

## 2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, the rules of an exchange to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) of the Act<sup>18</sup> in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it implements rules adopted by the Commission in Regulation SHO under the Act.

### 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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and Rule 19b-4(f)(6)<sup>20</sup> thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>21</sup> normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>22</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. BX has requested that the Commission waive

the 30-day operative delay so that it may implement the change no later than February 28, 2011 to coincide with the compliance date for the amendments to Rules 200(g) and 201 of Regulation SHO. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposed rule change, among other things, implements the amendments to Rules 200(g) and 201 of Regulation SHO which have a February 28, 2011 compliance date.<sup>23</sup> For this reason, the Commission designates the proposed rule change to be operative upon filing with the Commission.<sup>24</sup>

At any time within 60 days of the filing of the 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 Commission shall institute proceedings to determine whether the proposed rule 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-BX-2011-010 on the subject line.

### Paper Comment

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2011-010. 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

<sup>23</sup> See *supra* note 5.

<sup>24</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 Web site 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 a.m. and 3 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; 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-BX-2011-010 and should be submitted on or before March 25, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

Cathy H. Ahn,  
Deputy Secretary.

[FR Doc. 2011-4893 Filed 3-3-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63977; File No. SR-NYSE-2011-05]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Rule 440B (Short Sales) in Order To Implement the Provisions of Rule 201 of Regulation SHO Under the Securities Exchange Act of 1934

February 25, 2011.

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 24, 2011, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the

<sup>25</sup> 17 CFR 200.30-3(a)(12).

<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.

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> 15 U.S.C. 78k-1(a)(1).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 satisfied this requirement.

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> *Id.*

proposed rule change as described in Items I and II below, which Items have been substantially 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 its Rule 440B (Short Sales) in order to implement the provisions of Rule 201 of Regulation SHO ("Rule 201")<sup>4</sup> under the Act which, if triggered, imposes a restriction on the prices at which securities may be sold short ("Short Sale Price Test"). Among other things, Rule 201 requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of a covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. The proposed rule amendment would establish procedures for the Exchange, as a listing market, to determine that a Short Sale Price Test has been triggered for a covered security. The proposed rule amendment would also establish the protocols for the handling of short sale orders by the Exchange, as a trading center, in the event the Short Sale Price Test is triggered, including establishing what types of short sale orders will be re-priced to achieve a permitted price, in accordance with Rule 201, during the period in which a Short Sale Price Test is in effect ("Short Sale Period").<sup>5</sup> Amended Rule 440B would also establish the Exchange's procedures regarding the execution and display of permissible orders during the Short Sale Period, and the execution of orders marked "short exempt." Further, the proposed rule amendment would establish the Exchange's procedures regarding the permissible execution price of short sale orders in single-priced opening, re-opening and closing transactions. The proposed rule amendment would also make minor technical changes to the Supplementary Material to Rule 440B.<sup>6</sup> Finally, the

proposed rule amendment would also establish Exchange procedures for addressing situations where the Exchange determines that the Short Sale Price Test for a covered security was triggered by a "clearly erroneous" execution as that term is defined in NYSE Rule 128.<sup>7</sup>

The Exchange also proposes to amend its Rule 900 (Off-Hours Trading: Applicability and Definitions) to apply Rule 440B (including the short sale price test restrictions of Rule 201) to transactions in the Off-Hours Trading Facility (by deleting the current exclusion for Rule 440B). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

### **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 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**

On February 26, 2010, the Commission adopted amendments to Rule 201.<sup>8</sup> Among other things, the amendments establish a short sale-related circuit breaker that, if triggered with respect to a covered security,<sup>9</sup>

.12). The remaining provisions in Supplementary Material are not proposed to be modified and will remain in effect.

<sup>7</sup> See *infra* note 23 and accompanying text regarding "clearly erroneous" trades and proposed Rule 440B(d)(1). The proposed rule amendment would establish the duration of the Short Sale Price Test. See *infra* note 22 and accompanying text. In addition, the proposed rule amendment would provide for an Exchange determination that a Short Sale Price Test has been triggered for covered securities for which the Exchange is the listing market. See *infra* notes 21–22 and accompanying text.

<sup>8</sup> Amendments to Regulation SHO, Securities Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010) ("Rule 201 Adopting Release"). In the Rule 201 Adopting Release, the Commission also adopted amendments to Rule 200(g) of Regulation SHO to include a "short exempt" marking requirement. 17 CFR 242.200(g).

