

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91227; File No. SR-NYSE-2020-95)

March 1, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and Make Related Changes to Rules 7.32, 7.35C, 46B, and 47

I. Introduction

On November 13, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to make permanent Commentaries .01(a) and (b) and .06 to Rule 7.35A (DMM-Facilitated Core Open and Trading Halt Auctions) and Commentaries .01 and .03 to Rule 7.35B (DMM-Facilitated Closing Auctions) and to make related changes to Rules 7.32 (Order Entry), 7.35C (Exchange-Facilitated Closing Auctions), 46B (Regulatory Trading Official), and 47 (Floor Officials - Unusual Situations). The proposed rule change was published for comment in the Federal Register on December 1, 2020.<sup>3</sup>

On January 13, 2021, the Commission extended to March 1, 2021, the time period in which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to approve or disapprove the proposal.<sup>4</sup> The Commission has received no comments on

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 90495 (Nov. 24, 2020), 85 FR 77304 (Dec. 1, 2020) (SR-NYSE-2020-95) (“Notice”).

<sup>4</sup> See Securities Exchange Act Release No. 90917 (Jan. 13, 2021), 86 FR 6403 (Jan. 21, 2020).

the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

## II. Description of the Proposal

### Proposed Changes to Parameters for DMM-Facilitated Electronic Auctions

The Exchange proposes to make permanent the parameters for DMM-facilitated electronic auctions that are currently in effect on a temporary basis during the Covid-19 pandemic, as set forth in Commentaries .01(a) and (b) to Rule 7.35A and Commentary .01 to Rule 7.35B.<sup>5</sup>

Current Rules 7.35A(c)(1)(G) and (H) provide that a DMM may not effect a Core Open or Trading Halt Auction electronically if (i) the Auction Price will be more than 4% away from the Consolidated Last Sale Price,<sup>6</sup> or (ii) the paired volume for the Auction will be more than 1,500 round lots for securities with an average opening volume of 1,000 round lots or fewer in the previous calendar quarter, or 5,000 round lots for securities with an average opening volume of over 1,000 round lots in the previous calendar quarter. Rule 7.35A(c)(2) further provides that if, as of 9:00 a.m., the E-mini S&P 500 Futures are +/- 2% from the prior day's closing price of the E-mini S&P 500 Futures, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market, a DMM may effect an opening or reopening electronically if the Auction Price will be up to 8% away from Consolidated Last Sale Price, without any volume limitations.<sup>7</sup>

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<sup>5</sup> See Notice, supra note 3, at 77305.

<sup>6</sup> The term "Consolidated Last Sale Price" is defined in Rule 7.35 to mean the most recent consolidated last-sale eligible trade in a security on any market during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

<sup>7</sup> See Notice, supra note 3, at 77305.

Current Rule 7.35B(c)(1)(G) and (H) provide that a DMM may not effect a Closing Auction electronically if (i) the Auction Price will be more than a designated percentage away from the Exchange Last Sale Price, or (ii) the paired volume for the Closing Auction will be more than 1,000 round lots for such security.<sup>8</sup>

The Exchange proposes to make the price percentage parameter 10% and eliminate the volume restrictions for all DMM-facilitated Auctions. These parameters are currently in effect on a temporary basis pursuant to Commentaries .01(a) and (b) to Rule 7.35A and Commentary .01 to Rule 7.35B.<sup>9</sup>

#### Proposed Changes to Applicable Price Range for Pre-Opening Indications

The Exchange proposes to make permanent that the Applicable Price Range for determining whether to publish a pre-opening indication would be 10% for securities with an Indication Reference Price higher than \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00, which are currently in effect on a temporary basis during the Covid-19 pandemic, as set forth in Commentary .06 to Rule 7.35A.<sup>10</sup>

Rule 7.35A(d)(1)(A) currently provides that a DMM will publish a pre-opening indication before a security opens or reopens if the Core Open or Trading Halt Auction is anticipated to be a change of more than the “Applicable Price Range,” as specified in Rule 7.35A(d)(3), from a specified “Indication Reference Price,” as specified in Rule 7.35A(d)(2).<sup>11</sup>

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<sup>8</sup> See id.

<sup>9</sup> See Notice, supra note 3, at 77305-77306.

<sup>10</sup> See Notice, supra note 3, at 77307.

<sup>11</sup> See id.

