

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91143; File No. SR-NYSE-2021-13)

February 17, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 7.35C to Change the Auction Reference Price for Exchange-Facilitated Core Open Auctions

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 February 8, 2021, 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 7.35C (Exchange-Facilitated Auctions) to change the Auction Reference Price for Exchange-facilitated Core Open Auctions. 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 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

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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.

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 7.35C (Exchange-Facilitated Auctions) to change the Auction Reference Price for Exchange-facilitated Core Open Auctions.

For Exchange-facilitated Auctions, the Exchange determines an Auction Price based on the Indicative Match Price for a security, which is bound by Auction Collars.<sup>4</sup> Rule 7.35C(b)(1) specifies the Auction Reference Price that is used for determining Auction Collars for Exchange-facilitated Core Open Auctions, which is the Imbalance Reference Price, as determined under Rule 7.35A(e)(3).<sup>5</sup> Currently, the Auction Collars for the Core Open Auction are at a price that is the greater of \$0.15 or 10% away from the Auction Reference Price.

On June 4, 2020, the Exchange added Commentary .04 to Rule 7.35C to provide that the Auction Collars for Exchange-facilitated Core Open Auctions would be the greater of \$1.00 or 10% away from the Auction Reference Price.<sup>6</sup> The Exchange added this Commentary to reduce

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<sup>4</sup> See Rule 7.35C(b)(2).

<sup>5</sup> See Rule 7.35C(b)(3)(A)(i). Pursuant to Rule 7.35A(e)(3), the Imbalance Reference Price for a Core Open Auction is the Consolidated Last Sale Price, unless a pre-opening indication has been published. Pursuant to Rule 7.35(a)(11)(A), the term “Consolidated Last Sale Price” means the most recent consolidated last-sale eligible trade in a security during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

<sup>6</sup> See Securities Exchange Act Release No. 89059 (June 12, 2020), 85 FR 36911 (June 18, 2020) (SR-NYSE-2020-50) (amending Rule 7.35C to add Commentary .04) (“Rule 7.35C Filing”). Commentary .04 is in effect for a temporary period that began on June 4, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021.

the number of securities subject to a collared Exchange-facilitated Core Open Auction.<sup>7</sup> The Exchange observed that from June 4, 2020 up to June 17, 2020, when DMMs returned staff to the Trading Floor, even with the widened Auction Collars, if there were significant overnight market-wide volatility, Exchange-facilitated Core Open Auctions had a greater likelihood of being subject to an Auction Collar. For example, for that same June 4 - June 16 period, when the price of the SPDR S&P 500 ETF Trust (“SPY”)<sup>8</sup> moved over 1% from the prior day’s close, 1.4% of the Exchange-facilitated Core Open Auctions were subject to an Auction Collar, as compared to only .5% of the Exchange-facilitated Core Open Auctions being subject to an Auction Collar when SPY moved less than 1% from the prior day’s close.

The Exchange believes that adjusting the Auction Reference Price to align more closely with the anticipated price of the Core Open Auction, rather than widening the Auction Collars, would reduce the potential for an Exchange-facilitated Core Open Auction to be subject to an Auction Collar on all trading days, including when there is significant overnight market-wide volatility. Accordingly, rather than providing for a wider Auction Collar, as set forth in Commentary .04 to Rule 7.35C, the Exchange proposes to amend Rule 7.35C to update how the Auction Reference Price for Exchange-facilitated Core Open Auctions would be determined.

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<sup>7</sup> In the Rule 7.35C Filing, *id.*, the Exchange explained that for the period while the Trading Floor had been temporarily closed preceding that filing, the Exchange had facilitated 2.35% of the Core Open Auctions and that approximately 30% of the Exchange-facilitated Core Open Auctions had an Indicative Match Price that was subject to an Auction Collar, and approximately 50% of these collared Exchange-facilitated Core Open Auctions were in securities trading at prices under \$10.00. The Exchange further noted that if Auction Collars had not been applied to these securities priced under \$10.00, they would have opened at a price between \$0.15 and \$1.00 away from the Auction Reference Price.

<sup>8</sup> Because SPY is priced based on the securities included in the S&P 500 Index, the Exchange believes that SPY’s price as compared to its prior day’s closing price is indicative of the scope of market-wide volatility leading into the open of the Core Trading Session.

Specifically, the Exchange proposes to determine Auction Reference Prices for Exchange-facilitated Core Open Auctions in the same manner that the Exchange’s affiliates, NYSE Arca, Inc. (“NYSE Arca”) and NYSE American LLC (“NYSE American”), determine the Auction Reference Price for their electronic Core Open Auctions.

NYSE Arca Rule 7.35-E(a)(8)(A) and NYSE American Rule 7.35E(a)(8)(A) both provide that the Auction Reference Price for Core Open Auctions on those exchanges is, “[t]he midpoint of the Auction NBBO or, if the Auction NBBO is locked, the locked price. If there is no Auction NBBO, the prior day’s Official Closing Price.” The NYSE Arca and NYSE American rules define the term “Auction NBBO” to mean:

An NBBO that is used for purposes of pricing an auction. An NBBO is an Auction NBBO when (i) there is an NBB above zero and NBO for the security and (ii) the NBBO is not crossed. In addition, for the Core Open Auction, an NBBO is an Auction NBBO when the midpoint of the NBBO when multiplied by a designated percentage, is greater than or equal to the spread of that NBBO. The designated percentage will be determined by the Exchange from time to time upon prior notice to ETP Holders.<sup>9</sup>

The Exchange proposes to amend Rule 7.35C(b)(1) to provide that the Auction Reference Price for an Exchange-facilitated Core Open Auction would be: “The midpoint of the Auction NBBO or, if the Auction NBBO is locked, the locked price. If there is no Auction NBBO, the Official Closing Price from the prior trading day.” This rule text is based on NYSE Arca Rule 7.35-E(a)(8)(A) and NYSE American Rule 7.35E(a)(8)(A) without any differences.