<sup>9</sup> The term "covered security" shall have the same meaning as in Rule 201 of Regulation SHO. Rule

imposes a Short Sale Price Test.<sup>10</sup> Amended Rule 201 became effective on May 10, 2010 and the compliance date for the Rule is February 28, 2011.<sup>11</sup>

Rule 201(b) requires that trading centers,<sup>12</sup> including the NYSE, establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid<sup>13</sup> if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market<sup>14</sup> for the covered security as of the end of regular trading hours on the prior day ("Trigger Price").<sup>15</sup> In addition, Rule 201(b) requires that trading centers establish, maintain, and enforce written policies and procedures reasonably designed to impose the Short Sale Price Test for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.<sup>16</sup>

201(a)(1) defines the term "covered security" to mean any "NMS stock" as defined under Rule 600(b)(47) of Regulation NMS. Rule 600(b)(47) of Regulation NMS defines an "NMS stock" as "any NMS security other than an option." Rule 600(b)(46) of Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options." 17 CFR 242.201(a)(1); 17 CFR 242.600(b)(47); and 17 CFR 242.600(b)(46).

<sup>10</sup> 17 CFR 242.201(b).

<sup>11</sup> Rule 201 Adopting Release, 75 FR 11232. The Rule 201 compliance date, originally set for November 10, 2010, was extended to February 28, 2011 in Securities Exchange Act Release No. 63247 (Nov. 4, 2010), 75 FR 68702 (Nov. 9, 2010). The May 10th effective date and February 28th compliance date also apply to amended Rule 200(g).

<sup>12</sup> Rule 201(a)(9) states that the term "trading center" shall have the same meaning as in Rule 600(b)(78) of Regulation NMS. Rule 600(b)(78) defines a "trading center" as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent." 17 CFR 242.600(b)(78).

<sup>13</sup> The term "national best bid" shall have the same meaning as in Rule 201 of Regulation SHO. Rule 201(a)(4) states that such term shall have the same meaning as in Rule 600(b)(42) of Regulation NMS. 17 CFR 242.201(a)(4); 17 CFR 242.600(b)(42).

<sup>14</sup> The term "listing market" shall have the same meaning as in Rule 201 of Regulation SHO. Rule 201(a)(3) defines the term "listing market" to have the same meaning as the term "listing market" as defined in the effective transaction reporting plan for the covered security. 17 CFR 242.201(a)(3). See also 17 CFR 242.201(a)(2).

<sup>15</sup> 17 CFR 242.201(b)(1)(i).

<sup>16</sup> 17 CFR 242.201(b)(1)(ii). In addition, if the price of a covered security declines intra-day by at

<sup>4</sup> 17 CFR 242.201.

<sup>5</sup> See notes 24–26 *infra* and accompanying text.

<sup>6</sup> Supplementary Material to Rule 440B is proposed to be amended to (a) delete an incorrect reference to Rule 440B(c) (in .11) and (b) to permit orders to be marked "short exempt" in accordance with Rules 200(g)(2) and 201 of Regulation SHO (in

In the Rule 201 Adopting Release, the Commission stated that it was appropriate to adopt a short sale-related circuit breaker because, when triggered, it will prevent short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline, and will facilitate the ability of long sellers to sell first upon such a decline.<sup>17</sup> The Commission further stated that this approach establishes a narrowly-tailored Rule that strikes an appropriate balance between its goal of preventing potential short sale abuses and the need to limit impediments to the normal operations of the market,<sup>18</sup> and as such, the Rule will help address the erosion of investor confidence in markets generally.<sup>19</sup> For these reasons, the Exchange seeks to amend its short sale rule to comply with the Commission's amendment of Rule 201.

Paragraph (b) of the proposed rule makes clear that, in compliance with Rule 201, in the event a covered security experiences a decrease in price of 10% or more, as determined by the listing market for the security, from the security's closing price on the listing market as of the end of regular trading hours on the prior day, except for certain permissible and short exempt orders,<sup>20</sup> Exchange systems will not execute or display a short sale order with respect to that security at a price that is less than or equal to the current national best bid.

