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August 1, 2016

**VIA E-MAIL**

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: SR-NYSEMKT-2016-68

Dear Mr. Fields:

NYSE MKT, LLC. filed the attached Amendment No. 1 to the above-referenced filing on July 29, 2016.

Sincerely,

A handwritten signature in blue ink, appearing to be "BJF".

Encl. (Amendment No. 1 to SR-NYSEMKT-2016-68)

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 39      SECURITIES AND EXCHANGE COMMISSION      File No.\* SR - 2016 - \* 68  
 WASHINGTON, D.C. 20549      Form 19b-4      Amendment No. (req. for Amendments \*) 1

Filing by NYSE MKT LLC.  
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input type="checkbox"/>	Amendment * <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)		

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 Section 806(e)(1) <input type="checkbox"/> Section 806(e)(2) <input type="checkbox"/>	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) <input type="checkbox"/>
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Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**  
 Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

**Contact Information**  
 Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \*       Last Name \*   
 Title \*   
 E-mail \*   
 Telephone \*       Fax

**Signature**  
 Pursuant to the requirements of the Securities Exchange Act of 1934,  
 has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.  
 (Title \*)

Date       Senior Counsel   
 By         
 (Name \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> NYSE MKT LLC (“NYSE MKT” or the “Exchange”) proposes to amend Rule 49 - Equities (Emergency Powers) by (1) replacing the text of current Rule 49 - Equities with the Exchange’s proposed disaster recovery plans; and (2) moving the text of current Rule 431 (Exchange Backup Systems and Mandatory Testing) relating to Exchange member organizations to Rule 49 - Equities. This Amendment No. 1 supersedes the original filing in its entirety.

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1, and the text of the proposed rule change is attached as Exhibit 5.

- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

Clare F. Saperstein  
Associate General Counsel  
NYSE Group, Inc.  
[REDACTED]

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

- (a) Purpose

The Exchange proposes to amend Rule 49 – Equities (“Rule 49”), which

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

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

addresses the Exchange's emergency powers, by (1) replacing the text of current Rule 49 with the Exchange's proposed disaster recovery plans; and (2) moving the text of current Rule 431 (Exchange Backup Systems and Mandatory Testing) relating to Exchange equity member organizations to Rule 49 with no substantive changes. The Exchange further proposes to amend Rules 0 – Equities and 431 to specify that Rule 431 would govern Exchange Backup Systems and Mandatory Testing for Exchange ATP Holders only.

The Exchange proposes to amend Rule 49 in two ways. First, the Exchange proposes to replace the current disaster recovery plan, pursuant to which NYSE Arca, Inc. ("NYSE Arca"), the Exchange's affiliate, will act on behalf of and at the direction of the Exchange for auctions and specified regulatory messages in Exchange-listed securities, with a new disaster recovery plan that the Exchange would implement if the Exchange's primary data center is impaired. Under the proposed disaster recovery plan, the Exchange would no longer rely on NYSE Arca to act on its behalf. Rather, the Exchange would operate as a fully electronic exchange under its own trading rules and would maintain its own order book in its disaster recovery facility. In addition, quotes and trades would be published to the securities information processor ("SIP") as quotes and trades of the Exchange. To reflect this change, the Exchange proposes to delete Rule 49 (Emergency Powers) in its entirety and replace it with new proposed Rule 49(a).<sup>3</sup>

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<sup>3</sup> Because the Exchange would not implement proposed Rule 49(a) until after an opportunity to test it with Exchange member organizations, the Exchange proposes to retain current Rule 49 on its books and not delete it until after proposed Rule 49(a) is approved. The Exchange also proposes to file a separate proposed rule change to establish the operative date of paragraph (a) of proposed Rule 49 and delete the current version of the rule. To reduce the potential for any confusion regarding which version of the rule governs, the Exchange proposes to add the following preamble to current Rule 49: "This version of Rule 49 - equities will remain operative until the proposed rule changes described in SR-NYSEMKT-2016-68 are approved and the Exchange files a separate proposed rule change to delete this version of Rule 49 – Equities and preamble and to establish the operative date of paragraph (a) of 'Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.' Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of the deletion of this Rule and implementation of paragraph (a) of Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing." The Exchange also proposes to add a preamble to proposed Rule 49, which would provide: "The Exchange will file a separate proposed rule change to establish the operative date of paragraph (a) of this version of Rule 49 – Equities and to delete 'Rule 49 - Equities. Emergency Powers' and this preamble. Until such time, 'Rule 49 – Equities. Emergency Powers' will remain operative. Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of

Second, the Exchange proposes to move text from Rule 431 governing Exchange Backup Systems and Mandatory Testing relating to equity member organizations, to proposed Rule 49(b)(N) with only non-substantive changes to update subparagraph numbering and cross references. Because Rule 431 relates to mandatory testing of the Exchange’s disaster recovery facility, as required by Rule 1004 of Regulation SCI,<sup>4</sup> the Exchange believes that moving the rule text from Rule 431 to Rule 49 for its equity member organizations would make the Exchange’s rules easier to navigate by consolidating equity rules with a common theme into a single rule. To incorporate that proposed Rule 49 would also cover mandatory testing requirements for its equity member organizations, the Exchange also proposes to change the title of Rule 49 to “Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.”

Because Rule 431 would pertain only to options trading, the Exchange proposes to amend that rule to delete references to the terms “member,” “member organization,” and “designated market maker” and use the term “ATP Holder” instead. The Exchange also proposes to amend Rule 0 - Equities to remove the reference to Rule 431 as being applicable to equities trading.

### Background

In 2012, the Exchange adopted Rule 49 to provide the Exchange with the authority to declare an Emergency Condition with respect to trading on or through the systems and facilities of the Exchange and to act as necessary in the public interest and for the protection of investors.<sup>5</sup> The authority in Rule 49 may be exercised when, due to an Emergency Condition,<sup>6</sup> the Exchange’s systems and

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paragraph (a) of this Rule and deletion of ‘Rule 49 – Equities. Emergency Powers.’”

<sup>4</sup> 17 CFR 242.1004.

<sup>5</sup> See Securities Exchange Act Release No. 70822 (November 6, 2013), 78 FR 68128 (November 13, 2013) (SR-NYSEMKT-2013-66) (“2013 Approval Order”). At the same time, NYSE Arca amended NYSE Arca Equities Rule 2.100 to provide that NYSE Arca Equities would receive and process bids and offers in Exchange-listed securities on behalf of the Exchange. See *id.* (SR-NYSEArca-2013-77).

<sup>6</sup> Under current Rule 49, an “Emergency Condition” means an emergency as defined in Section 12(k)(7) of the Act, which is “(A) a major market disturbance characterized by or constituting – (i) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or (ii) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or (B) a major disturbance that substantially disrupts, or

facilities located at 11 Wall Street, New York, New York, including the Trading Floor, cannot be utilized, or if the Exchange’s primary data center is impaired. If such an Emergency Condition is declared, a qualified Exchange officer may designate NYSE Arca to serve as a backup facility so that the Exchange, as a self-regulatory organization (“SRO”), can remain operational.<sup>7</sup> NYSE Arca also would continue to operate simultaneously.<sup>8</sup> In September 2014, the Exchange further amended Rule 49 to revise how certain messages are disseminated.<sup>9</sup>

Under Rule 49, if the Exchange declares an Emergency Condition, the Exchange will halt all trading on the Exchange’s systems and facilities and purge any unexecuted orders from the Exchange’s own systems and facilities as soon as practicable following declaration of the Emergency Condition.<sup>10</sup> Beginning the next trading day, NYSE Arca, on behalf of and at the direction of the Exchange, will disseminate the official opening, re-opening, and closing trades of Exchange-listed securities to the Consolidated Tape as message of the Exchange, and any notification for Exchange listed securities to the Consolidated Quotation System of a regulatory halt and resumption of trading thereafter, trading pause and resumption of trading thereafter, and Short Sale Price Test trigger and lifting thereafter, as messages of the Exchange.<sup>11</sup>

In addition, bids and offers for Exchange-listed securities entered on or through

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threatens to substantially disrupt – (i) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or (ii) the transmission or processing of securities transactions.” 15 U.S.C. § 78l(k)(7).

