

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61419; File No. SR-BATS-2009-031)

January 26, 2010

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Establish Rules Governing the Trading of Options on the BATS Options Exchange

I. Introduction

On November 10, 2009, BATS Exchange, Inc. (“Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² to adopt rules governing the trading of options on the BATS Options Exchange Market (“BATS Options Exchange” or “BATS Options”), which will be an options trading facility of the Exchange. The proposed rule change was published for comment in the Federal Register on December 8, 2009.³ On January 21, 2010, BATS filed Amendment 1 to the proposed rule change.⁴ The Commission received no comments on the proposal. This order provides notice of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 61097 (December 2, 2009), 74 FR 64788 (“Notice”).

⁴ In Amendment No. 1, the Exchange: (1) clarified the Form 19b-4 discussion regarding establishing strike prices for Quarterly Options Series to conform to the proposed rule text; (2) clarified in its Form 19b-4 that the Exchange will not include options classes in its pilot program for quoting certain options in one-cent increments when the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company or is in bankruptcy and that, for purposes of assessing average daily volume, the Exchange will use Options Clearing Corporation data; (3) amended its Form 19b-4 and rules relating to that pilot program to provide for the quoting of all options on IWM and SPY in one-cent increments; (4) included in its Exhibit 5 an updated table of contents; (5) made technical changes to defined terms in BATS Rule 2.12(d) and proposed BATS Options Rule 21.1(d)(6) to conform to the terms as defined in proposed BATS Options Rule 16.1(a); (6) deleted proposed BATS Option

the filing of Amendment No. 1 and approves the proposed rule change, as modified by Amendment No. 1 thereto, on an accelerated basis.

II. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵ Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; 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. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers. Further, the Commission finds that the proposal is consistent with Sections 6(b)(1) of the Act,⁷ which requires, among other things, that a national securities exchange be so organized and have the

Rule 16.2(d); (7) added references to “BATS Options” in the title of Chapters XVI and XVII of the proposed rules; (8) stated its intent to amend its existing regulatory services agreement with FINRA to capture certain aspects of regulation specifically applicable to BATS Options and the regulation and discipline of Options Members; (9) clarified proposed BATS Options Rule 26.14(a) to conform to FINRA Rule 2150(c)(1); and (10) represented that it will comply with the specifications of the Consolidated Options Audit Trail System (“COATS”) in submitting data for purposes of creating a consolidated audit trail, as well as receive COATS data for purposes of its surveillance operations.

⁵ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f(b)(5).

⁷ 15 U.S.C. 78f(b)(1).

capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the exchange.

Overall, the Commission believes that approving the proposed rule change could confer important benefits on the public and market participants. In particular, BATS Options' entry into the marketplace could provide market participants with an additional venue for executing orders in standardized options, enhance innovation, and increase competition between and among the options exchanges, resulting in better prices and executions for investors.

This discussion does not review every detail of the proposal, but focuses on the most significant rules and policy issues considered in review of the proposal.

A. BATS Options Members

Only Options Members may transact business on BATS Options via the System.⁸ There will be two types of Options Members: Options Order Entry Firms (“OEFs”) and Options Market Makers. An Options Member must be a member of BATS Exchange, and another registered options exchange that is not registered solely under Section 6(g) of the Act⁹ or FINRA.¹⁰ As a BATS Exchange Member, Options Members must satisfy the requirements in Chapter II of the Exchange Rules, as well as additional requirements set forth in the BATS Options Rules.¹¹ An

⁸ See proposed BATS Options Rule 17.1(a). An Options Member means a firm or organization that is registered with the Exchange pursuant to Chapter XVII of the BATS Options Rules for purposes of participating in options trading on BATS Options. See proposed BATS Options Rule 16.1(a)(38).

⁹ 15 U.S.C. 78f(g).

¹⁰ See proposed BATS Options Rule 17.2(f).

¹¹ See Chapter XVII of the proposed BATS Options Rules. Except to the extent that specific rules relating to options govern or unless the context otherwise requires, the provisions of the Exchange Rules shall be applicable to Options Members and to the trading of option contracts on BATS Options. See proposed BATS Options Rule 16.2(b).

OEF may only transact business with Public Customers if such Options Member also is an Options Member of another registered national securities exchange or association with which the Exchange has entered into an agreement under Rule 17d-2 under the Act pursuant to which such other exchange or association shall be the designated options examining authority for the OEF.¹² Further, Options Members that transact business with Public Customers must at all times be members of FINRA.¹³

Among other things, each Options Member must be registered as a broker-dealer and have as the principal purpose of being an Options Member the conduct of a securities business, which shall be deemed to exist if and so long as: (1) the Options Member has qualified and acts in respect of its business on BATS Options as either an OEF or an Options Market Maker or both; and (2) all transactions effected by the Options Member are in compliance with Section 11(a) of the Act and the rules and regulation adopted thereunder. Participants may trade options for their own proprietary accounts or, if authorized to do so under applicable law, may conduct business on behalf of customers.¹⁴

OEFs are those Options Members representing as agent Customer Orders on BATS Options or trading as principal on BATS Options. OEFs also may register as Market Makers.¹⁵ A Market Maker that engages in specified Other Business Activities, or that is affiliated with a broker-dealer that engages in Other Business Activities, including functioning as an OEF, must

Exchange Rules is defined to mean the rules of the Exchange, including those for equities and options. See proposed BATS Options Rule 16.1(a)(5).

¹² See proposed BATS Options Rule 26.1.

¹³ See id.

¹⁴ See proposed BATS Options Rule 17.1(a).

¹⁵ See proposed BATS Options Rule 22.1.

have an Information Barrier between the market making activities and the Other Business Activities.¹⁶ Options Market Makers are Options Members registered with the Exchange as Options Market Makers and registered with BATS Options in an option series listed on BATS Options. To become an Options Market Maker, an Options Member is required to register by filing a written application with BATS, which will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.¹⁷ Such registration will consist of at least one options series and may include all series traded on the Exchange.¹⁸ All Market Makers are designated as specialists on BATS Options for all purposes under the Act or rules thereunder. The Exchange will not place any limit on the number of entities that may become Options Market Makers.¹⁹ The good standing of a Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with BATS or any provision of the BATS Options Rules.²⁰

The Exchange will not list an options series for trading unless at least one Options Market Maker is registered in the options series.²¹ In addition, before the Exchange opens trading for any additional series of an options class, it will require at least one Options Market Maker to be registered for trading that particular series.²²

¹⁶ See proposed BATS Options Rule 17.1(a).

