

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-80154; File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103)

March 3, 2017

Self-Regulatory Organizations; NYSE MKT LLC; NYSE Arca Inc.; Order Approving Proposed Rule Changes to Extend the Time Within Which a Member, Member Organization, an ATP Holder, OTP Holder, or OTP Firm Must File a Uniform Termination Notice for Securities Industry Registration (“Form U5”)

I. Introduction

On June 16, 2016, NYSE MKT LLC (“NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ a proposed rule change to extend the time within which a member or member organization, or an Amex Trading Permit Holder (“ATP Holder”) must file a Form U5, or any amendments thereto. The proposed rule change was published for comment in the Federal Register on July 7, 2016.⁴ On July 14, 2016, NYSE Arca, Inc. (“NYSE Arca”) (NYSE MKT and NYSE Arca, each an “Exchange”) filed with the Commission, a proposed rule change to extend the time within which an Options Trading Permit Holder (“OTP Holder”) or Options Trading Permit Firm (“OTP Firm”) must file a Form U5, or any amendments thereto. The proposed rule change was published for comment in the Federal

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 78198 (June 30, 2016), 81 FR 44363 (“NYSE MKT Notice”).

Register on July 27, 2016.⁵ The Commission received two comment letters regarding the proposals.⁶ NYSE responded to the NASAA Letter on August 12, 2016.⁷

On October 5, 2016, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule changes.⁸ The Commission received four additional comment letters regarding the proposals.⁹ NYSE responded to the OIA Letter on October 26, 2016.¹⁰ On December 21, 2016, the Commission designated a longer period of time to determine whether to approve or disapprove the proposed rule changes.¹¹ Thereafter the Commission received one additional comment letter.¹² NYSE submitted a response on January 16, 2017.¹³ This order approves the proposed rule changes.

⁵ See Securities Exchange Act Release No. 78381 (July 21, 2016), 81 FR 49286 (“NYSE Arca Notice”).

⁶ See letters from Judith Shaw, President, North American Securities Administrators Association, Inc., dated August 3, 2016 (“NASAA Letter”) and Rick A. Fleming, Investor Advocate and Tracey L. McNeil, Ombudsman, Office of the Investor Advocate, Commission, dated October 3, 2016 (“OIA Letter”), to Brent J. Fields, Secretary, Securities and Exchange Commission.

⁷ See letter from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange LLC (“NYSE”) dated August 12, 2016 (“NYSE Letter I”), to Brent J. Fields, Secretary, Commission.

⁸ See Securities Exchange Act Release No. 79055, 81 FR 70460 (October 12, 2016).

⁹ See letters from Kevin Zambrowicz, Associate General Counsel, Securities Industry and Financial Markets Association, dated October 19, 2016 (“SIFMA Letter”), Michele Van Tassel, President, Association of Registration Management (“ARM”), dated November 4, 2016 (“ARM Letter I”), Edwin L. Reed, Deputy Director, Alabama Securities Commission, dated November 14, 2016 (“ASC Letter”), and Mike Rothman, President, NASAA, dated November 16, 2016 (“NASAA Response”) to Brent J. Fields, Secretary, Commission.

¹⁰ See letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, dated October 26, 2016 (“NYSE Letter II”) to Brent J. Fields, Secretary, Commission.

¹¹ See Securities Exchange Act Release No. 79645, 81 FR 95679 (December 28, 2016).

¹² See letter from Michele Van Tassel, President, ARM, dated January 4, 2017 (“ARM Letter II”) to Brent J. Fields, Secretary, Commission.

¹³ See letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE,

II. Description of the Proposals

NYSEMKT-2016-52

As set forth in the NYSE MKT Notice, NYSE MKT proposes to amend its rules regarding when a member, member organization, or an ATP Holder must file a Form U5 and amendments thereto. Under Commentary .01 to NYSE MKT Rule 340, members and member organizations (collectively, “Members”) are required to file a Form U5 and any amendment thereto with the Central Registration Depository (“CRD”) within 10 days of the date of termination of an employee who has been approved for admission to the trading floor. Under Commentary .09 to NYSE MKT Rule 341, Members must submit information concerning the termination of employment of a Member, registered employee, or an officer on Form U5 within 10 days of the date of termination. Under NYSE MKT Rule 359(a), an ATP Holder that terminates an ATP Holder or approved person must file a Form U5 within 10 days of the termination.

NYSE MKT proposes to amend these rules by replacing the 10-day deadline with a requirement to promptly file a Form U5 with CRD, but not later than 30 calendar days after the date of termination of a Member, ATP Holder, registered employee, officer, or approved person. Further, the proposed rule change would require that any amendment to a Form U5 be promptly filed with CRD, but not later than 30 calendar days after learning of the facts or circumstances giving rise to the need to amend the Form. In addition, the proposed rule change would require that the Form U5 be provided to the terminated person concurrently with filing.