<sup>7</sup> NYSE Arca trades equity securities on the systems and facilities of its wholly owned subsidiary, NYSE Arca Equities, Inc., referred to as the “NYSE Arca Marketplace.” For the purposes of this filing and in the text of Rule 49, these shall be referred to collectively as the systems and facilities of NYSE Arca, or simply NYSE Arca.

<sup>8</sup> The Exchange’s affiliate, New York Stock Exchange LLC (“NYSE”), originally adopted a version of NYSE Rule 49 under which quotes and trades of NYSE-listed securities would continue to be reported to the SIP as quotes and trades of the NYSE. That plan was referred to as the “Print as N” plan. NYSE MKT did not have a corollary “Print as A” plan. When the NYSE amended its NYSE Rule 49 in 2013 and 2014, the Exchange adopted an identical version of that rule as Rule 49. See 2013 Approval Order, supra note 5 (SR-NYSE-2013-54).

<sup>9</sup> See Securities Exchange Act Release No. 73029 (Sept. 9, 2014), 79 FR 55061 (Sept. 15, 2014) (SR-NYSEMKT-2014-75) (“2014 Approval Order”).

<sup>10</sup> See Rule 49(b)(1).

<sup>11</sup> See Rule 49(b)(2)(A)(i) and (ii).

the systems and facilities of NYSE Arca during the Emergency Condition will be reported to the Consolidated Quotation system as bids and offers of NYSE Arca, except that the opening quote will be reported to the Consolidated Quotation System as a bid and/or offer of both the Exchange and NYSE Arca and any re-opening quote will be reported to the Consolidated Quotation System as a bid and/or offer of the Exchange only. Bids and offers for Exchange-listed securities executed on or through the systems and facilities of NYSE Arca during the Emergency Condition will be reported to the Consolidated Tape as executions of NYSE Arca, except for executions in the opening, re-opening, or closing transactions, which will be reported as Exchange executions and Exchange volume only.<sup>12</sup> Because intra-day quotes and trades in Exchange-listed securities would be reported to the SIP as quotes and trades of NYSE Arca (except for the opening, reopening and closing trades), this disaster recovery plan is referred to the “Print as P” plan.

Since adopting Rule 49, the Exchange has amended its rules to provide for Exchange-facilitated procedures for opening and closing securities if either a Designated Market Maker (“DMM”) or the Exchange’s 11 Wall Street facilities are unavailable.<sup>13</sup> Because the Exchange can now operate even in the absence of 11 Wall Street facilities, and because the Exchange’s Print as P disaster recovery plan is available in the exchange’s secondary data center, Rule 49 would be invoked only if an Emergency Condition impacted the Exchange’s primary data center. To date, the Exchange has not invoked Rule 49.

#### Proposed Rule Change

Proposed Rule 49(a) would govern the Exchange’s Disaster Recovery Facility. As proposed, Rule 49(a)(1) would provide that, as part of its business continuity and disaster recovery plans, the Exchange maintains a “Disaster Recovery Facility,” which is a secondary data center located in a geographically diverse location, as required by Regulation SCI.<sup>14</sup> This proposed rule text is intended to be definitional, and describes that the Exchange maintains a secondary data center.

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<sup>12</sup> See Rule 49(2)(B).

<sup>13</sup> See Rules 123D(a)(2) – (6) - Equities (describing process for the Exchange to facilitate the open and reopen of trading) and Supplementary Material .10 to Rule 123C – Equities (describing process for the Exchange to facilitate the close of trading).

<sup>14</sup> See 17 CFR 242.1001(a)(2)(v) (requiring policies and procedures for business continuity and disaster recovery plans that including maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption).

Proposed Rule 49(a)(2) would specify the procedures that the Exchange would follow if the Exchange determines under Rule 51 – Equities (“Rule 51”) to trade Exchange-traded securities on its Disaster Recovery Facility. Currently, Rule 49(a)(1) provides that a qualified Exchange officer shall have the authority to declare an Emergency Condition and current Rule 49(a)(3)(B) defines the term “qualified Exchange officer” to mean the ICE Chief Executive Officer or his or her designee, or the Chief Regulatory Officer of the Exchange or his or her designee. The rule further provides that in the event that none of these individuals is able to act due to incapacitation, the most senior surviving officer of ICE or the Exchange shall be a “qualified Exchange officer” for purposes of Rule 49.

Rather than specifying separately in Rule 49 who can act under that rule, the Exchange proposes to include in Rule 51 the authority to determine whether to use the Exchange’s Disaster Recovery Facility. Rule 51(b) currently provides that, except as may be otherwise determined by the Exchange Board of Directors, the Chief Executive Officer (“CEO”) of the Exchange shall have the power to: (i) halt or suspend trading in some or all securities trading on the Exchange; (ii) extend the hours for the transaction of business on the Exchange; (iii) close some or all Exchange facilities; or (iv) determine the duration of any halt, suspension or closing undertaken under this Rule. Rule 51(c) specifies the circumstances under which the CEO may take these actions, which includes a loss or interruption of facilities utilized by the Exchange.<sup>15</sup>

The Exchange believes that the authority to determine to trade Exchange-traded securities in its Disaster Recovery Facility should similarly be vested with the CEO of the Exchange. Specifically, the CEO may already take the above-specified actions under Rule 51(b) if there is a loss or interruption of facilities utilized by the Exchange. The Exchange believes that a loss or interruption of the Exchange’s primary data center is an event contemplated in Rule 51(c), and therefore the authority to take an action based on that event, whether suspending trading or determining to use the Disaster Recovery Facility, should be determined by the same person. Accordingly, the Exchange proposes to add proposed Rule 51(b)(v) to specify that the CEO of the Exchange may determine to trade securities on the Exchange’s Disaster Recovery Facility pursuant to Rule 49.<sup>16</sup>

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<sup>15</sup> See Rule 51(c)(1).

<sup>16</sup> Under Rule 1 - Equities, the CEO may formally designate one or more qualified employees of Intercontinental Exchange Group, Inc. to act in place of any person named in a rule as having authority to act under such rule in the event that the named person in the rule is not available to administer that rule. Because Rule 1 - Equities already provides the authority to designated alternate qualified employees, the Exchange would not include rule text from current Rule 49(a)(3)(B) regarding who may be designated to act in proposed Rule 51 in the absence of the CEO.

The Exchange also proposes non-substantive amendments to Rule 51(b) to provide that the CEO “may take any of the following actions” rather than to provide that the CEO “shall have the power to.” The Exchange believes the proposed amendment makes clear that the CEO may invoke one or more of the actions specified in Rule 51(b)(i) – (v). For the same reason, the Exchange proposes to make a conforming amendment to Rule 51(c) to specify that the CEO shall take *any of* the actions described in paragraph (b) above.

