will stand in the event of market volatility,” but urged the Commission to move to a “futures-style limit up/down functionality” as a better alternative to the circuit breaker trading halt approach.³⁵ This commenter argued that the limit up/limit down

³¹ See GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

³² Id.

³³ See GETCO Letter, at 3.

³⁴ See GETCO Letter, at 3, Newedge Letter, at 5, BlackRock Letter, at 2, and Knight Letter, at 2.

³⁵ See GETCO Letter, at 2-3.

approach “would virtually eliminate clearly erroneous trades.”³⁶ Another commenter also believed that the Commission should consider a “limit up/limit down approach or hybrid approach.”³⁷ Other commenters suggested alternative procedures, systems or rules to prevent erroneous trades from occurring, such as by rejecting orders that are materially away from the market.³⁸

The Commission appreciates the suggestions offered by these commenters to make more fundamental changes to the way in which FINRA addresses clearly erroneous executions. In the coming months, the Commission expects to continue to work with the markets and market participants on ways to reduce the occurrence of erroneous trades and improve the method by which they are resolved, as well as on enhancements to the mechanisms for addressing excessive market volatility, such as those that currently are reflected in the single-stock circuit breaker pilot. As noted above, however, the Commission believes that the proposed rule change represents a productive first step by FINRA in bringing greater clarity and transparency to the process for breaking clearly erroneous trades, and that these improvements should not be delayed pending consideration of more far-reaching initiatives.

C. Other Comments

One commenter was concerned that the proposed rule change was not clear as to how news or information regarding the review and cancellation of clearly erroneous trades would be

³⁶ See GETCO Letter, at 3.

³⁷ See SIFMA Letter, at 2.

³⁸ See FIF Letter, at 2, Wellington Letter, at 2-4, and SIFMA Letter, at 2. See also CSS Letter, at 2 (suggesting that circuit breakers for individual stocks based off of a percentage change from the previous day’s closing price (or the opening price to allow for the dissemination of overnight news) would eliminate the need for erroneous trade rules).

disseminated to the markets.³⁹ This commenter believed that the proposed rule should require FINRA to disseminate this information quickly and in a non-discriminatory fashion to market participants in order to minimize the market impact and not favor any one group of market participants over another.⁴⁰ In its response letter with respect to its proposal, BATS stated that it emails members with respect to clearly erroneous reviews and determinations according to a consistent and well established protocol that, according to BATS, strikes an appropriate balance between notifying members of significant market events and avoiding notifications every time a transaction is reviewed as potentially clearly erroneous.⁴¹ In addition, BATS believes that the existing requirement that an SRO promptly notify affected members of clearly erroneous reviews and determinations is sufficient.⁴² BATS also stated that communication between the exchanges and members should remain flexible as such methods are constantly changing.⁴³ BATS indicated that it is not aware of discrimination amongst participants with respect to the dissemination of information in relation to clearly erroneous reviews and believes that the “anti-discrimination requirements of the Act would sufficiently restrain” discrimination.⁴⁴

Another commenter believed that the Commission should require FINRA to clarify the application of the clearly erroneous execution rule when an event causes the price to cross to a different specified percentage threshold for breaking trades. Specifically, the commenter asked, “if a market decline triggers the CEE rules intra-day with respect to a stock that was priced at \$25.01, so the CEE price is below \$25, the proposed amendments do not explain at what price

³⁹ See Newedge Letter, at 6.

⁴⁰ Id.

⁴¹ See BATS Letter, at 2.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

trading would be calculated for the next application of the CEE rules. Would it be at 5 percent for stocks between \$25 and \$50 or 10 percent for stocks priced less than \$25?”⁴⁵ That commenter also expressed concern that the proposed rule change might provide an opportunity for market participants to manipulate events involving multiple stocks that are not subject to the single-stock circuit breakers. This might occur, for example, when an event subject to a 10% threshold (e.g., involving 20 securities) could be forced into the 30% threshold category (e.g., by manipulating the 21st security and causing an erroneous trade), by a market participant seeking the flexibility to trade at wider spreads with respect to all impacted securities.⁴⁶

