

1. Text of the Proposed Rule Change

- (a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> NYSE American LLC (“NYSE American” or the “Exchange”) proposes to amend Section 713 of the NYSE American LLC Company Guide (“Guide”) to (i) remove book value as a component in the pricing test for cash sales of stock that are exempt from shareholder approval under Section 713(a), (ii) adopt a “Minimum Price” definition for purposes of that pricing test, and (iii) add proposed Commentary .02 to Section 713 to clarify that only sales of securities for cash qualify for the exemption from shareholder approval for Minimum Price transactions available under Section 713(a).

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1, and the text of the proposed rule change is attached as Exhibit 5.

- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange's governing documents. Therefore, the Exchange's internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

John Carey  
Senior Director  
NYSE Group, Inc.  
(212) 656-5640

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

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

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

(a) Purpose

Section 713 of the Guide provides that the Exchange will require shareholder approval in accordance with Section 705 of the Guide as a prerequisite to approval of applications to list additional shares in certain enumerated circumstances, including when the additional shares will be issued in connection with a transaction involving: (i) the sale, issuance, or potential issuance by the issuer of common stock (or securities convertible into common stock) at a price less than the greater of book or market value (the "pricing test") which together with sales by officers, directors or principal shareholders of the issuer equals 20% or more of presently outstanding common stock; or (ii) the sale, issuance, or potential issuance by the issuer of common stock (or securities convertible into common stock) equal to 20% or more of presently outstanding stock for less than the greater of book or market value of the stock. The Exchange proposes to remove book value as an element in the pricing test in these provisions and to remove other related references to book value in Section 713 of the Guide.

Book value is an accounting measure, and its calculation is based on the historic cost of assets, not their current value. As such, listed companies have argued to the Exchange on many occasions, and the Exchange agrees, that book value is not a meaningful measure to be used in determining whether a transaction is dilutive or should otherwise require shareholder approval. The Exchange has also observed that when the market price is below the book value, issuers are often extremely surprised when confronted with the effect it has on their proposed transactions. In that regard, the existing book value test can have anomalous effects in transactions that appear to be clearly commercially reasonable for the issuer and have a disproportionate impact on companies in certain industries and at certain times. For example, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. In these situations, companies are precluded for purely technical accounting reasons from quickly raising capital on terms that are clearly at or above the market price. Furthermore, the Exchange is not aware of any evidence that shareholders consider book value to be a material factor when they are asked to vote to approve a proposed transaction.

The Exchange notes that both the New York Stock Exchange ("NYSE") and the Nasdaq Stock Market ("Nasdaq") have previously removed the book value components from the

pricing tests in their rules that have a comparable purpose to Section 713(a) of the Guide.<sup>3</sup>

The Exchange also proposes to adopt a “Minimum Price” definition in Section 713, so that a transaction will meet the pricing test for the exemption from shareholder approval in Section 713(a) if the securities are sold at a price at least as high as the Minimum Price. As proposed, for purposes of Section 713, “Minimum Price” would mean a price that is the lower of: (i) the Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement. For purposes of calculating the Minimum Price, the “Official Closing Price” of the issuer's common stock would mean the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 pm Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close of the regular session on Tuesday, then Monday's official closing price is used.

The Exchange notes that the proposed definitions of Minimum Price and Official Closing Price are identical to those set forth in Section 312.04 of the NYSE Listed Company Manual (“NYSE Manual”) for use in applying the pricing test for the exemption from shareholder approval included in Section 312.03(c) of the NYSE Manual. The Exchange also notes that its consistent practice in defining market value for purposes of the pricing test under Section 713(a) in its current form has been to apply a definition that is identical to the proposed Minimum Price definition. As such, the effect of the proposed adoption of the Minimum Price definition would be to simply provide additional clarity while not in any way changing the practical application of the pricing test, other than the proposed removal of book value as a component of the pricing test.

It has been the Exchange’s consistent longstanding interpretation that the exemption for market price transactions from the shareholder approval requirements under Section 713(a) is only available when such a transaction involves a sale of securities by the issuer for cash. As this requirement is not explicit in the current form of the rule, the Exchange proposes to clarify the rule by adopting proposed new Commentary .02 to Section 713. As proposed, Commentary .02 would state that the exemption from shareholder approval provided for in Section 713(a) for a transaction priced at or above the Minimum Price is available only for transactions in which the issuer is selling securities for cash at or above

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<sup>3</sup> See Securities Exchange Act Release No. 85374 (March 20, 2019), 84 FR 11354 (March 26, 2019) (SR-NYSE-2018-54). See also Securities Exchange Act Release No. 84287 (September 26, 2018), 83 FR 49599 (October 2, 2018) (SR-NASDAQ-2018-008).

the Minimum Price. Thus, the Exchange is clarifying that transactions priced at or above the Minimum Price that involve the sale, issuance or potential issuance by the issuer of common stock (or securities convertible into common stock) equal to 20% or more of presently outstanding stock, or which together with sales by officers, directors or principal shareholders of the issuer equal to 20% or more of the presently outstanding common stock where the securities are issued for consideration other than cash will continue to require shareholder approval under Section 713(a). Cash sales of securities for a price equal to or greater than the Minimum Price that are exempt from shareholder approval under Section 713(a) will continue to be subject to other applicable shareholder approval requirements under Exchange rules. As this proposed commentary simply states the Exchange's existing interpretation and application of the rule, its sole purpose is to clarify that application, and it is not intended make any substantive change to the rule.

