



SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

**Form 19b-4 Information (required)**

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

**Exhibit 1 - Notice of Proposed Rule Change (required)**

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

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

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Exhibit Sent As Paper Document

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

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

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Exhibit Sent As Paper Document

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

**Exhibit 4 - Marked Copies**

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

**Exhibit 5 - Proposed Rule Text**

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

**Partial Amendment**

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

1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act” or the “Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> BATS Exchange, Inc. (the “Exchange” or “BATS”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend BATS Rule 11.17, entitled “Clearly Erroneous Executions,” so that the rule will continue to operate in the same manner after changes to the single stock trading pause process are effective. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.<sup>3</sup> The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii) under the Act.<sup>4</sup> If such waiver is granted by the Commission, the Exchange shall implement this rule proposal immediately.

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

\* \* \* \* \*

CHAPTER XI. TRADING RULES

\* \* \* \* \*

Rule 11.17. Clearly Erroneous Executions

(No changes.)

(a)-(b) (No changes.)

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

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

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

<sup>4</sup> Id.

(c) *Thresholds.* Determinations of whether an execution is clearly erroneous will be made as follows:

(1) *Numerical Guidelines.* Subject to the provisions of paragraph (c)(3) below, a transaction executed during Regular Trading Hours or during the Pre-Opening or After Hours Session shall be found to be clearly erroneous if the price of the transaction to buy (sell) that is the subject of the complaint is greater than (less than) the Reference Price by an amount that equals or exceeds the Numerical Guidelines set forth below. The execution time of the transaction under review determines whether the threshold is Regular Trading Hours or Pre-Opening or After Hours Trading Sessions (which occur before and after the Regular Trading Hours). The Reference Price will be equal to the consolidated last sale immediately prior to the execution(s) under review except for: (A) Multi-Stock Events involving twenty or more securities, as described in paragraph (c)(2) below; (B) transactions not involving a Multi-Stock Event as described in paragraph (c)(2) that trigger a trading pause in certain specified securities and subsequent transactions, as described in paragraph (c)(4) below, in which case the Reference Price shall be determined in accordance with that paragraph (c)(4); and (C) in other circumstances, such as, for example, relevant news impacting a security or securities, periods of extreme market volatility, sustained illiquidity, or widespread system issues, where use of a different Reference Price is necessary for the maintenance of a fair and orderly market and the protection of investors and the public interest.

Reference Price, Circumstance or Product	Regular Trading Hours Numerical Guidelines (Subject transaction's % difference from the Reference Price):	Pre-Opening and After Hours Trading Session Numerical Guidelines (Subject transaction's % difference from the Reference Price):
Greater than \$0.00 up to and including \$25.00	10%	20%
Greater than \$25.00 up to and including \$50.00	5%	10%
Greater than \$50.00	3%	6%
Multi-Stock Event – Filings involving five or more, but less than twenty, securities whose executions occurred within a period of five minutes or less	10%	10%

Multi-Stock Event – Filings involving twenty or more securities whose executions occurred within a period of five minutes or less	30%, subject to the terms of paragraph (c)(2) below	30%, subject to the terms of paragraph (c)(2) below
Leveraged ETF/ETN securities	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier ( <i>i.e.</i> , 2x)	Regular Trading Hours Numerical Guidelines multiplied by the leverage multiplier ( <i>i.e.</i> 2x)

(2) Multi-Stock Events Involving Twenty or More Securities. During Multi-Stock Events involving twenty or more securities the number of affected transactions may be such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. In such circumstances, the Exchange may use a Reference Price other than consolidated last sale. With the exception of those securities under review that are subject to an individual stock trading pause in certain specified securities as described in paragraph (c)(4) below, and to ensure consistent application across market centers when this paragraph is invoked, the Exchange will promptly coordinate with the other market centers to determine the appropriate review period, which may be greater than the period of five minutes or less that triggered application of this paragraph, 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 one or more specific points in time selected as the Reference Price. The Exchange will nullify as clearly erroneous all transactions that are at prices equal to or greater than 30% away from the Reference Price in each affected security during the review period selected by the Exchange and other markets consistent with this paragraph.