¹⁷ See proposed BATS Options Rule 22.2.

¹⁸ See proposed BATS Options Rule 22.3.

¹⁹ See proposed BATS Options Rule 22.2(c).

²⁰ See proposed BATS Options Rule 22.4(b).

²¹ See proposed BATS Options Rule 19.5(a).

²² See id.

BATS Options Market Makers are required to electronically engage in a course of dealing to enhance liquidity available on BATS Options and to assist in the maintenance of fair and orderly markets.²³ Among other things, an Options Market Maker must: (1) on a daily basis maintain a two-sided market on a continuous basis in at least 75% of the options series in which it is registered; (2) enter a size of at least one contract for its best bid and its best offer; and (3) maintain minimum net capital in accordance with Commission and Exchange rules.²⁴ Substantial or continued failure by an Options Market Maker to meet any of its obligations and duties would subject the Options Market Maker to disciplinary action, suspension, or revocation of the Options Market Maker's registration in one or more options series.²⁵

The Commission finds that BATS Options Market Maker qualification requirements are consistent with the Act and notes that they are similar to those of other options exchanges.²⁶ The Commission also finds that the BATS Options Market Maker participation requirements are consistent with the Act. Market Makers receive certain benefits for carrying out their responsibilities. For example, a lender may extend credit to a broker-dealer without regard to the restrictions in Regulation T of the Board of Governors of the Federal Reserve System if the credit is used to finance a broker-dealer's activities as a specialist or market maker on a national securities exchange.²⁷ In addition, market makers are exempted from the prohibition in Section 11(a) of the Act. The Commission believes that a market maker must have sufficient affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own

²³ See proposed BATS Options Rule 22.5.

²⁴ See, e.g., proposed BATS Options Rules 22.5 and 22.6.

²⁵ See proposed BATS Options Rule 22.5(c).

²⁶ See, e.g., ISE Rule 804, and NOM Rules, Chapter VII, Sections 5 and 6.

²⁷ 12 CFR 221.5(c)(6).

account on a regular or continuous basis, to justify this favorable treatment. The Commission believes that BATS Options Market Maker participation requirements impose sufficient affirmative obligations on BATS Options Market Makers and, accordingly, that BATS Options requirements are consistent with the Act.

B. BATS Options Trading System

The BATS Options trading system will leverage the Exchange's current technology, including its customer connectivity, messaging protocols, quotation and execution engine, order router, data feeds, and network infrastructure. BATS Options will operate an electronic trading system to trade options ("System") that will provide for the electronic display and automatic execution of orders in price/time priority, without regard to the status of the entities that are entering orders.²⁸ The System will operate between the hours of 9:30 a.m. Eastern Time and 4:00 p.m. Eastern Time, with all orders being available for execution during that time frame.²⁹ The System will include a proprietary data feed, which will display the bid and offer at multiple price levels on an anonymous basis using the minimum price variation applicable to that security.³⁰

²⁸ The System includes: (1) an order execution service that enables Options Members to automatically execute transactions in securities listed and traded on BATS Options; (2) a trade reporting service that submits "locked-in" trades for clearing to a registered clearing agency for clearance and settlement, transmits last-sale reports of transactions automatically to OPRA for dissemination to the public and industry, and provides participants with monitoring and risk management capabilities to facilitate participation in a "locked-in" trading environment; and (3) a data feed(s) that can be used to display without attribution to Options Members' MPIDs Displayed Orders on both the bid and offer side of the market for price levels then within BATS Options using the minimum price variation applicable to that security. See proposed BATS Options Rule 21.1(a). See Notice, supra note 3, for a more complete description of BATS Options operation and rules. The Commission notes that the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan") requires each party to the Plan to collect and promptly transmit to the Options Price Reporting Authority ("OPRA") all last sale reports relating to its market. See OPRA Plan, Article V, Section 5.2(a).

²⁹ See proposed BATS Options Rule 21.2(a).

³⁰ See proposed BATS Options Rule 21.1(a)(3).

Options Members will be able to enter the following types of orders into the System:

Market Orders; Limit Orders; Reserve Orders;³¹ Minimum Quantity Orders;³² Discretionary Orders;³³ Price Improving Orders;³⁴ Destination Specific Orders;³⁵ BATS Only Orders;³⁶ BATS

³¹ Reserve Orders are limit orders that have both a displayed size as well as an additional non-displayed amount. Both the displayed and non-displayed portions of the Reserve Order are available for potential execution against incoming orders. If the displayed portion of a Reserve Order is fully executed, the System will replenish the display portion from reserve up to the size of the original display amount. A new timestamp is created for the replenished portion of the order each time it is replenished from reserve, while the reserve portion retains the timestamp of its original entry.

³² Minimum Quantity Orders are orders that require that a specified minimum quantity of contracts be obtained, or the order is cancelled. Minimum Quantity Orders may only be entered with a time-in-force designation of Immediate or Cancel.

³³ Discretionary Orders are orders that have a displayed price and size, as well as a non-displayed discretionary price range, at which the entering party is also willing to buy or sell. When displayed contracts become available on the opposite side of the market or an execution takes place at any price within the discretionary price range, the displayed price and size is automatically cancelled and an IOC buy (sell) order is generated priced at the highest (lowest) price in the discretionary price range. If more than one Discretionary Order is available for conversion to an IOC order, the System will convert and process all such orders in the same priority in which such Discretionary Orders were entered. If the IOC order is not executed in full, the unexecuted portion of the order is automatically re-posted and displayed in the BATS Options Book with a new time stamp, at its original displayed price, and with its non-displayed discretionary price range.

³⁴ Price Improving Orders are orders to buy or sell an option at a specified price at an increment smaller than the minimum price variation in the security. Price Improving Orders may be entered in increments as small as one cent. Price Improving Orders that are available for display shall be displayed at the minimum price variation in that security and shall be rounded up for sell orders and rounded down for buy orders. Unless a User has entered instructions not to do so, Price Improving Orders will be subject to the “displayed price sliding process.” Pursuant to the displayed price sliding process, a Price Improving Order that after rounding to the minimum price variation, or any other order to be displayed on the BATS Book that at the time of entry, would lock or cross a Protected Quotation (collectively, “the original locking price”): (a) will be displayed by the System at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers); and (b) in the event the NBBO changes such that the order at the original locking price would not lock or cross a Protected Quotation, the order will receive a new timestamp, and will be displayed at the original locking price.

