

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68724; File No. SR-NYSE-2013-03)

January 24, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 440B to Provide How the Trigger Price Will Be Calculated if Trading Is Interrupted Because of a Systems or Technical Issue and Is Not Restored During the Trading Day

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on January 10, 2013, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 proposes to amend Rule 440B to provide how the Trigger Price will be calculated if trading is interrupted because of a systems or technical issue and is not restored during the trading day. The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.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 self-regulatory organization included

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 those 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 440B to provide how the Trigger Price<sup>4</sup> will be calculated if trading is interrupted because of a systems or technical issue and is not restored during the trading day. Specifically, the Exchange proposes to provide that if trading in a covered security is interrupted because of a systems or technical issue and is not restored during that trading day, the Exchange's determination of the Trigger Price shall be based on the consolidated last sale price for that security on the most recent day on which the security traded.

The Exchange recently filed an interim proposed rule change for Rule 440B(b) to provide that on November 12, 2012, the closing price for 216 Exchange-listed securities that did not have a closing transaction on the Exchange was the consolidated last sale price available as of the end of regular trading hours on November 12, 2012, and that such closing price shall be the Trigger Price for purposes of determining whether a Short Sale Price Test has been triggered pursuant to Rule 440B(c) on November 13, 2012.<sup>5</sup>

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<sup>4</sup> Trigger Price is defined in Rule 440B(b). See Rule 440B(b). Determination of Trigger Price is set forth in Rule 440(c). See Rule 440B(c).

<sup>5</sup> See Securities Exchange Act Release No. 68220 (November 13, 2012), 77 FR 69528 (November 19, 2012) (SR-NYSE-2012-66).

The interim rule is in effect until the Exchange has an opportunity to amend its rules on a permanent basis. The Exchange now proposes to establish a rule provision that provides for how the Trigger Price is determined when a systems or technical issue prevents the closing of the security at the end of regular trading hours.

Rule 440B sets forth how the Exchange implements the provisions of Rule 201 of Regulation SHO (“Rule 201”)<sup>6</sup> under the Act which, if triggered, imposes a restriction on the prices at which securities may be sold short (“Short Sale Price Test”). Among other things, Rule 201 requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of a covered security decreases by 10% or more from the covered security’s closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. Accordingly, Rule 201(b)(1)(i) delegates to the listing market how to determine the closing price for a security.

The Exchange notes that market participants rely on the Exchange’s official closing price for purposes of calculating the value of mutual funds, exchange traded funds, and various indices, among other things. Because securities listed on the Exchange may continue to trade on other markets while systems or technical issues prevent trading on the Exchange, the Exchange believes that, under these circumstances, the closing price for purposes of determining whether a Short Sale Price Test has been triggered pursuant to Rule 440B(b) should be the consolidated last sale price available as of the end of regular trading hours on that day. The Exchange believes that using the

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<sup>6</sup> 17 CFR 242.201.

consolidated last sale price available as of the end of regular trading hours best approximates the market's determination of the appropriate price of such securities in the absence of a closing transaction on the listing market.

Rule 440B establishes procedures for the Exchange, as a listing market, to determine whether a Short Sale Price Test has been triggered for a covered security. Among other things, Rule 440B(b) defines the "Trigger Price" as the security's closing price on the listing market as of the end of regular trading hours on the prior day. Rule 440B(c)(2) provides that 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. The Exchange believes that Rule 440B(c)(2) does not contemplate how the Exchange should determine the closing price in the unique circumstance of a systems or technical failure similar to that which occurred on November 12, 2012. In particular, the reason why the Exchange did not trade the 216 securities was not because of a trading halt or trading suspension, and the Exchange does not believe the "or otherwise" language in Rule 440B(c)(2) was designed to address the unanticipated scenario on November 12, 2012 when due to a systems issue, the Exchange was unable to hold a closing transaction in those securities.

The Exchange believes that such consolidated last sale prices should be the closing price for purposes of determining the Trigger Price pursuant to Rule 440B(b) in the event that trading in a covered security is interrupted on the Exchange because of a systems or technical issue and is not restored during the trading day. Accordingly, the Exchange proposes to amend Rule 440B to provide that for circumstances when the

Exchange does not have a closing transaction because of systems or technical issues, but securities are otherwise eligible to trade on other markets, the Exchange shall use the consolidated last sale price available as of the end of regular trading hours as the closing price for purposes of Rule 440B.<sup>7</sup> This proposed rule will replace the interim rule in regards to how the Trigger Price is calculated in these circumstances.<sup>8</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, in that it is 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change will promote just and equitable principles of trade because it provides clarity of how the Exchange, as a listing market, determines the Trigger Price for securities that do not have a closing transaction due to a systems or technical issue. In particular, the Exchange believes that using a Trigger Price based on the consolidated last sale price available as of the end of regular trading hours for purposes of determining whether a Short Sale Price Test has been

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<sup>7</sup> If there is no trading on any market on the day of the systems or technical issue, the consolidated last sale price available for a security may be the Exchange's closing price from the most recent day on which the security traded.

<sup>8</sup> See supra note 5. The interim rule provided an interpretive position, while the proposal seeks to amend the text of the Exchange Rules.

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

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

triggered promotes just and equitable principles of trade because it provides transparency of how the Trigger Price will be determined for securities that do not have a closing transaction due to a systems or technical issue.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)

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

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written 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 requirement.

of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>13</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>14</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes that a waiver of this period is appropriate as the proposal is designed to provide transparency of how the Trigger Price will be determined for Exchange listed securities that did not have a closing transaction at the Exchange due to a systems or technical issue. According to the Exchange, the waiver of the operative delay will allow the participants on the Exchange to benefit from a permanent rule to determine the Trigger Price in situations where a systems or technical issue prevents a closing price during regular trading.

The Commission hereby grants the 30-day operative delay request.<sup>15</sup> The Commission believes that waiver of the 30-day operative delay is appropriate as the proposal provides clarity of how the Exchange, as a listing market, determines how the Trigger Price will be calculated if trading is interrupted on the Exchange because of a systems or technical issue and is not restored during the trading day. The Commission also believes a waiver of the 30-day operative delay is consistent with the protection of

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<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

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

investors and the public interest and, therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>16</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### 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-NYSE-2013-03 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-NYSE-2013-03. This file

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<sup>16</sup> 15 U.S.C. 78s(b)(2)(B).

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 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for website

viewing and printing at the NYSE's principal office and on its Internet website at [www.nyse.com](http://www.nyse.com). 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-NYSE-2013-03 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Kevin M. O'Neill  
Deputy Secretary

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