

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58834; File No. SR-NYSE-2008-93)

October 23, 2008

Self-Regulatory Organizations; The New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Temporarily Suspend the Operation of NYSE Rule 123D(3) to Respond to Market Conditions for Thornburg Mortgage, Inc (TMA) on September 29, 2008

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on October 10, 2008, 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. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

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

The Exchange proposes to temporarily suspend the operation of NYSE Rule 123D(3) to respond to market conditions for Thornburg Mortgage, Inc. (TMA) on September 29, 2008.

The text of the proposed rule change is available at the Exchange, www.nyse.com, and 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 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

specified in Item III 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 is proposing to temporarily suspend the operation of NYSE Rule 123D(3) with respect to the opening transactions on September 29, 2008, in the common stock and preferred Series E of Thornburg Mortgage, Inc. ("Thornburg"), a NYSE-listed company (TMA).

Background

Thornburg is a single-family residential mortgage lender that originates, acquires, and retains investments in adjustable-rate and variable-rate mortgage assets. On September 26, 2008, the common stock of TMA underwent a one-for-10 reverse stock split pursuant to which every ten shares of common stock were combined into one share of new common stock. As part of the stock split, TMA issued new stock certificates representing the new issue.⁴ Generally, reverse stock splits are intended to increase the value of the common stock of a company.

Because Thornburg issued new stock certificates, the Exchange considers the trading of TMA on September 29, 2008 to be a new issue, notwithstanding prior trading in the stock.⁵ Accordingly, in anticipation of TMA trading at the Exchange on September 29, 2008, the Exchange received multiple orders for TMA to participate in the opening transaction.

To ensure a fair and orderly market, and in particular, to ensure that orders in TMA that have been submitted to the Exchange get executed, the Exchange is proposing to suspend the operation of NYSE Rule 123D(3) on September 29, 2008 for Thornburg's common stock and the

⁴ See Thornburg Mortgage, Inc., Form 8-K (Sept. 26, 2008).

⁵ TMA has been the subject of a Sub-penny trading condition at the Exchange and closed Friday, September 26, 2008 at \$0.28 in away markets.

Preferred Series E (“TMA securities”)⁶ that would open at a price of \$1.05 or less. This proposed suspension relates only to the opening transactions of TMA securities on September 29, 2008. Immediately following the opening of such securities, the Exchange intends to halt trading of TMA securities pursuant to NYSE Rule 123D(3) and invoke a Sub-penny trading condition.

NYSE Rule 123D(3)

Sub-penny trading Condition

NYSE Rule 123D(3) provides that if a security would open on the Exchange at a price of \$1.05 or less, trading on the Exchange shall be immediately halted because of a “Sub-penny trading” condition. The Exchange adopted Rule 123D(3) in part to be compliant with Regulation NMS.

Regulation NMS, adopted by the Securities and Exchange Commission (“SEC”) in April 2005,⁷ provides that each trading center intending to qualify for trade-through protection under Regulation NMS Rule 611⁸ is required to have a Regulation NMS-compliant trading system fully operational by March 5, 2007 (the “Trading Phase Date”).⁹

For stocks priced below \$1.00 per share, Regulation NMS Rule 612¹⁰ permits markets to accept bids, offers, orders and indications of interest in increments smaller than a \$0.01, but not

⁶ See TMA and TMA-PE.

⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 17 CFR Parts 200, 201, 230, 240, 242, 249 and 270.

⁸ See 17 C.F.R. § 242.611.

⁹ See Securities Exchange Act Release No. 55160 (January 24, 2007), 72 FR 4202 (January 30, 2007)(S7-10-04).

¹⁰ See 17 C.F.R. § 242.612. Rule 612 originally was to become effective on August 29, 2005, but the date was later extended to January 29, 2006. See Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).

less than \$0.0001, and to quote and trade such stocks in sub-pennies. Markets may choose not to accept such bids, offers, orders or indications of interest and the NYSE has done so, maintaining a minimum trading and quoting variation of \$0.01 for all securities trading below \$100,000. See NYSE Rule 62.

The Commission's interpretation of Rule 612 requires a market that routes an order to another market in compliance with Rule 611 and receives a sub-penny execution, to accept the sub-penny execution, report that execution to the customer, and compare, clear, and settle that trade. Failure to do so constitutes a violation of Rule 611's Order Protection Rule. However, pursuant to Rule 611(b)(3) of Regulation NMS,¹¹ transactions that constitute a single-priced opening, reopening, or closing transaction by a trading center are excepted from the Order Protection Rule. Accordingly, a sub-penny execution at the opening that trades through another market center does not constitute a violation of Regulation NMS Rule 611's Order Protection Rule.

