

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78917; File No. SR-NYSEMKT-2016-68)

September 23, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 and Partial Amendment No. 2, Amending Exchange Rule 49 Regarding the Exchange's: (1) Emergency Powers; (2) Disaster Recovery Plans; and (3) Backup Systems and Mandatory Testing

I. Introduction

On July 29, 2016, NYSE MKT LLC ("NYSE MKT" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Exchange Rule 49 – Equities ("Rule 49") to establish a Disaster Recovery Facility and to move the text of Exchange Rule 438 – Equities ("Rule 438") to proposed Exchange Rule 49. The Exchange further proposes to amend Exchange Rule 0 – Equities ("Rule 0") and Rule 431 – Equities (Exchange Backup Systems and Mandatory Testing) ("Rule 431") to specify that Exchange Rule 431 would govern Exchange Backup Systems and Mandatory Testing for Exchange ATP Holders only. On August 1, 2016, the Exchange filed Amendment No. 1 to its proposal.³ On August 11, 2016, the proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register.⁴ On September 19, 2016, the Exchange filed Partial Amendment No. 2, to its proposal.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced the proposal in its entirety.

⁴ See Securities Exchange Act Release No. 78483 (August 5, 2016), 81 FR 53176 (SR-NYSEMKT-2016-68).

⁵ Amendment No. 2 partially amended the proposal to add additional text to proposed Exchange Rule 49, specifying that member organizations of the Exchange that are currently required to participate in testing of the Exchange's business continuity and

The Commission did not receive any comments on the proposal. This order approves the proposal, as modified by Amendment No. 1 and Partial Amendment No. 2.

II. Description of the Proposed Rule Changes, as Modified by Amendment No. 1 and Partial Amendment No. 2

The Exchange proposes to amend Exchange Rule 49 by removing the current text relating to the Exchange’s Emergency Powers and replacing it with new text regarding the Exchange’s Business Continuity and Disaster Recovery Plan, and by moving the text in Exchange Rule 438 regarding Mandatory Testing to Rule 49.⁶ The Exchange also proposes to amend Exchange Rule 51 – Equities (“Rule 51”) to govern the circumstances under which the Exchange’s CEO may determine to have the Exchange trade securities on its Disaster Recovery Facility.

A. Current NYSE MKT Rule 49

Exchange Rule 49(a) sets forth the Exchange’s emergency powers, which grant a qualified Exchange officer the authority to declare an emergency condition with respect to trading on or through the Exchange’s systems and facilities of the Exchange, and designates NYSE Arca, Inc. (“NYSE Arca”) to perform certain functions on behalf of, and at the direction of, the Exchange in the event of an emergency condition. Exchange Rule 49(a) also describes

disaster recovery plans under current Exchange Rule 438 and proposed Exchange Rule 49(b)(N) would also be required to test the Exchange’s proposed disaster recovery plans. Partial Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nysemkt-2016-68/nysemkt201668-2.pdf>. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

⁶ Because the Exchange would not implement amended Exchange Rule 49(a) until after an opportunity to test its procedures with Exchange member organizations, the Exchange proposes to retain current NYSE MKT Rule 49 on its rulebook. The Exchange would delete current Exchange Rule 49 through a separate proposed rule change to establish the operative date of amended Exchange Rule 49(a). In addition to filing the separate proposed rule change, the Exchange will announce via Trader Update the operative date of proposed Rule 49(a).

when an Emergency Condition may be declared and defines the terms “emergency” and “qualified Exchange officer.”