The Exchange proposes that the following would apply if the Exchange determines under Rule 51 to trade Exchange-traded securities on its Disaster Recovery Facility:

- Proposed Rule 49(a)(2)(A) would provide that the 11 Wall Street facilities would not be available for trading if the Exchange is operating from its Disaster Recovery Facility. Because the trading systems in the Exchange’s Disaster Recovery Facility would not have connectivity to DMM and Floor broker trading systems, the Exchange would operate as a fully electronic exchange when operating out of its Disaster Recovery Facility, even if 11 Wall Street facilities were not impacted.
- Proposed Rule 49(a)(2)(B) would provide that opening and reopening auctions would be subject to Rule 123D(a)(2) – (6) - Equities and closing auctions would be subject to Supplementary Material .10 to Rule 123C - Equities. Because there would be no Trading Floor or DMM connectivity, the Exchange proposes that, when operating out of its Disaster Recovery Facility, the Exchange would facilitate all openings, reopenings, and closings, as provided for in the enumerated rules. As noted above, this is the Exchange’s current business continuity plan if the 11 Wall Street facilities were unavailable, but the Exchange could continue to operate out of its primary data center.
- Proposed Rule 49(a)(2)(C) would provide that any unexecuted orders entered into Exchange systems before trading on the Disaster Recovery Facility begins would be deemed cancelled and would be purged from Exchange systems. This proposed rule text is based on current Rule 49(b)(1)(B), which provides that when an Emergency Condition is declared, the Exchange will purge any unexecuted orders from the Exchange’s own systems and facilities as soon as practicable following declaration of the Emergency Condition. The Exchange proposes to modify this text in proposed Rule 49(a)(2)(C) to make clear that any unexecuted orders entered into Exchange systems before trading on the Disaster Recovery Facility begins would be deemed cancelled because depending on

the scope of the disruption, the Exchange may not be able to transmit cancellation messages for unexecuted orders.

- Proposed Rule 49(a)(2)(D) would provide that member organizations registered as DMMs would not be subject to any DMM obligations or benefits under Exchange rules while securities trade on the Disaster Recovery Facility.<sup>17</sup> DMMs would not be subject to any such obligations or benefits because the Exchange will not maintain systems that support DMM quoting at its Disaster Recovery Facility. DMMs that route orders to the Disaster Recovery Facility would trade no differently than other market participants that electronically enter orders at the Exchange, and would be subject to the fees and credits applicable to non-DMM transactions.

Proposed Rule 49(a)(3) would provide that member organizations wishing to trade on the Exchange's Disaster Recovery Facility would be responsible for having contingency plans for establishing connectivity to such facility and changing routing instructions for their order entry systems to send bids and offers in Exchange-traded securities to such facility. This proposed rule text is based on current Rule 49(b)(3), but references connectivity to the Exchange's Disaster Recovery Facility rather than connectivity to NYSE Arca.

As noted above, because the Exchange would no longer be designating NYSE Arca to act on behalf of and at the direction of the Exchange, the Exchange would not include the provisions of current Rule 49(a)(1) and (b) relating to such designation. The Exchange further proposes that the term "Emergency Condition" and related definition, described in current Rule 49(a)(1), (2), and (3)(A), would not be included in proposed Rule 49 because this language has been superseded by Regulation SCI Rule 1001(a)(2)(v).<sup>18</sup> Likewise, the Exchange would not retain the current Rule 49(c)(2) requirement that the ability to invoke Rule 49(a) would be operative for only a ten-day period. The Exchange believes that, in the event of a wide-scale disruption, ten days may not be enough time.

In addition, the Exchange is not proposing to include the subject of current Rule 49(b)(2)(A) and (B) in proposed Rule 49. In the Exchange's proposed Disaster Recovery Facility, the Exchange would be reporting all quotes and trades to the SIP as quotes and trades of the Exchange. In addition, the Exchange would be disseminating regulatory messages for its listed securities, including notifications of a regulatory halt and resumption of trading thereafter, trading pause and resumption of trading thereafter, and Short Sale Price Test trigger and lifting

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<sup>17</sup> See, e.g., Rules 103B(I) - Equities (quoting requirements for allocation process of listed securities) and 104 - Equities (Dealings and Responsibilities of DMMs).

<sup>18</sup> See 17 CFR 242.1001(a)(2)(v).

thereafter. Accordingly, NYSE Arca would not be disseminating this information on behalf of the Exchange in the event it determines to trade Exchange-traded securities on its Disaster Recovery Facility.

Finally, the Exchange does not propose to retain the language in current Rule 49(c)(1), regarding notification requirements to the Commission as these have also been superseded by the notification requirements in Regulation SCI.<sup>19</sup> Accordingly, current Rule 49(c)(1) is obsolete and does not need to be included in proposed Rule 49(a).

As discussed above, proposed Rule 49(b)(N) would include all the text of current Rule 431, with non-substantive differences to update sub-paragraph numbering and rule paragraph cross references and to reference member organizations. The Exchange proposes to designate this paragraph of proposed Rule 49(b)(N) with an “N” to distinguish it from current Rule 49(b), as both would be operative at the same time.

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As discussed above in footnote 3, paragraph (a) of proposed Rule 49 would not be operative until the Exchange has an opportunity to test it with Exchange member organizations. The Exchange does not anticipate that the DR Facility will be available for testing in production until late in the fourth quarter of 2016. The Exchange will file a separate proposed rule change to establish the operative date of paragraph (a) of proposed Rule 49, delete current “Rule 49 – Equities. Emergency Powers,” delete the preamble to proposed Rule 49, and delete the “N” designation to proposed Rule 49(b). The operative date established in such separate proposed rule change will also be announced via Trader Update. The proposed changes to Rule 49(b)(N), 51, and Rule 431 will be operative on approval of this proposed rule change.

(b) Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>20</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>21</sup> in particular, because it is designed to promote just and equitable principles of trade and 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. Specifically, the Exchange believes that the proposed rule change will assist in facilitating trading in Exchange-traded

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<sup>19</sup> 17 CFR 242.1002(b)(1).

<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

securities in the event the Exchange experiences a disruption in its primary data center. Accordingly, the proposed rule change is designed to protect investors and the public interest by providing for minimal interruption of Exchange trading if the Exchange experiences a wide-scale disruption. The proposed rule change would therefore remove impediments to and perfect the mechanism of a free and open market and a national market system by providing for a business continuity and disaster recovery plan that includes maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that is reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical Exchange systems following a wide-scale disruption, as required by Regulation SCI.<sup>22</sup> Moreover, the Exchange believes that the proposed rule change would strengthen business continuity planning for itself and its member organizations, thereby benefiting market participants and investors generally.

More specifically, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because under the proposed disaster recovery plan, the Exchange would maintain its own facility within the Disaster Recovery Facility that would disseminate to the SIP all quote and trade information, including opening, reopening, and closing auction information and intra-day quotes and trades, as well as regulatory messages, as Exchange messages.

The Exchange further believes that the proposed rule change to vest the authority to determine to trade securities on the Exchange's Disaster Recovery Facility pursuant to Rule 49 with the CEO, as provided for in proposed Rule 51(b)(v), would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would consolidate in a single rule the individual with authority to take specified actions. This proposed rule change would also streamline the Exchange's rules and procedures by providing for consistent authority of who may act when there is a loss or interruption of facilities utilized by the Exchange.

