

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34 – 57251; File No. SR-NYSE-2007-62)

February 1, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes to NYSE Rules 104 (Dealings by Specialists); 111 (Reports of Executions); 123A (Miscellaneous Reports); 123C (Market on the Close Policy and Expiration Procedures); 421(Periodic Reports); 440B (Short Sales); 440C (Short Sale Borrowing and Delivery Requirements); 440F (Public Short Sale Transactions Effected on the Exchange); 440G (Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations); 902 (Off-Hours Trading Orders); 1000 (Automatic Execution of Limit Orders Against Orders Reflected in NYSE Published Quotation); and 1003 (Application of Tick Tests) Relating to Recent Amendments to Rule 10a-1 and Regulation SHO

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4<sup>3</sup> thereunder, notice is hereby given that on July 6, 2007, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), and on December 5, 2007 amended, the proposed rule change as described in Items I and II below, which items have been substantially prepared by the Exchange. The Exchange filed the proposals as “non-controversial” rule changes under Rule 19b-4(f)(6)<sup>4</sup> under the Act, which rendered the proposals effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

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

<sup>2</sup> 15 U.S.C. 78a et seq.

<sup>3</sup> 17 CFR 240.19b-4.

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

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to make conforming amendments to certain of its rules in light of recent changes to short sale provisions in Rule 10a-1<sup>5</sup> of the Act and Regulation SHO.<sup>6</sup> The rules the Exchange proposes to amend are the following: Rule 104 (Dealings by Specialists); Rule 111 (Reports of Executions); Rule 123A (Miscellaneous Reports); Rule 123C (Market on the Close Policy and Expiration Procedures); Rule 421(Periodic Reports); Rule 440B (Short Sales); Rule 440C (Short Sale Borrowing and Delivery Requirements); Rule 440F (Public Short Sale Transactions Effected on the Exchange); Rule 440G (Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations); Rule 902 (Off-Hours Trading Orders); Rule 1000 (Automatic Execution of Limit Orders Against Orders Reflected in NYSE Published Quotation); and Rule 1003 (Application of Tick Tests).

The text of the proposed rule change is available at the Exchange, on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), and in 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared

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<sup>5</sup> 17 CFR 240.10a-1.

<sup>6</sup> 17 CFR 242.200-203.

summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On June 28, 2007, the Commission approved final rules eliminating the price test of Rule 10a-1 and amending Regulation SHO (“Adopting Release”).<sup>7</sup> The amendments prohibit any self-regulatory organization (“SRO”) from having a price test and remove the “short exempt” marking requirement of Rule 200(g). The compliance date for these changes was July 6, 2007.

Accordingly, NYSE is proposing conforming amendments to the following rules: Rule 104 (Dealings by Specialists); Rule 111 (Reports of Executions); Rule 123A (Miscellaneous Reports); Rule 123C (Market on the Close Policy and Expiration Procedures); Rule 421(Periodic Reports); Rule 440B (Short Sales); Rule 440C (Short Sale Borrowing and Delivery Requirements); Rule 440F (Public Short Sale Transactions Effected on the Exchange); Rule 440G (Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations); Rule 902 (Off-Hours Trading Orders); Rule 1000 (Automatic Execution of Limit Orders Against Orders Reflected in NYSE Published Quotation); and Rule 1003 (Application of Tick Tests).

Background

Rule 10a-1 was adopted by the Commission as a means to restrict short selling in

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<sup>7</sup> See Securities Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007) (“Adopting Release”).

a declining market.<sup>8</sup> Rule 10a-1(a) covered short sales in listed securities, or admitted to unlisted securities trading privileges on a national securities exchange, if trades of the security were reported pursuant to an “effective transaction reporting plan” and information regarding such trades was made available in accordance with such plan on a real-time basis to vendors of market transaction information.<sup>9</sup> Rule 10a-1(a)(1) provided that, subject to certain exceptions, a listed security could be sold short either at a price above the price at which the immediately preceding sale was effected (plus tick), or at the last sale price if such price was higher than the last different price (zero-plus tick).<sup>10</sup> This requirement was commonly described as the “tick test.”