Where the Exchange is the listing market for a covered security, Exchange systems will determine whether the short sale price test restrictions of Rule 201 have been triggered (i.e., whether a transaction in a covered security has occurred at a Trigger Price) and will notify the single plan processor responsible for consolidation of information for the covered security pursuant to Rule 603(b) of Regulation

least 10% on a day on which the security is already subject to the short sale price test restriction of Rule 201, the restriction will be re-triggered and, therefore, will continue in effect for the remainder of that day and the following day. See Rule 201 Adopting Release, 75 FR 11232, 11253, n. 290. Rule 201 does not place any limit on the frequency or number of times the circuit breaker can be re-triggered with respect to a particular stock. Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, at Q&A 2.2 ("T&M FAQs").

<sup>17</sup> Rule 201 Adopting Release, 75 FR 11232.

<sup>18</sup> Rule 201 Adopting Release, 75 FR 11232, 11252.

<sup>19</sup> *Id.*

<sup>20</sup> See paragraphs (f) and (g) of proposed Rule 440B regarding the treatment of permissible and short exempt orders.

NMS.<sup>21</sup> The Trigger Price of a covered security will not be calculated until the Exchange opens trading for that security. In circumstances where a covered security did not trade on the Exchange on the prior trading day (for example, due to a trading halt, trading suspension, or otherwise), the Exchange will base its determination of the Trigger Price on the last sale on the Exchange for that security on the most recent day on which the security did trade.

Once a Short Sale Price Test is triggered by the listing market, the Short Sale Price Test will remain in effect until the close of trading on the next trading day.<sup>22</sup> If, however, the Exchange determines that the Short Sale Price Test for a covered security was triggered because of a clearly erroneous execution,<sup>23</sup> the Exchange may lift the Short Sale Price Test before the Short Sale Period ends for securities for which the Exchange is the listing market or, for securities listed on another market, notify the other market of the Exchange's determination that the triggering transaction was a clearly erroneous execution. Similarly, if the Exchange determines that the prior day's closing price for a covered security for which the Exchange is the listing market is incorrect in Exchange systems and resulted in an incorrect determination that the short sale price restriction had been triggered, the Exchange may correct the prior day's closing price and lift the Short Sale Price Test before the Short Sale Period ends.

During the Short Sale Period, short sale orders that are limited to the national best bid or lower and short sale market orders will be re-priced by Exchange systems one minimum price increment above the current national best bid ("Permitted Price") to permit their execution at a price that is compliant with the Short Sale Price Test. Consistent with Rule 201,<sup>24</sup> the Permitted Price for securities for which the national best bid is \$1 or more is

<sup>21</sup> 17 CFR 242.201(b)(3). See also Rule 201(a)(6) of Regulation SHO, which defines the term "plan processor" to have the same meaning as in Rule 600(b)(55) of Regulation NMS. 17 CFR 242.600(b)(55). The single plan processors are "exclusive processors" as defined under Section 3(a)(22) of the Act. See 15 U.S.C. 78c(a)(22).

<sup>22</sup> The Short Sale Price Test will remain in effect at all times when quotation information and the national best bid is collected, processed and disseminated. This may extend beyond regular trading hours. T&M FAQs, *supra* note 16, at Q&A 2.1.

<sup>23</sup> Determination of a "clearly erroneous" transaction will be made in accordance with Exchange Rule 128.

<sup>24</sup> Rule 201 Adopting Release, 75 FR 11232, 11247.

\$.01 above the national best bid; the Permitted Price for securities for which the national best bid is below \$1 is \$.0001 above the national best bid.<sup>25</sup>

To reflect declines in the national best bid, the Exchange will continue to re-price a short sale order at the lowest Permitted Price down to the order's original limit price, or if a market order, until the order is filled. Non-displayed orders will also be re-priced upward to a Permitted Price to correspond with a rise in the national best bid.<sup>26</sup> Also, during the Short Sale Period, immediate or cancel ("IOC") orders will be executed to the extent possible at a Permitted Price and higher and then cancelled, and will not be re-priced. Inter-market sweep orders not marked "short exempt" will be handled in the same manner as IOC orders.<sup>27</sup> In addition, during the Short Sale Period, Exchange systems will mark certain designated market maker ("DMM") sale interest as "long" or "short" on behalf of the DMM unit based on position information provided by the DMM unit.<sup>28</sup> For such DMM interest, after a security has opened for trading, Exchange systems (i) will not execute or display such DMM short sale interest<sup>29</sup> that is priced at or below the current national best bid and will cancel any such DMM interest, and (ii) will cancel any such DMM interest if the execution

<sup>25</sup> 17 CFR 242.612.

