

SECURITIES AND EXCHANGE COMMISSION
(Release No. 92373; File No. SR-NYSE-2020-93)

July 12, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Partial Amendment No. 2 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Partial Amendment No. 2, to Amend NYSE Rules 7.35 and 7.35A

I. Introduction

On November 3, 2020, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange 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 within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁴

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).

On February 12, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁵ to determine whether to approve or disapprove the proposal.⁶ On April 9, 2021, the Exchange filed Amendment No. 1 to the proposed rule change. On May 7, 2021, the Commission extended the time period for approving or disapproving the proposal for an additional 60 days until July 15, 2021.⁷ On May 11, 2021, the Exchange withdrew Partial Amendment No. 1 and filed Partial Amendment No. 2 to the proposal for inclusion in the public comment file.⁸ The Commission has not received comments on the proposed rule change, as modified by Partial Amendment No. 2.

The Commission is publishing this notice to solicit comment on Partial Amendment No. 2 to the proposed rule change from interested persons, and is approving the proposed rule change, as modified by Partial Amendment No. 2, on an accelerated basis.

⁵ 15 U.S.C. 78s(b)(2)(B).

⁶ See Securities Exchange Act Release No. 91121, (Feb. 12, 2021), 86 FR 10386 (Feb. 19, 2021) (“Order Instituting Proceedings”).

⁷ See Securities Exchange Act Release No. 91791 (May 7, 2021), 86 FR 26110 (May 12, 2021).

⁸ In Partial Amendment No. 2, the Exchange proposes to (1) update NYSE Rule 7.35A(g)(1) in Exhibit 5 of the proposal to incorporate the term “Selling Shareholder Direct Floor Listing” to reflect the text of NYSE Rule 7.35A(g)(1) as recently amended, and (2) provide additional background for the proposal in response to the Commission’s request for comment in the Order Instituting Proceedings. See Letter from Martha Redding, Associate General Counsel, NYSE LLC to Secretary, Commission (May 11, 2021). Partial Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nyse-2020-93/srnyse202093-8785691-237727.pdf>.

II. Description of the Proposal, As Modified by Partial Amendment No. 2⁹ and Order Instituting Proceedings

A. Description of the Proposal As Modified by Partial Amendment No. 2

The Exchange proposes to (1) amend NYSE Rule 7.35 to make permanent that the Exchange would disseminate Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction, and (2) amend NYSE Rule 7.35A regarding DMM consultations in connection with an IPO Auction or Direct Listing Auction.¹⁰

NYSE Rule 7.35 - Auction Imbalance Information

The Exchange proposes to make permanent that the Exchange would disseminate Auction Imbalance Information if a security is an IPO or Direct Listing¹¹ and has not had its IPO Auction or Direct Listing Auction.¹² The Exchange states that disseminating Auction Imbalance Information in advance of an IPO Auction or Direct Listing Auction would promote

⁹ See Notice, supra note 3, for a complete description of the proposal as originally filed.

¹⁰ In Partial Amendment No. 2, the Exchange also proposes to update the text to NYSE Rule 7.35A(g)(1) in the Exhibit 5 to correctly reflect the text of that rule as recently amended. See supra note 8 and accompanying text.

¹¹ As used in Exchange Rules, the term “Direct Listing” means a security that is listed under Footnote (E) to Section 102.01B of the Listed Company Manual, which can be either a “Selling Shareholder Direct Floor Listing” or a “Primary Direct Floor Listing.” See NYSE Rule 1.1(f).

¹² See Notice, supra note 3, 85 FR at 73323. Commentaries .01 and .02 to Rule 7.35, currently in effect on a temporary basis through August 31, 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. 91778 (May 5, 2021), 86 FR 25902 (May 11, 2021) (SR-NYSE-2021-29).

transparency in advance of these Auctions, which would benefit investors and other market participants.¹³

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 NYSE Rule 7.35, respectively.¹⁴ Specifically, the Imbalance Reference Price for determining the Auction Imbalance Information for a Core Open Auction under NYSE Rule 7.35A(e)(3) is the Consolidated Last Sale Price, bound by the bid and offer of any published pre-opening indication.¹⁵ Because the 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 NYSE 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 Listing that has not had its Direct Listing Auction, the Consolidated Last Sale Price would mean the Indication Reference Price for such security.¹⁶

NYSE Rule 7.35A - DMM Consultations

The Exchange proposes to amend NYSE Rule 7.35A(g)(1) to provide that a DMM may consult with an underwriter or financial advisor for initial listings or follow-on offerings for the

¹³ See Notice, supra note 3, 85 FR at 73323.

¹⁴ See id.

¹⁵ See Notice, supra note 3, 85 FR at 73323.