The Exchange also believes that, because the Exchange is now subject to the requirements of Regulation SCI, certain elements of current Rule 49 have been superseded, and therefore it would remove impediments to and perfect the mechanism of a free and open market and a national market system for proposed Rule 49(a) not to include specified provisions of the current rule. Specifically, the Exchange does not believe that proposed Rule 49(a) needs to be limited to what is currently defined as an "Emergency Condition" or be invoked for only ten days because the proposed rule would be invoked as part of a robust business continuity and disaster recovery plan in the event of a wide-scale disruption, as required by Rule 1001(a)(2)(v) of Regulation SCI.<sup>23</sup> For similar reasons, the

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<sup>22</sup> See supra note 4.

<sup>23</sup> 17 CFR 242.1001(a)(2)(v).

Exchange does not believe that proposed Rule 49 needs separate provisions specifying notice requirements to the Commission because these are now required by Rule 1002(b) of Regulation SCI.<sup>24</sup>

Finally, the Exchange believes that moving the text of current Rule 431 relating to equity member organizations to proposed Rule 49(b)(N), amending Rule 431 to pertain only to ATP Holders, and renaming Rule 49 as “Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing,” would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would consolidate into a single rule related content, i.e., the Exchange’s proposed equity disaster recovery plan and mandatory testing requirements related to such plan. Thus, the proposed rule change would make the Exchange’s rules easier to navigate for Exchange equity members, the Commission, and the public.

4. 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. The proposed rule change is designed to facilitate trading in Exchange-listed securities on its Disaster Recovery Facility. As such, the Exchange believes that the proposed rule change would promote competition for the benefit of market participants and investors generally because it provides transparency in terms of which rules would govern trading in Exchange-traded securities if they trade on the Exchange’s Disaster Recovery Facility.

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

Written comments on the proposed rule change were neither solicited nor received.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

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<sup>24</sup>

17 CFR 242.1002(b).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advanced Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Publication in the Federal Register

Exhibit 4 – Text of the Proposed Rule Change as Amended

Exhibit 5 – Text of the Proposed Rule Change

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NYSEMKT-2016-68, Amendment No. 1)

[Date]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rule 49 - Equities

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 July 29, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been 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 Rule 49 - Equities (Emergency Powers) by (1) replacing the text of current Rule 49 - Equities with the Exchange’s proposed disaster recovery plans; and (2) moving the text of current Rule 431 (Exchange Backup Systems and Mandatory Testing) relating to Exchange member organizations to Rule 49 - Equities. This Amendment No. 1 supersedes the original filing in its entirety. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<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.

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

The Exchange proposes to amend Rule 49 – Equities (“Rule 49”), which addresses the Exchange’s emergency powers, by (1) replacing the text of current Rule 49 with the Exchange’s proposed disaster recovery plans; and (2) moving the text of current Rule 431 (Exchange Backup Systems and Mandatory Testing) relating to Exchange equity member organizations to Rule 49 with no substantive changes. The Exchange further proposes to amend Rules 0 – Equities and 431 to specify that Rule 431 would govern Exchange Backup Systems and Mandatory Testing for Exchange ATP Holders only.

The Exchange proposes to amend Rule 49 in two ways. First, the Exchange proposes to replace the current disaster recovery plan, pursuant to which NYSE Arca, Inc. (“NYSE Arca”), the Exchange’s affiliate, will act on behalf of and at the direction of the Exchange for auctions and specified regulatory messages in Exchange-listed securities, with a new disaster recovery plan that the Exchange would implement if the Exchange’s primary data center is impaired. Under the proposed disaster recovery plan,

the Exchange would no longer rely on NYSE Arca to act on its behalf. Rather, the Exchange would operate as a fully electronic exchange under its own trading rules and would maintain its own order book in its disaster recovery facility. In addition, quotes and trades would be published to the securities information processor (“SIP”) as quotes and trades of the Exchange. To reflect this change, the Exchange proposes to delete Rule 49 (Emergency Powers) in its entirety and replace it with new proposed Rule 49(a).<sup>4</sup>

Second, the Exchange proposes to move text from Rule 431 governing Exchange Backup Systems and Mandatory Testing relating to equity member organizations, to proposed Rule 49(b)(N) with only non-substantive changes to update sub-paragraph numbering and cross references. Because Rule 431 relates to mandatory testing of the

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<sup>4</sup> Because the Exchange would not implement proposed Rule 49(a) until after an opportunity to test it with Exchange member organizations, the Exchange proposes to retain current Rule 49 on its books and not delete it until after proposed Rule 49(a) is approved. The Exchange also proposes to file a separate proposed rule change to establish the operative date of paragraph (a) of proposed Rule 49 and delete the current version of the rule. To reduce the potential for any confusion regarding which version of the rule governs, the Exchange proposes to add the following preamble to current Rule 49: “This version of Rule 49 - equities will remain operative until the proposed rule changes described in SR-NYSEMKT-2016-68 are approved and the Exchange files a separate proposed rule change to delete this version of Rule 49 – Equities and preamble and to establish the operative date of paragraph (a) of ‘Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.’ Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of the deletion of this Rule and implementation of paragraph (a) of Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.” The Exchange also proposes to add a preamble to proposed Rule 49, which would provide: “The Exchange will file a separate proposed rule change to establish the operative date of paragraph (a) of this version of Rule 49 – Equities and to delete ‘Rule 49 - Equities. Emergency Powers’ and this preamble. Until such time, ‘Rule 49 – Equities. Emergency Powers’ will remain operative. Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of paragraph (a) of this Rule and deletion of ‘Rule 49 – Equities. Emergency Powers.’”

Exchange's disaster recovery facility, as required by Rule 1004 of Regulation SCI,<sup>5</sup> the Exchange believes that moving the rule text from Rule 431 to Rule 49 for its equity member organizations would make the Exchange's rules easier to navigate by consolidating equity rules with a common theme into a single rule. To incorporate that proposed Rule 49 would also cover mandatory testing requirements for its equity member organizations, the Exchange also proposes to change the title of Rule 49 to "Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing."

Because Rule 431 would pertain only to options trading, the Exchange proposes to amend that rule to delete references to the terms "member," "member organization," and "designated market maker" and use the term "ATP Holder" instead. The Exchange also proposes to amend Rule 0 - Equities to remove the reference to Rule 431 as being applicable to equities trading.

#### Background

In 2012, the Exchange adopted Rule 49 to provide the Exchange with the authority to declare an Emergency Condition with respect to trading on or through the systems and facilities of the Exchange and to act as necessary in the public interest and for the protection of investors.<sup>6</sup> The authority in Rule 49 may be exercised when, due to an Emergency Condition,<sup>7</sup> the Exchange's systems and facilities located at 11 Wall

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<sup>5</sup> 17 CFR 242.1004.

<sup>6</sup> See Securities Exchange Act Release No. 70822 (November 6, 2013), 78 FR 68128 (November 13, 2013) (SR-NYSEMKT-2013-66) ("2013 Approval Order"). At the same time, NYSE Arca amended NYSE Arca Equities Rule 2.100 to provide that NYSE Arca Equities would receive and process bids and offers in Exchange-listed securities on behalf of the Exchange. See *id.* (SR-NYSEArca-2013-77).