³⁵ Destination Specific Orders are market or limit orders that instruct the System to route the order to a specified away trading center, after exposing the order to the BATS

Post Only Orders;³⁷ Partial Post Only at Limit Orders;³⁸ Intermarket Sweep Orders;³⁹ and Directed Intermarket Sweep Orders,⁴⁰ with characteristics and functionality similar to what is currently

Options Book. Destination Specific Orders that are not executed in full after routing away are processed by the Exchange, as described in proposed BATS Options Rules 21.8 and 21.9.

³⁶ BATS Only Orders are orders that are to be ranked and executed on the Exchange or cancelled, as appropriate, without routing away to another trading center. A BATS Only Order that, at the time of entry, would cross a Protected Quotation will be repriced to the locking price and ranked at such price in the BATS Options Book. A BATS Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process.

³⁷ BATS Post Only Orders are orders that are to be ranked and executed on the Exchange or cancelled, as appropriate, without routing away to another trading center. Such orders will not remove liquidity from the BATS Options Book. A BATS Post Only Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process.

³⁸ Partial Post Only at Limit Orders are orders that are to be ranked and executed on the Exchange or cancelled, as appropriate, without routing away to another trading center. Such orders will only remove liquidity from the BATS Options Book under the following circumstances: (a) a Partial Post Only at Limit Order will remove liquidity from the BATS Options Book up to the full size of the order if, at the time of receipt, it can be executed at prices better than its limit price (i.e., price improvement); (b) regardless of any liquidity removed from the BATS Options Book under the circumstances described in paragraph (a) above, a User may enter a Partial Post Only at Limit Order instructing the Exchange to also remove liquidity from the BATS Options Book at the order's limit price up to a designated percentage of the remaining size of the order after any execution pursuant to paragraph (a) above ("Maximum Remove Percentage") if, after removing such liquidity at the order's limit price, the remainder of such order can then post to the BATS Options Book. If no Maximum Remove Percentage is entered, such order will only remove liquidity to the extent such order will obtain price improvement as described in paragraph (a) above. A Partial Post Only at Limit Order will be subject to the displayed price sliding process unless a User has entered instructions not to use the displayed price sliding process.

³⁹ Intermarket Sweep Orders ("ISOs") are orders that have the meaning provided in proposed BATS Options Rule 27.1, which relates to intermarket trading. Such orders may be executed at one or multiple price levels in the System without regard to Protected Quotations at other options exchanges (i.e., may trade through such quotations). The Exchange relies on the marking of an order by a User as an ISO order when handling such order, and thus, it is the entering Options Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to ISOs. ISOs are not eligible for routing.

approved for use in the Exchange's equities trading facility or on other options exchanges.⁴¹

Orders entered into the System will be designated for display (price and size) on an anonymous basis in the order display service of the System.⁴²

The System will execute trading interest within the System in price/time priority, meaning it will execute all trading interest at the best price level within the System before executing trading interest at the next best price.⁴³ At each price level, displayed trading interest⁴⁴ will be executed before non-displayed trading interest.⁴⁵

Notwithstanding the Exchange's reliance on a User's marking of an order as an ISO, the Exchange has an obligation under Rule 608(c), 17 CFR 242.608(c), and Section 19(g)(1) of the Act, 15 U.S.C. 78s(g)(1), to enforce members' compliance with the plan and exchange rules related to the plan. Accordingly, BATS must have a robust regulatory program, including surveillance, examination, investigative, and disciplinary programs, to enforce its members' compliance with its rules and the plan provisions.

⁴⁰ Directed Intermarket Sweep Orders are ISOs entered by a User that bypass the System and are immediately routed by the Exchange to another options exchange specified by the User for execution. It is the entering Member's responsibility, not the Exchange's responsibility, to comply with the requirements relating to ISOs.

⁴¹ See proposed BATS Options Rule 21.1(d). Options Members entering orders into the System may designate such orders to remain in force and available for display and/or potential execution for varying periods of time. Unless cancelled earlier, once these time periods expire, the order (or the unexecuted portion thereof) is returned to the entering party. Such "Time in Force" designations for orders include "Good Til Day" or "GTD," "Immediate Or Cancel" or "IOC," "DAY," and "WAIT." See proposed BATS Options Rule 21.1(f).

⁴² See proposed BATS Options Rules 21.8 and 21.10.

⁴³ See proposed BATS Options Rule 21.8(a).

⁴⁴ Trading interest at each price level where the price is not displayed will be executed in the following priority: (a) Price Improving Orders and orders subject to displayed price sliding, and then (b) discretionary portion of discretionary orders as set forth in proposed BATS Options Rule 21.1(d)(4).

⁴⁵ After orders that are displayed within the System at each price level are executed, the non-displayed portion of Reserve Orders will be executed followed by the discretionary portion of discretionary orders. See proposed BATS Options Rules 21.8(a)(1) and 21.8(a)(2).

The Commission believes that BATS' proposed execution priority rules and order types are consistent with the Act, and in particular, with the requirements in Section 6(b)(5) of the Act, which requires an exchange's rules be, among other things, designed 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission further finds that BATS Options proposed trading rules are consistent with the requirements of the Options Order Protection and Locked/Crossed Market Plan. Specifically, subject to the exceptions contained in proposed BATS Options Rule 27.2(b), the System will ensure that an order is not executed at a price that trades through another options exchange.⁴⁶ In this regard, the Commission notes that BATS is required under Rule 608(c) of Regulation NMS to comply with and enforce compliance by its members with the Options Order Protection and Locked/Crossed Market Plan, including the requirement to avoid trading through better prices available on other markets.⁴⁷ Any order entered with a price that would lock or cross a Protected Quotation that is not eligible for either routing or the displayed price sliding process, as defined in proposed BATS Options Rule 21.1(d)(6), will be cancelled.⁴⁸

As with its equities market, the Exchange will allow Options Members to use Member Match Trade Prevention ("MMTP") Modifiers. See proposed BATS Options Rule 21.1(g). Any incoming order designated with an MMTP modifier would be prevented from executing against a resting opposite side order also designated with an MMTP modifier and originating from the same market participant identifier ("MPID"), Exchange Member identifier, or Exchange Sponsored Participant identifier. Id.

