

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-70822; File Nos. SR-NYSE-2013-54; SR-NYSEMKT-2013-66;  
SR-NYSEARCA-2013-77)

November 6, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Approval to Proposed Rule Changes, as Modified by Amendment No. 1, that Address the Exchanges' Emergency Powers

I. Introduction

On July 22, 2013, the New York Stock Exchange LLC (“NYSE”), NYSE MKT LLC (“NYSE MKT”), and NYSE Arca, Inc. (“NYSE Arca” and, together with NYSE and NYSE MKT, the “Exchanges”) each filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> proposed rule changes to address their emergency powers. The proposed rule changes were published for comment in the Federal Register on August 8, 2013.<sup>3</sup> The Commission received two comments on the proposals.<sup>4</sup> The Exchanges submitted a response to the comment letters on September 9, 2013.<sup>5</sup> On September 20, 2013, the Commission designated a longer period for action on the proposed rule changes, noting that the Exchanges had yet to conduct a planned industry-wide test of the changes contemplated by the

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release Nos. 70099 (August 2, 2013), 78 FR 48522 (SR-NYSE-2013-54) (“NYSE Notice”); 70098 (August 2, 2013), 78 FR 48513 (SR-NYSEMKT-2013-66) (“NYSE MKT Notice”); and 70097 (August 2, 2013), 78 FR 48528 (SR-NYSEARCA-2013-77) (“NYSE Arca Notice”).

<sup>4</sup> See Letters to the Commission from Elizabeth King, Global Head of Regulatory Affairs, KCG Holdings, Inc., dated August 28, 2013 (“KCG Letter”), and Manisha Kimmel, Executive Director, Financial Information Forum (“FIF”), dated August 29, 2013 (“FIF Letter”). The Commission notes that the KCG Letter addresses only the NYSE proposal.

<sup>5</sup> See Letter to the Commission from Janet McGinnis, General Counsel, NYSE Markets, dated September 9, 2013 (“Exchanges’ Response Letter”).

proposals.<sup>6</sup> On October 29, 2013, as a result of the industry-wide test, the Exchanges submitted Amendment No. 1 to the proposals.<sup>7</sup> This order approves the proposed rule changes, as amended.<sup>8</sup>

## II. Description of the Proposals

The Exchanges' proposals seek to establish clear and operationally feasible procedures that would govern the Exchanges' conduct during emergency conditions. NYSE currently sets forth its emergency powers in its Rule 49, which includes the power to designate NYSE Arca as its backup trading facility during an emergency. NYSE proposes to revise Rule 49 in several key ways to respond to operational capabilities and preferences expressed by its members and the industry. NYSE MKT, which currently has no rule setting forth its emergency powers, proposes to adopt the text of revised NYSE Rule 49 as NYSE MKT Rule 49 – Equities, which would provide its officials with the same emergency powers that NYSE officials may exercise. NYSE Arca, which currently has in place NYSE Arca Equities Rule 2.100 to mirror and effect the operation of NYSE Rule 49, would revise Rule 2.100 to reflect the changes to NYSE Rule 49

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<sup>6</sup> See Securities Exchange Act Release No. 34-70463, 78 FR 59390 (September 26, 2013).

<sup>7</sup> In Amendment No. 1, NYSE modified its proposal to (1) change how certain trade and quote messages would be disseminated by NYSE Arca during an emergency and (2) clarify how the proposed rules would apply when a stock opened on a quote or if an issuer chose to proceed with an initial public offering during an emergency. NYSE MKT and NYSE Arca submitted conforming amendments. The Exchanges note that these amendments were submitted to incorporate feedback received in response to an industry-wide test they conducted on September 21, 2013. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment. The Commission notes, however, that the Exchanges each submitted on October 30, 2013, a comment letter attaching Amendment No. 1 so that this amendment could be posted on the Commission's website.

