

Diamonds Trust ("DIA"), as eligible contracts, but the filing did not specifically certify them as such.

As noted in SR-OCC-2008-03, OCC had not included security futures on ETFs based on broad-based stock indices as eligible contracts in the OCC-CME cross-margining program because it was awaiting the issuance of an order by the Commodity Futures Trading Commission ("CFTC") providing relief from certain provisions of Section 4d(a) of the Commodity Exchange Act. The CFTC staff recently contacted OCC and CME to request that each organization separately file with the CFTC rule changes certifying futures on SPY and DIA as eligible cross-margining contracts in connection with the issuance of the order.<sup>6</sup> Although OCC functions as an SEC-registered clearing agency in connection with the OCC-CME cross-margin program, the CFTC made the request of OCC in its capacity as a CFTC-registered derivatives clearing organization. In response, OCC is submitting this filing to certify that futures on SPY and DIA will be eligible contracts for the OCC-CME cross-margining program upon issuance of the CFTC order and has attached as Exhibit 5A to the filing of proposed rule change a current Exhibit A to the OCC-CME XM Agreement.

The proposed change is consistent with Section 17A of the Act because it enhances the utility of an existing cross-margining program by permitting the inclusion of contracts that did not exist at the time the program was originally implemented. Cross-margining reduces systemic risk while providing lower margin costs to participants. Therefore, expanding the positions that may be included in cross-margining is beneficial to the clearing system and its participants. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

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

OCC does not believe that the proposed rule change would impose any burden on competition.

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

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

<sup>6</sup> Changes to Exhibit A are not required to be filed with the Commission. See Securities Exchange Act Release No. 57118 (January 9, 2008) 73 FR 2970 (January 16, 2008) (File No. SR-OCC-2007-19).

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Act<sup>7</sup> and Rule 19b-4(f)(1)<sup>8</sup> thereunder because the proposal constitutes an interpretation with respect to the meaning, administration, or enforcement of an existing rule of OCC. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-OCC-2009-09 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-OCC-2009-09. 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

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(i).

<sup>8</sup> 17 CFR 240.19b-4(f)(1).

the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC. 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-OCC-2009-09 and should be submitted on or before June 19, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59963; File No. SR-BATS-2009-012]

### **Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rules To Offer an After Hours Trading Session**

May 21, 2009.

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 20, 2009, BATS Exchange, Inc. ("BATS" or the "Exchange") 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 Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6)(iii) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

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

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

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange is proposing to amend BATS Rules in order to begin offering a trading session after the close of Regular Trading Hours<sup>5</sup> (the "After Hours Trading Session") that will last from 4 to 5 p.m. Eastern Time.

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

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

##### **1. Purpose**

The Exchange currently allows trading during a Pre-Opening Session that lasts from 8 a.m. to 9:30 a.m. Eastern Time, with Regular Trading Hours lasting from 9:30 a.m. to 4 p.m. Eastern Time. The purpose of the proposed rule change is to amend BATS Rules in order to allow trading on the Exchange during an After Hours Trading Session that will last from 4 to 5 p.m. Eastern Time. Thus, in addition to adding a definition to BATS Rule 1.5 for the "After Hours Trading Session," the Exchange has proposed to add a reference to the After Hours Trading Session to Exchange Rules that address trading outside of Regular Trading Hours (currently only through the Pre-Opening Session). The Exchange has also proposed modifications to the Time-in-Force section of BATS Rule 11.9 to indicate that a Good 'til Day Order, for which a User must indicate an expiration time, can last until the close of the After Hours Trading Session, and to add a new Time-in-

<sup>5</sup> As defined in current BATS Rule 1.5(v), which the Exchange proposes to re-number as BATS Rule 1.5(w).

Force parameter called a Good 'til Extended Day Order ("GTX"). As defined in proposed BATS Rule 11.9(c)(5), a limit order with a Time-in-Force of GTX will be cancelled by the close of the After Hours Trading Session, if not executed earlier.

Market Makers registered with the Exchange are required to satisfy certain obligations, including the requirement to maintain continuous two-sided quotations in securities in which they are registered. Pursuant to BATS Rule 11.8(b), a Market Maker's obligations apply during Regular Trading Hours on days that the Exchange is open for business. The Exchange has proposed language to clarify that to the extent a Market Maker chooses to act as a Market Maker outside of Regular Trading Hours, such Market Maker must comply, while its quotes are open, with all applicable Exchange Rules.