Rule 7.35A(d)(3)(A) provides that the Applicable Price Range will be 5% for securities with an Indication Reference Price over \$3.00 and \$0.15 for securities with an Indication Reference Price equal to or lower than \$3.00. Rule 7.35A(d)(3)(B) further provides that, if as of 9:00 a.m., the E-mini S&P 500 Futures are +/- 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 7.12, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and order market, the Applicable Price Range for determining whether to publish a pre-opening indication will be 10% for securities with an Indication Reference Price over \$3.00 and \$0.30 for securities with an Indication Reference Price equal to or lower than \$3.00.<sup>12</sup>

Current Rule 7.35A(1)(A) further provides that a DMM may not effect a Core Open or Trading Halt Auction electronically if a pre-opening indication has been published for the Core Open Auction. The Exchange notes that if a DMM chooses to facilitate a Core Open Auction or Trading Halt Auction manually (i.e., if there is less than a 10% price movement), a DMM could still choose to publish a pre-opening indication in connection with such Auction, even if the Applicable Price Range has not been triggered.<sup>13</sup>

#### Proposed Changes to Floor Broker Interest for the Closing Auction

The Exchange proposes to make permanent that Floor Broker Interest would not be eligible to participate in the Closing Auction, as set forth in Commentary .03 to Rule 7.35B. The term "Floor Broker Interest" is defined in Rule 7.35(a)(9) to mean orders represented orally by a Floor broker at the point of sale.<sup>14</sup>

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<sup>12</sup> See id.

<sup>13</sup> See id.

<sup>14</sup> See id.

Rule 7.35B(a)(1) currently provides that Floor Broker Interest is eligible to participate in the Closing Auction provided that the Floor broker has electronically entered such interest before the Auction Processing Period for the Closing Auction begins. The Rule further provides that for such interest to be eligible to participate in the Closing Auction, a Floor broker must first, by the end of, but not after, Core Trading Hours, orally represent Floor Broker Interest at the point of sale, including symbol, side, size, and limit price, and then second, electronically enter such interest after the end of Core Trading Hours. Current Rules 7.35B(a)(1)(B) and (C) set forth additional requirements relating to electronic acceptance of such interest by the DMM and circumstances when such interest can be cancelled.<sup>15</sup>

To effect this change, the Exchange proposes to amend Rule 7.35B(a)(1) to provide that Floor Broker Interest would not be eligible to participate in the Closing Auction. The Exchange further proposes to provide that Floor brokers must enter any orders for the Closing Auction, as defined in Rule 7.31, electronically during Core Trading Hours. The Exchange states that the cross-reference to Rule 7.31 in the Rule would provide notice to Floor brokers and their customers of which order types are available for electronic entry by Floor brokers for the Closing Auction, which include both Auction-Only Orders described in Rule 7.31(c) and other orders that may be resting on the Exchange Book that are eligible to participate in the Closing Auction. The Exchange also proposes to delete Commentary .03 to Rule 7.35B.<sup>16</sup>

The Exchange proposes to make related changes by deleting the clause “and Floor Broker Interest intended for the Closing Auction as defined in Rule 7.35B(a)(1)” from Rule 7.32. Similarly, the Exchange proposes to delete the text set forth in Rule 7.35C(a)(2) relating to Floor

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<sup>15</sup> See Notice, supra note 3, at 77307-77308.

<sup>16</sup> See Notice, supra note 3, at 77308.

Broker Interest that provides that “Floor Broker Interest that has been electronically accepted by the DMM and that has not been cancelled as provided for in Rule 7.35B(a)(1)(C) will be eligible to participate in an Exchange-facilitated Closing Auction.”<sup>17</sup>

In addition, the Exchange proposes to delete Rule 46B and amend Rule 47(b). Under Rule 47, Floor Officials have the authority to “supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor.” The Exchange recently amended its rules to add Regulatory Trading Officials (“RTO”), which are defined in Rule 46B.<sup>18</sup> The Exchange amended Rule 47 to add subparagraph (b), which provides that RTOs, instead of Floor Officials, would be responsible for supervising and regulating situations regarding whether a verbal bid or verbal offer is eligible for inclusion in the Closing Auction by the DMM.<sup>19</sup>

In connection with eliminating verbal bids or verbal offers for the Closing Auction, the Exchange proposes to delete the last clause of Rule 47(a) and subparagraph (b) to Rule 47.<sup>20</sup> According to the Exchange, as proposed, Rule 47 would revert to the rule text in effect prior to the RTO Approval Order and would provide that “Floor Officials shall have power to supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor.” According to the Exchange, with this proposed

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<sup>17</sup> See id.