<sup>7</sup> Under current Rule 49, an "Emergency Condition" means an emergency as

Street, New York, New York, including the Trading Floor, cannot be utilized, or if the Exchange's primary data center is impaired. If such an Emergency Condition is declared, a qualified Exchange officer may designate NYSE Arca to serve as a backup facility so that the Exchange, as a self-regulatory organization ("SRO"), can remain operational.<sup>8</sup> NYSE Arca also would continue to operate simultaneously.<sup>9</sup> In September 2014, the Exchange further amended Rule 49 to revise how certain messages are disseminated.<sup>10</sup>

Under Rule 49, if the Exchange declares an Emergency Condition, the Exchange will halt all trading on the Exchange's systems and facilities and purge any unexecuted orders from the Exchange's own systems and facilities as soon as practicable following

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defined in Section 12(k)(7) of the Act, which is "(A) a major market disturbance characterized by or constituting – (i) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or (ii) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or (B) a major disturbance that substantially disrupts, or threatens to substantially disrupt – (i) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or (ii) the transmission or processing of securities transactions." 15 U.S.C. § 78l(k)(7).

<sup>8</sup> NYSE Arca trades equity securities on the systems and facilities of its wholly owned subsidiary, NYSE Arca Equities, Inc., referred to as the "NYSE Arca Marketplace." For the purposes of this filing and in the text of Rule 49, these shall be referred to collectively as the systems and facilities of NYSE Arca, or simply NYSE Arca.

<sup>9</sup> The Exchange's affiliate, New York Stock Exchange LLC ("NYSE"), originally adopted a version of NYSE Rule 49 under which quotes and trades of NYSE-listed securities would continue to be reported to the SIP as quotes and trades of the NYSE. That plan was referred to as the "Print as N" plan. NYSE MKT did not have a corollary "Print as A" plan. When the NYSE amended its NYSE Rule 49 in 2013 and 2014, the Exchange adopted an identical version of that rule as Rule 49. See 2013 Approval Order, supra note 5 (SR-NYSE-2013-54).

<sup>10</sup> See Securities Exchange Act Release No. 73029 (Sept. 9, 2014), 79 FR 55061 (Sept. 15, 2014) (SR-NYSEMKT-2014-75) ("2014 Approval Order").

declaration of the Emergency Condition.<sup>11</sup> Beginning the next trading day, NYSE Arca, on behalf of and at the direction of the Exchange, will disseminate the official opening, re-opening, and closing trades of Exchange-listed securities to the Consolidated Tape as message of the Exchange, and any notification for Exchange listed securities to the Consolidated Quotation System of a regulatory halt and resumption of trading thereafter, trading pause and resumption of trading thereafter, and Short Sale Price Test trigger and lifting thereafter, as messages of the Exchange.<sup>12</sup>

In addition, bids and offers for Exchange-listed securities entered on or through the systems and facilities of NYSE Arca during the Emergency Condition will be reported to the Consolidated Quotation system as bids and offers of NYSE Arca, except that the opening quote will be reported to the Consolidated Quotation System as a bid and/or offer of both the Exchange and NYSE Arca and any re-opening quote will be reported to the Consolidated Quotation System as a bid and/or offer of the Exchange only. Bids and offers for Exchange-listed securities executed on or through the systems and facilities of NYSE Arca during the Emergency Condition will be reported to the Consolidated Tape as executions of NYSE Arca, except for executions in the opening, re-opening, or closing transactions, which will be reported as Exchange executions and Exchange volume only.<sup>13</sup> Because intra-day quotes and trades in Exchange-listed securities would be reported to the SIP as quotes and trades of NYSE Arca (except for the opening, reopening and closing trades), this disaster recovery plan is referred to the “Print

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<sup>11</sup> See Rule 49(b)(1).

<sup>12</sup> See Rule 49(b)(2)(A)(i) and (ii).

<sup>13</sup> See Rule 49(2)(B).

as P” plan.

Since adopting Rule 49, the Exchange has amended its rules to provide for Exchange-facilitated procedures for opening and closing securities if either a Designated Market Maker (“DMM”) or the Exchange’s 11 Wall Street facilities are unavailable.<sup>14</sup> Because the Exchange can now operate even in the absence of 11 Wall Street facilities, and because the Exchange’s Print as P disaster recovery plan is available in the exchange’s secondary data center, Rule 49 would be invoked only if an Emergency Condition impacted the Exchange’s primary data center. To date, the Exchange has not invoked Rule 49.

#### Proposed Rule Change

Proposed Rule 49(a) would govern the Exchange’s Disaster Recovery Facility. As proposed, Rule 49(a)(1) would provide that, as part of its business continuity and disaster recovery plans, the Exchange maintains a “Disaster Recovery Facility,” which is a secondary data center located in a geographically diverse location, as required by Regulation SCI.<sup>15</sup> This proposed rule text is intended to be definitional, and describes that the Exchange maintains a secondary data center.

Proposed Rule 49(a)(2) would specify the procedures that the Exchange would follow if the Exchange determines under Rule 51 – Equities (“Rule 51”) to trade

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<sup>14</sup> See Rules 123D(a)(2) – (6) - Equities (describing process for the Exchange to facilitate the open and reopen of trading) and Supplementary Material .10 to Rule 123C – Equities (describing process for the Exchange to facilitate the close of trading).

<sup>15</sup> See 17 CFR 242.1001(a)(2)(v) (requiring policies and procedures for business continuity and disaster recovery plans that including maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption).

Exchange-traded securities on its Disaster Recovery Facility. Currently, Rule 49(a)(1) provides that a qualified Exchange officer shall have the authority to declare an Emergency Condition and current Rule 49(a)(3)(B) defines the term “qualified Exchange officer” to mean the ICE Chief Executive Officer or his or her designee, or the Chief Regulatory Officer of the Exchange or his or her designee. The rule further provides that in the event that none of these individuals is able to act due to incapacitation, the most senior surviving officer of ICE or the Exchange shall be a “qualified Exchange officer” for purposes of Rule 49.

Rather than specifying separately in Rule 49 who can act under that rule, the Exchange proposes to include in Rule 51 the authority to determine whether to use the Exchange’s Disaster Recovery Facility. Rule 51(b) currently provides that, except as may be otherwise determined by the Exchange Board of Directors, the Chief Executive Officer (“CEO”) of the Exchange shall have the power to: (i) halt or suspend trading in some or all securities trading on the Exchange; (ii) extend the hours for the transaction of business on the Exchange; (iii) close some or all Exchange facilities; or (iv) determine the duration of any halt, suspension or closing undertaken under this Rule. Rule 51(c) specifies the circumstances under which the CEO may take these actions, which includes a loss or interruption of facilities utilized by the Exchange.<sup>16</sup>

The Exchange believes that the authority to determine to trade Exchange-traded securities in its Disaster Recovery Facility should similarly be vested with the CEO of the Exchange. Specifically, the CEO may already take the above-specified actions under Rule 51(b) if there is a loss or interruption of facilities utilized by the Exchange. The

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<sup>16</sup> See Rule 51(c)(1).

Exchange believes that a loss or interruption of the Exchange's primary data center is an event contemplated in Rule 51(c), and therefore the authority to take an action based on that event, whether suspending trading or determining to use the Disaster Recovery Facility, should be determined by the same person. Accordingly, the Exchange proposes to add proposed Rule 51(b)(v) to specify that the CEO of the Exchange may determine to trade securities on the Exchange's Disaster Recovery Facility pursuant to Rule 49.<sup>17</sup>

The Exchange also proposes non-substantive amendments to Rule 51(b) to provide that the CEO "may take any of the following actions" rather than to provide that the CEO "shall have the power to." The Exchange believes the proposed amendment makes clear that the CEO may invoke one or more of the actions specified in Rule 51(b)(i) – (v). For the same reason, the Exchange proposes to make a conforming amendment to Rule 51(c) to specify that the CEO shall take *any of* the actions described in paragraph (b) above.