¹⁶ See id.

issuer of such security.¹⁷ The Exchange represents that the proposed rule text reflects long-standing practice relating to the type of consultations that a Designated Market Maker (“DMM”) may have with an underwriter or financial advisor.¹⁸ The Exchange further proposes to specify that any such consultations will be conducted by an underwriter or financial advisor relaying information to the DMM via either a Floor broker or Exchange staff.¹⁹ The Exchange represents that, as with current practice, the only consultations that would be required in Exchange rules would be in connection with a Selling Shareholder Direct Floor Listing that has not had recent sustained history of trading in a Private Placement Market prior to listing.²⁰ The Exchange states that it believes that this proposed rule 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.²¹

B. Order Instituting Proceedings

In the Order Instituting Proceedings, the Commission requested comment on, among other things: (1) whether the proposed rule should specify what is a permitted consultation provided for in the proposed amendments to NYSE Rule 7.35A; (2) whether there any types of information that the underwriter or financial advisor should be prohibited from conveying to the DMM in these consultations; (3) whether a DMM should be permitted to communicate directly

¹⁷ See Notice, supra note 3, 85 FR at 73324.

¹⁸ See id.

¹⁹ See id.

²⁰ See id.

²¹ See id.

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; and (4) whether the Exchange's rules should 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.²²

In response to the questions raised in the Order Instituting Proceedings, the Exchange states that there is a long-standing practice on the Trading Floor for DMMs to communicate with underwriters via Floor brokers in connection with IPO Auctions and Core Open Auctions for follow-on offerings.²³ According to the Exchange, this practice is consistent with Exchange rules, which permit Floor brokers to use cellular phones at the point of sale, including to relay market look information off the Trading Floor.²⁴ The Exchange states its belief that this practice also promotes a fair and orderly and transparent auction process because any information that is relayed from the underwriter to the DMM or from the DMM to the underwriter is announced on the Trading Floor, and is thereby available to anyone at the point of sale.²⁵ The Exchange also states that, to the extent the DMM receives information that would affect the opening price, that information would be incorporated into the pre-opening indication published by the DMM, which is disseminated via both proprietary data feeds and the Consolidated Tape. The Exchange

²² See Order Instituting Proceedings, supra note 6, 86 FR at 10387.

²³ See Partial Amendment No. 2, supra note 8, at 7.

²⁴ See id.

²⁵ See id.

states that when the Exchange introduced Direct Listing Auctions, DMMs met their obligation to consult with financial advisors using the same process.²⁶

The Exchange states that the proposal would specify in Exchange rules this long-standing practice with only one proposed difference—specifically, that the Exchange proposes to provide an underwriter or financial advisor the choice to use either a Floor broker or Exchange staff to relay information to and from the DMM.²⁷ The Exchange states that it has been operating in this manner on a temporary basis during the period when there have been reduced DMM and Floor broker staff on the Trading Floor to reduce the spread of COVID-19.²⁸ The Exchange states its belief that if an underwriter or financial advisor chooses to use Exchange staff to relay information, it would still be an open and transparent process, because any information that Exchange staff request of a DMM would be relayed to anyone at the point of sale, and any information that an underwriter or financial advisor provides to Exchange staff would be relayed to the DMM at the point of sale, again, available to anyone else standing in the crowd.²⁹

The Exchange states its belief that it is not necessary for Exchange rules to impose any restrictions on the type of information that is relayed from an underwriter or financial advisor to the DMM and vice versa because, in the Exchange’s view, the manner of such communications makes them available to all Floor brokers that choose to be at the point of sale, and if the communications impact pricing, that information would be incorporated into the pre-opening indication published by the DMM and disseminated via both proprietary data feeds and the

²⁶ See Partial Amendment No. 2, supra note 8, at 7–8.

²⁷ See Partial Amendment No. 2, supra note 8, at 8.

²⁸ See id.

²⁹ See id.

Consolidated Tape.³⁰ The Exchange also states its belief that, because any such communications are available to any Floor brokers at the point of sale, and could be shared with customers of those Floor brokers, Exchange rules do not need to limit the information an underwriter or financial advisor may ask to be relayed to the DMM by a Floor broker or Exchange staff.³¹ The Exchange further states that having a Floor-based intermediary between an underwriter or financial advisor and the DMM ensures an open and transparent process on the Trading Floor, and that, therefore, in the Exchange's view, Exchange rules do not need to be modified at this time to permit direct communications between the DMM and underwriter or financial advisor.³² Finally, the Exchange states that, for similar reasons, the Exchange does not believe that the permissible method of communication needs to be distinguished among an IPO Auction, Direct Listing Auction, or Core Open Auction in connection with a follow-on offering.³³

III. Discussion and Commission Findings

After careful review, the Commission is approving the proposed rule change, as modified by Amendment No. 2, for the reasons discussed below.³⁴ The Commission finds that the proposed rule change, as modified, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, including Section 6(b)(5) of the Exchange Act,³⁵ which requires, among other things, that the rules of a national securities

³⁰ See id.

³¹ See id.

³² See id.

³³ See id.

