

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76343; File No. SR-NYSEMKT-2015-82)

November 4, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Requiring Certain Member Organizations to Participate in Business Continuity and Disaster Recovery Plans Testing in Connection with Regulation Systems Compliance and Integrity

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 October 26, 2015, 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 and II 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 require certain Exchange member organizations<sup>4</sup> (“Members”)

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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.

<sup>4</sup> The term "member organization" is defined in Rule 24 (Office Rules) as “a partnership, corporation or such other entity as the Exchange may, by Rule, permit to become a member organization, and which meets the qualifications specified in the Rules.” The term “member organization” is defined in Rule 2(b)(i) (Equities Rules) as a registered broker or dealer (unless exempt pursuant to the Securities Exchange Act of 1934) (the "Act") that is a member of the Financial Industry Regulatory Authority, Inc. ("FINRA") or another registered securities exchange. Member organizations that transact business with public customers or conduct business on the Floor of the Exchange shall at all times be members of FINRA. A registered broker or dealer must also be approved by the Exchange and authorized to designate an associated natural person to effect transactions on the floor of the Exchange or any facility thereof. This term shall include a natural person so registered, approved and licensed who directly effects transactions on the floor of the Exchange or any facility thereof.” The term “member organization” also includes any registered broker or dealer that is a member of FINRA or a registered securities

to participate in business continuity and disaster recovery plans (“BC/DR Plans”) testing in connection with Regulation Systems Compliance and Integrity (“Regulation SCI”).<sup>5</sup> The text of 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.

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

As adopted by the Commission, Regulation SCI applies to certain self-regulatory organizations (including the Exchange), alternative trading systems (“ATs”), plan processors, and exempt clearing agencies (collectively, “SCI entities”), and will require these SCI entities to comply with requirements with respect to the automated systems central to the performance of their regulated activities. Among the requirements of Regulation SCI is Rule 1001(a)(2)(v), which requires the Exchange and other SCI entities to maintain “[b]usiness continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently

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exchange, consistent with the requirements of section 2(b)(i) of this Rule, which does not own a trading license and agrees to be regulated by the Exchange as a member organization and which the Exchange has agreed to regulate.” See Rule 2(b)(ii) - Equities.

<sup>5</sup> See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) (“SCI Adopting Release”).

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.”<sup>6</sup> As a matter of course, the Exchange has put extensive time and resources toward planning for system failures and already maintains robust BC/DR plans consistent with the proposed rule. As set forth below, in connection with Regulation SCI, the Exchange is proposing to require certain Members to participate in testing of the operation of the Exchange’s BC/DR plans.

With respect to an SCI entity’s BC/DR plans, including its backup systems, paragraph (a) of Rule 1004 of Regulation SCI requires each SCI entity to: “[e]stablish standards for the designation of those members or participants that the SCI entity 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 such plans.”<sup>7</sup> Paragraph (b) of Rule 1004 further requires each SCI entity to “[d]esignate members or participants pursuant to the standards established in paragraph (a) of [Rule 1004] and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months.”<sup>8</sup>

To comply with Rule 1004 of Regulation SCI, the Exchange proposes to amend current Rule 431,<sup>9</sup> governing mandatory testing of Exchange backup systems as described below. The

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<sup>6</sup> 17 CFR 242.1001(a)(2)(v).

<sup>7</sup> 17 CFR 242.1004(a).

<sup>8</sup> 17 CFR 242.1004(b).

<sup>9</sup> Current Rule 431 requires each member or member organization to participate in the testing of their computer systems to ascertain decimal pricing conversion compatibility of

requirements of revised Rule 431 would apply to Members of the Exchange's equities and options markets.<sup>10</sup>

First, in paragraph (a) of revised Rule 431, the Exchange proposes to establish standards for the designation of Members that the Exchange 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.

Second, in paragraph (b) of revised Rule 431, the Exchange proposes to specify that Members that are designated pursuant to paragraph (a) of revised Rule 431 would be required to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans, which shall not be less than once every 12 months.

Third, in paragraph (c) of revised Rule 431, the Exchange proposes to make clear that Designated Market Makers,<sup>11</sup> Specialists and e-Specialists<sup>12</sup> 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 further proposes that it may also consider other factors in

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such systems. The Exchange proposes to delete the text of the current rule as it is obsolete and no longer applicable.