(b) Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>5</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but at least as high as market value does not diminish the existing investor protections of Section 713 of the Guide. Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as not being a meaningful measure to use in analyzing the current value of a stock. The Exchange has also observed that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, companies that make large investments in infrastructure may have a market capitalization that is significantly less than the accounting carrying value of those assets. Because book value is not a meaningful measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price

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<sup>4</sup> 15 U.S.C. 78f(b).

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

less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing investor protections of Section 713 of the Guide.

The Exchange believes that the adoption of the proposed Minimum Price definition for purposes of the pricing test in Section 713(a) is consistent with the public interest and the protection of investors. The Exchange notes that the proposed definitions of Minimum Price and Official Closing Price are identical to those set forth in Section 312.04 of the NYSE Manual for use in applying the pricing test for the exemption from shareholder approval included in Section 312.03(c) of the NYSE Manual. The Exchange also notes that its consistent practice in defining market value for purposes of the pricing test under Section 713(a) in its current form has been to apply a definition that is identical to the proposed Minimum Price definition. As such, the effect of the proposed adoption of the Minimum Price definition would be to simply provide additional clarity while not in any way changing the practical application of the pricing test, other than the proposed removal of book value as a component of the pricing test.

The Exchange believes that the proposed addition of Commentary .02 to Section 713 is consistent with the public interest and the protection of investors. It has been the Exchange's consistent longstanding interpretation that the exemption from shareholder approval requirements under Section 713(a) for Minimum Price transactions is only available when such a transaction involves a sale of securities by the issuer for cash. As this requirement is not explicit in the current form of the rule, the Exchange proposes to clarify the rule by adopting proposed new Commentary .02 to Section 713. As proposed, Commentary .02 would state that the exemption from shareholder approval provided for in Section 713(a) for a transaction priced at or above the Minimum Price is available only for transactions in which the issuer is selling securities for cash at or above the Minimum Price. As this proposed commentary simply restates the Exchange's existing interpretation and application of the rule, its sole purpose is to clarify that application, and it is not intended make any substantive change to the rule. The Exchange notes that the proposed exemption from shareholder approval for cash sales at or above the Minimum Price provided for under proposed Commentary .02 is consistent with the exemption from shareholder approval provided for cash sales that meet the Minimum Price requirement of Section 312.03(c) of the NYSE Manual.

#### 4. 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.

The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval and would also clarify an existing interpretation of Section 713. All listed companies would be affected in the same manner by these changes. The Exchange believes that the proposed rule change will not impose any burden on intermarket competition, as it will conform the Exchange's rules to the comparable rules already in place at the other equity listing exchanges. As such, these changes are neither intended to, nor expected to, 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 neither solicited nor received written comments on the proposed rule change.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

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

The Exchange believes that the proposal qualifies for immediate effectiveness upon filing as a "non-controversial" rule change in accordance with Section 19(b)(3)(A) of the Act<sup>6</sup> and Rule 19b-4(f)(6) thereunder.<sup>7</sup>

The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest. In addition, the Exchange provided the Commission with 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, or such shorter time as the Commission may designate.

The Exchange believes that the proposed rule change would not adversely affect investors or the public interest or diminish the existing investor protections of Section

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<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

713 of the Guide, because (i) book value is primarily an accounting measure calculated based on historic cost and is generally perceived as not being a meaningful measure to use in analyzing the current value of a stock, (ii) the proposed definitions of Minimum Price and Official Closing Price are consistent with the Exchange's longstanding application of the market value prong of the pricing test in Section 713(a) and are identical to those included in Section 312.04 of the NYSE Manual and (iii) proposed new Commentary .02 to Section 713 simply clarifies the Exchange's longstanding interpretation and application of that rule. The Exchange notes that the proposed exemption from shareholder approval for cash sales at or above the Minimum Price provided for under proposed Commentary .02 is consistent with the exemption from shareholder approval provided for cash sales that meet the Minimum Price requirement of Section 312.03(c) of the NYSE Manual.

The Exchange further believes that the proposed rule change would not impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would revise requirements that burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes. The Exchange believes that the proposed rule change will not impose any burden on intermarket competition, as it will conform the Exchange's rules to the comparable rules already in place at the other equity listing exchanges. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

The Exchange also notes that (i) the proposal rule change with respect to the removal of book value from the pricing test is substantially similar to rule changes previously adopted by the NYSE and Nasdaq,<sup>8</sup> (ii) the proposed definitions of Minimum Price and "Official Closing Price" are identical to those included in Section 312.04 of the NYSE Manual, and (iii) proposed new Commentary .02 to Section 713 simply clarifies the Exchange's longstanding interpretation and application of that rule. The Exchange notes that the proposed exemption from shareholder approval for cash sales at or above the Minimum Price provided for under proposed Commentary .02 is consistent with the exemption from shareholder approval provided for cash sales that meet the Minimum Price requirement of Section 312.03(c) of the NYSE Manual.

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<sup>8</sup> See note 3 *supra*.

Accordingly, the Exchange believes that this rule change is eligible for immediately effective treatment under the Commission's current procedures for processing rule filings.<sup>9</sup>

For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4.<sup>10</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 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.

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

The proposal in relation to the removal of references to book value from Section 713 is based on rule amendment previously adopted by the NYSE and Nasdaq.<sup>11</sup> The proposed definition of "Minimum Price" is identical to that in Section 312.04 of the NYSE Manual and the treatment of cash sales of securities under the proposed amended form of Section 713 will be identical to their treatment under Section 312.03(c) of the NYSE Manual.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 5 – Proposed Rule Text

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<sup>9</sup> See Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008) (concerning 17 CFR 200 and 241).

<sup>10</sup> Id.

<sup>11</sup> See note 3 supra.