<sup>8</sup> Because the NYSE MKT filing would simply copy and adopt the substance of revised NYSE Rule 49, and because the NYSE Arca filing simply conforms NYSE Arca's current emergency powers rule to incorporate the changes to NYSE Rule 49 and NYSE MKT Rule 49 – Equities, the Commission is addressing the NYSE, NYSE MKT, and NYSE Arca proposals together in this Order.

and the adoption of NYSE MKT Rule 49 – Equities. The Exchanges submitted the proposals in part in response to the aftermath of Superstorm Sandy, which struck the New York City area in October 2012, causing the NYSE and NYSE MKT to remain closed for two days and highlighting certain operational difficulties with current NYSE Rule 49.

NYSE’s Current Emergency Powers Rule (Rule 49)

The NYSE’s current Rule 49 was adopted in 2009 to provide the Exchange with the authority to declare an emergency condition<sup>9</sup> with respect to trading on or through the systems and facilities of the exchange and to act as necessary in the public interest and for the protection of investors.<sup>10</sup> The authority in Rule 49 may be exercised when: (i) there exists a regional or national emergency that would prevent the NYSE from operating normally; and (ii) such a declaration is necessary so that the securities markets in general, and the NYSE’s systems and facilities, including the trading floor, in particular, may continue to operate in a manner

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<sup>9</sup> NYSE Rule 49(a)(3)(i) incorporates the same definition of “emergency” as that found in Section 12(k)(7) of the Act. Section 12(k)(7) defines an emergency to mean “(A) a major market disturbance characterized by or constituting – (i) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or (ii) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or (B) a major disturbance that substantially disrupts, or threatens to substantially disrupt – (i) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or (ii) the transmission or processing of securities transactions.” 15 U.S.C. 78l(k)(7).

<sup>10</sup> See Securities Exchange Act Release No. 61177 (December 16, 2009), 74 FR 68643 (December 28, 2009) (SR-NYSE-2009-105) (Order approving proposal to adopt Rule 49) (“NYSE Rule 49 Approval Order”). At the same time, NYSE Arca amended NYSE Arca Rule 2.100 to allow it to act as the designated alternative trading facility of NYSE in an emergency. See Securities Exchange Act Release No. 61178 (December 16, 2009), 74 FR 68434 (December 24, 2009).

consistent with the protection of investors and in pursuit of the public interest.<sup>11</sup> To date, the NYSE has never invoked the rule.

If such an emergency condition is declared, NYSE Rule 49 authorizes a “qualified Exchange officer”<sup>12</sup> to designate NYSE Arca, the NYSE’s affiliate, to serve as a backup facility to receive and process bids and offers and to execute orders on behalf of the NYSE so that the NYSE, as a self-regulatory organization (“SRO”), can remain operational. In essence, the NYSE would use NYSE Arca’s system as the execution engine for NYSE trades.<sup>13</sup> During such an emergency condition, NYSE Arca also would continue to operate simultaneously in its own capacity. NYSE Arca Rule 2.100 provides NYSE Arca with the authority to effectuate the provisions of NYSE Rule 49.

Upon the declaration of an emergency, the NYSE would halt all trading conducted on its systems and facilities. Unexecuted orders would remain on the NYSE’s systems unless cancelled. The NYSE would open trading on the systems and facilities of NYSE Arca as soon thereafter as possible, but not earlier than the next trading day. As soon as practicable following the commencement of trading on the systems and facilities of NYSE Arca, any unexecuted orders would be purged from the NYSE’s own systems and facilities.<sup>14</sup>

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<sup>11</sup> See NYSE Rule 49(a)(2). Rule 49(c)(1) provides further that the NYSE will make reasonable efforts to contact the Commission prior to taking action under Rule 49. The authority granted under NYSE Rule 49 may be operative for up to 10 calendar days from the date that the NYSE invokes such authority. Any longer exercise of such authority must be approved by the Commission. See NYSE Rule 49(c)(2).

<sup>12</sup> A “qualified Exchange officer” is the NYSE Euronext Chief Executive Officer or his or her designee, or the NYSE Regulation, Inc. Chief Executive Officer or his or her designee. If these individuals are unable to act due to incapacitation, the most senior surviving officer of NYSE Euronext or NYSE Regulation, Inc. will be a “qualified Exchange officer” for purposes of NYSE Rule 49. See NYSE Rule 49(a)(3)(ii).

<sup>13</sup> See NYSE Rule 49 Approval Order, supra note 10, 74 FR at 68643.