⁴⁶ See proposed BATS Options Rules 21.6(e) and 27.2.

⁴⁷ See 17 CFR 242.608(c).

⁴⁸ See proposed BATS Options Rule 21.6(f).

Proposed BATS Options Rule 22.12 prohibits Options Members from executing, as principal, orders they represent as agent unless the agency order is first exposed on BATS Options for at least one second or the Options Member has been bidding or offering on BATS Options for at least one second prior to receiving an agency order that is executable against such bid or offer.

The Commission believes that in the electronic environment of BATS Options, a one second exposure period could facilitate the prompt execution of orders while continuing to provide option members with an opportunity to compete for exposed bids and offers. The Exchange represents that market participants are sufficiently automated that a one second exposure period allows an adequate time for market participants to electronically respond to an order.⁴⁹ In addition, the Exchange's trading system for BATS Options is identical to the trading system currently used for equities trading on the Exchange today. The Exchange believes, based on its experience with that trading system, that one second is an adequate exposure period. Further, the Exchange believes that many of its current Members will be Options Members and that such current Members have demonstrated an ability to respond to orders in a timely fashion.⁵⁰ Accordingly, the Commission believes it is consistent with the Act to have an order exposure time of one second.

C. Openings

The System will open options, other than index options, for trading based on the first transaction after 9:30 a.m. Eastern Time in the securities underlying the options as reported on the first print disseminated pursuant to an effective national market system plan.⁵¹ With respect to index options, the System will open such options for trading at 9:30 a.m. Eastern Time.⁵² Because

⁴⁹ See Notice, supra note 3, at 64791.

⁵⁰ Id.

⁵¹ See proposed BATS Options Rule 21.7(a).

⁵² See id.

the exchange does not propose to adopt an opening cross or similar process, the opening trade that occurs on the Exchange will be a trade in the ordinary course of dealings on the Exchange. Accordingly, the System will ensure that the opening trade in an options series will not trade through a Protected Quotation (as defined in proposed BATS Options Rule 27.1) at another options exchange, consistent with the general standard regarding trade-throughs articulated in proposed BATS Options Rule 21.6(e). The Commission believes that BATS Options rules regarding the opening of trading on BATS Options, particularly the fact that a trade will not occur until the underlying security has begun trading and that any opening trade will be subject to the trade-through provisions of BATS Options Rule 21.6(e), is reasonably designed to provide for an orderly opening and is consistent with the Act.

D. Routing

Options Members may designate orders to be routed to another options exchange when trading interest is not available on BATS Options or to execute only on BATS Options. An order that is designated as routable will be routed to other options markets to be executed when the Exchange is not at the NBBO consistent with the Options Order Protection and Locked/Crossed Market Plan. Orders routed to other options exchanges do not retain time priority with respect to orders in the System, and the System will continue to execute orders while routed orders are away at another exchange.⁵³ If a routed order is returned, in whole or in part, that order (or its remainder) will receive a new time stamp reflecting the time of its return to the System.⁵⁴ Options Members whose orders are routed away will be obligated to honor trades executed on other

⁵³ See proposed BATS Options Rule 21.9(b).

⁵⁴ Id.

exchanges to the same extent they would be obligated to honor a trade executed on BATS Options.⁵⁵

BATS Options will route orders in options via BATS Trading, Inc. (“BATS Trading”), which currently serves as the Outbound Router of the Exchange, pursuant to Rule 2.11.⁵⁶ The function of the Outbound Router will be to route orders in options listed and open for trading on BATS Options to other options exchanges pursuant to BATS Options rules solely on behalf of BATS Options.⁵⁷ The Outbound Router will be subject to regulation as a facility of the Exchange, including the requirement to file proposed rule changes under Section 19 of the Act.⁵⁸

Pursuant to Rule 2.11, BATS Trading is required to be a member of an SRO unaffiliated with BATS that is its designated examining authority, and BATS Trading is required to establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between BATS and its facilities, including BATS Trading, and any other entity.⁵⁹ In addition, the books, records, premises, officers, directors, agents, and employees of BATS Trading, as a facility of BATS, are deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.⁶⁰

In the event the Exchange is not able to provide order routing services through its affiliated broker-dealer, the Exchange would route orders to other options exchanges in conjunction with one or more routing brokers that are not affiliated with the Exchange (“Routing Services”).⁶¹ The

⁵⁵ See proposed BATS Options Rule 21.9(c).

⁵⁶ See proposed BATS Options Rule 21.9(d).

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ See BATS Rule 2.11(a)(5).

⁶⁰ See BATS Rule 2.11(b).

⁶¹ See proposed BATS Options Rule 21.9(e).

Exchange will determine the logic that provides when, how, and where orders are routed away to other options exchanges.⁶² The routing broker will receive routing instructions from the Exchange to route orders to other options exchanges and report the executions back to the Exchange.⁶³ The routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order.⁶⁴ The Exchange would enter into an agreement with each routing broker used by the Exchange that would, among other things, restrict the use of any confidential and proprietary information that the routing broker receives to legitimate business purposes necessary for the routing of the order at the direction of the Exchange.⁶⁵ Further, the Exchange would establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between (1) the Exchange and the routing broker, and any other entity, including any affiliate of the routing broker; and (2) if the routing broker or any of its affiliates engages in any other business activities, other than providing routing services to the Exchange, the segment of the routing broker or affiliate that provides the other business activities and the segment of the routing broker that provides the routing services.⁶⁶

The Exchange may not use a routing broker for which the Exchange or any affiliate of the Exchange is the designated examining authority.⁶⁷ In addition, the Exchange will provide its Routing Services in compliance with the provisions of the Act and the rules thereunder, including, but not limited to, the requirements in Section 6(b)(4) and (5) of the Act that the rules of a national

⁶² See proposed BATS Options Rule 21.9(e)(5).

⁶³ See proposed BATS Options Rule 21.9(e)(6).

⁶⁴ Id.

⁶⁵ See proposed BATS Options Rule 21.9(e)(1).

⁶⁶ See proposed BATS Options Rule 21.9(e)(2).