<sup>26</sup> The following example illustrates the operation of Exchange systems in this situation. Assume the national best bid is 10.10 and a sell short order priced at 10.10 arrives at the Exchange during the Short Sale Period. The order will be re-priced to 10.11 and will rest on the limit order book. The national best bid then rises to 10.11. If that short sale order was displayed on the offer side, that order will remain priced at 10.11. See note 30 *infra* and accompanying text. If the order was not displayed at the customer's instruction, then the order will be re-priced to 10.12 because it cannot be executed at the national best bid. See T&M FAQs, *supra* note 16, at Q&A 4.1.

<sup>27</sup> See Exchange Rule 13 for the definition of inter-market sweep order.

<sup>28</sup> Under Rule 200(g) of Regulation SHO, broker-dealers are responsible for proper marking of orders. However, with respect to certain trading by DMM units, Exchange systems will monitor DMM unit positions on a real-time basis during the trading day and will be responsible for order marking on behalf of DMM units for certain trading entered through Exchange systems. This will be done by receiving a position report prior to the opening of trading and updating DMM unit positions based on position information provided by the DMM unit and/or Exchange trade executions during the day. DMM units will be responsible for properly marking any DMM interest entered into Exchange systems for which the Exchange does not monitor or update the DMM unit's position. Exchange systems will treat such DMM interest that is marked short the same as how it treats other interest, as provided for in proposed Rule 440B(e), and will not cancel such DMM interest as provided for in proposed Rule 440B(e)(2).

<sup>29</sup> See Exchange Rules 104(b) and 1000 regarding DMM trading algorithms and automatic execution.

of the full amount of all DMM sell interest at a price at or below the national best bid would result in a change in the DMM position from long to short.

During the Short Sale Period, Exchange systems will execute and display a short sale order without regard to price if, at the time of initial display of the short sale order, the order was at a price above the then current national best bid.<sup>30</sup> Un-displayed short sale orders that are entered into the Exchange's systems prior to the Short Sale Period will be re-priced as described above.

As permitted by Rule 201, during the Short Sale Period, Exchange systems will execute and display orders marked "short exempt" without regard to whether the order is at a Permitted Price.<sup>31</sup> Exchange systems will also accept orders marked "short exempt" at any time when such systems are open for order entry, regardless of whether the Short Sale Price Test has been triggered.<sup>32</sup>

In addition, the proposed amendments to Rule 440B will also provide for calculation of the Permitted Price and re-pricing of short sale orders with respect to any single-priced opening, re-opening or closing transaction during the Short Sale Period. Paragraph (h) of Rule 440B, as proposed, would provide that, with respect to the execution of short sale orders in a covered security in any single-priced opening, re-opening or closing transaction during the Short Sale Period, Exchange systems will re-price short sale orders in a covered security as follows: (1) Opening—one minimum price increment above the national best bid at 9:30 a.m.; (2) Re-opening following a halt or pause in trading—one minimum price increment above the last published Exchange bid prior to such halt or pause; and (3) Closing—one minimum price increment above the last published Exchange bid prior to the close.<sup>33</sup> For purposes of paragraph (h) the term "minimum price increment" shall mean \$.01 for securities for which the national best bid or the published Exchange bid, as the case may be, is \$1 or more, and \$.0001 for securities for which the national best bid or the published

Exchange bid, as the case may be, is below \$1.

Paragraph (h) of Rule 440B, as proposed, also provides that, during a Short Sale Period, Exchange systems will not execute a short sale order for a covered security in a single-priced opening transaction at or below the national best bid at 9:30 a.m.,<sup>34</sup> and will not execute a short sale order for a covered security in a single-priced re-opening or closing transaction at or below the last published Exchange bid prior to a halt or pause in trading (in the case of a single-priced re-opening transaction), or at or below the last published Exchange bid prior to the close (in the case of a single-priced closing transaction).