<sup>14</sup> See NYSE Rule 49(b)(2)(i).

Quotes or orders for NYSE-listed securities entered or executed on or through the systems and facilities of NYSE Arca would be reported to the Consolidated Quotation System (“CQS”) as bids and offers, or to the Consolidated Tape Association (“CTA”) as executions, made on or through the systems and facilities of the NYSE, not NYSE Arca. This means that, for the duration of the emergency condition, trades in NYSE-listed securities would print to the CTA with the NYSE’s “N” symbol, and quotes would be designated as NYSE quotes in the CQS, notwithstanding that they were processed on or through the systems and facilities of NYSE Arca.<sup>15</sup>

NYSE members, member organizations, and Sponsored Participants Members would be permitted to enter quotes and to execute orders on or through the systems and facilities of NYSE Arca, regardless of whether these members, member organizations, or Sponsored Participants are members or sponsored participants of NYSE Arca at the time an emergency condition was declared.<sup>16</sup> Additionally, NYSE members and member organizations would be required to have contingency plans for changing the routing instructions for their order entry systems and to take such other appropriate actions as instructed by the Exchange to accommodate the use of the systems and facilities of NYSE Arca to trade NYSE-listed securities.<sup>17</sup> Furthermore, NYSE member organizations registered as Designated Market Makers (“DMMs”) would, if designated as a temporary member of NYSE Arca during an emergency condition, be considered a “Market Maker” under NYSE Arca Equities Rules.<sup>18</sup> As such, these member organizations would be

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<sup>15</sup> See NYSE Rule 49 Approval Order, supra note 10, 74 FR at 68643 n.12.

<sup>16</sup> See NYSE Rule 49(b)(3)(i)(A); see also NYSE Arca Equities Rule 2.100(b)(3).

<sup>17</sup> See NYSE Rule 49(b)(2)(iii).

<sup>18</sup> See NYSE Rule 49(b)(3)(i)(B); see also NYSE Arca Equities Rule 2.100(b)(3)(i)(C).

subject to the quoting obligations that NYSE Arca imposes on its “Market Makers” in NYSE Arca Equities Rule 7.23.

All trades of NYSE-listed securities entered or executed on or through the systems and facilities of NYSE Arca would be subject to the NYSE Arca Equities Rules governing trading, and these rules would be considered NYSE rules for the purposes of such transactions, except that (i) the NYSE’s rules governing member firm conduct – including, but not limited to, membership requirements and net capital requirements – would continue to apply to its members, member organizations, and Sponsored Participants and (ii) the NYSE’s listing requirements for its listed securities would continue to apply.<sup>19</sup>

Surveillance of trading of NYSE-listed securities on or through the systems and facilities of NYSE Arca would be conducted by NYSE Arca on behalf of the NYSE. Members and member organizations of the NYSE would remain subject to the jurisdiction of the NYSE for any disciplinary actions related to the trading of NYSE-listed securities on or through the systems and facilities of NYSE Arca. Violations of the rules of NYSE Arca would be referred to the NYSE for prosecution according to the NYSE’s disciplinary rules. NYSE members and member organizations could not assert as an affirmative defense to prosecution the lack of jurisdiction of the NYSE over trading of NYSE-listed securities on or through the systems and facilities of NYSE Arca.<sup>20</sup>

#### NYSE’s Proposed Revisions to Rule 49

As a result of Superstorm Sandy, which caused NYSE and NYSE MKT to close for two days on October 29 and 30, 2012, the industry identified certain difficulties with the operation of NYSE’s current Rule 49. Accordingly, NYSE has proposed to revise the Rule to more

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<sup>19</sup> See NYSE Rule 49(b)(4)(i)-(ii); see also NYSE Arca Equities Rule 2.100 (b)(4).

<sup>20</sup> See NYSE Rule 49(b)(5); see also NYSE Arca Equities Rule 2.100(b)(5).

effectively delineate the SRO functions of the NYSE and NYSE Arca during an emergency condition, to reflect the operational capabilities and preferences of the industry, and to reflect the current structure of member-organization connectivity to and system coding for exchange systems.