Trading outside of Regular Trading Hours involves potential risks, including the possibility of less information regarding indicative values, lower liquidity, higher volatility, changing prices, unlinked markets with the possibility of trade-throughs, and wider spreads. Moreover, trades executed during extended hours sessions may receive executions at inferior prices when compared to the high/low of the day. Exchange Rule 14.1(c)(2) presently requires the Exchange to distribute an information circular to its Members in connection with any UTP Derivative Security<sup>6</sup> traded on the Exchange that includes a section advising the Member of the risks of trading such security during the Pre-Opening Session. The Exchange has proposed to amend BATS Rule 14.1 to also include reference to the After Hours Trading Session in paragraph (c)(2), and thus, will provide information to its Members regarding trading of any UTP Derivative Security during the After Hours Trading Session in future information circulars.

In addition, and in light of the risks described above, the Exchange has proposed adding new BATS Rule 3.21 that will require Exchange Members that execute trades on behalf of customers during either extended hours session offered by the Exchange to provide such customers with notice regarding the risks of trading during extended hours. In order to reduce additional compliance burdens with respect to this disclosure requirement, the Exchange has based BATS Rule 3.21 on the rules

<sup>6</sup> As defined in BATS Rule 14.1(c).

of other self-regulatory organizations,<sup>7</sup> and thus, believes that many or all Exchange Members to which proposed BATS Rule 3.21 will apply are already required to provide such disclosures to their customers.

The information circular requirement applicable to the Exchange and the customer disclosure requirement applicable to Members, along with all other equity rules and trading surveillance that currently apply to trading on the Exchange during the Pre-Opening Session and Regular Trading Hours will apply to the After Hours Trading Session. As it currently does with trades executed during the Pre-Opening Session, the Exchange will designate all trades executed during the After Hours Trading Session appropriately when reporting such trades through any consolidated transaction reporting system.

The Exchange has also proposed adding new Interpretation and Policy .01 to BATS Rule 14.1, which explains the circumstances under which the Exchange will halt trading during the Pre-Opening and After Hours Trading Sessions. Specifically, as permitted pursuant to the rules of other national securities exchanges,<sup>8</sup> the Exchange may continue trading of a UTP Derivative Security (as defined in BATS Rule 14.1(c)) during the Pre-Opening Session if that security commenced trading during that session notwithstanding an interruption in the calculation or wide dissemination of the Intraday Indicative Value ("IIV") or value of the underlying index, as applicable. If the IIV or value of an underlying index for a UTP Derivative Security is not calculated or available after the close of Regular Trading Hours on the Exchange, the Exchange will only trade that UTP Derivative Security to the extent the listing market traded the security until the close of its regular trading session without a halt. If the IIV or value of an underlying index for a UTP Derivative Security is still unavailable or is not being calculated as of the beginning of the Pre-Opening Session on the next business day, the Exchange will not commence trading of that security during the Pre-Opening Session, and will resume trading of the UTP Derivative Security only if the IIV or value of an underlying index for that UTP Derivative Security is again being calculated or widely disseminated, or if the listing market resumes trading.

<sup>7</sup> See, e.g., NASDAQ Rule 4631, NYSE Arca Equities Rule 7.34(e), and ISE Rule 2102, Interpretation and Policy .04 and .05.

<sup>8</sup> See, e.g., NYSE Arca Equities Rule 7.34(a)(4); ISE Rule 2102(e).

In addition to the proposed changes described above, the Exchange is proposing to make certain non-substantive changes to Interpretation and Policy .01 of Exchange Rule 8.15 to update and correct cross-references to other Exchange Rules.

## 2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>9</sup> Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,<sup>10</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. In particular, the proposed rule change will allow the Exchange to provide a competitive marketplace for Exchange Users to trade securities until 5 p.m. Eastern Time.

### *B. Self-Regulatory Organization's Statement of 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 rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>13</sup> However, Rule 19b-

4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that BATS' proposal is substantially similar to the rules of other national securities exchanges and does not raise any new substantive issues.<sup>15</sup> BATS expects to have operational and technological changes in place to support the proposed rule change on May 26, 2009.<sup>16</sup> In addition, BATS states that the proposal does not require significant programming efforts by BATS Users or other market participants that would necessitate a delay.<sup>17</sup> Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and hereby designates the proposal operative upon filing.<sup>18</sup>

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-BATS-2009-012 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this notice requirement.

<sup>14</sup> *Id.*

<sup>15</sup> See *supra* note 7.

<sup>16</sup> See SR-BATS-2009-012, Item 7.

<sup>17</sup> *Id.*

<sup>18</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-BATS-2009-012. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of BATS. 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-2009-012 and should be submitted on or before June 19, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written

<sup>19</sup> 17 CFR 200.30-3(a)(12).