The Commission periodically added exceptions to Rule 10a-1 and granted numerous written requests for relief from the provisions of Rule 10a-1.<sup>11</sup> Requests for exemptive relief increased considerably over time in response to significant developments in the securities markets, such as the increased use of matching systems

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<sup>8</sup> See Securities Exchange Act Release No. 1548 (Jan. 24, 1938), 3 FR 213 (Jan. 26, 1938).

<sup>9</sup> Rule 10a-1 used the term "effective transaction reporting plan" as defined in Rule 600 of Regulation NMS (17 CFR 242.600) under the Exchange Act. See 17 CFR 240.10a-1(a)(1)(i).

<sup>10</sup> The last sale price was the price reported pursuant to an effective transaction reporting plan, *i.e.*, the consolidated tape, or to the last sale price reported in a particular marketplace. Under Rule 10a-1, the Commission gave market centers the choice of measuring the tick of the last trade based on executions solely on their own exchange rather than those reported to the consolidated tape. See 17 CFR 240.10a-1(a)(2).

<sup>11</sup> See Securities Exchange Act Release No. 54891 (December 7, 2006), 71 FR 75071-75072 (December 13, 2006) (“Proposing Release”) (discussing exceptions to Rule 10a-1 added by the Commission and relief granted by the Commission from the rule’s restrictions in recent years).

that execute trades at independently derived prices during random times within specific time intervals and the spread of fully automated markets. Decimal pricing increments substantially reduced the difficulty of short selling on an uptick. In addition, under the then-effective short sale regulatory regime, different price tests applied to different securities trading in different markets and applied generally only to large or more actively-traded securities.

In 2004, the Commission adopted Regulation SHO to update short sale regulation in light of numerous market developments since short sale regulation was first adopted in 1938.<sup>12</sup> Rule 202T of Regulation SHO<sup>13</sup> established procedures for the Commission to temporarily suspend price tests so that the Commission could study their utility and effectiveness in connection with short sales. Under the authority of Rule 202T, in July 2004, the Commission issued an order to establish a pilot program (“Pilot”) for one-year to temporarily suspend the provisions of Rule 10a-1(a) and any price test of any exchange or national securities association for short sales of certain securities.<sup>14</sup> The Pilot was designed to assist the Commission in assessing whether changes to current short sale regulation were necessary in light of current market practices. The Commission was interested in the extent to which price tests were necessary to further the objectives of short sale regulation.<sup>15</sup>

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<sup>12</sup> See Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48012-48013 (Aug. 6, 2004) (“Regulation SHO Adopting Release”).

<sup>13</sup> 17 CFR 242.202T.

<sup>14</sup> See Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (Aug. 6, 2004).

<sup>15</sup> See id. See also Adopting Release, 69 FR at 48009.

The Pilot commenced on May 2, 2005 and terminated on April 28, 2006.<sup>16</sup> The Commission collected and analyzed the data from the Pilot to determine whether the short sale rules should be amended. Generally, the Pilot results supported removal of price test restrictions.<sup>17</sup>

Accordingly, in December 2006, the Commission, based on a careful study of the Pilot results and the status of price test restrictions, proposed amendments to remove the price test of Rule 10a-1 and add Rule 201 of Regulation SHO to provide that no price test, including any price test of any SRO, shall apply to short sales in any security.<sup>18</sup> The Commission also proposed to amend Rule 200(g) of Regulation SHO to remove the requirement that a broker-dealer mark a sell order of an equity security as “short exempt” if the seller was relying on an exception from a price test. The purpose of the amendments was to modernize and simplify short sale regulation and to provide greater regulatory consistency by removing restrictions where they no longer appeared necessary or effective.<sup>19</sup> The proposed amendments were adopted on June 28, 2007 and became effective upon publication in the Federal Register<sup>20</sup> on July 3, 2007. They had a July 6, 2007 compliance date.