The Exchange proposes that the following would apply if the Exchange determines under Rule 51 to trade Exchange-traded securities on its Disaster Recovery Facility:

- Proposed Rule 49(a)(2)(A) would provide that the 11 Wall Street facilities would not be available for trading if the Exchange is operating from its Disaster Recovery Facility. Because the trading

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<sup>17</sup> Under Rule 1 - Equities, the CEO may formally designate one or more qualified employees of Intercontinental Exchange Group, Inc. to act in place of any person named in a rule as having authority to act under such rule in the event that the named person in the rule is not available to administer that rule. Because Rule 1 - Equities already provides the authority to designated alternate qualified employees, the Exchange would not include rule text from current Rule 49(a)(3)(B) regarding who may be designated to act in proposed Rule 51 in the absence of the CEO.

systems in the Exchange's Disaster Recovery Facility would not have connectivity to DMM and Floor broker trading systems, the Exchange would operate as a fully electronic exchange when operating out of its Disaster Recovery Facility, even if 11 Wall Street facilities were not impacted.

- Proposed Rule 49(a)(2)(B) would provide that opening and reopening auctions would be subject to Rule 123D(a)(2) – (6) - Equities and closing auctions would be subject to Supplementary Material .10 to Rule 123C - Equities. Because there would be no Trading Floor or DMM connectivity, the Exchange proposes that, when operating out of its Disaster Recovery Facility, the Exchange would facilitate all openings, reopenings, and closings, as provided for in the enumerated rules. As noted above, this is the Exchange's current business continuity plan if the 11 Wall Street facilities were unavailable, but the Exchange could continue to operate out of its primary data center.
- Proposed Rule 49(a)(2)(C) would provide that any unexecuted orders entered into Exchange systems before trading on the Disaster Recovery Facility begins would be deemed cancelled and would be purged from Exchange systems. This proposed rule text is based on current Rule 49(b)(1)(B), which provides that when an Emergency Condition is declared, the Exchange will purge any unexecuted orders from the Exchange's own systems and facilities

as soon as practicable following declaration of the Emergency Condition. The Exchange proposes to modify this text in proposed Rule 49(a)(2)(C) to make clear that any unexecuted orders entered into Exchange systems before trading on the Disaster Recovery Facility begins would be deemed cancelled because depending on the scope of the disruption, the Exchange may not be able to transmit cancellation messages for unexecuted orders.

- Proposed Rule 49(a)(2)(D) would provide that member organizations registered as DMMs would not be subject to any DMM obligations or benefits under Exchange rules while securities trade on the Disaster Recovery Facility.<sup>18</sup> DMMs would not be subject to any such obligations or benefits because the Exchange will not maintain systems that support DMM quoting at its Disaster Recovery Facility. DMMs that route orders to the Disaster Recovery Facility would trade no differently than other market participants that electronically enter orders at the Exchange, and would be subject to the fees and credits applicable to non-DMM transactions.

Proposed Rule 49(a)(3) would provide that member organizations wishing to trade on the Exchange's Disaster Recovery Facility would be responsible for having contingency plans for establishing connectivity to such facility and changing routing instructions for their order entry systems to send bids and offers in Exchange-traded

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<sup>18</sup> See, e.g., Rules 103B(I) - Equities (quoting requirements for allocation process of listed securities) and 104 - Equities (Dealings and Responsibilities of DMMs).

securities to such facility. This proposed rule text is based on current Rule 49(b)(3), but references connectivity to the Exchange's Disaster Recovery Facility rather than connectivity to NYSE Arca.

As noted above, because the Exchange would no longer be designating NYSE Arca to act on behalf of and at the direction of the Exchange, the Exchange would not include the provisions of current Rule 49(a)(1) and (b) relating to such designation. The Exchange further proposes that the term "Emergency Condition" and related definition, described in current Rule 49(a)(1), (2), and (3)(A), would not be included in proposed Rule 49 because this language has been superseded by Regulation SCI Rule 1001(a)(2)(v).<sup>19</sup> Likewise, the Exchange would not retain the current Rule 49(c)(2) requirement that the ability to invoke Rule 49(a) would be operative for only a ten-day period. The Exchange believes that, in the event of a wide-scale disruption, ten days may not be enough time.

In addition, the Exchange is not proposing to include the subject of current Rule 49(b)(2)(A) and (B) in proposed Rule 49. In the Exchange's proposed Disaster Recovery Facility, the Exchange would be reporting all quotes and trades to the SIP as quotes and trades of the Exchange. In addition, the Exchange would be disseminating regulatory messages for its listed securities, including notifications of a regulatory halt and resumption of trading thereafter, trading pause and resumption of trading thereafter, and Short Sale Price Test trigger and lifting thereafter. Accordingly, NYSE Arca would not be disseminating this information on behalf of the Exchange in the event it determines to trade Exchange-traded securities on its Disaster Recovery Facility.

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<sup>19</sup> See 17 CFR 242.1001(a)(2)(v).

Finally, the Exchange does not propose to retain the language in current Rule 49(c)(1), regarding notification requirements to the Commission as these have also been superseded by the notification requirements in Regulation SCI.<sup>20</sup> Accordingly, current Rule 49(c)(1) is obsolete and does not need to be included in proposed Rule 49(a).

As discussed above, proposed Rule 49(b)(N) would include all the text of current Rule 431, with non-substantive differences to update sub-paragraph numbering and rule paragraph cross references and to reference member organizations. The Exchange proposes to designate this paragraph of proposed Rule 49(b)(N) with an “N” to distinguish it from current Rule 49(b), as both would be operative at the same time.

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As discussed above in footnote 3, paragraph (a) of proposed Rule 49 would not be operative until the Exchange has an opportunity to test it with Exchange member organizations. The Exchange does not anticipate that the DR Facility will be available for testing in production until late in the fourth quarter of 2016. The Exchange will file a separate proposed rule change to establish the operative date of paragraph (a) of proposed Rule 49, delete current “Rule 49 – Equities. Emergency Powers,” delete the preamble to proposed Rule 49, and delete the “N” designation to proposed Rule 49(b). The operative date established in such separate proposed rule change will also be announced via Trader Update. The proposed changes to Rule 49(b)(N), 51, and Rule 431 will be operative on approval of this proposed rule change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section

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<sup>20</sup> 17 CFR 242.1002(b)(1).

6(b) of the Act,<sup>21</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>22</sup> in particular, because it is designed to promote just and equitable principles of trade and 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.

Specifically, the Exchange believes that the proposed rule change will assist in facilitating trading in Exchange-traded securities in the event the Exchange experiences a disruption in its primary data center. Accordingly, the proposed rule change is designed to protect investors and the public interest by providing for minimal interruption of Exchange trading if the Exchange experiences a wide-scale disruption. The proposed rule change would therefore remove impediments to and perfect the mechanism of a free and open market and a national market system by providing for a business continuity and disaster recovery plan that includes maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that is reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical Exchange systems following a wide-scale disruption, as required by Regulation SCI.<sup>23</sup> Moreover, the Exchange believes that the proposed rule change would strengthen business continuity planning for itself and its member organizations, thereby benefiting market participants and investors generally.