⁶⁷ See proposed BATS Options Rule 21.9(e)(3).

securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.⁶⁸ Any bid or offer entered on the Exchange routed to another options exchange through a routing broker that results in an execution shall be binding on the Options Member that entered such bid or offer.⁶⁹

Use of BATS Trading or the Routing Services to route orders to other market centers is optional.⁷⁰ Parties that do not desire to use BATS Trading or other Routing Services provided by the Exchange must designate orders as not available for routing.⁷¹

In light of these protections, for both the use of BATS Trading or an unaffiliated router, the Commission believes that BATS rules and procedures regarding the use of BATS Trading or an unaffiliated router to route orders to away exchanges are consistent with the Act.

E. Minimum Quoting and Trading Increments

The Exchange is proposing to apply the following minimum quoting increments: (1) if the option price is less than \$3.00, five (5) cents; and (2) if the option price is \$3.00 or higher, ten (10) cents. In addition, the Exchange proposes to participate in a pilot program, until December 31, 2010, to allow quoting in certain options in smaller increments (“Pilot Program”). BATS will include in the Pilot Program all classes that are, on that date, included by other options exchanges in substantially similar pilot programs. The Exchange further proposes to expand the classes subject to the Pilot Program on a quarterly basis, by adding 75 classes at a time through August

⁶⁸ See proposed BATS Options Rule 21.9(e)(4). See also 15 U.S.C. 78f(b)(4) and (5).

⁶⁹ See proposed BATS Options Rule 21.9(e)(7).

⁷⁰ See proposed BATS Options Rule 21.9(d).

⁷¹ See id.

2010.⁷² If an options class is included in the Pilot Program, BATS will allow quoting in one (1) cent increments any option priced less than \$3.00 or options on QQQs, IWM, and SPY. Options priced at \$3.00 or higher that are in the Pilot Program will be quoted in five (5) cent increments.⁷³

In addition, the Exchange is proposing that the minimum trading increment for options contracts traded on BATS Options would be one (1) cent for all series.⁷⁴

The Commission believes that BATS' proposal to commence quoting pursuant to the Pilot Program, which is consistent with the rules of the other options exchanges, is consistent with the Act. As the Commission noted in approving the latest expansion of the Pilot Program, allowing market participants to quote in smaller increments has been shown to reduce spreads, thereby lowering costs to investors.⁷⁵ In addition, permitting options to be quoted in smaller increments pursuant to the Pilot Program provides the opportunity for reduced spreads for a significant amount of trading volume.⁷⁶ The Commission believes that BATS' proposal to commence quoting pursuant to the Pilot Program would promote the continuing narrowing of spreads. Further, although the Pilot Program has contributed to the increase in quote message traffic, the Commission notes that it has been manageable by the exchanges and OPRA, and the Commission

⁷² See Notice, supra note 3 (providing additional details regarding the Pilot Program). The Exchange will not include in the Pilot Program options classes in which the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company or if the issuer is in bankruptcy, and, for purposes of assessing average daily volume, the Exchange will use data compiled and disseminated by the Options Clearing Corporation ("OCC"). See Amendment No. 1, supra note 4.

⁷³ See proposed BATS Options Rule 21.5(a). See also Amendment No. 1, supra note 4.

⁷⁴ See proposed BATS Options Rule 21.5(b).

⁷⁵ See Securities Exchange Act Release No. 60711 (September 23, 2009), 74 FR 49419, 49424 (September 28, 2009) (SR-NYSEArca-2009-44) (partially approving a proposed rule change to expand the Pilot Program).

⁷⁶ See id.

has not received any reports of disruptions in the dissemination of pricing information.⁷⁷ Although the Commission anticipates that BATS' proposal will contribute to further increases in quotation message traffic, the Commission believes that BATS' proposal is sufficiently limited such that it is unlikely to increase quotation message traffic beyond the capacity of market participants' systems and disrupt the timely receipt of information.⁷⁸

F. Securities Traded on BATS Options

The Exchange proposes to adopt initial and continued listing standards for equity and index options that are substantially similar to the listing standards adopted by other options exchanges.⁷⁹ The Commission believes that BATS' proposed initial and continued listing standards are consistent with the Act, including Section 6(b)(5), in that they are designed to protect investors and the public interest and to promote just and equitable principles of trade. BATS' operation of the BATS Options Exchange, however, is conditioned on BATS becoming a Plan Sponsor in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Act

⁷⁷ See id.

⁷⁸ The Commission believes that the continued operation and phased expansion of the Pilot Program will provide valuable information to the exchanges, the Commission, and others about the impact of penny quoting in the options market. See Securities Exchange Act Release No. 60711, supra note 75. In particular, extending and expanding the Pilot Program will allow further analysis of the impact of penny quoting in the Pilot Program classes over a longer period of time on, among other things: (1) spreads; (2) peak quotation rates; (3) quotation message traffic; (4) displayed size; (5) "depth of book" liquidity; and (6) market structure. See id. The Exchange has committed to provide the Commission with periodic reports that will analyze the impact of the expanded Pilot Program. See Notice, supra note 3. The Commission expects the Exchange to include statistical information relating to these factors in its periodic reports.

⁷⁹ See, e.g., Rules of NOM, Chapters IV and XIV; Rules of BOX, Chapters IV and XIV.

(“OLPP”). The Exchange represents that it will join OLPP.⁸⁰ In addition, BATS will need to become a participant in the OCC.

G. Regulation

According to the Exchange, consistent with the Exchange’s existing regulatory structure, the Exchange’s Chief Regulatory Officer will have general supervision of the regulatory operations of BATS Options, including responsibility for overseeing the surveillance, examination, and enforcement functions and for administering all regulatory services agreements applicable to BATS Options. Similarly, the Exchange’s existing Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of Exchange’s regulatory and self-regulatory organization (“SRO”) responsibilities, including those applicable to BATS Options.⁸¹

BATS rules provide that it has disciplinary jurisdiction over its members, including Options Members, so that it can enforce its members’ compliance with its rules and the federal securities laws.⁸² The Exchange’s rules also permit it to sanction members, including Options Members, for violations of its rules and of the federal securities laws by, among other things, expelling or suspending members, limiting members’ activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member.⁸³ BATS rules also provide for the imposition of fines for minor rule violations in lieu of commencing disciplinary proceedings.⁸⁴

⁸⁰ See Notice, supra note 3, at 64793.