NYSEArca-2016-103

As set forth in the NYSE Arca Notice, NYSE Arca also proposes to amend its rules

dated January 16, 2017 (“NYSE Letter III”) to Brent J. Fields, Secretary, Commission.

regarding when an OTP Holder and an OTP Firm must file a Form U5 and amendments thereto. Under NYSE Arca Rule 2.17(c), an OTP Holder that terminates an OTP is required to file a Form U5 or any amendment thereto within 10 business days of the termination or the occurrence requiring the amendment. Under NYSE Arca Rule 2.23(i), OTP Holders and OTP Firms are required to file a Form U5 and any amendment thereto within 10 business days of the termination date of an employee who has been approved for admission to the trading floor or participation on any trading system. Similar to NYSE MKT, NYSE Arca proposes to amend its rules to require OTP Holders and OTP Firms to promptly file a Form U5 with CRD, but not later than 30 calendar days after the date of termination of an OTP or employee, as applicable. In addition, NYSE Arca proposes to require that any amendment to a Form U5 be promptly filed with CRD, but not later than 30 calendar days after learning of the facts or circumstances giving rise to the need to amend the Form U5 and add a requirement to the rules that the Form U5 be provided to the terminated person concurrently with filing. The Exchanges state that the proposed rule changes would harmonize their rules with the requirements of other exchanges and FINRA.¹⁴

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities

¹⁴ See, e.g., NYSE Rule 345(a).17(a) (providing for prompt reporting but in any event no later than 30 days following termination, and concurrently to the person); BATS BZX Exchange, Inc. Rule 2.5 Interpretations and Policies .04(a) Termination of Employment (providing for immediate reporting but in no event later than 30 days following termination, and concurrently to the person); FINRA By-Laws Article 5 Sec. 3(a) (providing for giving notice not later than 30 days after termination, and concurrently to the person).

exchange.¹⁵ In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,¹⁶ 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 remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and not to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed rule changes, which will provide additional time for Members to file Forms U5, should help to ensure more accurate information regarding the reasons for the termination of a registered person, which would serve to protect investors and the public interest.

As noted above, the Commission received seven comment letters on the proposed rule changes and three letters from the NYSE responding to the comments.¹⁷ SIFMA and ARM support the proposed 30-day filing deadline¹⁸ because they think it is more reasonable than the current 10-day period¹⁹ and would align the Form U5 filing requirement with the more broadly applicable FINRA standard.²⁰ SIFMA also notes that the 10-day period may create challenges for firms in the process of collecting and reviewing information that may be relevant to the accuracy of the filing.²¹ ARM also supports the 30-day filing deadline and asserts that the 10-

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

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ See NASAA Letter, OIA Letter, SIFMA Letter, ARM Letter I, ASC Letter, NASAA Response, and ARM Letter II and NYSE Letter I responding to the NASAA Letter, NYSE Letter II responding to the OIA Letter, and NYSE Letter III responding to all the comment letters.

¹⁸ See SIFMA Letter, ARM Letter I, and ARM Letter II.

¹⁹ See SIFMA Letter at 2, ARM Letter I at 2.

²⁰ See SIFMA Letter at 2.

²¹ See id.

day Form U5 filing requirement imposes unnecessary urgency on the process, causing Members to rush to meet the deadline at the risk of being less thorough than a 30-day review period would allow.²²

In contrast, NASAA, OIA, and the ASC object to extending the time for filing Form U5 because regulators use the information on the Form U5 and need the information on a timely basis.²³ All three commenters argue that the 10-day filing requirement for Form U5 should be maintained, noting that any harmonization effort among self-regulatory organizations should focus on shortening the Form U5 filing deadlines across the industry, rather than on lengthening them.²⁴

NASAA, the OIA, and the ASC also raise concerns about the impact of the proposed rule changes on investor protection, including potential challenges the proposals would pose for state regulators trying to fulfill their regulatory responsibilities, and note that the Form U5 contains valuable regulatory information relating to the termination of securities industry professionals, which is used by regulators in making licensing decisions, often under short timeframes.²⁵ The OIA notes that the information on Form U5 is used by state regulators making licensing decisions, FINRA to identify and initiate investigations, firms when making hiring decisions, and the information alerts investors about potential red flags in a broker's employment history.²⁶ NASAA states that a 30-day filing deadline for the Form U5 poses significant challenges for

²² See ARM Letter I at 2 and ARM Letter II at 2. SIFMA and ARM object to the use of the word “promptly” in the rule language because they believe it may create unnecessary ambiguity regarding the standard. SIFMA Letter at 3 and ARM Letter I at 2.

²³ See NASAA Letter at 1-2, NASAA Response at 1-2, OIA Letter at 2-7, and ASC Letter.

²⁴ See NASAA Letter at 1-2, NASAA Response at 3, OIA Letter at 6, and ASC Letter at 2.

²⁵ See NASAA Letter at 1-2, OIA Letter at 2 – 7, and ASC Letter.