(3) Additional Factors. Except in the context of a Multi-Stock Event involving five or more securities, and individual stock trading pauses in certain specified securities as described in paragraph (c)(4) below an Official may also consider additional factors to determine whether an execution is clearly erroneous, including but not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an initial public offering, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Pre-Opening or After Hours Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market and the protection of investors and the public interest.

(4) Individual Stock Trading Pauses in Certain Specified Securities. For purposes of this paragraph, the phrase “Trading Pause Trigger Price” shall mean the price that triggered a trading pause in any securities included in the S&P 500<sup>®</sup> Index, the Russell 1000<sup>®</sup> Index, as well as a pilot list of Exchange Traded Products (“Subject Securities”)[Circuit Breaker Securities as defined in Interpretation and Policy .05 of Rule 11.18]. All trading pauses triggered with respect to securities other than Subject Securities shall be reviewed under the same provisions of this Rule as non pause-triggered events. 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. In the event a primary listing market issues an individual stock trading pause in any [Circuit Breaker] Subject Securities, and regardless of whether the security at issue is part of a Multi-Stock Event involving five or more securities as described in paragraphs (c)(1) and (c)(2) above, the Exchange shall utilize the Trading Pause Trigger Price as the Reference Price for any transactions that trigger a trading pause and subsequent transactions occurring before the trading pause is in effect on the Exchange. The Exchange will rely on the primary listing market that issued an individual stock trading pause to determine and communicate the Trading Pause Trigger Price for such stock. Notwithstanding the discretion otherwise provided by the first sentence of paragraph (g) below, the Exchange shall review, on its own motion pursuant to paragraph (g), transactions that trigger a trading pause for a Subject Security and subsequent transactions occurring before the trading pause is in effect on the Exchange. In connection with the review of transactions pursuant to this paragraph, the Exchange will apply the Numerical Guidelines set forth in paragraph (c)(1) above other than the Numerical Guidelines applicable to Multi-Stock Events. In conducting this review, and notwithstanding anything to the contrary contained in paragraph (c)(1), where a trading pause was triggered for a Subject Security by a price decline (rise), the Exchange will limit its review to transactions that executed at a price lower (higher) than the Trading Pause Trigger Price.

(d) – (g) (No changes.)

\* \* \* \* \*

(b) Not applicable.

(c) Not applicable.

## 2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange on November 10, 2009. Exchange staff will advise the BATS Exchange Board of Directors of any

action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions regarding this rule filing may be directed to Eric Swanson, Senior Vice President and General Counsel of the Exchange at (913) 815-7000.

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

(a) Purpose

*Background*

The Exchanges<sup>5</sup> and FINRA, in consultation with the Commission, have made changes to their respective rules in a concerted effort to strengthen the markets after the severe market disruption that occurred on May 6, 2010. One such effort by the Exchanges and FINRA was to adopt a uniform trading pause process during periods of extraordinary market volatility as a pilot in S&P 500<sup>®</sup> Index stocks ("Pause Pilot")<sup>6</sup>, approved by the Commission on June 10, 2010.<sup>7</sup> On September 10, 2010, the Commission approved the Exchanges' and FINRA's proposals to add the securities

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<sup>5</sup> For purposes of this filing, the term "Exchanges" refers collectively to BATS Exchange, Inc., BATS Y-Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., National Stock Exchange, Inc., and NASDAX OMX PHLX LLC.

<sup>6</sup> See Rule 11.18(d) and Interpretation and Policy .05 to Rule 11.18.

