

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79055; File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103)

October 5, 2016

Self-Regulatory Organizations; NYSE MKT LLC; NYSE Arca, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Extend the Time Within Which a Member, Member Organization, an ATP Holder, an OTP Holder, or an 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, pursuant to Section 19(b)(1)⁵ of the Act and Rule 19b-4 thereunder,⁶ 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 Register on July 27, 2016.⁷

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.

⁵ 15 U.S.C.78s(b)(1).

⁶ 17 CFR 240.19b-4.

⁷ See Securities Exchange Act Release No. 78381 (July 21, 2016), 81 FR 49286.

The Commission received two comment letters regarding the proposals.⁸ NYSE responded to the NASAA Letter on August 12, 2016.⁹ This order institutes proceedings under Section 19(b)(2)(B) of the Act¹⁰ to determine whether to approve or disapprove the proposed rule changes.

II. Description of the Proposed Rule Changes

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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 that 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 such 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

⁸ 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, to Brent J. Fields, Secretary, Commission (“OIA Letter”).

⁹ See letter from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange LLC, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated August 12, 2016 (“NYSE Letter”).

¹⁰ 15 U.S.C. 78s(b)(2)(B).

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 amendment. In addition, the proposed rule change would require that all Form U5s be provided to the terminated person concurrently with filing.

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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 that has been approved for admission to the trading floor or participation on any trading system.

NYSE Arca proposes to extend these deadlines to 30 days in the same manner that NYSE MKT has proposed to amend its rules. The Exchanges stated that the proposed rule changes would harmonize their rules with similar requirements of other exchanges and FINRA.¹¹ In

¹¹ See New York Stock Exchange LLC Rule 345(a).17(a) and (b) (requiring that a Form U5 shall be reported promptly, but in any event not later than 30 days following termination, that any amendment to the Form U5 shall be filed not later than 30 days after learning of the facts or circumstances giving rise to the amendment, and that any termination notice must be provided concurrently to the person whose association has been terminated); BATS BZX Exchange, Inc. Rule 2.5 Interpretations and Policies .04(a) and (b) (requiring that a Form U5 be reported immediately following the date of termination, but in no event later than 30 days following termination, that any amendment to the Form U5 shall be filed no later than 30 days after learning of the facts or circumstances giving rise to the amendment, and that any termination notice or amendment shall be provided concurrently to the person whose association has been terminated); FINRA By-Laws Article 5 Sec. 3(a) and (b) (requiring that notice of termination be filed not later than 30 days after termination, that an amendment to a Form U5 be filed not later than 30 days after learning of the facts or circumstances giving rise to the amendment, and that notice be provided concurrently to the person whose association has been terminated within the

addition, the Exchanges believe that by adding a requirement that Form U5 be filed promptly, the proposals may lead to Form U5s being filed sooner than the current 10-day requirement.

III. Comment Letters and NYSE's Response

The Commission received two comments on the proposed rule changes, one from NASAA and one from the Commission's Office of the Investor Advocate.¹² The Commission also received a response to the NASAA comment letter from the NYSE.¹³ NASAA and OIA raise concerns about extending the time that firms would have to submit Form U5 to 30 days. NASAA states that the 10-day filing requirement for Form U5 should be maintained, noting that the form "contains valuable regulatory information, relating to the termination of securities industry professionals, which is used by regulators in making licensing decisions and by securities firms in making hiring decisions."¹⁴ NASAA also states that timely access to the information on Form U5 is critical, noting that state regulators use the information from Form U5 filings when making decisions regarding whether to register a person in that state.¹⁵ NASAA further notes that state regulators often must make such decisions in short timeframes.¹⁶ In addition, NASAA notes that information and money flow through the economy very quickly and "regulators making registration determinations and securities firms making hiring decisions should not have to do so without a full picture of the facts and circumstances and should have access to information in the most timely manner possible."¹⁷

time periods prescribed).

¹² See supra note 8.

¹³ See supra note 9.

¹⁴ See NASAA Letter at 1.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id. at 2.

