

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76360 ; File No. SR-FINRA-2015-046)

November 5, 2015

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Mandatory Participation in Business Continuity and Disaster Recovery Testing under Regulation SCI

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 30, 2015, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,³ which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to adopt FINRA Rule 4380 related to mandatory participation in business continuity and disaster recovery (“BC/DR”) testing under Regulation Systems Compliance and Integrity (“Regulation SCI”).

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

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

In its filing with the Commission, FINRA 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. FINRA 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

Regulation SCI was adopted by the Commission on November 19, 2014, with the objective of strengthening the technology infrastructure of the U.S. securities markets.⁴ The regulation applies to "SCI entities," which includes FINRA, the national securities exchanges and equity alternative trading systems ("ATs") that meet specified volume thresholds.⁵ One topic of several Regulation SCI rule requirements is BC/DR testing.

Rule 1004 of SEC Regulation SCI requires FINRA, as an SCI entity, to do the following with respect to its BC/DR plan: (1) establish standards to designate the members that FINRA 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 its BC/DR plan; (2) designate members pursuant to its established standards and require them to participate in scheduled functional and performance testing of the operation of FINRA's BC/DR plan, in the manner and frequency specified by FINRA, provided the frequency is no less than once every 12 months; and (3)

⁴ See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252, 72254 (December 5, 2014) ("SCI Adopting Release").

⁵ Rule 1000 of SEC Regulation SCI.

coordinate the testing of FINRA's BC/DR plan on an industry- or sector-wide basis with other SCI entities.

Consistent with Regulation SCI, FINRA proposes to adopt Rule 4380 to establish authority to designate members for mandatory participation in its BC/DR testing. As noted in proposed Rule 4380(a), FINRA will designate members according to established criteria that are designed to ensure participation by those members that FINRA 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 its BC/DR plan. As further noted in proposed Rule 4380(a), FINRA's criteria will consider volume of activity on a FINRA market system over a specified period of time.⁶ FINRA will communicate to members its criteria for designation under this Rule, and any changes to such criteria, on a prospective basis⁷ by Regulatory Notice.

Proposed Rule 4380(b) would reiterate several important points from Regulation SCI with respect to BC/DR plan testing. Specifically, the rule would note that Regulation SCI requires BC/DR testing to include functional and performance testing, rather than simple connectivity testing, and that such testing must occur at least once per 12 months.⁸ Proposed Rule 4380(b) would further state that FINRA will notify members that are designated to participate in the BC/DR test at least 90 days prior to the scheduled testing date.⁹

⁶ Volume-based criteria may contemplate quoting, trading, or reportable order events, depending on the type of activity conducted on a FINRA system.

⁷ For example, should FINRA change its volume-based criteria, or the specified period of time over which such volume is measured (i.e., the look-back period), it would not apply any of those changes retroactively. Instead, it would only apply such changes, after notice, to the next testing cycle with a full look-back period.

⁸ See SCI Adopting Release, 79 FR at 72351-52.

⁹ FINRA believes, based on preliminary discussions among SCI entities that the yearly testing contemplated by this proposal would likely take the place of the current industry test facilitated by the Securities Industry and Financial Markets Association ("SIFMA")

Finally, proposed Rule 4380(c) would state the obligations of member firms that are designated for mandatory participation in BC/DR testing. As noted in the rule, designated members would be required to fulfill, within the time frames established by FINRA, certain testing requirements that FINRA determines are necessary and appropriate. These requirements could include, for example, bringing up their systems on the designated testing day and processing test scripts to simulate trading activity. Designated members may also be required to satisfy related reporting requirements, for example, reporting the member's testing results, so that FINRA may evaluate the efficacy of the test and, correspondingly, its BC/DR plan.¹⁰

FINRA recognizes that there may be additional market participants that wish to participate on a voluntary basis in FINRA's annual BC/DR test, beyond those that are designated under Rule 4380. For example, certain system participants may wish to test their backup capabilities even if they do not exceed the system's threshold cutoff. Additionally, third party service providers, like service bureaus that transmit information to FINRA systems on behalf of FINRA members, may also wish to ensure their ability to function in FINRA's backup environment, even though the service providers are not themselves FINRA members subject to Rule 4380. FINRA will encourage any such market participant to consider voluntary participation in FINRA's BC/DR test, consistent with Commission guidance.¹¹

each October. This would be consistent with Commission guidance – Regulation SCI recognized that the existing SIFMA test could provide a foundation for the regulation's mandatory testing requirements. See SCI Adopting Release, 79 FR at 72349.