<sup>7</sup> Securities Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR-BATS-2010-014; SR-EDGA-2010-01; SR-EDGX-2010-01; SR-BX-2010-037; SR-ISE-2010-48; SR-NYSE-2010-39; SR-NYSEAmex-2010-46; SR-NYSEArca-2010-41; SR-NASDAQ-2010-061; SR-CHX-2010-10; SR-NSX-2010-05; and SR-CBOE-2010-047); 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR-FINRA-2010-025).

included in the Russell 1000<sup>®</sup> Index and specified Exchange Traded Products (“ETPs”) to the Pause Pilot.<sup>8</sup> On September 10, 2010, the Commission also approved changes proposed by the Exchanges to amend certain of their respective rules to set forth clearer standards and curtail their discretion with respect to breaking erroneous trades.<sup>9</sup> The changes, among other things, provided uniform treatment of clearly erroneous execution reviews in the event of transactions that result in the issuance of an individual stock trading pause pursuant to the Pause Pilot on the listing market and those that occur up to the time the trading pause message is received by the other markets from the single plan processor responsible for consolidation and dissemination of information for the security (“Latency Trades”).

As part of the changes to the clearly erroneous process under Rule 11.17, the Exchange adopted new text to provide clarity in the clearly erroneous process when a Pause Pilot trading pause is triggered. Pursuant to Rule 11.17(c)(4), Latency Trades will be broken by the Exchange if they exceed the applicable percentage from the Reference Price, as noted in the table found under Rule 11.17(c)(1).<sup>10</sup> The Reference Price, for

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<sup>8</sup> See e.g., Securities Exchange Act Release Nos. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (File Nos. SR-BATS-2010-018; SR-BX-2010-044; SR-CBOE-2010-065; SR-CHX-2010-14; SR-EDGA-2010-05; SR-EDGX-2010-05; SR-ISE-2010-66; SR-NASDAQ-2010-079; SR-NYSE-2010-49; SR-NYSEAmex-2010-63; SR-NYSEArca-2010-61; and SR-NSX-2010-08); and Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR-FINRA-2010-033).

<sup>9</sup> Securities Exchange Act Release No. 62886 (September 16, 2010), 75 FR 56613 (September 16, 2010) (File Nos. SR-BATS-2010-016; SR-BX-2010-040; SR-CBOE-2010-056; SR-CHX-2010-13; SR-EDGA-2010-03; SR-EDGX-2010-03; SR-ISE-2010-62; SR-NASDAQ-2010-076; SR-NSX-2010-07; SR-NYSE-2010-47; SR-NYSEAmex-2010-60; and SR-NYSEArca-2010-58).

<sup>10</sup> Pursuant to Rule 11.17(c)(1), a security with a Reference Price of greater than zero and up to an including \$25.00 is subject to a 10% threshold; a security with a

purposes of Rule 11.17(c)(4), is the price that triggered a trading pause pursuant to the Pause Pilot (the “Trading Pause Trigger Price”). As such, Latency Trades that occur on the Exchange would be broken by the Exchange pursuant to 11.17(c)(4) if the transaction occurred at either three, five or ten percent above the Trading Pause Trigger Price.<sup>11</sup>

On June 23, 2011, the Commission approved a joint proposal to expand the respective Pause Pilot rules of the Exchanges and FINRA to include all remaining NMS stocks (“Phase III Securities”).<sup>12</sup> The new pilot rules, which will be implemented on August 8, 2011, not only expand the application of the Pause Pilot, but also apply larger percentage moves that trigger a pause to the Phase III Securities. The primary listing exchanges, which will continue to calculate trading pauses under the Pause Pilot and disseminate messages when a trading pause has been issued, amended their Pause Pilot rules by adding new subparagraphs to address the treatment of the Phase III Securities in different categories. The primary listing markets continue to treat the original Pause Pilot securities, the S&P 500<sup>®</sup> Index, the Russell 1000<sup>®</sup> Index, as well as a pilot list of ETPs, as one category of securities for purposes of imposing trading pauses. All remaining NMS stocks have been categorized in two other groups, one for stocks that had a closing

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Reference Price of greater than \$25.00 and up to and including \$50.00 is subject to a 5% threshold; and a security with a Reference Price of greater than \$50.00 is subject to a 3% threshold.

