

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82566; File No. SR-NYSE-2018-04)

January 22, 2018

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Listing Standard for Warrants in Section 703.12 of the Exchange's Listed Company Manual

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 11, 2018, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 proposes to amend its listing standard for warrants as set forth in Section 703.12 of the Exchange's Listed Company Manual (the "Manual") to create an exception to the prohibition on reducing the exercise price of listed warrants so as to permit exercise price reductions that are widely publicized and that continue in effect for at least 20 business days³ (or such longer period as may be required under the tender offer rules of the Securities and Exchange Commission ("SEC" or "Commission") and otherwise comply with any other applicable tender offer regulatory provisions under the federal securities laws, including Section

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term "business day" is used as defined in Rule 14d-1(g)(3) under the Act (17 CFR 240.14d-1(g)(3)).

13(e)⁴ of the Act and Rule 13e-4⁵ under the Act. The proposed rule change is available on the Exchange's website at 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 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 NYSE proposes to amend its listing standard for warrants as set forth in Section 703.12 of the Manual to create an exception to the prohibition on reducing the exercise price of listed warrants so as to permit exercise price reductions that are widely publicized and that continue in effect for at least 20 business days (or such longer period as may be required under the SEC's tender offer rules) and otherwise comply with any other applicable tender offer regulatory provisions under the federal securities laws, including Section 13(e)⁶ of the Act and Rule 13e-4⁷ under the Act.⁸

⁴ 15 U.S.C. 78m(e).

⁵ 17 CFR 240.13e-4.

⁶ 15 U.S.C. 78m(e).

⁷ 17 CFR 240.13e-4.

⁸ In order to be listed on the Exchange under Section 703.12, warrants must be issued to

The Exchange's initial listing standards for warrants are set forth in Section 703.12(A) of the Manual. Section 703.12(A) of the Manual provides that the terms of listed warrants must not give the company the right to reduce the established price (i.e., the exercise price) for periods of time, or from time to time, during the life of the warrants. The Exchange has interpreted this prohibition broadly as prohibiting the taking of any other action which has the same economic effect as a reduction in the exercise price of the warrant.⁹

The warrant listing standards of other exchanges either contain no limitation on the repricing of listed warrants¹⁰ or permit companies to reduce the price of their listed warrants subject to certain conditions.¹¹ Specifically, the warrant listing standard of the Nasdaq Global Market ("Nasdaq") set forth in Nasdaq Marketplace Rule 5410 does not in any way restrict companies from reducing the exercise price of listed warrants. Separately, NYSE American permits reductions, but only if the reductions meet specific criteria. Specifically, Section 105(a) of the NYSE American Company Guide provides that NYSE American will not list warrants containing provisions which give the company the right, at its discretion, to reduce the exercise price of the warrants for periods of time, or from time to time, during the life of the warrants unless the company establishes a minimum period of ten business days within which such price reduction will be in effect. Section 105(a) specifies that this policy does not preclude the listing

purchase a common equity security that is already listed or that will be listed concurrent with the warrants.

⁹ For example, the Exchange would view an exchange of common stock for outstanding warrants as a transaction prohibited by the rule if the economic benefit to the warrant holder of participating in the exchange was effectively the same as the benefit to the holder of exercising the warrants at a reduced exercise price. Similarly, an increase in the number of shares for which a warrant is exercisable without a related increase in the warrant exercise price is economically equivalent to a reduction in the exercise price.

¹⁰ See Nasdaq Marketplace Rule 5410.