More specifically, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a

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<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>23</sup> See supra note 4.

national market system because under the proposed disaster recovery plan, the Exchange would maintain its own facility within the Disaster Recovery Facility that would disseminate to the SIP all quote and trade information, including opening, reopening, and closing auction information and intra-day quotes and trades, as well as regulatory messages, as Exchange messages.

The Exchange further believes that the proposed rule change to vest the authority to determine to trade securities on the Exchange's Disaster Recovery Facility pursuant to Rule 49 with the CEO, as provided for in proposed Rule 51(b)(v), would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would consolidate in a single rule the individual with authority to take specified actions. This proposed rule change would also streamline the Exchange's rules and procedures by providing for consistent authority of who may act when there is a loss or interruption of facilities utilized by the Exchange.

The Exchange also believes that, because the Exchange is now subject to the requirements of Regulation SCI, certain elements of current Rule 49 have been superseded, and therefore it would remove impediments to and perfect the mechanism of a free and open market and a national market system for proposed Rule 49(a) not to include specified provisions of the current rule. Specifically, the Exchange does not believe that proposed Rule 49(a) needs to be limited to what is currently defined as an "Emergency Condition" or be invoked for only ten days because the proposed rule would be invoked as part of a robust business continuity and disaster recovery plan in the event of a wide-scale disruption, as required by Rule 1001(a)(2)(v) of Regulation SCI.<sup>24</sup> For

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<sup>24</sup> 17 CFR 242.1001(a)(2)(v).

similar reasons, the Exchange does not believe that proposed Rule 49 needs separate provisions specifying notice requirements to the Commission because these are now required by Rule 1002(b) of Regulation SCI.<sup>25</sup>

Finally, the Exchange believes that moving the text of current Rule 431 relating to equity member organizations to proposed Rule 49(b)(N), amending Rule 431 to pertain only to ATP Holders, and renaming Rule 49 as “Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing,” would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would consolidate into a single rule related content, i.e., the Exchange’s proposed equity disaster recovery plan and mandatory testing requirements related to such plan. Thus, the proposed rule change would make the Exchange’s rules easier to navigate for Exchange equity members, the Commission, and the public.

**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. The proposed rule change is designed to facilitate trading in Exchange-listed securities on its Disaster Recovery Facility. As such, the Exchange believes that the proposed rule change would promote competition for the benefit of market participants and investors generally because it provides transparency in terms of which rules would govern trading in Exchange-traded securities if they trade on the Exchange’s Disaster Recovery Facility.

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<sup>25</sup> 17 CFR 242.1002(b).

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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-NYSEMKT-2016-68 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2016-68. 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. 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-NYSEMKT-2016-68 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Robert W. Errett  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).

Additions: Underlined

Deletions: [Bracketed]

Additions proposed in Exhibit 4: Double-underlined

Rules of NYSE MKT LLC

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**Rule 49 - Equities. Emergency Powers**

*This version of Rule 49- Equities will remain operative until the proposed rule changes described in SR-NYSEMKT-2016-68 are approved and the Exchange files a separate proposed rule change to delete this version of Rule 49 – Equities and preamble and to establish the operative date of paragraph (a) of “Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.” Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of the deletion of this Rule and implementation of paragraph (a) of Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.*

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**Rule 49 - Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing**

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(b)(N) Exchange Backup Systems and Mandatory Testing

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Additions: Underlined

Deletions: [Bracketed]

## Rules of NYSE MKT LLC

### Office Rules

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### Section 7. Conduct of Accounts

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#### Rule 431. Exchange Backup Systems and Mandatory Testing

(a) The Exchange will establish standards for the designation of [members and member organizations]ATP Holders it reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of the Exchange's business continuity and disaster recovery plans.

(b) [A member or member organization]An ATP Holder designated pursuant to standards established in paragraph (a) of this Rule will be required to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans in the manner and frequency specified by the Exchange, which will occur not less than once every 12 months.

(c) [Designated Market Makers,] Specialists and e-Specialists that have been determined by the Exchange to contribute a meaningful percentage of volume in securities they trade, measured on a quarterly or monthly basis, will be required to participate in scheduled functional and performance testing. The Exchange may also consider other factors in determining the [members and member organizations]ATP Holders that will be required to participate in scheduled functional and performance testing, including average daily volume traded on the Exchange measured on a quarterly or monthly basis, or [members or member organizations]ATP Holders who collectively account for a certain percentage of market share on the Exchange.

(d) At least three (3) months prior to a scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans, the Exchange will publish the criteria to be used by the Exchange to determine which [members or member organizations]ATP Holders will be required to participate in such testing, and notify those [members or member organizations]ATP Holders that are required to participate based on such criteria.

(e) [Members or member organizations]ATP Holders not designated pursuant to standards established in paragraph (a) of this Rule are permitted to connect to the Exchange's backup systems and may participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans.

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## **Equities Rules**

### **Rule 0 - Equities . Applicability and Phase-In**

Except to the extent particular Non-Equities Rules are expressly designated herein as applicable, the Equities Rules (as such rules may be amended from time to time) shall govern all transactions conducted on the Equities Trading Systems. For the avoidance of doubt, the following Non-Equities Rules shall be applicable to transactions conducted on the Equities Trading Systems: Rules 41[, 431] and Section 9A or 9B of the Office Rules, as applicable. Rules 46 - Equities to 294 - Equities, inclusive, shall apply to all Exchange Contracts made on the Equities Trading Systems, and to the extent determined to be applicable, to Exchange Contracts not made on the Exchange.

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### **Rule 49 - Equities. Emergency Powers**

*This version of Rule 49- Equities will remain operative until the proposed rule changes described in SR-NYSEMKT-2016-68 are approved and the Exchange files a separate proposed rule change to delete this version of Rule 49 – Equities and preamble and to establish the operative date of paragraph (a) of “Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.” Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of the deletion of this Rule and implementation of paragraph (a) of Rule 49 – Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing.*

(a)(1) In the event of an emergency, a qualified Exchange officer shall have the authority to declare an emergency condition with respect to trading on or through the systems and facilities of the Exchange ("Emergency Condition") and designate NYSE Arca, Inc. ("NYSE Arca") to perform the functions set forth in paragraph (b)(2)(A) on behalf of and at the direction of the Exchange.

(2) No declaration of an Emergency Condition shall be made pursuant to paragraph (a)(1) unless (A) there exists a regional or national emergency that would prevent the Exchange from operating normally, and (B) such declaration is necessary so that the securities markets, in general, may continue to operate and trading in Exchange-listed securities, in particular, may continue to occur in a manner consistent with the protection of investors and in pursuit of the public interest.

(3) Definitions:

(A) The term "emergency" as used herein means an "emergency" as defined in Section 12(k)(7) of the Securities Exchange Act of 1934, as amended.

(B) The term "qualified Exchange officer" as used herein means the ICE Chief Executive Officer or his or her designee, or the Chief Regulatory Officer of the Exchange or his or her designee. In the event that none of these individuals is able to act due to incapacitation, the most senior surviving officer of ICE or the Exchange shall be a "qualified Exchange officer" for purposes of this rule.

(b)(1) When an Emergency Condition is declared under paragraph (a), the Exchange:

(A) shall halt all trading conducted on the Exchange's systems and facilities and shall not route any unexecuted orders to NYSE Arca;

(B) shall purge any unexecuted orders from the Exchange's own systems and facilities as soon as practicable following declaration of the Emergency Condition.