Under Exchange Rule 49, once an emergency condition is declared, the Exchange shall halt all trading on its systems and facilities, purge any unexecuted orders as soon as practicable, and prevent those orders from routing to NYSE Arca.⁷ Beginning the next trading day following the declaration of an emergency condition, NYSE Arca, on behalf of and at the direction of the Exchange, shall disseminate the official opening, re-opening, and closing trades of Exchange-listed securities to the Consolidated Tape as messages of the Exchange, and also disseminate certain other notifications for Exchange-listed securities to the Consolidated Quotation System as messages of the Exchange.⁸ In addition, 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 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 or offer of the Exchange only.⁹

Members and member organizations of the Exchange who wish to trade Exchange-listed securities during an emergency condition are responsible for having a contingency plan for connecting to NYSE Arca.¹⁰ All trading of Exchange-listed securities during an emergency condition on or through NYSE Arca shall be subject to NYSE Arca Equities Rules.¹¹ Before

⁷ See Current Exchange Rule 49(b)(1)(A) and (B).

⁸ See Current Exchange Rule 49(b)(2)(A).

⁹ See Current Exchange Rule 49(b)(2)(B).

¹⁰ See Current Exchange Rule 49(b)(3).

¹¹ See Current Exchange Rule 49(b)(4). However, the Exchange’s listing requirements shall remain applicable. See Current Exchange Rule 49(b)(4).

declaring an emergency condition, the qualified Exchange officer shall make a reasonable effort to consult with the Commission.¹² An emergency condition may remain in effect for up to 10 calendar days from the date it is invoked.¹³ The Exchange has represented that, to date, it has not invoked Exchange Rule 49.¹⁴

B. Proposed Amendments to Exchange Rules

The Exchange proposes to adopt new business continuity and disaster recovery plans for use on the Disaster Recovery Facility to be maintained by the Exchange. Under the proposed business continuity and disaster recovery plans, if the Exchange trades securities on its Disaster Recovery Facility, then:

1. The 11 Wall Street facilities will not be available for trading.¹⁵
2. Consistent with the Exchange's business continuity plan, opening and reopening auctions of Exchange-traded securities traded on the Disaster Recovery Facility would be subject to Rule 123D(a)(2) – (6) – Equities and closing auctions would be subject to Supplementary Material .10 to Rule 123C – Equities.¹⁶

¹² See Current Exchange Rule 49(c)(1).

¹³ See Current Exchange Rule 49(c)(2).

¹⁴ See Notice, supra note 3, at 53177.

¹⁵ See Proposed Exchange Rule 49(a)(2)(A). The Exchange states that, because the trading systems in the Exchange's Disaster Recovery Facility would not have connectivity to designated market maker ("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.

¹⁶ See Proposed Exchange Rule 49(a)(2)(B). The Exchange states that, because there would be no Trading Floor or DMM connectivity, the Exchange would facilitate all openings, reopenings, and closings.

3. Any unexecuted Exchange-traded securities orders entered into the Exchange's systems prior to commencing trading on the Disaster Recovery Facility would be deemed canceled and would be purged from the Exchange's systems.¹⁷
4. 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.¹⁸

The Disaster Recovery Facility and the revised business continuity and disaster recovery plans would allow the Exchange to no longer designate NYSE Arca as its backup facility but instead operate as a fully electronic exchange on its own facilities under its own trading rules, with its own order book and with quotes and trades publicly reported as quotes and trades of the Exchange, rather than as quotes and trades of NYSE Arca. Member organizations wishing to trade on the Exchange's Disaster Recovery Facility would be responsible for having contingency plans for establishing connectivity to that facility and changing routing instructions for their order entry systems to send bids and offers in Exchange-traded securities to that facility.¹⁹ The proposed rule change would also require member organizations to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery

¹⁷ See Proposed Exchange Rule 49(a)(2)(C). The Exchange states that the orders would have to be canceled because, depending on the scope of the disruption, the Exchange may be unable to transmit cancellation messages for unexecuted orders.

¹⁸ See Proposed Exchange Rule 49(a)(2)(D). See also Exchange Rule 103B(I) – Equities (quoting requirements for allocation process of listed securities) and Rule 104 – Equities (Dealings and Responsibilities of DMMs). According to the Exchange, DMMs would not be subject to any such obligations or benefits because the Exchange would not maintain systems that support DMM quoting at its Disaster Recovery Facility. Therefore, DMMs that route orders to the Disaster Recovery Facility would trade in a manner similar to other market participants that electronically enter orders at the Exchange, and DMMs would be subject to the same fees and credits applicable to non-DMM transactions.