<sup>18</sup> See Securities Exchange Act Release No. 88765 (April 29, 2020), 85 FR 26771 (May 5, 2020) (SR-NYSE-2020-03) (“RTO Approval Order”).

<sup>19</sup> See id.

<sup>20</sup> RTOs were approved when the Trading Floor was temporarily closed. Id. Because Commentary .03 to Rule 7.35B was implemented when DMMs returned to the Trading Floor, there has not been any Floor Broker Interest for Closing Auctions since RTOs were created and therefore RTOs have not had to perform the functions as described in Rule 46(b).

change, RTOs would no longer have a role under Exchange rules, and it therefore proposes to delete Rule 46B.<sup>21</sup>

The Exchange also proposes to delete Commentary .02 to Rule 7.35B. According to the Exchange, this Commentary is obsolete because it has not been in effect since May 22, 2020.

### III. Proceedings to Determine Whether to Disapprove SR-NYSE-2020-95 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>22</sup> 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 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,<sup>23</sup> 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

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<sup>21</sup> See id.

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

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 Rules 7.35A and 7.35B to widen the price parameters to 10% for DMM-facilitated electronic Core Open, Trading Halt, and Closing Auctions. Accordingly, the Commission seeks public comment on the proposed price parameters for DMM-facilitated electronic auctions. Specifically, the Commission seeks public comment on the following topics:

1. The NYSE proposal for Trading Halt Auctions facilitated electronically by DMMs would differ from other primary listing markets' reopening processes after limit-up/limit-down (LULD) pauses and market-wide circuit breaker (MWCB) halts in that it would permit a fully automated reopening of trading at prices up to 10% away from the auction reference price immediately after a trading pauses or halts, whereas Nasdaq, NYSE Arca, and Cboe BZX establish 5% price bands for reopening and then widen those price bands in increments of 5%, with additional auction extension messages associated with each widening, until market interest can be satisfied. Should the primary listing exchanges harmonize their respective processes for reopening trading by fully automated auction after an LULD pause or a Level 1 or Level 2 MWCB halt, and if so, why? If so, which aspects of the reopening processes following LULD pauses and MWCB halts should be harmonized (e.g., period of auction order entry, type of auction information disseminated, length of dissemination period, frequency of dissemination, auction reference price, determination of auction match price, width of permitted price bands, or expansions of permitted price bands) and what are the appropriate parameters? Should NYSE further harmonize its proposed Trading Halt Auction process for fully automated auctions facilitated electronically by DMMs to align with Nasdaq,



NYSE Arca, and Cboe BZX regarding the establishment of permitted price bands, and/or the limit (or lack thereof) on price band adjustments?

2. Is it appropriate for the Exchange to permit a DMM to reopen a security up to 10% away from the reference price immediately after an LULD pause or MWCB halt without human intervention? Are there any specific data, statistics, or studies to support the Exchange's proposed price parameters within which a DMM can electronically facilitate a Trading Halt Auction?

3. Are there characteristics of the NYSE market structure that warrant divergence from the price parameters in place for other exchanges' fully automated reopening auctions immediately following an LULD pause or MWCB halt? For example, does the nature of DMM participation in a Trading Halt Auction, whether the DMM participates manually or electronically, justify the ability of the NYSE to conduct a fully automated reopening auction 10% away from the reference price immediately after an LULD pause or MWCB halt, rather than 5% away, as at other primary listing exchanges?

4. Should the price parameters within which DMMs are permitted to electronically facilitate auctions be the same for Core Open Auctions, Trading Halt Auctions, and Closing Auctions?

#### 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)<sup>24</sup>

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<sup>24</sup> 15 U.S.C. 78f(b)(5).

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 by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>25</sup> any request for an opportunity to make an oral presentation.<sup>26</sup>

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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2020-95 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-2020-95. 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

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<sup>25</sup> 17 CFR 240.19b-4.

<sup>26</sup> 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).

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 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-2020-95 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.<sup>27</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>27</sup> 17 CFR 200.30–3(a)(57).