<sup>11</sup> Rule 11.17(c)(4).

<sup>12</sup> Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR-BATS-2011-016; SR-BYX-2011-011; SR-BX-2011-025; SR-CBOE-2011-049; SR-CHX-2011-09; SR-EDGA-2011-15; SR-EDGX-2011-14; SR-FINRA-2011-023; SR-ISE-2011-028; SR-NASDAQ-2011-067; SR-NYSE-2011-21; SR-NYSEAmex-2011-32; SR-NYSEArca-2011-26; SR-NSX-2011-06; SR-Phlx-2011-64).

price on the previous trading day of \$1 or more and the other for stocks that had a closing price on the previous trading day of less than \$1.

*The Issue*

The recently-approved changes to the Pause Pilot will have the unintended effect of removing the Phase III Securities from the normal clearly erroneous process and potentially result in unfair outcomes in the face of severe volatility in such securities. Phase III Securities are currently subject to the clearly erroneous process under Rules 11.17(c)(1)-(3), which apply to all securities except the current Pause Pilot securities subject to a pause. For purposes of transactions in securities not involving Pause Pilot securities, or transactions involving Pause Pilot securities that occur when there is not a pause pursuant to the Pause Pilot, the Reference Price is the consolidated last sale price immediately prior to the execution(s) under review, subject to certain exceptions.<sup>13</sup> As noted above, the Trading Pause Trigger Price is used as the Reference Price when a Pause Pilot pause is in effect. As a consequence, under the current rules a Latency Trade is subject to the clearly erroneous thresholds based on the Trading Pause Trigger Price, which represents a ten percent or greater move in the transacted price of the security in a five minute period.

Under the new Pause Pilot rules, a Latency Trade in a Phase III Security occurs only after either a 30 or 50 percent (or greater) move in the transacted price of the security in a five minute period. As a result, an Exchange User that trades in a Phase III Security that triggers a clearly erroneous threshold of three, five or ten percent from the Reference Price, yet falls below the Pause Pilot trigger of either 30 or 50 percent, would

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<sup>13</sup>

Id.

be able to avail themselves of a clearly erroneous review. A similarly situated User that transacts in the same security as a Latency Trade at a price equal to or greater than the Phase III Security thresholds, yet less than the clearly erroneous thresholds under Rule 11.17(c)(1), would not be able to avail themselves of the clearly erroneous process. Another User that transacts in the same security as a Latency Trade that exceeds three, five or ten percent from the Trading Pause Trigger Price would automatically receive clearly erroneous relief. The Exchange believes that this would be an inequitable result and an arbitrary application of the clearly erroneous process. Specifically, the Exchange believes that, since the 30 and 50 percent triggers of the Pause Pilot are substantially greater than the 10 percent threshold of the original Pause Pilot, the Phase III Securities should remain under the current clearly erroneous process of Rules 11.17(c)(1)-(3).

Applying the clearly erroneous process under Rules 11.17(c)(1)-(3) to the Phase III Securities would allow the Exchange to review all transactions that exceed the normal clearly erroneous thresholds and Reference Price, and, importantly, avoid arbitrary selection of “winners” and “losers” in the face of severe volatile moves in a security of 30 or 50 percent over a five minute period. For example, a User that trades in a security subject to Rule 11.18 that triggers a clearly erroneous threshold of three, five or ten percent, yet falls below the Pause Pilot trigger threshold trading at 29 percent from the prior day’s closing price, would be potentially entitled to a clearly erroneous break pursuant Rule 11.17(c)(1). Should trading in that same stock trigger a trading pause at a price of 30 or 50 percent greater than the prior day’s close, the User would not be entitled to a clearly erroneous trade break unless that trade exceeded three, five or ten percent beyond the price that triggered the pause. This scenario causes an inequity among a

group of Users that have transactions in the Phase III Securities falling between the three, five and ten percent thresholds from the Reference Price under the normal Rule 11.17(c)(1) clearly erroneous process and the Pause Pilot clearly erroneous triggers of three, five or ten percent away from the Trading Pause Trigger Price. Such Users would not be provided relief under the clearly erroneous rules merely due to the imposition of a Pause Pilot halt, notwithstanding that other Users with transactions that occur at the same rolling five minute percentage difference. The Exchange believes a better outcome is to afford all Users transacting in Phase III Securities the opportunity of having such trades reviewed.