Another commenter noted that, when an individual stock trading pause is triggered, trades will be broken at specified percentages away from the Trading Pause Trigger Price.⁴⁷ According to this commenter, this calculation “has the practical effect of doubling the clearly erroneous price window for most U.S. equity securities and is a significant expansion of the window for certain securities.”⁴⁸ This commenter suggested using more conservative parameters such as the greater of 2% or \$0.05 from the Trading Pause Trigger Price or, alternatively, using the Trading Pause Trigger Price, in addition to a comparison to the last sale, as part of an analysis for clearly erroneous trades.”⁴⁹ This commenter also favored providing FINRA discretion to break trades after the deadlines specified in its rule in extraordinary circumstances.⁵⁰

⁴⁵ See ICI Letter, at 3.

⁴⁶ Id.

⁴⁷ See SIFMA Letter, at 2-3.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id.

With respect to the dissemination of information regarding the review and resolution of clearly erroneous trades, the Commission understands that the practice of FINRA is to promptly notify participants that specified trades are under review and, once that review is complete, to describe the resolution thereof. Although the Commission believes prompt communication by email, phone, website or otherwise concerning erroneous trade reviews should generally assure dissemination in a non-discriminatory fashion, as noted above, it intends to continue to work with FINRA on additional ways to improve the transparency of this process.

With respect to an event that causes the price to cross to a different specified percentage threshold for breaking trades, the Commission believes that the proposal is sufficiently clear regarding the applicability of the new rule. As to the specific example provided by the commenter, under the proposed rule, if a stock triggers a trading pause, the Trading Pause Trigger Price would be used as the Reference Price. The Trading Pause Trigger Price is calculated by the listing market over a rolling five minute period. If the Trading Pause Trigger Price is calculated at a level below \$25.00, as identified in the example, then the 10% threshold would apply to clearly erroneous execution reviews of the Trigger Trade and other transactions that occur immediately after a Trigger Trade but before the trading pause is fully implemented across markets. If another series of transactions trigger a second trading pause, the review process set forth in the rule would be repeated and a new Reference Price would be calculated to determine the appropriate percentage threshold.

With respect to the potential for market participants to engage in manipulation in order to achieve a higher trade break percentage threshold, the Commission emphasizes that it will vigorously pursue instances of illegal market manipulation. In addition, during the pilot period, the Commission will work with FINRA to review the operation of the amended rule, and make

improvements as warranted, including if it appears the selected percentage thresholds create distortions or incent improper or illegal behavior.

With respect to the chosen parameters, the Commission notes that the parameters that were selected were the product of a coordinated and deliberate effort by FINRA and the Exchanges to improve the handling of clearly erroneous trades. Regarding the specific comment expressing concern that breaking trades only when they are 10%, 5% or 3% away from the Trading Pause Trigger Price has the practical effect of doubling the trading pause parameters, the Commission notes that, as an initial matter, implementation of the individual stock trading pause should prevent most trades from occurring at prices outside of the Trading Pause Trigger Price. To the extent trades occur outside of such price before the trading pause is fully applied across all markets, the Commission believes that it is appropriate to break these “leakage” trades only when they are a meaningful percentage away from the Trading Pause Trigger Price. This is consistent with the traditional approach of the Exchanges and FINRA to take the more extreme step of breaking a trade only in cases where it occurs at a price sufficiently away from the current market price that the parties should have been on notice it may be “clearly erroneous.” Of course, the pilot program may indicate that different parameters are better to accomplish the stated goals. If so, the parameters could be changed as part of the overall initiative. The Commission will further study and consider the examples and suggestions offered by the commenters during the pilot period.

D. Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA. In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section

15A(b)(6) of the Act,⁵¹ which, among other things, requires that the rules of FINRA be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

In the Commission's view, the proposed rule change will help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change also should help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Finally, the Commission notes that the proposed rule change is being implemented on a pilot basis so that the Commission and FINRA can monitor the effects of the pilot on the markets and investors, and consider appropriate adjustments, as necessary.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵² that the proposed rule change (SR-FINRA-2010-032), be, and hereby is, approved.

By the Commission.

Elizabeth M. Murphy
Secretary

⁵¹ 15 U.S.C. 78o-3(b)(6).

⁵² 15 U.S.C. 78s(b)(2).