²⁶ See OIA Letter at 3.

state regulators, particularly due to the often automatic nature of the registration process in many states where, under a 30-day standard, a state may not have Form U5 information before it is required to make a new licensing decision.²⁷ NASAA further suggests that it is time for a comprehensive review of Form U5 filing deadlines.²⁸ In addition, NASAA asserts that the importance of state licensing decisions outweigh any arguable burden of the shorter filing deadline.²⁹ NASAA also asserts that because “approximately 73% of Form U5s are already filed within 10 days of a representative’s termination,” the burden of maintaining a shorter filing deadline is demonstrably minimal, as the vast majority of firms already comply with the deadline.³⁰ Thus, NASAA does not believe that the 10-day requirement imposes a competitive disadvantage on the Exchanges’ members.³¹ NASAA also asserts that Commission approval of the proposal would be premature, as NASAA’s ongoing work in this area may lead to an industry-wide examination of Form U5 filing issues, and ultimately a recommendation to shorten the deadlines for filing the Form U5.³² OIA supports a harmonized approach among the self-regulatory organizations but argues that the appropriate way to harmonize the requirement would be to shorten the filing timeframes to 10 days across the industry.³³

NYSE responds by stating that the proposed rule changes would harmonize the Exchanges’ rules with the existing rules of the other exchanges and FINRA and thereby ensure

²⁷ See NASAA Letter at 2 and NASAA Response at 2. See also ASC Letter at 2 (stating it is far more efficient for a state to prevent an agent with disqualifying history from becoming registered than it is to revoke or suspend a registered agent).

²⁸ See NASAA Response at 2.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.* at 2-3.

³² See *id.* at 3.

³³ See OIA Letter at 3.

uniformity and promote clarity and consistency.³⁴ In addition, the Exchange believes that maintaining a requirement for NYSE MKT and NYSE Arca Members different from the requirement for FINRA members results in a burden on competition.³⁵ With respect to concerns regarding timely access to information by investors, NYSE references a proposed rule change that amended FINRA's rules to reduce the time period within which information disclosed on Form U5 is made available to the public via BrokerCheck from 15 days to three days.³⁶ In this regard, NYSE suggests that the relevant timing is when information provided on the Form U5 is made available on BrokerCheck. NYSE also states that unless FINRA moves to a shorter timeframe it would be a burden on competition for NYSE MKT and NYSE Arca to continue to maintain a different standard than is required of members of other self-regulatory organizations.³⁷

Finally, NYSE asserts its belief that the proposals are consistent with the Act because they conform to the rules of other self-regulatory organizations.³⁸ Further, NYSE believes that the proposals should eliminate potential reporting inaccuracies caused by any such disparities

³⁴ See NYSE Letter III at 2.

³⁵ See NYSE Letter I at 1, NYSE Letter II at 2.

³⁶ See NYSE Letter I at 2. But see OIA Letter at 6 noting “that, while timelier disclosure of Form U5 information on BrokerCheck impacts the speed in which a retail investor may be alerted to red flag conduct, it has no impact on the speed in which regulators are alerted to, and can respond to, the information in the Form U5.”

³⁷ See NYSE Letter I at 2, NYSE Letter II at 3.

³⁸ See NYSE Letter I at 1-2, NYSE Letter II at 1-2, NYSE Letter III at 1-2. NYSE refers to similar exchange rules featuring a 30-day time limit for the filing and amending of the Form U5, including two rules adopted in 2016. See NYSE Letter II at 2. The Commission approved a rule change, SR-NYSEArca-2016-104, which amended one rule to add “calendar” to modify the 30-day time frame within which to submit Form U5 and a second rule to shorten the time within which to submit the Form U5 from 30 business days to 30 calendar days. See Securities Exchange Act Release No. 78809 (September 9, 2016), 81 FR 63543 (September 15, 2016).

among exchanges' regulatory reporting requirements and ensure greater accuracy in Form U5 reporting because the proposed timeframes would provide Members with sufficient time to perform due diligence before reporting a termination.³⁹ Specifically responding to SIFMA and ARM, NYSE states that the proposed rule language is not ambiguous, adding that the "prompt" requirement is consistent with rules of other self-regulatory organizations and should encourage prompt filing of Form U5, but does not shorten the deadline of 30 days.⁴⁰

As discussed above, the Commission believes that the changes, which will provide additional time for Members to file Forms U5, may result in more accurate information describing the reasons for the termination of a registered person, which would serve to protect investors and the public interest. Certain commenters appear to be concerned that Members may require additional time to accurately and completely respond to questions on the Form U5.⁴¹ The additional time associated with the proposed rule change should contribute to the accuracy of information contained in the Form U5. The Commission notes that Forms U5 must be accurate and complete so that investors have the information that they need to determine if they wish to work with a particular registered person, and regulators have the information they need to properly oversee the associated persons engaged in the securities business in their jurisdictions, as soon as possible. In addition, the Commission notes that proposed time limits are consistent with the rules of other self-regulatory organizations.⁴²

³⁹ See NYSE Letter III at 2.

⁴⁰ See id.

⁴¹ See SIFMA letter at 2, ARM Letter I at 1-2 and ARM Letter II at 2.

⁴² See supra, note 14 and accompanying text.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴³ that the proposed rule changes (SR-NYSEMKT-2016-52 and SR-NYSE Arca 2016-103) be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴

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Assistant Secretary

⁴³ 15 U.S.C. 78s(b)(2).

⁴⁴ 17 CFR 200.30-3(a)(12).