When rule proposal to expand the Pause Pilot to the Phase III Securities becomes operative, the Exchange will no longer defines the original Pause Pilot securities within its rules. Accordingly, in order to achieve the objectives of this proposal, the Exchange proposes to adopt a definition of “Subject Securities”, to be included in Rule 11.17(c)(4), which will mean the S&P 500<sup>®</sup> Index, the Russell 1000<sup>®</sup> Index, as well as a pilot list of ETPs.

#### *Summary*

The expansion of the Pause Pilot to the Phase III Securities will have the unintended consequence of setting the point at which a clearly erroneous transaction occurs once a Pause Pilot pause is initiated far beyond the triggers applied prior to the expansion, which will, in turn, prevent certain market participants from availing themselves of the clearly erroneous rules, notwithstanding that other similarly situated participants are able to do so. The Exchange believes that this would be an arbitrary application of the clearly erroneous process in a manner that is unfair and not consistent

with the spirit and purpose of the rule. Accordingly, the Exchange is proposing to amend Rules 11.17(c)(1)-(4) to specify that Rule 11.17(c)(4) applies only to the current securities of Pause Pilot, or Subject Securities.<sup>14</sup>

(b) Statutory Basis

The Exchange believes that the rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>15</sup> In particular, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>16</sup> because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The proposed rule change is also designed to support the principles of Section 11A(a)(1)<sup>17</sup> of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning reviews of potentially clearly erroneous executions in various contexts, including reviews in the context of a Multi-Stock Event involving twenty or more securities and reviews resulting from a Trigger Trade and any executions occurring immediately after a Trigger

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<sup>14</sup> BATS notes that the Exchanges are filing similar proposals to make the changes proposed herein.

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78k-1(a)(1).

Trade but before a trading pause is in effect on the Exchange. Further, the Exchange believes that the proposed changes enhance the objectivity of decisions made by the Exchange with respect to clearly erroneous executions. The Exchange notes that the changes proposed herein will in no way interfere with the operation of the Pause Pilot process, as amended.

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

The proposed rule change does not impose any burden on competition.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

6. Extension of Time Period for Commission Action

Not applicable.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>18</sup> and Rule 19b-4(f)(6)<sup>19</sup> thereunder in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

Exchange notes that the changes proposed herein will in no way interfere with the operation of the Pause Pilot process, as amended. Instead, the proposed changes will allow the Exchange to continue to apply the current criteria applicable to clearly erroneous execution reviews.

The Exchange requests that the Commission waive the 30-day operative waiting period contained in Exchange Act Rule 19b-4(f)(6)(iii).<sup>20</sup> The Exchange requests this waiver because it will allow the change to be operative as close as possible to the effective date of Pause Pilot expansion, August 8, 2011. The Exchange believes that amending the clearly erroneous rules so that they continue operate as they currently do once the Pause Pilot expansion is effective will ensure that the clearly erroneous process continues to be applied in an equitable manner. As such, the Exchange believes that implementation of that proposal should not be delayed, so that it may become operative as close as possible to the effective date of the Pause Pilot expansion, August 8, 2011.

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

Not applicable.

9. Exhibits

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

Exhibit 2 – 5: Not applicable.

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<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-\_\_\_\_\_ ; File No. SR-BATS-2011-028

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 8, 2011, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend BATS Rule 11.17, entitled “Clearly Erroneous Executions,” so that the rule will continue to operate in the same manner after changes to the single stock trading pause process are effective.