The NYSE proposes to amend Rule 49(a)(1) to state that the authority of a “qualified Exchange officer” to declare an “Emergency Condition” – which would become a defined term under the amended rule – shall include the authority to designate NYSE Arca to perform the functions set forth in the Rule “on behalf of and at the direction” of the NYSE.

Rule 49(a)(2) would be amended to remove a reference to the NYSE’s systems and facilities, including the trading floor, continuing to operate during the Emergency Condition. The text would be revised to provide that an Emergency Condition declaration may be made if necessary so that the securities markets, in general, may continue to operate and so that trading in NYSE-listed securities, in particular, may continue to occur in a manner consistent with the protection of investors and in pursuit of the public interest. In Rule 49(a)(3), the subparagraphs would be re-designated so that the rule text follows a consistent convention.

Current Rules 49(b)(1) and 49(b)(2)(i), which include text describing how the NYSE would halt trading and how NYSE Arca would begin receiving and processing bids and offers and executing orders on behalf of the Exchange beginning on the next trading day, would be deleted and replaced with text that more specifically describes the steps that each exchange would take upon the declaration of the Emergency Condition.

Specifically, proposed Rule 49(b)(1) would provide that, when an Emergency Condition is declared, the NYSE would: (A) halt all trading conducted on the NYSE’s systems and facilities and would not route any unexecuted orders to NYSE Arca; (B) accept cancellations for

Good 'Til Cancelled (“GTC”) orders; and (C) purge any unexecuted orders from the NYSE’s own systems and facilities as soon as practicable following declaration of the Emergency Condition.

Proposed Rule 49(b)(2) would provide that, beginning on the next trading day following the declaration of the Emergency Condition,<sup>21</sup> NYSE Arca, on behalf of and at the direction of the NYSE, would: (A) disseminate the official opening, re-opening, and closing transactions in NYSE-listed securities as messages of the NYSE (with the “N” designation); and (B) disseminate notifications to the CQS for NYSE-listed securities of (i) regulatory halts and resumption of trading thereafter, (ii) trading pause and resumption of trading thereafter, and (iii) Short Sale Price Test trigger and subsequent lifting (collectively, “primary listing market notifications”) as messages of both the NYSE (with the “N” designation) and NYSE Arca (with the “P” designation).<sup>22</sup> Bids and offers for NYSE-listed securities entered on NYSE Arca during the Emergency Condition would be reported to CQS as bids or offers of NYSE Arca, except that the opening quote would be reported to CQS as a bid or offer of both the NYSE and NYSE Arca.<sup>23</sup> Bids and offers for NYSE-listed securities executed on or through NYSE Arca during the Emergency Condition would be reported to CTA as executions of NYSE Arca, except that

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<sup>21</sup> The NYSE noted in its filing that its current and proposed disaster recovery plans do not enable the intra-day failover of the NYSE’s system onto NYSE Arca.

<sup>22</sup> See NYSE Rules 80B, 80C, and 440B. As the NYSE observed in its filing, each of these types of notifications is a responsibility of the primary listing market for a security. Because the NYSE is not able to force an intra-day failover of the NYSE’s system to NYSE Arca, see supra note 21, in the event of an intra-day declaration of an Emergency Condition, the NYSE would manually disseminate these primary listing market notifications to CQS.

<sup>23</sup> The Exchanges noted that the plan to disseminate the opening quote as a bid or offer of both the NYSE and NYSE Arca would apply in the event there were no opening auction, for instance, as a result of insufficient volume, and trading opened on a quote, to the extent doing so is authorized under the NYSE’s current rules. See NYSE Rules 115A(b)(2) and 123D(1).



executions in the opening,<sup>24</sup> re-opening, or closing auctions would be reported only as NYSE executions and NYSE volume in order to avoid any double counting.

Current Rule 49(b)(2)(iii) provides that members and member organizations must have contingency plans for changing the routing instructions for their order entry systems, and that they take such other appropriate actions as instructed by the NYSE, to accommodate the use of the systems and facilities of NYSE Arca to trade NYSE-listed securities. The proposed rule change would re-designate this provision as Rule 49(b)(3) and amend the text to provide that members and member organizations wishing to trade NYSE-listed securities during an Emergency Condition would be responsible for having contingency plans to establish connectivity to NYSE Arca and for changing the routing instructions for their order entry systems to route quotes and orders in NYSE-listed securities to NYSE Arca.