¹⁹ See Proposed Exchange Rule 49(a)(3).

plans in the manner and frequency specified by the Exchange, which shall not be less than once every 12 months.²⁰

The Exchange also proposes to delete certain current Rule 49 text that will be rendered obsolete or unnecessary by the proposal. This text includes certain terms, references to NYSE Arca, limits on the operative period for emergency powers, and notifications to the Commission.²¹ In addition the Exchange has proposed non-substantive conforming changes to Exchange Rules 49(b)(N), 431, and 438, to update numbering and cross-references.²² The Exchange also proposes to amend Exchange Rule 51 to govern the circumstances under which the Exchange’s Chief Executive Officer (“CEO”) may determine to have the Exchange trade securities on its Disaster Recovery Facility.²³ Finally, the Exchange proposes to amend Rule 431 to delete references to the terms “member,” “member organization,” and “designated market maker” and use the term “ATP Holder” because Rule 431 would pertain only to options trading. Additionally the Exchange proposes to amend Rule 0 to remove the reference to Rule 431 as being applicable to equities trading.

²⁰ See Proposed Exchange Rule 49(b)(N).

²¹ The Commission notes that, under Regulation SCI, the Exchange would be required to notify the Commission of any “SCI event,” such as a systems disruption that caused the Exchange to use its Disaster Recovery Facility. See 17 CFR 242.1002(b)(1).

²² The Exchange proposes to designate this paragraph of proposed Exchange Rule 49(b)(N) with an “N” to distinguish it from current Exchange Rule 49(b), as both would be operative at the same time.

²³ The Exchange proposes to amend Exchange Rule 51(b) to provide the Exchange’s CEO with the authority to determine whether to use the Exchange’s Disaster Recovery Facility. The Exchange also proposes to make a conforming amendment to Exchange Rule 51(c) to specify that the CEO shall take any of the actions described in Exchange Rule 51(b) only when such action is deemed necessary or appropriate for the maintenance of a fair and orderly market, or the protection of investors of otherwise in the public interest, due to extraordinary circumstances.

III. Discussion and Commission Findings

After careful review of the proposal, as modified by Amendment Nos. 1 and No. 2, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁵ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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.

Under amended Exchange Rule 49, the Exchange would maintain its own Disaster Recovery Facility to continue Exchange operations when necessary without substantial disruption to member organizations. This Disaster Recovery Facility would allow the Exchange to no longer designate NYSE Arca as its backup facility but instead operate as a fully electronic exchange on its own facilities, under its own trading rules, with its own order book and with quotes and trades publicly reported under the Exchange's own reporting symbol. The proposed rule change would also require member organizations to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans in the

²⁴ In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78f(b)(5).

manner and frequency specified by the Exchange, which shall not be less than once every 12 months.²⁶

Under the proposal, the Exchange CEO would be authorized to make a determination for the Exchange to trade securities on the Disaster Recovery Facility only when the CEO deems such action to be necessary or appropriate for the maintenance of a fair and orderly market, or for the protection of investors or otherwise in the public interest, due to extraordinary circumstances. The Exchange CEO must notify the Exchange board of directors as soon as feasible if the CEO makes a determination to use the Disaster Recovery Facility.

The Commission believes that the proposal is reasonably designed to permit the Exchange to continue to operate in the event of an emergency by using a secondary data center located in a geographically diverse location to open, trade, and close Exchange-listed securities. Accordingly, the Commission believes that the proposal is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and the Commission therefore finds that the proposed rule change is consistent with the requirements of the Act.

²⁶ See Proposed Exchange Rule 49(b)(N).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁷ that the proposed rule change (SR-NYSE MKT-2016-68), as modified by Amendments No. 1 and Partial Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Brent J. Fields
Secretary

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).