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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67162; File No. SR-BATS-2012-019)

June 7, 2012

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Exchange Rule 11.19, Entitled “Short Sales”

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 May 24, 2012, 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 filing with the Commission a proposal to amend Exchange Rule 11.19, entitled “Short Sales,” to adopt certain changes related to Regulation SHO in connection with the Exchange’s recent status as the primary listing market for certain securities.

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

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

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

On February 26, 2010, the Commission adopted amendments to Rules 200(g) and 201 of Regulation SHO.<sup>3</sup> Rule 201 of Regulation SHO, as amended, requires trading centers<sup>4</sup> such as the Exchange to establish, maintain, and enforce certain written policies and procedures reasonably designed to comply with the rule.<sup>5</sup> The Exchange has proposed and received approval of rule changes<sup>6</sup> in connection with the amendments to

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<sup>3</sup> 17 CFR 242.200(g); 17 CFR 242.201. See Securities Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010) (“Adopting Release”) (amending Rules 201 and 200 of Regulation SHO to adopt a short sale price test restriction and “short exempt” marking requirement).

<sup>4</sup> Rule 201(a)(9) states the term “trading center” will have the same meaning as in Rule 600(b)(78). 17 CFR 242.201(a)(9). Rule 600(b)(78) of Regulation NMS defines a “trading center” as “a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.” 17 CFR 242.600(b)(78).

<sup>5</sup> See 17 CFR 242.201(b). The amendments to Rule 200(g) of Regulation SHO provide a “short exempt” marking requirement. See 17 CFR 242.200(g).

<sup>6</sup> See Securities Exchange Act Release No. 63948 (Feb. 23, 2011), 76 FR 11303 (Mar. 1, 2011) (SR-BATS-2011-002). See Rule 11.9(g)(2), which describes the handling of orders pursuant to Exchange “short sale price sliding” functionality in

Rules 201 and 200 of Regulation SHO that were implemented in 2011.<sup>7</sup> The Exchange recently began operation as a primary listing market of certain securities, and is thus proposing additional rules in connection with Regulation SHO, as amended.

Proposed Exchange Rule 11.19(b)(1), “Definitions,” defines the terms “covered security,” “listing market,” and “national best bid” as having the same meaning as such terms have in Rule 201 of Regulation SHO.<sup>8</sup>

Under Proposed Exchange Rule 11.19(b)(2), Short Sale Price Test, the System<sup>9</sup> will not execute or display a short sale order with respect to a covered security at a price that is less than or equal to the current national best bid if the price of that security decreases by 10% or more from the security’s closing price on the listing market as of the

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connection with the short sale price test restriction; see also, Rule 11.13, which codifies in the Exchange’s rules the execution restrictions of Rule 201; see also Rule 11.19, which requires marking of short sale orders as either “short” or “short exempt.”

<sup>7</sup> See supra note 3; see also Securities Exchange Act Release No. 63247 (Nov. 4, 2010), 75 FR 68702 (Nov. 9, 2010) (extending the compliance date of the amendments to Rules 201 and 200 of Regulation SHO until February 28, 2011).

<sup>8</sup> See Rule 201(a) of Regulation SHO. The System will utilize the national best bid from the systems information processor. Rule 201(a)(1) defines “covered security” to mean any “NMS stock” as defined under Rule 600(b)(47) of Regulation NMS. 17 CFR 242.201(a)(1). Rule 600(b)(47) of Regulation NMS defines an “NMS stock” as “any NMS security other than an option.” 17 CFR 242.600(b)(47). Rule 600(b)(46) of Regulation NMS defines an “NMS security” as “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” 17 CFR 242.600(b)(46).

<sup>9</sup> See Exchange Rule 1.5(aa). The term “System” means the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.

end of regular trading hours on the prior day (“Trigger Price”).<sup>10</sup> For covered securities for which the Exchange is the listing market, the BATS Official Closing Price for each security is established by the Exchange pursuant to procedures set forth in Exchange Rule 11.23.<sup>11</sup>

Under Proposed Exchange Rule 11.19(b)(3), “Determination of Trigger Price,” the Exchange will continuously compare each execution by the System with the BATS Official Closing Price<sup>12</sup> and alert the single plan processor<sup>13</sup> when a Trigger Price has been reached.<sup>14</sup> The single plan processor will then disseminate a notice to market participants in accordance with procedures established by the single plan processor. When the single plan processor disseminates such notice, the Exchange will systematically apply the short sale price test restriction for short sale orders in the covered security in the manner described in Proposed Exchange Rule 11.19(b)(2).

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<sup>10</sup> See Rule 201(b)(1)(i) of Regulation SHO. Such execution or display needs to be in compliance with applicable rules concerning minimum pricing increments. See 17 CFR 242.612.

<sup>11</sup> See Exchange Rule 11.23. The Closing Auction for any BATS listed security will occur at 4:00 p.m. EST on each day when the Exchange is open for business. The Exchange’s Closing Auction establishes the Closing Auction price by determining the price level that maximizes the number of shares of eligible interest that can be executed, subject to certain price collars.

<sup>12</sup> Under Proposed Rule 11.19(b)(3)(B), if a covered security did not trade on the Exchange on the prior trading day (due to a trading halt, trading suspension, or otherwise), the Exchange’s determination of the Trigger Price shall be based on the last sale price on the Exchange for that security on the most recent day on which the security traded. See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 3.1.

<sup>13</sup> See 17 CFR 242.201(a)(6).

<sup>14</sup> See Rule 201(b)(3) of Regulation SHO. See Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 1.1 (explaining calculation of the Trigger Price).