⁸¹ Pursuant to a Regulatory Services Agreement, FINRA would perform certain regulatory functions on behalf of the Exchange. See infra note 90 and accompanying text.

⁸² See proposed BATS Options Rules 17.3 and 25.1.

⁸³ See BATS Rule 8.1 and proposed BATS Options Rule 25.1.

⁸⁴ See infra notes 100 to 107 and accompanying text.

Moreover, the Exchange will: (1) join the existing options industry agreements pursuant to Section 17(d) of the Act; (2) amend as necessary the Exchange's existing Regulatory Services Agreement ("RSA") with FINRA to cover many aspects of the regulation and discipline of Members that participate in options trading; (3) perform options listing regulation, as well as authorize Options Members to trade on BATS Options; and (4) perform automated surveillance of trading on BATS Options for the purpose of maintaining a fair and orderly market at all times.⁸⁵

In addition, the Exchange will oversee the process for determining and implementing trading halts, identifying and responding to unusual market conditions, and administering the Exchange's process for identifying and remediating "obvious errors" by and among its Options Members. BATS proposed rules (Chapter XX) regarding halts, unusual market conditions, extraordinary market volatility, obvious errors, and audit trail are closely modeled on the approved rules of The NASDAQ Options Market LLC ("NOM") and the Boston Options Exchange Group, LLC ("BOX").⁸⁶

The Commission finds that the Exchange's proposed rules and regulatory structure with respect to BATS Options Exchange are consistent with the requirements of the Act, and in particular with Section 6(b)(1) of the Act, which requires an exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act and the rules

⁸⁵ As it does with its equities trading, the Exchange will monitor BATS Options to identify unusual trading patterns and determine whether particular trading activity requires further regulatory investigation by FINRA. The Exchange represents that it will comply with COATS specifications in submitting data for purposes of creating a consolidated audit trail, as well as receive COATS data for purposes of its surveillance operations. See Amendment No. 1, supra note 4.

⁸⁶ See Rules of NOM, Chapter V, and Rules of BOX, Chapter V.

and regulations thereunder, and the rules of the Exchange,⁸⁷ and with Section 6(b)(6) and 6(b)(7) of the Act⁸⁸ which require an Exchange to provide fair procedures for the disciplining of members and persons associated with members.⁸⁹

1. Regulatory Services Agreement

Currently, the Exchange and FINRA are parties to an existing RSA, pursuant to which FINRA personnel operate as agents for the Exchange in performing certain functions. According to the Exchange, the RSA between the Exchange and FINRA will be amended to capture certain aspects of regulation specifically applicable to BATS Options and the regulation and discipline of Options Members.⁹⁰ The Commission notes that BATS will continue to bear ultimate regulatory responsibility for functions performed on BATS' behalf under the RSA. Further, BATS retains ultimate legal responsibility for the regulation of its Members and its market.

⁸⁷ 15 U.S.C. 78f(b)(1).

⁸⁸ 15 U.S.C. 78f(b)(6) and (b)(7).

⁸⁹ Every Options Member will be required to have at least one registered Options Principal who satisfies the criteria of that rule, including passing an appropriate qualification examination. See proposed BATS Options Rule 17.2(g). In addition, all Options Principals will be required to comply with the Exchange's existing continuing education requirements. See BATS Rule 2.5, Interpretation and Policy .02. and proposed BATS Options Rule 17.2(g)(4). The Commission believes these rules will help ensure that the Exchange can meet its obligations under Section 6(b)(1) of the Act to, among other things, enforce compliance by associated persons of its Members with the Act, the rules thereunder, and the Exchange's rules, and are consistent with the Act. The Commission further notes that Authorized Traders of Options Members will be required to comply with existing Exchange registration and continuing education requirements applicable to Authorized Traders. See BATS Rule 2.5, Interpretation and Policy .01 and .02, BATS Rule 11.4., and proposed BATS Options Rule 16.2(b). "Authorized Trader" is defined as a person who may submit orders (or who supervises a routing engine that may automatically submit orders) to the Exchange's trading facilities on behalf of his or her Member or Sponsored Participant. See BATS Rule 1.5(d).

⁹⁰ See Amendment No. 1, supra note 4.

The Commission believes that it is consistent with the Act to allow BATS Exchange to contract with FINRA to perform examination, enforcement, and disciplinary functions.⁹¹ These functions are fundamental elements to a regulatory program and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner, and the Commission believes that FINRA has the expertise and experience to perform these functions on behalf of BATS Exchange.⁹² The Commission is conditioning the operation of BATS Options Exchange on the finalization of the provisions in the RSA that will expand the scope of that agreement to options trading and specify the BATS Exchange and Commission rules for which FINRA will provide regulatory functions for the trading of options on the BATS Options Exchange.

The Commission notes that, unless relieved by the Commission of its responsibility,⁹³ BATS bears the responsibility for self-regulatory conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange's behalf. In performing these functions, however, FINRA may nonetheless bear liability for causing or aiding and abetting the failure of the Exchange to perform its regulatory functions.⁹⁴

⁹¹ See, e.g., Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). See also, e.g., Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR-Amex-2004-32) (approving rule that allowed Amex to contract with another SRO for regulatory services) (“Amex Regulatory Services Approval Order”); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004) (“NOM Approval Order”); and 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) (“Nasdaq Exchange Registration Order”).

⁹² See Amex Regulatory Services Approval Order; NOM Approval Order; and Nasdaq Exchange Registration Order, *id.*

⁹³ See Section 17(d)(1) of the Act and Rule 17d-2 thereunder (15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2). The Commission notes that this order is not approving the RSA.