¹¹ See NYSE American Company Guide Section 105(a).

of warrants for which regularly scheduled and specified changes in the exercise price have been previously established.¹²

The Exchange proposes to amend Section 703.12(A) to provide an exception to its prohibition on the reduction in the exercise price of listed warrants subject to similar conditions to those set forth in the warrant listing standard of NYSE American, except that any reduction in the exercise price of a listed series of warrants would be required to be in effect for a minimum period of 20 business days rather than the 10 day period required by the NYSE American rule. In addition, the Exchange proposes to require any company that reduces the exercise price of a listed series of warrants to promptly give public notice of the reduction in exercise price in a manner consistent with the Exchange's immediate release policy set forth in Section 202.06 of the Manual.¹³ The Exchange also proposes to add to Section 703.12(A) a statement that these policies will not preclude the listing of warrant issues for which regularly scheduled and specified changes in the exercise price have been previously established at the time of issuance of the warrants. Notwithstanding the foregoing, the Exchange will not list any warrants under Section 703.12 whose exercise price is subject to possible modification for reasons other than scheduled and specified changes established at the time of issuance.

¹² While the applicable Nasdaq and NYSE American rules do not address the requirements of the SEC's tender offer rules with respect to temporary reductions in the exercise price of warrants, companies listed on Nasdaq and NYSE American that reduce the exercise price of listed warrants are required to comply with the twenty business day minimum offering period required under the tender offer rules. The applicable SEC tender offer rules are described in detail below.

¹³ The Exchange proposes to include text in the proposed amended rule: (i) specifying that it will apply these requirements to the taking of any other action which has the same economic effect as a reduction in the exercise price of a listed warrant and (ii) requiring that any issuer of listed warrants including a provision providing for repricings must undertake to comply with any applicable tender offer regulatory provisions under the federal securities laws, including a minimum period of 20 business days within which such price reduction will be in effect (or such longer period as may be required under the SEC's tender offer rules).

A reduction in the exercise price of publicly-traded warrants for a limited time period is deemed to be a tender offer by the SEC staff and is therefore subject to the requirements of the SEC's tender offer rules as set forth in Regulation 14E under the Exchange Act.¹⁴ SEC Rule 14e-1(a)¹⁵ requires that any tender offer subject to Regulation 14E be held open for at least 20 business days. SEC Rule 14e-1(b)¹⁶ provides for certain circumstances in which a tender offer period must be extended beyond that initial 20 business day period. Rule 14e-1(c)¹⁷ under the Act requires securityholders to be paid promptly after tendering their securities into a tender offer. In addition, all tender offers for listed warrants will be subject to Section 13(e) of the Act, Rule 13e-4 under the Act, Section 14(e) of the Act, and Regulation 14E under the Act.

The Exchange's proposal that any repricing of listed warrants be held open for at least 20 business days, or such longer period as may be required by the SEC's tender offer rules, would be consistent with the SEC's tender offer rules. The Exchange also believes that the proposed 20 business day minimum notice requirement would ensure that warrant holders have a reasonable amount of time to consider the advisability of exercising their warrants during the period in which the reduced exercise price is in effect and that warrant holders will therefore not be under unreasonable pressure to make a hasty, ill-informed investment decision. The Exchange also proposes to require that any listed company that reduces the exercise price of listed warrants announce that fact in a manner consistent with the Exchange's policies with respect to the dissemination of material news as set forth in Section 202.06 of the Manual. The Exchange

¹⁴ 17 CFR 240.14e-1 et seq.

¹⁵ 17 CFR 240.14e-1(a).

¹⁶ 17 CFR 240.14e-1(b).

¹⁷ 17 CFR 240.14e-1(c).

believes that this requirement would give all warrant holders appropriate notice and the ability to avail themselves of the lower exercise price if they so desire.

The Exchange's warrant listing standard has been in place for many years and the Exchange has not been able to ascertain the basis for inclusion in that listing standard of the provision which it proposes to amend in this filing. However, the Exchange notes that the American Stock Exchange ("Amex") had a similar requirement in its own warrant listing standard until it adopted the rule currently in effect at NYSE American in 1986. In the SEC's notice of that Amex filing,¹⁸ the SEC noted that the Amex had stated in its filing that:

The primary impetus for adopting this prohibition arose from a perception that management's unfettered ability to temporarily reduce the exercise price would add a further element of speculation to an instrument already viewed as having inherent speculative qualities. Today, however, with the growth of new securities and commodities products, warrants are no longer viewed as being the speculative instruments they once were.