The Exchange adopted Rule 123D(3) to provide for a "Sub-penny trading" condition because the Exchange's trading systems did not then accommodate sub-penny executions on orders routed to better-priced protected quotations, nor could it recognize a quote disseminated by another market center if such quote had a sub-penny component and, therefore, could have inadvertently traded through better protected quotations. The rule requires the Exchange to halt trading in a security whose price was about to fall below \$1.00, without delisting the security, so that the security could continue to trade on other markets that deal in bids, offers, orders or indications of interest in sub-penny prices, until the price of the security had recovered sufficiently to permit the Exchange to resume trading in minimum increments of no less than one

¹¹ See 17 C.F.R. § 242.611(b)(3).

penny or the issuer is delisted for failing to correct the price condition within the time provided under NYSE rules.¹²

A subsequent amendment established that any orders received by the NYSE in a security subject to a “Sub- penny trading” condition would be routed to NYSE Arca, Inc. (“NYSE Arca”) and handled in accordance with the rules governing that market.¹³ When a “Sub-penny trading” condition is invoked, all open limit orders in such security at the Exchange will be cancelled and will not be routed to NYSE Arca.

Proposed Suspension of Rule 123D(3) for TMA securities

Because of reverse stock split in the common stock of Thornburg on September 26, 2008, the Exchange considered trading in that security on September 29, 2008 as a new issue. Accordingly, prior to the opening, the Exchange received pre-opening orders in the common stock. The Exchange also received pre-opening orders in the Preferred Series E of Thornburg. If the Exchange were to invoke a “Sub-penny trading” condition for those securities prior to the opening, such orders would be cancelled and would not be routed to NYSE Arca. Therefore, such orders would not be executed, potentially harming the investing public that routed such orders to the Exchange before the Exchange’s announcement of a sub-penny trading halt.

The Exchange notes that while such an opening transaction would be a violation of NYSE Rule 123D(3), an execution at a sub-penny price at the opening at the Exchange would not be a violation of Regulation NMS. Accordingly, because a sub-penny execution at the opening would not constitute a violation of the Regulation NMS Rule 611 Order Protection Rule, the Exchange believes that the harm to the investing public in not having their orders in TMA

¹² See Securities and Exchange Commission Release No. 34-55398; File No. SR-NYSE-2007-25 (Mar. 5, 2007).

¹³ See Securities and Exchange Commission Release No. 34-55537; File No. SR-NYSE-2007-30 (Mar. 27, 2007).

securities executed at the opening outweighs any harm that may result from a violation of NYSE Rule 123D(3). The Exchange therefore proposes a one-day suspension of the operation of NYSE Rule 123D(3) that would be in effect only for the opening transactions of TMA securities on September 29, 2008.

After trading in TMA securities opened at the Exchange, the Exchange halted any further trading in TMA securities and invoked a “Sub-penny trading” condition for such securities.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹⁴ of the Act, in general, and furthers the objectives of Section 6(b)(5)¹⁵ 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.

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.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

III. 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. Please include File Number SR-NYSE-2008-93 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-93. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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 Number SR-NYSE-2008-93 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁷ which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, 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.

The Exchange previously filed this rule proposal on September 29, 2008 for immediate effectiveness pursuant to Section 19(b)(3)(A)¹⁸ of the Act and Rule 19b-4(f)(6)¹⁹ thereunder; however the proposed rule change was rejected for technical, non-substantive reasons. In that prior rule filing, the Exchange noted that the proposal should be effective on September 29, 2008 because of the immediate nature of the relief requested. Specifically, the Exchange received pre-opening orders of TMA securities in response to the reverse stock split, which did not have the intended consequences. Instead, pre-opening interest was below \$0.70. By temporarily

¹⁶ In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f)(6).

suspending operation of Rule 123D(3) for opening transactions of TMA securities on September 29, 2008, the Exchange was able to execute the pre-opening orders it received in TMA securities.

As noted above, the Exchange previously submitted a proposed rule change for immediate effectiveness on September 29, 2008 that was rejected by the Commission for technical non-substantive reasons. The Commission is granting accelerated approval of this proposed rule change on a retroactive basis to September 29, 2008. The Commission finds good cause for approving this proposal before the thirtieth day after the date of publication of notice of this filing in the Federal Register.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NYSE-2008-93) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence E. Harmon
Acting Secretary

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).