<sup>10</sup> A rule reference has been added to Rule 0 – Equities to make clear that the proposed rule applies to Members that conduct equities transactions on the Exchange.

<sup>11</sup> The term "Designated Market Maker" ("DMM") shall mean an individual member, officer, partner, employee or associated person of a Designated Market Maker Unit who is approved by the Exchange to act in the capacity of a DMM. See Rule 2(i) - Equities.

<sup>12</sup> The term "Specialist" means an individual or entity that has been deemed qualified by the Exchange for the purpose of making transactions on the Exchange in accordance with the provisions of Rule 920NY, and who meets the qualification requirements of Rule 927NY(b). Each Specialist must be registered with the Exchange as a Market Maker. Any ATP Holder registered as a Market Maker with the Exchange is eligible to be qualified as a Specialist. See Rule 900.2NY(76). E-Specialists are Members designated by the Exchange in an options class to fulfill certain obligations required of Specialists. See Rule 927.4NY.

determining the Members 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 who collectively account for a certain percentage of market share on the Exchange.

Fourth, in paragraph (d) of revised Rule 431, the Exchange proposes that 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 will be required to participate in such testing and notify those Members that are required to participate based on such criteria.<sup>13</sup> The Exchange believes that proposed notice requirements are necessary to provide Members with proper advance notice when they become subject to the proposed rule. The proposed timeframes would also provide Members with adequate time to prepare for the testing, including any systems changes needed, to connect to the Exchange's backup systems.

Finally, in paragraph (e) of revised Rule 431, the Exchange proposes to make clear that Members not designated pursuant to standards established in paragraph (a) of revised Rule 431 are permitted to connect to the Exchange's backup systems and may participate in testing of such systems. Proposed paragraph (e) is consistent with Regulation SCI, which encourages "SCI entities to permit non-designated members or participants to participate in the testing of the SCE entity's BC/DR plans if they request to do so."<sup>14</sup>

The Exchange notes that it encourages all Members to connect to the Exchange's backup systems and to participate in testing of such systems. However, in adopting the requirements of revised Rule 431, the rule will subject only those Members to mandatory testing that the

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<sup>13</sup> The Exchange will publish the initial notice to Members no later than November 3, 2015.

<sup>14</sup> See SCI Adopting Release, supra note 5 at 72350.

Exchange believes are, taken as a whole, the minimum necessary to maintain fair and orderly markets. The Exchange believes that designating Members to participate in mandatory testing because they, for example, account for a significant portion of the Exchange's overall volume or maintain exclusive responsibilities with respect to Exchange-listed securities is a reasonable means to ensure the maintenance of a fair and orderly market on the Exchange.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>16</sup> in particular, because it is 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal would ensure that the Members necessary to ensure the maintenance of a fair and orderly market are properly designated consistent with Rule 1004 of Regulation SCI. Specifically, as proposed, the Exchange would adopt clear and objective criteria with respect to the designation of Members that are required to participate in the testing of the Exchange's BC/DR plans, as well as appropriate notification regarding such designation. As set forth in the SCI Adopting Release, "SROs have the authority, and legal responsibility, under Section 6 of the Exchange Act, to adopt and enforce rules (including rules to comply with Regulation SCI's

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

requirements relating to BC/DR testing) applicable to their members or participants that are 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.”<sup>17</sup> The Exchange believes that this proposal is consistent with such authority and legal responsibility.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposal is not a competitive proposal but rather is necessary for the Exchange’s compliance with Regulation SCI.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to

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<sup>17</sup> See SCI Adopting Release, *supra* note 5 at 72350.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

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)<sup>20</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>21</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission 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 BCP/DR participants, prior to the November 3, 2015 compliance date. Accordingly, the Commission designates the proposed rule change to be operative upon filing.<sup>22</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>23</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning

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<sup>20</sup> 17 CFR 240.19b-4(f)(6).

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

<sup>22</sup> 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).

<sup>23</sup> 15 U.S.C. 78s(b)(2)(B).



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-2015-82 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-2015-82. 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 Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at [www.nyse.com](http://www.nyse.com). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-

NYSEMKT-2015-82 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>24</sup>

Brent J. Fields  
Secretary

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<sup>24</sup> 17 CFR 200.30-3(a)(12).