(2)(A) Beginning on the next trading day following the declaration of the Emergency Condition, NYSE Arca shall, on behalf of and at the direction of the Exchange, disseminate:

(i) the official opening, re-opening, and closing trades of Exchange-listed securities to the Consolidated Tape as messages of the Exchange, and

(ii) any notification for Exchange-listed securities to the Consolidated Quotation System of a regulatory halt and resumption of trading thereafter, trading pause and resumption of trading thereafter, and Short Sale Price Test trigger and lifting thereafter, as messages of the Exchange.

(B) Bids and offers for Exchange-listed securities entered on or through the systems and facilities of NYSE Arca during the Emergency Condition shall be reported to the Consolidated Quotation System as bids and offers of NYSE Arca, except that the opening quote shall be reported to the Consolidated Quotation System as a bid and/or offer of both the Exchange and NYSE Arca and any re-opening quote shall be reported to the Consolidated Quotation System as a bid and/or offer of the Exchange. Bids and offers for Exchange-listed securities executed on or through the systems and facilities of NYSE Arca during the Emergency Condition shall be reported to the Consolidated Tape as executions of NYSE Arca, except for executions in the opening, re-opening, or closing auctions, which shall be reported as Exchange executions and Exchange volume only.

(3) Members and member organizations wishing to trade Exchange-listed securities during an Emergency Condition are responsible for having contingency plans for establishing connectivity to NYSE Arca and changing the routing instructions for their order entry systems to send bids and offers in Exchange-listed securities to NYSE Arca.

(4) During an Emergency Condition, all trading of Exchange-listed securities entered or executed on or through the systems and facilities of NYSE Arca shall be subject to the NYSE Arca Equities Rules (including but not limited to the opening, re-opening, and closing auction processes applicable to securities for which NYSE Arca is the primary listing market set forth in NYSE Arca Equities Rule 7.35), except that the Exchange's listing requirements for its listed securities shall continue to apply.

(c)(1) In connection with taking action under this rule, a qualified Exchange officer shall make reasonable efforts to consult with the Securities and Exchange Commission before taking such action, or, if the qualified Exchange officer is unable to consult prior to acting, as promptly thereafter as practicable under the circumstances.

(2) The authority granted pursuant to this rule shall be operative for up to 10 calendar days from the date that the Exchange invokes such authority. The Exchange may request that the initial 10-calendar-day period be extended for a specific amount of time by submission of a rule filing pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934, as amended. Such extension shall not take effect except upon approval of such a filing by the Securities and Exchange Commission.

(3) Actions taken pursuant to this rule may be terminated by the Exchange at any time. The Exchange shall provide adequate prior notice to members, member organizations, Sponsored Participants and investors regarding its intention to terminate any such action.

#### **Rule 49 - Equities. Exchange Business Continuity and Disaster Recovery Plans and Mandatory Testing**

*The Exchange will file a separate proposed rule change to establish the operative date of paragraph (a) of this version of Rule 49 – Equities and to delete “Rule 49 - Equities. Emergency Powers” and this preamble. Until such time, “Rule 49 – Equities. Emergency Powers” will remain operative. Subject to such separate proposed rule change, the Exchange will announce via Trader Update the operative date of paragraph (a) of this Rule and deletion of “Rule 49 – Equities. Emergency Powers.”*

##### **(a) Disaster Recovery Facility**

(1) As part of its business continuity and disaster recovery plans, the Exchange maintains a Disaster Recovery Facility, which is a secondary data center located in a geographically diverse location.

(2) If the Exchange determines under Rule 51 - Equities to trade Exchange-traded securities on its Disaster Recovery Facility:

(A) The 11 Wall Street facilities will not be available for trading.

(B) Opening and reopening auctions will be subject to Rule 123D(a)(2) – (6) - Equities and closing auctions will be subject to Supplementary Material .10 to Rule 123C - Equities.

(C) Any unexecuted orders entered into Exchange systems before trading on the Disaster Recovery Facility begins will be deemed cancelled and will be purged from Exchange systems.

(D) Member organizations registered as Designated Market Makers (“DMM”) will not be subject to any DMM obligations or benefits under Exchange rules while securities trade on the Disaster Recovery Facility.

(3) Member organizations wishing to trade on the Exchange’s Disaster Recovery Facility are responsible for having contingency plans for establishing connectivity to such facility and changing the routing instructions for their order entry systems to send bids and offers in Exchange-traded securities to such facility.

(b)(N) Exchange Backup Systems and Mandatory Testing

(1) The Exchange will establish standards for the designation of member organizations it reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of the Exchange's business continuity and disaster recovery plans.

(2) Member organizations designated pursuant to standards established in paragraph (b)(1) of this Rule will be required to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans in the manner and frequency specified by the Exchange, which shall not be less than once every 12 months.

(3) Designated Market Makers that have been determined by the Exchange to contribute a meaningful percentage of the Exchange's overall volume, measured on a quarterly or monthly basis, will be required to participate in scheduled functional and performance testing. The Exchange may also consider other factors in determining the member organizations that will be required to participate in scheduled functional and performance testing, including average daily volume traded on the Exchange measured on a quarterly or monthly basis, or member organizations who collectively account for a certain percentage of market share on the Exchange.

(4) At least three (3) months prior to a scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans, the Exchange will publish the criteria to be used by the Exchange to determine which member organizations will be required to participate in such testing, and notify those member organizations that are required to participate based on such criteria.

(5) Member organizations not designated pursuant to standards established in paragraph (b)(1) of this Rule are permitted to connect to the Exchange's backup systems and may participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans.

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### **Rule 51 - Equities. Hours for Business**

(a) Except as may be otherwise determined by the Board of Directors as to particular days, the Exchange shall be open for the transaction of business on every business day, excluding Saturdays; (a) for a 9:30 a.m. to 4:00 p.m. trading session; (b) for the purposes of 'Off-Hours Trading' (as Rule 900 - Equities (Off-Hours Trading: Applicability and Definitions) defines that term), during such hours as the Exchange may from time to time specify; and (c) during such hours as may be specified by Exchange rule.

(b) Except as may be otherwise determined by the Exchange Board of Directors, the Chief Executive Officer ("CEO") of the Exchange may take any of the following actions [shall have the power to]:

(i) halt or suspend trading in some or all securities traded on the Exchange;

(ii) extend the hours for the transaction of business on the Exchange;

(iii) close some or all Exchange facilities; [or]

(iv) determine the duration of any halt, suspension or closing undertaken pursuant to this rule[.] ; or

(v) determine to trade securities on the Exchange's Disaster Recovery Facility pursuant to Rule 49 – Equities.

(c) The CEO shall take any of the actions described in paragraph (b) above only when he deems such action to be necessary or appropriate for the maintenance of a fair and orderly market, or the protection of investors or otherwise in the public interest, due to extraordinary circumstances such as (1) actual or threatened physical danger, severe climatic conditions, civil unrest, terrorism, acts of war, or loss or interruption of facilities utilized by the Exchange, (2) a request by a governmental agency or official, or (3) a period of mourning or recognition for a person or event. [In considering such action, the CEO shall consult with such available Executive Floor Governors as he deems appropriate under the circumstances.]

(d) The CEO shall notify the Exchange Board of actions taken pursuant to this Rule, except for a period of mourning or recognition for a person or event, as soon thereafter as is feasible.

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