¹⁰ FINRA anticipates that compliance with this proposal would be enforced consistent with existing FINRA rules and practice, and that a designated firm's failure to participate in mandatory testing could result in possible sanctions, including fines, under FINRA Rule 8310.

¹¹ See SCI Adopting Release, 79 FR at 72351 n.1170 (encouraging SCI entities to permit voluntary participation).

FINRA has filed the proposed rule change for immediate effectiveness. FINRA will announce its criteria for designated members for mandatory test participation in a Regulatory Notice by November 3, 2015, the general compliance date for Regulation SCI. FINRA anticipates that the first BC/DR test that will include designated members' mandatory participation will occur in October, 2016.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹² which requires that FINRA rules must be designed to, among other things, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

FINRA believes that the proposal, which would authorize FINRA to compel participation by certain designated members in FINRA's BC/DR testing, is consistent with these provisions of the Act for the reasons articulated by the Commission when it adopted Regulation SCI. As the Commission stated, "unless there is effective participation by certain of its members or participants in the testing of [BC/DR] plans, the objective of ensuring resilient and available markets in general, and the maintenance of fair and orderly markets in particular, would not be achieved."¹³

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The

¹² 15 U.S.C. 78o-3(b)(6).

¹³ SCI Adopting Release, 79 FR at 72351 (internal citations omitted).

proposal is intended to carry out the requirements imposed by Regulation SCI with respect to FINRA's BC/DR testing. When the Commission adopted the mandatory backup testing requirements of Regulation SCI, the Commission recognized that the requirements could have some cost impact on designated firms. It concluded, however, that such costs were justified by the need for SCI entities to prepare for the possibility of wide-scale disruptions in the securities markets.¹⁴

FINRA recognizes that the criteria it announces in its Regulatory Notice may impose costs, particularly on those members designated pursuant to the established criteria. However, the Commission noted its belief that the costs of this requirement could be mitigated by the fact that designated members are likely to be larger firms with greater resources.¹⁵ Consistent with the Commission's guidance, FINRA expects that its criteria will mitigate costs by designating larger firms that have greater resources, and likely have experience with the current SIFMA-facilitated industry test, and therefore are more likely to have existing connections to FINRA's backup systems. Moreover, other firms who may anticipate some competitive advantage to participating in the SCI testing are not precluded from doing so by this rule, further mitigating any competitive effects of the rule.

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

Written comments were neither solicited nor received.

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

¹⁴ See SCI Adopting Release, 79 FR at 72348-49. The Commission explained that the designation of larger firms may result in minimal or relatively modest administrative costs because such firms are likely to already have established connectivity to backup sites and to monitor and maintain such connectivity. See *id.*, 79 FR at 72341.

¹⁵ See SCI Adopting Release, 79 FR at 72351.

the Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷ 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) of the Act and Rule 19b-4(f)(6)(iii) thereunder. A proposed rule change filed under Rule 19b-4(f)(6)¹⁸ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁹ 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 believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will allow the Exchange to incorporate changes required under Regulation SCI, such as establishing standards for designating BC/DR participants, prior to the November 3, 2015 compliance date. Accordingly, the Commission designates the proposed rule change to be operative upon filing.²⁰

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

¹⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁷ 17 CFR 240.19b-4(f)(6).

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 240.19b-4(f)(6)(iii).

²⁰ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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. Please include File Number SR-FINRA-2015-046 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-FINRA-2015-046. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2015-046 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.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).