³⁴ In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁵ 15 U.S.C. 78f(b)(5).

exchange be designed 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to make permanent that the Exchange would disseminate Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction is reasonably designed to promote fair and orderly IPO Auctions and Direct Listing Auctions, because including this information in the Auction Imbalance Information on the same terms that it is disseminated for other Core Open Auctions would promote transparency in advance of an IPO Auction or Direct Listing Auction. The Exchange initially excluded IPOs and Direct Listings from Order Imbalance Information because Exchange systems at the time did not have access to interest represented in the crowd by Floor brokers.³⁶ Since the Exchange transitioned to its Pillar trading platform in August 2019, all Floor broker interest intended for a Core Open Auction, IPO Auction, or Direct Listing Auction must be entered electronically,³⁷ and Exchange systems will include such orders in the Auction Imbalance Information.³⁸ Because Floor broker interest is now entered electronically and can be

³⁶ See Securities Exchange Act Release Nos. 74837 (April 29, 2015), 80 FR 25741 (May 5, 2015) (SR-NYSE-2015-19) (Notice of filing and immediate effectiveness of proposed rule change); and 82627 (Feb. 2, 2018), 83 FR 5650 (Feb. 8, 2018) (SR-NYSE-2017-30) (Approval Order).

³⁷ See Securities Exchange Act Release No. 85962 (May 29, 2019), 84 FR 26188, 26208 at n.73 (June 5, 2019) (SR-NYSE-2019-05) (Approval Order). As part of the transition to Pillar, the Exchange replaced the term “Order Imbalance Information” with “Auction Imbalance Information.”

³⁸ See Notice, supra note 3, 85 FR at 73323.

included in Auction Imbalance Information for all Core Open Auctions, the original rationale for excluding such information has become moot.

The Commission also finds that the proposal to make permanent the ability of an underwriter or financial advisor to convey information to the DMM in connection with initial listings and follow-on offerings via either a Floor broker or Exchange staff is consistent with the Act. Whether an underwriter or financial advisor relays information to the DMM via Exchange staff or a Floor broker, the process would remain open and transparent because all such communications would occur on the Exchange floor in the presence of all persons present in the trading crowd and because, if those communications impact the anticipated pricing of the auction, that information would be incorporated into the pre-opening indication published by the DMM and disseminated via both proprietary data feeds and the Consolidated Tape, which provides additional transparency.³⁹ The Commission, however, reminds market participants that the federal securities laws, including Regulation M and other antifraud and anti-manipulation provisions, will continue to apply and that the proposed amendments to NYSE Rule 7.35A(g)(1) do not modify or provide any relief from—or create an exception to—these provisions of the federal securities laws and regulations, including Regulation M.⁴⁰ Further, reliance on NYSE

³⁹ See id.

⁴⁰ See, e.g., Securities Exchange Act Release No. 90758 (Dec. 22, 2020), 85 FR 85807, 85813 (Dec. 29, 2020) (SR-NYSE-2019-67) (stating, in approving the Exchange’s proposed modification to its direct listing rules, that the Exchange had added language to its rule proposal “reminding financial advisers to an issuer and the DMM that any consultations with the financial advisor must be conducted in a manner consistent with the federal securities laws, including Regulation M and other anti-manipulation requirements,” and further stating that the Exchange had represented that it had retained FINRA to monitor such compliance and that it planned to issue regulatory guidance in this area).

Rule 7.35A(g)(1) or any amendments thereto would not create a safe harbor with respect to violations of Regulation M.

The proposed change to NYSE Rule 7.35A(g)(1) is reasonably designed to protect investors and the public interest and provide greater clarity and transparency in Exchange rules by codifying the current practice for DMM consultations with the underwriter or financial advisor of an issuer of a security in connection with initial listings and follow-on offerings. The Exchange represents that this proposed rule change would not result in any changes to how a DMM would determine the Auction Price for Core Open Auctions under NYSE Rule 7.35A(g).⁴¹

For the reasons discussed above, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and in particular Section 6(b)(5) because it is reasonably 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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

IV. Solicitation of Comments on Partial Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Partial Amendment No. 2 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

⁴¹ See Notice, supra note 3, 85 FR at 73325.

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 Number SR-NYSE-2020-93. 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 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 the filing also will be available for inspection and copying at the principal office of the Exchange and on the Exchange's website <https://www.nyse.com/regulation/rule-filings?market=NYSE>. 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].

V. Accelerated Approval of the Proposed Rule Change, as Modified as Partial Amendment No. 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁴² to approve the proposed rule change, as modified by Partial Amendment No. 2, prior to the 30th day after the date of publication of Partial Amendment No. 2 in the Federal Register. As noted above, Partial Amendment No. 2 does not amend the substance of the proposal as initially filed but instead corrects reference in the rule text in the Exhibit 5 and provides additional background on the proposal. Because Partial Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, the Commission finds that accelerated approval of Partial Amendment No. 2 is consistent with the Act.

For the reasons discussed above, the Commission finds that Partial Amendment No. 2 is reasonably designed to protect investors and the public interest, and consistent with the requirements of the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁴³ to approve the proposed rule change, as modified by Partial Amendment No. 2, on an accelerated basis.

⁴² 15 U.S.C. 78s(b)(2).

⁴³ 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,⁴⁴ that the proposed rule change (SR-NYSE-2020-93), as modified by Partial Amendment No. 2, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

J. Matthew DeLesDernier
Assistant Secretary

⁴⁴ 15 U.S.C. 78s(b)(2).

⁴⁵ 17 CFR 200.30-3(a)(12).