NYSE responded that the proposed rule change would harmonize its rules with the existing rules of the other exchanges and FINRA.¹⁸ With respect to NASAA’s concerns, NYSE referenced a proposed rule change which amended FINRA’s rules to reduce the time period within which information disclosed on Form U5 is made available to the public via BrokerCheck.¹⁹ Finally, NYSE stated that unless FINRA moves to a shorter timeframe it would be a burden on competition for NYSE Arca and NYSE MKT to continue to maintain a different standard.²⁰

The OIA objects to the proposed amendments, stating its view that the amendments “...are not in the public interest and may be designed to contribute to, rather than to prevent, fraudulent and manipulative acts and practices in the markets.”²¹ Like NASAA, the OIA argues that the appropriate way to harmonize the requirement would be to shorten the filing timeframes to 10 days across the industry.²² The OIA notes that the information on Form U5 is used by state regulators making licensing decisions, FINRA to identify and initiate investigations of firms and brokers that pose risks, firms when making hiring decisions, and, “perhaps most important, the information alerts retail investors about potential red flags in a broker’s employment history.”²³

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEMKT-2016-52 and NYSEArca-2016-103 and Grounds for Disapproval Under Consideration

¹⁸ See NYSE Letter at 1.

¹⁹ Id. at 2.

²⁰ Id.

²¹ See OIA Letter at 2-3.

²² See OIA Letter at 6 and NASAA Letter at 1.

²³ See OIA Letter at 4.

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁴ to determine whether the proposed rule changes should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule changes, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,²⁵ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings because the proposals raise important issues that warrant further public comment and Commission consideration. Specifically, the Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule changes' consistency with Section 6(b)(5) of the Act,²⁶ which requires that the rules of a national securities exchange be designed, among other things, 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 and, in general, to protect investors and the public interest.

The Commission seeks comment on whether the proposals to extend the deadline that firms have to file Form U5 would undermine the ability of the Exchanges, the state securities

²⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding.

²⁵ 15 U.S.C. 78s(b)(2)(B).

²⁶ 15 U.S.C. 78f(b)(5).

regulators and the public to use information required on Form U5. As a practical matter, would such a change result in less timely filing of Form U5? If so, would the proposals compromise investor protection, degrade the ability of state securities regulators to vet potential registrants and affect the hiring decisions of firms, as the commenters suggest?

The Commission also seeks comment on whether all exchanges and FINRA should pursue an initiative to harmonize their respective requirements and, if so, what is the appropriate timeframe? Would a 10-day standard unduly burden firms and potentially compromise the quality or integrity of the information reported on Form U5?²⁷ The Commission is interested in any additional burdens or benefits a requirement to file Form U5 within 10 days might impose on the public or the participants in the securities industry.

The Commission believes the proposals raise questions as to whether they are consistent with the requirements of Section 6(b)(5) of the Act,²⁸ including whether the proposals are 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 and, in general, to protect investors and the public interest.

V. Procedure: Request for Written Comments

²⁷ See FINRA Regulatory Notice 10-39, which states that when providing explanations for reasons for terminations, firms must answer all disclosure questions accurately and provide enough information so the reader can understand the conduct that led to the termination and that the failure to do so may result in sanctions; see also In the matter of Wedbush Securities Inc., Securities Exchange Act Release No. 78568 (August 12, 2016) (noting that Form U5 serves as a warning mechanism to member firms of the potential risks and accompanying supervisory responsibilities they must assume if they decide to employ an individual with a suspect history and provides FINRA with information useful in deciding whether to initiate an investigation, and that failure to file these forms accurately and on time frustrates these objectives) .

²⁸ 15 U.S.C. 78f(b)(5).

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposed rule changes. In particular, the Commission invites the written views of interested persons concerning whether the proposals are consistent with Sections 6(b)(5)²⁹ or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issue relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,³⁰ any request for an opportunity to make an oral presentation.³¹ Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. In light of the concerns raised by the proposed rule changes, as discussed above, the Commission invites additional comment on the proposed rule changes as the Commission continues its analysis of the proposed rule changes' consistency with Sections 6(b)(5) and 6(b)(8),³² or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of NYSE MKT's and/or

²⁹

Id.

³⁰

17 CFR 240.19b-4.

³¹

Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

³²

15 U.S.C. 78f(b)(5), (b)(8).

NYSE Arca's statements in support of the proposed rule changes, in addition to any other comments they may wish to submit about the proposed rule changes.

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 No. SR-NYSEMKT-2016-52 and File No. SR-NYSEArca-2016-103 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File No. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103.

The file numbers 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 submissions, all subsequent amendments, all

written statements with respect to the proposed rule changes that are filed with the Commission,

and all written communications relating to the proposed rule changes 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, D.C. 20549 on official

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filings also will be

available for inspection and copying at the principal office of each respective Exchange. 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 No. SR-NYSEMKT-2016-52 and File No. SR-NYSEArca-2016-103, and should be submitted by [insert date 21 days from the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Brent J. Fields
Secretary

³³ 17 CFR 200.30-3(a)(57).