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<sup>16</sup> See Securities Exchange Act Release No. 50747 (Nov. 29, 2004), 69 FR 70480 (Dec. 6, 2004). See also NYSE Information Memos 04-64 (Dec. 22, 2004) and 05-30 (April 27, 2005), which explain the establishment of the second Pilot Order.

<sup>17</sup> See Proposing Release.

<sup>18</sup> See Proposing Release.

<sup>19</sup> See Adopting Release

<sup>20</sup> See Adopting Release.

The Adopting Release removed Rule 10a-1 and added Rule 201 of Regulation SHO to provide that no price test, including any price test by any SRO, shall apply to short selling in any security. Additionally, Rule 200 of Regulation SHO previously required broker-dealers to mark sales in all equity securities “long,” “short,” or “short exempt.” Under the Rule, an order could be marked “short exempt” if the seller was entitled to rely on any exception from the tick test, under Rule 10a-1 or any SRO price test. The amendments modified Rule 200(g) of Regulation SHO to remove the requirement that a broker-dealer mark a sell order of an equity security as “short exempt” if the seller is relying on an exception from the price test of Rule 10a-1, or any price test of any exchange or national securities association, to reflect the rescission of the price test requirements.<sup>21</sup>

The Exchange notes the Adopting Release statement that “although the current price test restrictions are being removed, today’s markets are characterized by high levels of transparency and regulatory surveillance. These characteristics greatly reduce the risk of undetected manipulation and permit regulators to monitor for the types of activities that current price test restrictions are designed to prevent.” The Commission also noted that “the general anti-fraud and anti-manipulation provisions of the federal securities laws continue to prohibit activity designed to improperly influence the price of a security.”<sup>22</sup>

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<sup>21</sup> See Adopting Release.

<sup>22</sup> Adopting Release, 69 FR at 48013. See also, e.g., Section 17(a) of Securities Act of 1933, Sections 9(a), 10(b), and 15(c) of Exchange Act, and Rule 10b-5 thereunder.

### Proposed NYSE Amendments

The NYSE is proposing amendments to certain of its rules to conform to the Commission's amendments to Rule 10a-1 and Regulation SHO. Specifically, the Exchange is proposing amendments to remove short sale price test provisions, references to Rule 10a-1 and references to the "short exempt" marking requirement to update its rules in light of the amendments.

### NYSE Rule 440B (Short Sales)

NYSE Rule 440B incorporates by reference Exchange Act Rule 10a-1 and Rules 200 and 203 of Regulation SHO. Rule 440B also includes an Explanatory Note, which generally describes changes to short sale regulation and implementation dates. Specifically, the Explanatory Note incorporates and explains the tick test under Rule 10a-1. In addition, the Explanatory Note incorporates the Pilot order, issued under Regulation SHO by the SEC, which suspended the NYSE tick test and any SRO price test for designated securities.

The proposed amendments to Rule 440B would delete the Explanatory Note as such information is no longer accurate as a result of the above-mentioned expiration of Rule 202T and the Commission's amendments rescinding Rule 10a-1 and prohibiting any SRO price tests on short sales.

Current Rule 440B(a) provides restrictions on certain short sales pursuant to Rule 10a-1. Current Rule 440B(c) suspends subsection (a) for such time and as to such securities as are designated under the Pilot. Additionally, Rule 440B(b) currently restricts a short sale by a specialist in which such specialist is registered for his own account or any other person in reliance upon the exemption provided under Rule 10a-1(e)(5). The

Exchange is proposing to delete sections (a) - (c) of Rule 440B to reflect the rescission of Rule 10a-1.