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<sup>9</sup> See NYSE Arca Rule 7.35-E(a)(5) and NYSE American Rule 7.35E(a)(5).

The Exchange further proposes to amend Rule 7.35(a) to add a definition for the term “Auction NBBO,” which would similarly be based on the definition of that term in the NYSE Arca and NYSE American rules without any substantive differences, as follows:

“Auction NBBO” means an NBBO that is used for purposes of pricing an auction. An NBBO is an Auction NBBO when (i) there is an NBB above zero and NBO for the security and (ii) the NBBO is not crossed. In addition, for the Core Open Auction, an NBBO is an Auction NBBO when the midpoint of the NBBO when multiplied by a designated percentage, is greater than or equal to the spread of that NBBO. The designated percentage will be determined by the Exchange from time to time upon prior notice to member organizations.

The Exchange proposes to add the term “Auction NBBO” as Rule 7.35(a)(5) and make non-substantive changes to renumber the definitions currently set forth in Rules 7.35(a)(5) - (12) as Rules 7.35(a)(6) - (13).

Because there are technology changes associated with this proposed rule change, the Exchange proposes to announce the implementation date of this change by Trader Update. The Exchange anticipates that the Exchange will implement this technology change in the first quarter of 2021.

To provide continuity, the Exchange further proposes to amend Commentary .04 to Rule 7.35C to provide that such Commentary would end on the earlier of when the Exchange implements its technology change to use the midpoint of the Auction NBBO as the Auction Reference Price for the Core Open Auction or after the Exchange closes on April 30, 2020. With this proposed rule change, the widened Auction Collars specified in that Commentary would

continue to be operative until such time that the proposed changes to the Auction Reference Price for Exchange-facilitated Core Open Auctions are operative and implemented.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>11</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 proposal to change the Auction Reference Price for Exchange-facilitated Core Open Auctions would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would reduce the potential number of securities that would be subject to a collared Exchange-facilitated Core Open Auction, including when there is significant overnight market-wide volatility.

Commentary .04 to Rule 7.35C sought to achieve this goal by widening the Auction Collars, but as noted above, these temporary widened Auction Collars would not prevent an Exchange-facilitated Core Open Auction from being subject to an Auction Collar when there has been significant overnight market-wide volatility. The Exchange believes that aligning the Auction Reference Price more closely with the anticipated opening price by using the midpoint of the Auction NBBO as the Auction Reference Price (or Official Closing Price of the prior Trading Day if no Auction NBBO) would reduce the potential for an Exchange-facilitated Core Open

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

Action to be subject to an Auction Collar on all trading days, including when there is significant overnight market-wide volatility. The Exchange further believes that this proposed rule change would reduce the potential number of securities that would open at a price that may not represent the current value of the security due to unfilled marketable auction interest, while still preserving investor protections by preventing significantly dislocated openings. This proposed rule change would therefore promote the fair and orderly operation of Exchange-facilitated Core Open Auctions by allowing such securities to open at a price that is consistent with the buy and sell interest in the security, which would also allow more buy and sell interest to participate in such Auction.

The Exchange notes that this proposed change is not novel and is based on how NYSE Arca and NYSE American determine the Auction Reference Price for their respective electronic Core Open Auctions. Accordingly, this proposed change would align how Auction Reference Prices are determined for electronic Exchange-facilitated Auctions across NYSE, NYSE Arca, and NYSE American.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide the Exchange with additional tools for when it facilitates an Auction, including by aligning the Auction Reference Price for an Exchange-facilitated Core Open Auction with the Auction Reference Price used for NYSE Arca and NYSE American electronic Core Open Auctions. The proposed rule change does not implicate any intermarket competition concerns because it relates to how the Exchange would facilitate Auctions in Exchange-listed securities.

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>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</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; or (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)(iii) of the Act<sup>14</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>15</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>16</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>17</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 has represented that the technology to implement this proposed rule

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

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

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>15</sup> 17 CFR 240.19b-4(f)(6). 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, 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 complied with this requirement.

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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

change will be available in less than 30 days from filing and that a waiver of the operative delay would allow the Exchange to implement this proposed rule change as soon as the technology is available. The Commission notes that the proposal was previously included in another filing and afforded a public comment period under that filing of greater than 30 days.<sup>18</sup> The Commission believes that a waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal was published previously for a substantial period time for public comment and no comments were received on the proposal, and because a waiver will allow the proposed rules to become effective in time for the Exchange to implement its related technological changes. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>19</sup>

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

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<sup>18</sup> The proposal was originally included in SR-NYSE-2020-89, and published for public notice and comment on November 5, 2020. See Securities Exchange Act Release No. 90363 (Nov. 5, 2020), 85 FR 71964 (Nov. 12, 2020). The comment period for SR-NYSE-2020-89 was extended to February 10, 2021. See Securities Exchange Act Release No. 90726 (Dec. 18, 2020), 85 FR 84431 (Dec. 28, 2020). The Exchange amended SR-NYSE-2020-89 on February 5, 2021 to remove the proposal from that filing, see Securities Exchange Act Release No. 91095 (Feb. 10, 2021), 86 FR 9978 (Feb. 17, 2021), and then subsequently filed the proposal as SR-NYSE-2021-13 on February 13, 2021. The Commission notes that it received no comments on the proposal under SR-NYSE-2020-89.

<sup>19</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Commission shall institute proceedings under Section 19(b)(2)(B)<sup>20</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-2021-13 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-2021-13. 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,

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<sup>20</sup> 15 U.S.C. 78s(b)(2)(B).

Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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-2021-13 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>21</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).