⁹⁴ For example, if failings by FINRA have the effect of leaving BATS Exchange in violation of any aspect of BATS Exchange's self-regulatory obligations, BATS Exchange

Accordingly, although FINRA will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for BATS relating to the operation of BATS Options, FINRA also may have secondary liability if, for example, the Commission finds the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by BATS Exchange.⁹⁵

2. 17d-2 Agreements

Rule 17d-2 under the Act permits SROs to file with the Commission plans under which the SROs allocate among each other the responsibility to receive regulatory reports from, and examine and enforce compliance with specified provisions of the Act and rules thereunder and SRO rules by, firms that are members of more than one SRO (“common members”). If such a plan is declared effective by the Commission, an SRO that is a party to the plan is relieved of regulatory responsibility as to any common member for whom responsibility is allocated under the plan to another SRO.⁹⁶

All of the options exchanges, FINRA, and the New York Stock Exchange LLC (“NYSE”) have entered into the Options Sales Practices Agreement, a Rule 17d-2 Agreement, which allocates to certain SROs (“examining SROs”) regulatory responsibility for common members with respect

would bear direct liability for the violation, while FINRA may bear liability for causing or aiding and abetting the violation. See Nasdaq Exchange Registration Order, supra note 91. See also Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (approving the International Securities Exchange LLC’s application for registration as a national securities exchange).

⁹⁵ See id.

⁹⁶ Rule 17d-2 provides that any two or more SROs may file with the Commission a plan for allocating among such SROs the responsibility to receive regulatory reports from persons who are members or participants of more than one of such SROs to examine such persons for compliance, or to enforce compliance by such persons, with specified provisions of the Act, the rules and regulations thereunder, and the rules of such SROs, or to carry out other specified regulatory functions with respect to such persons. See 17 CFR 240.17d-2.

to certain options-related sales practice matters.⁹⁷ Under this Agreement, the examining SROs would examine firms that are common members of the Exchange and the particular examining SRO for compliance with certain provisions of the Act, certain of the rules and regulations adopted thereunder, certain examining SRO rules, and certain BATS Options Rules. In addition, BATS Options Rules contemplate participation in this Agreement by requiring that any Options Member also be a member of at least one of the examining SROs.⁹⁸

Moreover, all of the options exchanges and FINRA have entered into the Options Related Market Surveillance Agreement, which allocates regulatory responsibility for certain options-related market surveillance matters among the participants.⁹⁹ Under this agreement, the examining SRO would assume regulatory responsibility with respect to firms that are common members of the Exchange and the particular examining SRO for compliance with applicable common rules for certain accounts.

The Commission notes that, as a condition to this order, BATS must become a party to each of these 17d-2 Agreements, which will cover BATS Members that are Options Members.

3. Minor Rule Violation Plan

The Commission approved the BATS Exchange's Minor Rule Violation Plan ("MRVP") in 2008.¹⁰⁰ The Exchange's MRVP specifies those uncontested minor rule violations with sanctions not exceeding \$2,500 that would not be subject to the provisions of Rule 19d-1(c)(1)

⁹⁷ See Securities Exchange Act Release No. 57987 (June 18, 2008), 73 FR 36156 (June 25, 2008) (File No. S7-966).

⁹⁸ See proposed BATS Options Rule 26.1.

⁹⁹ See Securities Exchange Act Release No. 58765 (October 9, 2008), 73 FR 62344 (October 20, 2008) (File No. 4-551).

¹⁰⁰ See Securities Exchange Act Release No. 58807 (October 17, 2008), 73 FR 63219 (October 23, 2008) (File No. 4-568) ("BATS MRVP Order").

under the Act¹⁰¹ requiring that an SRO promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.¹⁰² The Exchange's MRVP includes the policies and procedures included in BATS Rule 8.15 (Imposition of Fines for Minor Violation(s) of Rules) and in BATS Rule 8.15, Interpretations and Policy .01.

The Exchange proposes to amend its MRVP and BATS Rule 8.15, Interpretation and Policy .01, to include proposed BATS Options Rule 25.3 (Penalty for Minor Rule Violations).¹⁰³ The rules included in proposed BATS Options Rule 25.3 as appropriate for disposition under the Exchange's MRVP are: (a) Position Limit violations for both customer accounts as well as the accounts of Options Members that are Exchange Members; (b) Order Entry violations regarding restrictions on orders entered by Market Makers, and (c) Continuous Quote violations regarding Market Maker continuous bids and offers.

The Commission notes that the rules included in proposed BATS Options Rule 25.3 are similar to rules included in the MRVPs of other options exchanges.¹⁰⁴ The Commission finds that BATS' MRVP, as amended to include the rules listed in proposed BATS Options Rule 25.3,

¹⁰¹ 17 CFR 240.19d-1(c)(1).

¹⁰² The Commission adopted amendments to paragraph (c) of Rule 19d-1 to allow SROs to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. See Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23828 (June 8, 1984) (File No. S7-983A). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan filed with and declared effective by the Commission would not be considered "final" for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding \$2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies.

¹⁰³ In the BATS MRVP Order, the Commission noted that any amendments to Rule 8.15.01 made pursuant to a rule filing submitted under Rule 19b-4 would automatically be deemed a request by the Exchange for Commission approval of a modification to its MRVP. See BATS MRVP Order, supra note 100, at note 6.

¹⁰⁴ See, e.g., Rules of NOM, Chapter X, Section 7, and Rules of BOX, Chapter X, Section 2.

is consistent with Sections 6(b)(1), 6(b)(5), and 6(b)(6) of the Act, which require, in part, that an exchange have the capacity to enforce compliance with, and provide appropriate discipline for, violations of the rules of the Commission and of the exchange.¹⁰⁵ In addition, because BATS Rule 8.15 will offer procedural rights to a person sanctioned for a violation listed in proposed BATS Options Rule 25.3, the Commission believes that BATS' rules provides a fair procedure for the disciplining of members and associated persons, consistent with Section 6(b)(7) of the Act.¹⁰⁶

The Commission also finds that the proposal to include the provisions in proposed BATS Options Rule 25.3 in BATS' MRVP is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d-1(c)(2) under the Act,¹⁰⁷ because it should strengthen BATS' ability to carry out its oversight and enforcement responsibilities as an SRO in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving the proposed change to BATS' MRVP, the Commission in no way minimizes the importance of compliance with BATS rules and all other rules subject to the imposition of fines under BATS' MRVP. The Commission believes that the violation of any SRO rules, as well as Commission rules, is a serious matter. However, BATS' MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that BATS will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or

¹⁰⁵ 15 U.S.C. 78f(b)(1), 78f(b)(5), and 78f(b)(6).

¹⁰⁶ 15 U.S.C. 78f(b)(7).

¹⁰⁷ 17 CFR 250.19d-1(c)(2).

less than the recommended amount is appropriate for a violation under BATS' MRVP or whether a violation requires a formal disciplinary action.