Under Proposed Exchange Rule 11.19(b)(4), “Duration of Short Sale Price Test,” once triggered, the short sale price test restriction shall remain in effect until the next trading day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effect [sic] national market system [sic],<sup>15</sup> as provided for in Regulation SHO Rule 201(b)(1)(ii) (the “Short Sale Period”). There are two exceptions in the proposed rule.<sup>16</sup> First, if the Exchange determines pursuant to Proposed Exchange Rule 11.19(b)(4)(A) that the short sale price test restriction for a covered security was triggered because of a clearly erroneous execution,<sup>17</sup> the Exchange may lift the short sale price test restriction before the Short Sale Period ends for covered securities for which the Exchange is the listing market.<sup>18</sup> The Exchange also proposes to include language in Exchange Rule 11.19(b)(4)(A) to provide that the Exchange may also lift the short sale price test

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<sup>15</sup> See 17 CFR 242.201(b)(1)(ii). See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 2.1.

<sup>16</sup> If the price of a covered security declines intra-day by at least 10% on a day on which the security is already subject to the short sale price test restriction of Rule 201, the restriction will be re-triggered and, therefore, will continue in effect for the remainder of that day and the following day. See Adopting Release, 75 FR at 11253, n. 290. In addition, Rule 201 does not place any limit on the frequency or number of times the circuit breaker can be re-triggered with respect to a particular stock. See Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 2.2.

<sup>17</sup> See Exchange Rule 11.17, which sets forth the standards for determining when a trade is “clearly erroneous.” The terms of a transaction executed on the Exchange are “clearly erroneous” when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security. A transaction made in clearly erroneous error and cancelled by both parties or determined by the Exchange to be clearly erroneous will be removed from the consolidated tape.

<sup>18</sup> See 17 CFR 242.201(a)(3).

restrictions before the Short Sale Period ends, for covered securities for which the Exchange is the listing market, if the Exchange has been informed by another exchange or self-regulatory organization (“SRO”) that a transaction in the covered security that occurred at the Trigger Price was a clearly erroneous execution, as determined by that exchange or SRO under its rules.<sup>19</sup> Second, if the Exchange determines pursuant to Proposed Exchange Rule 11.19(b)(4)(B) that the prior day’s closing price for a covered security is incorrect in the System and resulted in an incorrect determination of the Trigger Price, the Exchange may correct the prior day’s BATS Official Closing Price and lift the short sale price test restriction before the Short Sale Period ends.

The proposed language for Exchange Rule 11.19(b) is substantively identical to paragraphs (a) through (d) of Rule 4763 of the rules of The NASDAQ Stock Market LLC (“Nasdaq”), paragraphs (a) through (d) of Rule 440B of the rules of the New York Stock Exchange, LLC (“NYSE”) and sub-paragraphs (i) through (iv) of Rule 7.16(f) of the rules of NYSE Arca Equities, Inc. (“NYSE Arca”). The Exchange has separately adopted rules implementing other aspects related to the amendments to Regulation SHO, which are described in the remainder of Nasdaq Rule 4763, NYSE Rule 440B and NYSE Arca Rule 7.16.<sup>20</sup>

## 2. Statutory Basis

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<sup>19</sup> The Exchange will only lift the short sale price test restrictions before the Short Sale Period ends under these circumstances when informed by another exchange or SRO that a triggering transaction has been determined to be a clearly erroneous execution under the rules of the exchange or SRO, consistent with the authority of that exchange or SRO for making such determinations.

<sup>20</sup> See supra note 6.

The Exchange believes that its proposal 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>21</sup> In particular, the proposal is consistent with Section 6(b)(5) of the Act,<sup>22</sup> because it would promote just and equitable principles of trade. Regulation SHO, among other purposes, was implemented to help to strengthen investor confidence in the markets and, thus, was intended to enhance and promote capital formation.<sup>23</sup> The Exchange believes that the proposed rule promotes just and equitable principles of trade in that it implements rules adopted by the Commission in Regulation SHO under the Act. The proposed rule change is also consistent with Section 11A(a)(1) of the Act<sup>24</sup> in that it seeks to assure fair competition among brokers and dealers and exchange markets.<sup>25</sup> The Exchange believes that the proposed rule change promotes just and equitable principles of trade in that it promotes uniformity across listing markets concerning the application of Regulation SHO, 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.

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<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>23</sup> The Commission notes that Rule 201 of Regulation SHO was adopted to prevent short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline, facilitate the ability of long sellers to sell first upon such a decline and address erosions in investor confidence.

<sup>24</sup> 15 U.S.C. 78k-1(a)(1).

<sup>25</sup> See supra note 3.

(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>26</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>27</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>28</sup> The Commission notes the proposal is substantially similar to and based on the rules of other exchanges,<sup>29</sup> and does not raise any new regulatory issues. In addition, the Exchange's operation as a listing market for certain securities requires it to comply with

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<sup>26</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>27</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>28</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>29</sup> See, e.g., Nasdaq Rule 4763(a)-(d); NYSE Rule 440B(a)-(d); NYSE Arca Rule 7.16(f)(i)-(iv).

the provisions of Rule 201 of Regulation SHO. Codification within the Exchange's rules of the provisions of Rule 201 of Regulation SHO as described above will help to avoid any confusion regarding the Exchange's status as a listing market, including, but not limited to, the manner in which the Exchange calculates the Trigger Price and the Exchange's ability to lift a Short Sale Price Test in the event it was triggered by a clearly erroneous execution. Accordingly, waiver of the operative delay will help to ensure uniformity across listing markets concerning the application of Rule 201 of Regulation SHO. For these reasons, the Commission designates the proposed rule change as operative upon filing.

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 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-2012-019 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-2012-019. 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 website (<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 website 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-2012-019 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>30</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>30</sup> 17 CFR 200.30-3(a)(12).