The text of the proposed rule change is available at the Exchange’s Web site at <http://www.batstrading.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it

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

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

received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

*Background*

The Exchanges<sup>3</sup> and FINRA, in consultation with the Commission, have made changes to their respective rules in a concerted effort to strengthen the markets after the severe market disruption that occurred on May 6, 2010. One such effort by the Exchanges and FINRA was to adopt a uniform trading pause process during periods of extraordinary market volatility as a pilot in S&P 500<sup>®</sup> Index stocks (“Pause Pilot”)<sup>4</sup>, approved by the Commission on June 10, 2010.<sup>5</sup> On September 10, 2010, the Commission approved the Exchanges’ and FINRA’s proposals to add the securities included in the Russell 1000<sup>®</sup> Index and specified Exchange Traded Products (“ETPs”) to

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<sup>3</sup> For purposes of this filing, the term “Exchanges” refers collectively to BATS Exchange, Inc., BATS Y-Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., National Stock Exchange, Inc., and NASDAX OMX PHLX LLC.

<sup>4</sup> See Rule 11.18(d) and Interpretation and Policy .05 to Rule 11.18.

<sup>5</sup> Securities Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR-BATS-2010-014; SR-EDGA-2010-01; SR-EDGX-2010-01; SR-BX-2010-037; SR-ISE-2010-48; SR-NYSE-2010-39; SR-NYSEAmex-2010-46; SR-NYSEArca-2010-41; SR-NASDAQ-2010-061; SR-CHX-2010-10; SR-NSX-2010-05; and SR-CBOE-2010-047); 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR-FINRA-2010-025).

the Pause Pilot.<sup>6</sup> On September 10, 2010, the Commission also approved changes proposed by the Exchanges to amend certain of their respective rules to set forth clearer standards and curtail their discretion with respect to breaking erroneous trades.<sup>7</sup> The changes, among other things, provided uniform treatment of clearly erroneous execution reviews in the event of transactions that result in the issuance of an individual stock trading pause pursuant to the Pause Pilot on the listing market and those that occur up to the time the trading pause message is received by the other markets from the single plan processor responsible for consolidation and dissemination of information for the security (“Latency Trades”).

As part of the changes to the clearly erroneous process under Rule 11.17, the Exchange adopted new text to provide clarity in the clearly erroneous process when a Pause Pilot trading pause is triggered. Pursuant to Rule 11.17(c)(4), Latency Trades will be broken by the Exchange if they exceed the applicable percentage from the Reference Price, as noted in the table found under Rule 11.17(c)(1).<sup>8</sup> The Reference Price, for

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<sup>6</sup> See e.g., Securities Exchange Act Release Nos. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (File Nos. SR-BATS-2010-018; SR-BX-2010-044; SR-CBOE-2010-065; SR-CHX-2010-14; SR-EDGA-2010-05; SR-EDGX-2010-05; SR-ISE-2010-66; SR-NASDAQ-2010-079; SR-NYSE-2010-49; SR-NYSEAmex-2010-63; SR-NYSEArca-2010-61; and SR-NSX-2010-08); and Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR-FINRA-2010-033).

<sup>7</sup> Securities Exchange Act Release No. 62886 (September 16, 2010), 75 FR 56613 (September 16, 2010) (File Nos. SR-BATS-2010-016; SR-BX-2010-040; SR-CBOE-2010-056; SR-CHX-2010-13; SR-EDGA-2010-03; SR-EDGX-2010-03; SR-ISE-2010-62; SR-NASDAQ-2010-076; SR-NSX-2010-07; SR-NYSE-2010-47; SR-NYSEAmex-2010-60; and SR-NYSEArca-2010-58).