The Exchange notes that there may be valid reasons for a reduction in the exercise price of listed warrants, that such reductions are not uncommon among companies listed on other listing exchanges, and that it has found no evidence that these exercise price reductions have generally been controversial. The Exchange believes that the board of a listed company is best positioned to determine whether a reduction in the exercise price of the company's outstanding warrants is in the best interests of shareholders and therefore believes that a general prohibition on such reductions is unnecessarily restrictive as it completely deprives a listed company board

¹⁸ See Securities Exchange Act Release No. 22581 (October 29, 1985); 50 FR 46376 (November 7, 1985) (SR-Amex-85-35). The filing was approved in Securities Exchange Act Release No. 22777 (January 8, 1986); 51 FR 2613 (January 17, 1986).

of the discretion to make such a determination. The Exchange believes it is appropriate to provide companies with the flexibility to make these determinations and that the state law fiduciary duties of officers and directors of listed companies would provide significant protection to shareholders against the possibility of inappropriate exercises of discretion by company boards and management in relation to reductions in warrant exercise prices. Given (i) the significant protections afforded to shareholders by the fiduciary duties of the boards and management of listed companies, (ii) the protections provided to warrant holders by the inclusion of a notice requirement and a minimum period, and (iii) the fact that the proposed amendment is consistent with the tender offer rules, the Exchange believes that the proposed amendment is consistent with the protection of investors and the public interest.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)¹⁹ of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁰ 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.

The Exchange believes that the proposed amendment is consistent with the investor protection objectives of Section 6(b)(5) because: (i) there may be valid business reasons for a listed company to reduce the exercise price of its listed warrants and the company's board is best positioned to make this determination in light of its fiduciary duties, so a general prohibition is

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

not in the best interests of shareholders; (ii) the proposed requirement that the price reduction must stay in effect for 20 business days or such longer period as required by the SEC's tender offer rules would give the warrant holders a reasonable amount of time to consider the advisability of exercising their warrants during the period in which the reduced exercise price was in effect and warrant holders would therefore not be under unreasonable pressure to make a hasty, ill-informed investment decision; and (iii) the proposed requirement that any listed company which reduces the exercise price of listed warrants must announce that fact in a manner consistent with the Exchange's material news dissemination policies would give all warrant holders appropriate notice and the ability to avail themselves of the lower exercise price if they so desired.

The requirement that any warrant repricing under the proposed amendment must be held open for at least 20 business days (or such longer period as is required under the SEC's tender offer rules) and that the company must undertake to comply with applicable tender offer regulatory provisions [sic] would ensure that any warrant repricing under the proposed amendment would be in compliance with Section 13(e) of the Act, Rule 13e-4 under the Act, Section 14(e) of the Act, and Regulation 14E under the Act.

The addition to the rule of language stating that the Exchange will apply its requirements with respect to warrant repricings to the taking of any other action which has the same economic effect as a reduction in the exercise price of a listed warrant is consistent with the Act as it simply codifies a longstanding interpretation of the rule by the Exchange.

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 purpose of the Act. The

purpose of the proposed rule change is to permit listed companies to adjust the exercise price of listed warrants in a manner that is consistent with the SEC's tender offer rules and permitted by the rules of the other listing markets. As such, the Exchange believes the proposed rule change does not impose any burden on competition.

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) of the Act²¹ and Rule 19b-4(f)(6) thereunder.²² 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 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 and Rule 19b-4(f)(6) thereunder.²³

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.

²¹ 15 U.S.C. 78s(b)(3)(A)(iii).

²² 17 CFR 240.19b-4(f)(6).

²³ In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

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. Please include File Number SR-NYSE-2018-04 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-2018-04. 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 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 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 office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2018-04, 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.²⁴

Eduardo A. Aleman
Assistant Secretary

²⁴ 17 CFR 200.30-3(a)(12).