Such connectivity and routing could be established either directly by becoming an NYSE Arca member (technically referred to as an NYSE Arca Equity Trading Permit (“ETP”) Holder) or indirectly through a third party, such as a service bureau, that is an ETP Holder. The NYSE would not have the ability to reroute quotes and orders from NYSE to NYSE Arca on behalf of members and member organizations, as noted in proposed Rule 49(b)(1)(A). The proposed rule change would also delete text stating that the NYSE would provide instructions to its members and member organizations about using NYSE Arca facilities because, as NYSE members would be required under the proposed rule either to become NYSE Arca ETP Holders or to access NYSE Arca through an ETP Holder, such instructions would no longer be necessary.

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<sup>24</sup> The Exchanges noted that if an issuer were to proceed with an initial public offering during an emergency, then, consistent with the proposal, the opening execution would print only with the NYSE’s “N” designation. The Exchanges noted further that an issuer could alternatively choose to delay a scheduled initial public offering until the emergency was resolved and the NYSE was fully operational again.

Current Rule 49(b)(3), which, during an emergency, provides NYSE members with temporary membership at NYSE Arca and deems NYSE DMMs to be NYSE Arca Market Makers, would be deleted in its entirety. The NYSE explained that it proposed this change because all trading would occur under the NYSE Arca SRO either via a direct membership as an ETP Holder or indirectly via a service bureau as described above, making temporary memberships unnecessary. Additionally, the NYSE stated that, upon further review, it has determined that there would be substantial technological difficulties for NYSE DMMs to become established as NYSE Arca Market Makers during the Emergency Condition and to comply with quoting obligations under NYSE Arca Equities Rule 7.23, as that rule was amended in 2011.<sup>25</sup> At the same time, the NYSE asserted that it would be technologically impracticable and inconsistent with the structure of the proposed rule change to impose NYSE's DMM requirements in a different market. Accordingly, under the proposed rule, if an NYSE DMM wanted to be able to act as an NYSE Arca Market Maker during the Emergency Condition, it would have to apply for and obtain this market maker status in advance.

Rule 49(b)(4) would be amended to state that all trading on NYSE Arca during an Emergency Condition would occur pursuant to NYSE Arca rules, surveillance, and discipline. Current Rule 49(b)(4) already provides that that NYSE Arca trading rules would apply to all trading on NYSE Arca during an emergency condition, so this feature of the rule would not change.<sup>26</sup> Current Rule 49(b)(4), however, further provides that NYSE Arca rules will, during

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<sup>25</sup> See Securities Exchange Act Release No. 64422 (May 6, 2011), 76 FR 27691 (May 12, 2011) (SR-NYSEArca-2011-26).

<sup>26</sup> The proposed revisions to Rule 49(b)(4) would also specify that such NYSE Arca trading rules include, but are not limited to, the opening, reopening, and closing auction processes applicable to securities for which NYSE Arca is the primary listing market set forth in NYSE Arca Equities Rule 7.35. As the NYSE noted in its filing, NYSE Arca's auction processes at the open, at the close, and following a trading halt differ from those

the emergency, be considered rules of the NYSE, and this provision would be deleted by the proposal. Furthermore, the NYSE proposes to delete current Rule 49(b)(5), which states that NYSE Arca will provide surveillance on behalf of the NYSE for trading of NYSE-listed securities during an emergency and that members and member organizations shall remain subject to the NYSE's jurisdiction for any disciplinary actions related to the trading of NYSE-listed securities on or through the systems and facilities of NYSE Arca. Thus, under the terms of the proposal, if an NYSE member organization violated an NYSE Arca trading rule while trading on NYSE Arca during an Emergency Condition, it would be subject to discipline by NYSE Arca, not the NYSE.

#### NYSE MKT's Adoption of NYSE Rule 49

NYSE MKT currently does not have a rule setting forth its authority and procedures in the event of an emergency. NYSE MKT thus proposes to adopt an identical version of NYSE Rule 49 as NYSE MKT Rule 49 – Equities. The proposed rule would provide NYSE MKT officials with the same emergency powers that NYSE Rule 49 would vest in NYSE officials. Proposed NYSE MKT Rule 49 – Equities would also, like NYSE Rule 49, rely on NYSE Arca for trading and quoting activity in NYSE MKT-listed securities during an Emergency Condition.