<sup>8</sup> Pursuant to Rule 11.17(c)(1), a security with a Reference Price of greater than zero and up to an including \$25.00 is subject to a 10% threshold; a security with a Reference Price of greater than \$25.00 and up to and including \$50.00 is subject

purposes of Rule 11.17(c)(4), is the price that triggered a trading pause pursuant to the Pause Pilot (the “Trading Pause Trigger Price”). As such, Latency Trades that occur on the Exchange would be broken by the Exchange pursuant to 11.17(c)(4) if the transaction occurred at either three, five or ten percent above the Trading Pause Trigger Price.<sup>9</sup>

On June 23, 2011, the Commission approved a joint proposal to expand the respective Pause Pilot rules of the Exchanges and FINRA to include all remaining NMS stocks (“Phase III Securities”).<sup>10</sup> The new pilot rules, which will be implemented on August 8, 2011, not only expand the application of the Pause Pilot, but also apply larger percentage moves that trigger a pause to the Phase III Securities. The primary listing exchanges, which will continue to calculate trading pauses under the Pause Pilot and disseminate messages when a trading pause has been issued, amended their Pause Pilot rules by adding new subparagraphs to address the treatment of the Phase III Securities in different categories. The primary listing markets continue to treat the original Pause Pilot securities, the S&P 500<sup>®</sup> Index, the Russell 1000<sup>®</sup> Index, as well as a pilot list of ETPs, as one category of securities for purposes of imposing trading pauses. All remaining NMS stocks have been categorized in two other groups, one for stocks that had a closing

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to a 5% threshold; and a security with a Reference Price of greater than \$50.00 is subject to a 3% threshold.

<sup>9</sup> Rule 11.17(c)(4).

<sup>10</sup> Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR-BATS-2011-016; SR-BYX-2011-011; SR-BX-2011-025; SR-CBOE-2011-049; SR-CHX-2011-09; SR-EDGA-2011-15; SR-EDGX-2011-14; SR-FINRA-2011-023; SR-ISE-2011-028; SR-NASDAQ-2011-067; SR-NYSE-2011-21; SR-NYSEAmex-2011-32; SR-NYSEArca-2011-26; SR-NSX-2011-06; SR-Phlx-2011-64).

price on the previous trading day of \$1 or more and the other for stocks that had a closing price on the previous trading day of less than \$1.

*The Issue*

The recently-approved changes to the Pause Pilot will have the unintended effect of removing the Phase III Securities from the normal clearly erroneous process and potentially result in unfair outcomes in the face of severe volatility in such securities. Phase III Securities are currently subject to the clearly erroneous process under Rules 11.17(c)(1)-(3), which apply to all securities except the current Pause Pilot securities subject to a pause. For purposes of transactions in securities not involving Pause Pilot securities, or transactions involving Pause Pilot securities that occur when there is not a pause pursuant to the Pause Pilot, the Reference Price is the consolidated last sale price immediately prior to the execution(s) under review, subject to certain exceptions.<sup>11</sup> As noted above, the Trading Pause Trigger Price is used as the Reference Price when a Pause Pilot pause is in effect. As a consequence, under the current rules a Latency Trade is subject to the clearly erroneous thresholds based on the Trading Pause Trigger Price, which represents a ten percent or greater move in the transacted price of the security in a five minute period.

Under the new Pause Pilot rules, a Latency Trade in a Phase III Security occurs only after either a 30 or 50 percent (or greater) move in the transacted price of the security in a five minute period. As a result, an Exchange User that trades in a Phase III Security that triggers a clearly erroneous threshold of three, five or ten percent from the Reference Price, yet falls below the Pause Pilot trigger of either 30 or 50 percent, would

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<sup>11</sup> Id.

be able to avail themselves of a clearly erroneous review. A similarly situated User that transacts in the same security as a Latency Trade at a price equal to or greater than the Phase III Security thresholds, yet less than the clearly erroneous thresholds under Rule 11.17(c)(1), would not be able to avail themselves of the clearly erroneous process. Another User that transacts in the same security as a Latency Trade that exceeds three, five or ten percent from the Trading Pause Trigger Price would automatically receive clearly erroneous relief. The Exchange believes that this would be an inequitable result and an arbitrary application of the clearly erroneous process. Specifically, the Exchange believes that, since the 30 and 50 percent triggers of the Pause Pilot are substantially greater than the 10 percent threshold of the original Pause Pilot, the Phase III Securities should remain under the current clearly erroneous process of Rules 11.17(c)(1)-(3).