Current Rule 440B.10 generally explains Rule 10a-1 and sets forth the application of Rule 440B in connection with Rule 10a-1 and Regulation SHO. The Exchange is proposing to delete all references to Rule 10a-1 and its requirements in this provision. The Exchange is also proposing to amend Rule 440B.11 to delete any reference to Rule 10a-1 and to delete Rule 440B.12 which sets forth the place of transaction requirements in connection with Rule 10a-1. The Exchange also proposes to delete Rule 440B.15 as it describes prices at which short sales are to be made in accordance with Rule 10a-1.

Further, the Exchange proposes to amend Rule 440B.13 to delete references to the “short exempt” marking requirement, and to delete Rule 440B.20, which sets forth such marking requirement, in its entirety, as the “short exempt” marking requirement has been removed by the Commission. The Supplementary Material of Rule 440B will be renumbered to reflect the proposed amendments.

#### Rule 440C (Short Sale Borrowing and Delivery Requirements)

NYSE Rule 440C governs borrowing and deliveries against short sales by incorporating by reference the requirements of Rule 203 of Regulation SHO and Exchange Act Rule 10a-1. The Exchange is proposing to delete reference in Rule 440C to Rule 10a-1.

#### Rule 421 (Periodic Reports)

NYSE Rule 421 requires that member organizations submit to the Exchange periodic reports with respect to short positions in securities, covering such time period as may be designated by the Exchange. Also, Rule 421.10 provides that short

positions to be reported exclude positions resulting from certain provisions of Rule 10a-1(e).

The proposed amendment to Rule 421.10 would delete reference to Rule 10a-1(e)(1), (6), (7), (8) and (10) based on the rescission of Rule 10a-1, and add the language from these specific provisions to the rule text. Although the tick test is being eliminated, the substance of these provisions will be maintained as it is appropriate to retain an exception to the short sale interest reporting requirements. Thus, Rule 421 will continue to provide the same exception as previously provided by Rule 10a-1(e)(1), (6), (7), (8), and (10) to the short sale reporting requirements.

#### Other Rules

The proposed amendment to NYSE Rules 104, 111, 123A, 123C and 1000 would delete all references to Rule 10a-1 and short sale tick tests. The amendments would delete NYSE Rule 1003 in its entirety as it relates solely to tick tests. Further, the proposed amendments would delete references to the “short exempt” marking requirement in current NYSE Rules 440F, 440G and 902.

#### 2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5)<sup>23</sup> of the Act which requires, among other things, that the rules of an Exchange are 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 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

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

market and national market system, and in general, to protect investors and the public interest. The proposed amendment will serve these interests by conforming the subject NYSE rules of this filing with the Commission's recent amendments to provisions governing short sales.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change does not: (A) significantly affect the protection of investors or the public interest; (B) impose any significant burden on competition; and (C) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A)<sup>24</sup> of the Act and Rule 19b-4(f)(6)<sup>25</sup> thereunder.

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>25</sup> 17 CFR 240.19b-4(f)(6).

The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement<sup>26</sup> and the 30-day operative delay<sup>27</sup> of the proposed rule change. The Commission believes that such waiver is consistent with the protection of investors and the public interest<sup>28</sup> given that the compliance date for the Commission's amendments to Rule 10a-1 was July 6, 2007.<sup>29</sup> For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate 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.

#### 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

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<sup>26</sup> See 17 CFR 240.19b-4(f)(6)(iii), which requires that a self-regulatory organization submit to the Commission written notice of its intent to file a 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.

<sup>27</sup> See 17 CFR 240.19b-4(f)(6)(iii).

<sup>28</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>29</sup> See Adopting Release.

- Send an e mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2007-62 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-NYSE-2007-62. 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 Web site <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 inspection and copying 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. to 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File number SR-NYSE-2007-62 and should be submitted by  
[insert date 21 days from date of publication].

For the Commission, by the Division of Trading and Markets, pursuant to  
delegated authority.<sup>30</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>30</sup> 17 CFR 200.30-3(a)(12).