H. Section 11(a) of the Act

Section 11(a)(1) of the Act¹⁰⁸ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, "covered accounts") unless an exception applies. Rule 11a2-2(T) under the Act,¹⁰⁹ known as the "effect versus execute" rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute transactions on the exchange. To comply with Rule 11a2-2(T)'s conditions, a member: (i) must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;¹¹⁰ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission, BATS requests that the Commission concur with BATS' conclusion that Options Members that enter orders into the System satisfy the requirements of

¹⁰⁸ 15 U.S.C. 78k(a)(1).

¹⁰⁹ 17 CFR 240.11a2-2(T).

¹¹⁰ The member may, however, participate in clearing and settling the transaction.

Rule 11a2-2(T).¹¹¹ For the reasons set forth below, the Commission believes that Options Members entering orders into the System would satisfy the conditions of the Rule.

The Rule's first condition is that orders for covered accounts be transmitted from off the exchange floor. The BATS Options System receives orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.¹¹² Because the BATS Options System receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the System satisfies the off-floor transmission requirement.

Second, the Rule requires that the member not participate in the execution of its order. BATS has represented that at no time following the submission of an order is an Options Member able to acquire control or influence over the result or timing of an order's execution.¹¹³ According to BATS, the execution of a member's order is determined solely by what other orders, bids, or offers are present in the System at the time the Options Member submits the

¹¹¹ See Letter from Eric Swanson, Senior Vice President and General Counsel, BATS Exchange, to Elizabeth M. Murphy, Secretary, Commission, dated January 20, 2010 ("BATS 11(a) Letter").

¹¹² See, e.g., NOM Approval Order, *supra* note 91; Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) (approving Nasdaq Stock Market LLC); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR-PCX-00-25) (approving Archipelago Exchange); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR-NYSE-90-52 and SR-NYSE-90-53) (approving NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) ("1979 Release").

¹¹³ See BATS 11(a) Letter, *supra* note 111.

order and on the priority of those orders, bids, and offers.¹¹⁴ Accordingly, the Commission believes that an Options Member does not participate in the execution of an order submitted to the System.

Third, Rule 11a2-2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as the BATS Options System, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.¹¹⁵ BATS has represented that the design of the System ensures that no Options Member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the Exchange.¹¹⁶ Based on BATS' representation, the Commission believes that the BATS Options System satisfies this requirement.

¹¹⁴ See id. An Options Member may cancel or modify the order, or modify the instruction for executing the order, but only from off the floor. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. See Securities Exchange Act Release No. 14713 (April 27, 1978), 43 FR 18557 (May 1, 1978) ("1978 Release") (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

¹¹⁵ In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See 1979 Release, supra note 112.

¹¹⁶ See BATS 11(a) Letter, supra note 111.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T).¹¹⁷ BATS represents that Options Members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.¹¹⁸

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹¹⁷ 17 CFR 240.11a2-2(T)(a)(2)(iv). In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, supra note 114 (stating “[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests”).

¹¹⁸ See BATS 11(a) Letter, supra note 111.

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BATS-2009-031 on the subject line.

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-2009-031. 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 the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BATS-2009-031 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Accelerated Approval of the Proposal, as Amended

The Commission finds good cause for approving the proposal, as amended, prior to the thirtieth day after the date of publication of notice of filing of the amended proposal in the Federal Register. The changes proposed in Amendment No. 1 are technical or non-substantive in nature, or are designed to clarify BATS Options Rules or make them consistent with the rules adopted by other options exchanges. Specifically, in Amendment No. 1, the Exchange (1) clarified its discussion regarding the establishment of strike prices for Quarterly Options Series to conform to the proposed rule text, the substance of which is consistent with the rules of other SROs; (2) clarified, consistent with the rules of other SROs, that it will not include options classes in the Pilot Program when the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company or is in bankruptcy and that, for purposes of assessing average daily volume, it will use OCC data; (3) amended its rules relating to the Pilot Program to provide for the quoting of all options on IWM and SPY in one-cent increments, consistent with what the Commission has previously approved for another options exchange; (4) included in its Exhibit 5, as a technical matter, an updated table of contents; (5) made non-substantive changes to defined terms in BATS Rule 2.12(d) and proposed BATS Options Rule 21.1(d)(6) to conform to the terms as defined in proposed BATS Options Rule 16.1(a); (6) deleted proposed BATS Option Rule 16.2(d) as unnecessary; (7) added references to “BATS Options” in the title of Chapters XVI and XVII of the proposed rules; (8) stated its intent to amend its existing RSA with FINRA to capture certain aspects of regulation specifically applicable to BATS Options and the regulation and discipline of Options Members; (9) in the interest of protecting investors, amended proposed BATS Options Rule 26.14(a) (Profit Sharing) to make it consistent with FINRA Rule 2150(c)(1); and (10) made clear that it will comply with

COATS specifications in submitting data for purposes of creating a consolidated audit trail, as well as receive COATS data for purposes of its surveillance operations. For these reasons, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹⁹ that the proposed rule change (SR-BATS-2009-031), as modified by Amendment No. 1 thereto, be, and hereby is, approved on an accelerated basis.

Although the Commission's approval of the proposed rule change is final, and the proposed rules are therefore effective, it is further ordered that the operation of BATS Options Exchange is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans Relating to Options Trading.

BATS must join the OPRA, the OLPP, the Options Order Protection and Locked/Crossed Market Plan, and the National Market System Plan of the Options Regulatory Surveillance Authority.

B. Examination by the Commission. BATS must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it has adequate surveillance procedures and programs in place to effectively regulate the BATS Options Exchange.

C. RSA and 17d-2 Agreements. BATS must ensure that all necessary changes are made to its Regulatory Services Agreement with FINRA and must become a party to the multi-party Rule 17d-2 agreements concerning sales practice regulation and market surveillance.¹²⁰

¹¹⁹ 15 U.S.C. 78s(b)(2).

D. Participation in the Options Clearing Corporation. BATS must join the Options Clearing Corporation.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²¹

Florence E. Harmon
Deputy Secretary

¹²⁰ See supra notes 97 and 99 and accompanying text. See also 17 CFR 240.17d-2.

¹²¹ 17 CFR 200.30-3(a)(12).