

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76427; File No. SR-NYSEMKT-2015-76)

November 12, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Constituting a Stated Interpretation with Respect to the Meaning, Administration, and Enforcement of Rule 28 – Equities

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on October 28, 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 constitute a stated interpretation with respect to the meaning, administration, and enforcement of Rule 28 – Equities (“Rule 28”). The proposed rule change is available on the Exchange’s website at 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 a rule change that constitutes a stated interpretation with respect to the meaning, administration, and enforcement of Rule 28. The Exchange is not proposing any changes to the text of the current version of Rule 28.

Rule 28 describes and provides the basis for the Exchange's practice of conducting fingerprint-based criminal record checks. The Rule permits the Exchange to obtain fingerprints of prospective and current employees, temporary personnel, independent contractors and service providers of the Exchange and its principal subsidiaries; submit those fingerprints to the Attorney General of the United States or his or her designee ("Attorney General") for identification and processing; and receive criminal history record information from the Attorney General for evaluation and use, in accordance with applicable law, in enhancing the security of the facilities, systems, data, and/or records of the Exchange and its principal subsidiaries.

The Exchange utilizes a Live-Scan⁴ electronic system to capture and transmit fingerprints directly to the Federal Bureau of Investigation ("FBI"), which maintains on behalf of the Attorney General a database of fingerprint-based criminal history records. The capture and transmittal function, and corresponding receipt of criminal history information from the FBI, is handled directly by Exchange personnel. The Exchange intends to engage an FBI-approved

⁴ Live-Scan refers to the process of capturing fingerprints directly into a digitized format as opposed to traditional ink and paper methods. Live-Scan technology captures and transfers images to a central location and/or interface for identification processing.

“Channel Partner”⁵ to maintain and operate, on behalf of the Exchange, a Live-Scan and/or other electronic system(s) for the submission of fingerprints to the FBI; to receive and maintain criminal history record information from the FBI; and to disseminate such information, through secure systems, to a limited set of approved reviewing officials within the Exchange and its affiliates. The Exchange believes Rule 28 allows for the retention of a Channel Partner for these purposes.⁶

The foregoing interpretation is consistent with the Exchange’s authority under Section 17(f)(2) of the Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),⁷ which requires, *inter alia*, that employees of exchanges be fingerprinted and that exchanges “shall submit such fingerprints, or cause the same to be submitted, to the Attorney General of the United States for identification and appropriate processing.” The Exchange further notes that the proposed interpretation is consistent with the rules and procedures at other self-regulatory organizations (“SROs”).⁸

⁵ FBI-approved Channel Partners receive the fingerprint submission and relevant data, collect the associated fee(s), electronically forward the fingerprint submission with the necessary information to the FBI Criminal Justice Information Services Division (“CJIS”) for a national Criminal History Summary check, and receive the electronic summary check result for dissemination to the authorized employer entity. *See* Securities Exchange Act Release No. 71066 (December 12, 2013), 78 FR 76667 (December 18, 2013) (SR-ISE-2013-66).

⁶ Rule 28 allows the Exchange to obtain fingerprints from service providers, including employees of affiliates of the Exchange. *See* Chicago Board Options Exchange, Incorporated (“CBOE”) Rule 15.10; Securities Exchange Act Release No. 69496 (May 2, 2013), 78 FR 26671, 26671 (May 7, 2013) (SR-CBOE-2013-044) (CBOE conducts fingerprint-based criminal record checks of directors, officers and employees as well as, without limitation, “temporary personnel, independent contractors, consultants, vendors and service providers ... who have or are anticipated to have access to facilities and records.”).

⁷ *See* 15 U.S.C. 17(f)(2) [sic]; Dodd-Frank Act Sect. 929S.

⁸ *See* International Securities Exchange (“ISE”) Rule 1408; Chicago Board Options Exchange (“CBOE”) Rule 15.10. *See generally* Securities Exchange Act Release No.

The Exchange accordingly believes that under Rule 28 and applicable statutes, the Exchange has the authority to engage an FBI-approved Channel Partner for some or all of the fingerprinting processes described in the Rule. The Exchange believes that this proposed interpretation would ensure the Exchange's continued compliance with its Rules and applicable state and federal law.⁹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that the proposed stated interpretation would enable the Exchange to continue to identify and exclude persons with felony or misdemeanor conviction records that may pose a threat to the safety of Exchange personnel or the security of facilities and records, thereby

71066 (December 12, 2013), 78 FR 76667, 76668 n. 12 (December 18, 2013) (SR-ISE-2013-66) (noting that “[a]n FBI-approved Channel Partner simply helps expedite the delivery of Criminal History Summary information on behalf of the FBI”, and that the “process for making a request through an FBI-approved Channel Partner is consistent with FBI submission procedures”).

⁹ Access to the FBI's fingerprint-based database of criminal records is permitted only when authorized by law. Section 17(f)(2) of the Act explicitly directs the Attorney General to provide SROs designated by the Commission (e.g., the Exchange) with access to such criminal history record information. Further, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 17(f)(2) specifically requires, inter alia, that employees of national securities exchanges be fingerprinted. New York's General Business Law also requires SROs to fingerprint employees “as a condition of employment,” as well as certain non-employee service providers. N.Y. Gen. Bus. Law § 359-e (McKinney).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

enhancing business continuity, workplace safety and the security of the Exchange's operations and helping to protect investors and the public interest.

Continuing to run fingerprint-based background checks is imperative for the Exchange and its affiliates, as this process helps to identify persons with criminal history records who may pose a threat to the safety of Exchange personnel and/or the security of Exchange facilities and records. This identification and screening process thus enhances business continuity, workplace safety, and the security of the Exchange's operations. The use of an FBI-approved Channel Partner in some or all phases of this process is consistent with Rule 28 and applicable state and federal law, and in furtherance of the important objectives described herein. Additionally, the use of a Channel Partner is consistent with the fingerprinting method currently employed by other SROs.¹² For all these reasons, the proposal is also designed to protect investors as well as the public interest.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would enhance the security of the Exchange's facilities and records without adding any burden on market participants and allow the Exchange continued compliance with its fingerprinting rules and with Section 17(f)(2) of the Act as amended by the Dodd-Frank Act.¹³

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

¹² See note 8, supra.

¹³ See Section 929S of the Dodd-Frank Act.

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)¹⁴ of the Act and Rule 19b-4(f)(1)¹⁵ thereunder. The proposed rule change effects a change that constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

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 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 will institute proceedings 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 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-NYSEMKT-2015-76 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.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(6).

All submissions should refer to File Number SR-NYSEMKT-2015-76. 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 10 a.m. and 3 p.m. 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. 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-2015-76 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.¹⁶

Robert W. Errett
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).