Applying the clearly erroneous process under Rules 11.17(c)(1)-(3) to the Phase III Securities would allow the Exchange to review all transactions that exceed the normal clearly erroneous thresholds and Reference Price, and, importantly, avoid arbitrary selection of “winners” and “losers” in the face of severe volatile moves in a security of 30 or 50 percent over a five minute period. For example, a User that trades in a security subject to Rule 11.18 that triggers a clearly erroneous threshold of three, five or ten percent, yet falls below the Pause Pilot trigger threshold trading at 29 percent from the prior day’s closing price, would be potentially entitled to a clearly erroneous break pursuant Rule 11.17(c)(1). Should trading in that same stock trigger a trading pause at a price of 30 or 50 percent greater than the prior day’s close, the User would not be entitled to a clearly erroneous trade break unless that trade exceeded three, five or ten percent beyond the price that triggered the pause. This scenario causes an inequity among a

group of Users that have transactions in the Phase III Securities falling between the three, five and ten percent thresholds from the Reference Price under the normal Rule 11.17(c)(1) clearly erroneous process and the Pause Pilot clearly erroneous triggers of three, five or ten percent away from the Trading Pause Trigger Price. Such Users would not be provided relief under the clearly erroneous rules merely due to the imposition of a Pause Pilot halt, notwithstanding that other Users with transactions that occur at the same rolling five minute percentage difference. The Exchange believes a better outcome is to afford all Users transacting in Phase III Securities the opportunity of having such trades reviewed.

When rule proposal to expand the Pause Pilot to the Phase III Securities becomes operative, the Exchange will no longer defines the original Pause Pilot securities within its rules. Accordingly, in order to achieve the objectives of this proposal, the Exchange proposes to adopt a definition of “Subject Securities”, to be included in Rule 11.17(c)(4), which will mean the S&P 500<sup>®</sup> Index, the Russell 1000<sup>®</sup> Index, as well as a pilot list of ETPs.

#### *Summary*

The expansion of the Pause Pilot to the Phase III Securities will have the unintended consequence of setting the point at which a clearly erroneous transaction occurs once a Pause Pilot pause is initiated far beyond the triggers applied prior to the expansion, which will, in turn, prevent certain market participants from availing themselves of the clearly erroneous rules, notwithstanding that other similarly situated participants are able to do so. The Exchange believes that this would be an arbitrary application of the clearly erroneous process in a manner that is unfair and not consistent

with the spirit and purpose of the rule. Accordingly, the Exchange is proposing to amend Rules 11.17(c)(1)-(4) to specify that Rule 11.17(c)(4) applies only to the current securities of Pause Pilot, or Subject Securities.<sup>12</sup>

## 2. Statutory Basis

The Exchange believes that the rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>13</sup> In particular, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>14</sup> because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The proposed rule change is also designed to support the principles of Section 11A(a)(1)<sup>15</sup> of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning reviews of potentially clearly erroneous executions in various contexts, including reviews in the context of a Multi-Stock Event involving twenty or more securities and reviews resulting from a Trigger Trade and any executions occurring immediately after a Trigger

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<sup>12</sup> BATS notes that the Exchanges are filing similar proposals to make the changes proposed herein.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> 15 U.S.C. 78k-1(a)(1).

Trade but before a trading pause is in effect on the Exchange. Further, the Exchange believes that the proposed changes enhance the objectivity of decisions made by the Exchange with respect to clearly erroneous executions. The Exchange notes that the changes proposed herein will in no way interfere with the operation of the Pause Pilot process, as amended.

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

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

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

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

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-BATS-2011-028 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 No. SR-BATS-2011-028. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00

am and 3:00 pm. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-BATS-2011-028 and should be submitted on or before [\_\_\_\_\_21 days from publication in the Federal Register].

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

Cathy H. Ahn  
Deputy Secretary

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