The Exchange is also proposing changes to the Supplementary Material to Rule 440B. First, in .11, the Exchange is proposing to delete an outdated reference to Rule 440B(c). Second, the Exchange is proposing to amend .12 to add language permitting orders to be marked "short exempt" in accordance with Rule 200(g)(2) and Rule 201 of Regulation SHO. Under amended .12, an order may be marked "short exempt" if the broker-dealer had a reasonable basis for believing that the order meets one of the exceptions specified in Rule 201(d) of Regulation SHO.<sup>35</sup> An order may also be marked "short exempt" if it is entered during a Short Sale Period and meets the conditions specified in Rule 201(c) of Regulation SHO.<sup>36</sup>

Finally, the Exchange also proposes to amend its Rule 900 regarding its Off-Hours Trading Facility to apply Rule 440B (including the short sale price test restrictions of Rule 201) to transactions in the Off-Hours Trading Facility (by deleting the current exclusion for Rule 440B). An obsolete reference to the Intermarket Trading System ("ITS") in Rule 900(b) will also be deleted.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>37</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>38</sup> in particular, in that it is designed to, among other things, prevent fraudulent and manipulative acts and practices, to

promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposal is designed to implement the provisions of Rule 201 of Regulation SHO by establishing, maintaining and enforcing written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security in violation of the Short Sale Price Test established in that rule. To that end, the proposed rule change will, among other things, establish the Exchange's procedures regarding the execution and display of permissible orders during the Short Sale Period, and the execution of orders marked "short exempt."

### 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 that is 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

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>39</sup> and Rule 19b-4(f)(6) thereunder.<sup>40</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; and (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>41</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>42</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>43</sup> normally does not

<sup>34</sup> Short sale orders designated for execution only at the opening will be cancelled if not executed at the opening. Other short sale orders will remain on the Display Book for execution during the trading day if at a Permitted Price or higher and may be repriced throughout the day, consistent with proposed Rule 440B(e).

<sup>35</sup> 17 CFR 242.201(d); T&M FAQs, *supra* note 16, at Q&A 5.4.

<sup>36</sup> 17 CFR 242.201(c); *see also* T&M FAQs, *supra* note 16, at Q&A 4.2 and 5.5.

<sup>37</sup> 15 U.S.C. 78f(b).

<sup>38</sup> 15 U.S.C. 78f(b)(5).

<sup>39</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>40</sup> 17 CFR 240.19b-4(f)(6).

<sup>41</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>42</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 satisfied this requirement.

<sup>43</sup> 17 CFR 240.19b-4(f)(6).

<sup>30</sup> *See also* 17 CFR 242.201(b)(1)(iii)(A).

<sup>31</sup> *See also* 17 CFR 242.201(b)(1)(iii)(B).

<sup>32</sup> Exchange systems will also follow the guidance in the T&M FAQs. *See supra* note 16.

<sup>33</sup> *See* Letter from James Brigagliano, Deputy Director, Division of Trading & Markets, SEC, to Janet McGinness, Senior Vice President and Secretary, NYSE Euronext, February 7, 2011.

become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>44</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 Commission hereby grants the request.<sup>45</sup> Waiving the 30-day operative delay will allow the Exchange to implement the proposed amendments by February 28, 2011, which, as noted by the Exchange, is the compliance date for amendments to Regulation SHO under the Act. By waiving the operative delay, the Exchange will be able to comply with the amendments to Regulation SHO by February 28, 2011. Therefore, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and designates the proposal as operative upon filing.

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.

#### 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*

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- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2011-05 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2011-05. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at <http://www.nyse.com>. 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-2011-05 and should be submitted on or before March 25, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

**Cathy H. Ahn,**  
*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63985; File No. SR-Phlx-2011-23]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Clarifying Changes to Rules 607 and 3202 Concerning the Application and Collection of the Covered Sale Fee

February 28, 2011.

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> notice is hereby given that on February 16, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the

Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. 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 make clarifying changes to Rules 607 and 3202 concerning the application and collection of the Covered Sale Fee.

The text of the proposed rule change is available on the Exchange's Website at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, at the principal office of the Exchange, on the Commission's Web site at <http://www.sec.gov>, 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 Exchange 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 these statements may be examined at the places specified in Item IV below. The Exchange has prepared 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

The purpose of the proposed rule change is to make clarifying changes to Rules 607 and 3202 concerning the application and collection of the Covered Sale Fee. In light of the varying means by which a Covered Sale Fee is incurred by members, as described below, the Exchange believes that a more detailed description of the circumstances that trigger the Covered Sale Fee is warranted. Accordingly, the new rule language proposed by the Exchange expressly discusses covered sales in both equity and option securities. In addition, the proposed new rule language includes a description of sell orders entered into the Exchange transaction execution systems that result in a covered sale on another exchange, expressly discussing the fee incurred by the Exchange and

<sup>44</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>45</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>46</sup> 17 CFR 200.30-3(a)(12).

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

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