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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91121; File No. SR-NYSE-2020-93]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend Rules 7.35 and 7.35A

February 12, 2021.

I. Introduction

On November 3, 2020, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rule 7.35 regarding dissemination of Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction, and Rule 7.35A regarding DMM consultations in connection with an IPO or Direct Listing. The proposed rule change was published for comment in the Federal Register on November 17, 2020.³

On December 18, 2020, the Commission extended to February 15, 2020, the time period in which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to approve or disapprove the proposal.⁴ The Commission has received no comments on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90387 (Nov. 10, 2020), 85 FR 73322 (Nov. 17, 2020) (“Notice”).

⁴ See Securities Exchange Act Release No. 90723 (Dec. 18, 2020), 85 FR 84446 (Dec. 28, 2020).

II. Description of the Proposal

Rule 7.35 - Auction Imbalance Information

The Exchange proposes to amend Rule 7.35 to eliminate, on a permanent basis, the restriction on the Exchange disseminating Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction.⁵ The Exchange asserts that disseminating Auction Imbalance Information in advance of an IPO Auction or Direct Listing Auction would promote transparency in advance of these Auctions, which would benefit investors and other market participants.⁶

As part of the proposed change, the Exchange proposes that the Imbalance Reference Price for determining the Auction Imbalance Information for either an IPO Auction or a Direct Listing Auction would be determined in the same manner as currently provided for under the temporary Commentaries .01 and .02 to Rule 7.35, respectively.⁷ Specifically, the Imbalance Reference Price for determining the Auction Imbalance Information for a Core Open Auction under Rule 7.35A(e)(3) is the Consolidated Last Sale Price, bound by the bid and offer of any published pre-opening indication.⁸ Because this definition of Imbalance Reference Price does not currently specify what the Consolidated Last Sale Price would be for an IPO Auction or Direct Listing Auction (which does not exist because the security has not been previously listed on an exchange), the Exchange proposes to amend the definition of Consolidated Last Sale Price in Rule 7.35(a)(11)(A) to provide that: (i) for an IPO that has not had its IPO Auction, the Consolidated Last Sale Price would mean the security's offering price; and (ii) for a Direct

⁵ See Notice, supra note 3, at 73323. Commentaries .01 and .02 to Rule 7.35, currently in effect on a temporary basis through April 30, 2021, provide for the dissemination of Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction. See Securities Exchange Act Release No. 90795 (Dec. 23, 2020), 85 FR 86608 (Dec. 30, 2020).

⁶ See id.

⁷ See id.

⁸ See id.

Listing that has not had its Direct Listing Auction, the Consolidated Last Sale Price would mean the Indication Reference Price for such security.⁹

Rule 7.35A - DMM Consultations

The Exchange proposes to amend Rule 7.35A(g)(1) to provide for DMM consultations with an underwriter or financial advisor for initial listings and follow-on offerings.¹⁰ The Exchange represents that the proposed rule text reflects long-standing practice relating to the type of consultations that a DMM may have with an underwriter or financial advisor.¹¹ The Exchange further proposes to specify that any such consultations may be conveyed to the DMM via either a Floor broker or Exchange staff. The Exchange represents that, as with current practice, the only consultations that would be required in Exchange rules would be in connection with a Direct Listing that has not had recent sustained history of trading in a Private Placement Market prior to listing.¹² The Exchange states that it believes that this proposed rule text would promote transparency and clarity in Exchange rules by specifying the existing process whereby a DMM may consult with an underwriter or financial advisor in connection with a security having its initial listing on the Exchange or for a follow-on offering.¹³

III. Proceedings to Determine Whether to Disapprove SR-NYSE-2020-93 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁴ to determine whether the proposal should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached

⁹ See id.

¹⁰ See Notice, supra note 3, 85 FR at 73324.

¹¹ See id.

¹² See id.

¹³ See id.

¹⁴ 15 U.S.C. 78s(b)(2)(B).

any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposal.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,¹⁵ which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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. In addition, Section 6(b)(5) of the Act prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under the proposal, the Exchange seeks to amend Rule 7.35A with respect to the consultations a DMM may have with an underwriter or financial advisor. The Exchange further proposes to specify that any such consultations may be conveyed to the DMM via either a Floor broker or Exchange staff. Accordingly, the Commission seeks public comment on the nature of the communications permitted between the DMM and the underwriter or financial advisor. Specifically, the Commission seeks public comment on the following topics:

(1) Should the proposed rule specify what is a permitted consultation provided for in the proposed amendments to NYSE Rule 7.35A—that is, specify what is a permitted consultation “to effect a fair and orderly opening on the first day of trading of a security having its initial listing on the Exchange or for a follow-on offering”¹⁶—so that the permitted consultations are limited to conveying only such information?

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ Notice, supra note 3, 85 FR at 73324.

(2) Are there any types of information that the underwriter or financial advisor should be prohibited from conveying to the DMM in these consultations? Would any other types of limitations be appropriate with respect to the consultations between DMMs and underwriters or financial advisors?

(3) Should a DMM be permitted to communicate directly with the underwriter or financial advisor with respect to these consultations, rather than through a Floor broker or a member of the Exchange's staff? If so, what, if any, different restrictions should apply to such consultations?

(4) Should the Exchange's rules distinguish between DMM consultations with underwriters or financial advisors with respect to follow-on offerings for securities that have a market value reflected in trading prices as opposed to initial offerings? If so, why and in what way? What types of consultations, if any, would be appropriate for a follow-on offering and why? Would the types of appropriate consultations differ between a follow-on offering conducted through a firm-commitment underwriting and a follow-on offering conducted through a direct offering?

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5)¹⁷ of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated

¹⁷ 15 U.S.C. 78f(b)(5).

by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,¹⁸ any request for an opportunity to make an oral presentation.¹⁹

Interested persons are invited to submit written data, views and arguments regarding whether the proposal should be disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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-2020-93 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 Numbers SR-NYSE-2020-93. The 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 proposal that are filed with the Commission, and all written communications relating to the proposal 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

¹⁸ 17 CFR 240.19b-4.

¹⁹ Rule 700(c)(2) of the Commission's Rules of Practice provides that “[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views.” 17 CFR 201.700(c)(2).

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 filings also will be available for inspection and copying at the principal office of the Exchanges. 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-2020-93 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Jill M. Peterson,
Assistant Secretary.

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²⁰ 17 CFR 200.30-3(a)(57).