#### NYSE Arca's Proposed Revisions to NYSE Arca Equities Rule 2.100

Current NYSE Arca Equities Rule 2.100 mirrors and effectuates current NYSE Rule 49. NYSE Arca proposes to amend Rule 2.100 to incorporate the proposed revisions to NYSE Rule 49. NYSE Arca also has proposed to add NYSE MKT as an affiliate exchange that may declare an Emergency Condition and designate NYSE Arca as its alternative trading facility. No

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of NYSE. The provision in current Rule 49(b)(4)(ii) that specifies that the NYSE's listing requirements would continue to apply to any NYSE-listed security that was trading on NYSE Arca during the Emergency Condition would be incorporated without change into revised Rule 49(b)(4).

elements of the NYSE Arca proposal would have any independent operation beyond effectuating the proposed revisions to NYSE Rule 49 and NYSE MKT Rule 49 – Equities.

### III. Comment Letters and the Exchanges' Responses

The Commission received two comments on the proposals. Both comment letters broadly supported the Exchanges' proposals.

The first letter asserted that the proposed changes to NYSE Rule 49 “would appropriately focus [the NYSE’s] trading operations during an emergency condition on those services for which the NYSE is the sole provider in the securities market.”<sup>27</sup> Specifically, this commenter expressed support for the NYSE’s proposal to eliminate the requirement that NYSE DMMs satisfy market maker obligations as NYSE Arca Market Makers during an emergency condition, because the commenter believes that such a revision would eliminate potential and unnecessary operational risks.<sup>28</sup> For instance, according to the commenter, the NYSE’s proposal to eliminate the requirement that NYSE members and member organizations connect and send quotes and orders for NYSE-listed securities to NYSE Arca during an emergency condition would avoid the risks associated with NYSE members trading on NYSE Arca without sufficient experience.<sup>29</sup> Additionally, the commenter supported the feature of the NYSE’s proposal concerning NYSE Arca’s dissemination of the opening and closing prices and the primary listing market notifications as messages of both NYSE Arca and the primary listing market, because doing so would minimize operational risks and challenges to market participants.<sup>30</sup>

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<sup>27</sup> See KCG Letter, supra note 4, at 2.

<sup>28</sup> See id.

<sup>29</sup> See id. at 4 .

<sup>30</sup> See id. at 2.

The second commenter similarly characterized the proposals as “a step forward to addressing industry concerns with the current NYSE Rule 49.”<sup>31</sup> In particular, the second commenter highlighted the following elements of the Exchanges’ proposals that it considers critical to an orderly transition of trading activity during an emergency: (1) next-day resumption of trading on NYSE Arca, because an intra-day failover would not allow firms sufficient time to make necessary changes and adequately test those changes; (2) printing orders routed to NYSE Arca as orders of NYSE Arca, with the “P” designation, rather than as orders of NYSE, because doing so will conform to firms’ front, middle, and back office expectations that orders routed to an exchange will result in executions and clearing activity associated with that same exchange; (3) printing opening closing prints with both the “P” and the “N” or “A” designations, because doing so accommodates the reliance of some firms and processes on the primary market print;<sup>32</sup> and (4) the provisions of the proposal relating to NYSE Arca membership.<sup>33</sup>

The second commenter coupled its support with three recommendations that it says are aimed at fully assessing the policies and procedures outlined in the proposals: (1) the creation of a robust test plan for the industry to test and evaluate readiness; (2) the establishment of an “Emergency Powers Playbook” designed for operations and technology staff that includes

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<sup>31</sup> See FIF Letter, supra note 4, at 1.

<sup>32</sup> The commenter qualified its support of this point by observing that firms will need to test this process to ensure that they can properly handle both prints. The Commission notes that, as a result of the industry-wide test conducted on September 21, 2013, the Exchanges in fact altered this element of the proposal. As described more fully above, supra notes 21 to 24 and accompanying text, under the amended proposals, NYSE Arca would disseminate primary listing market notifications and opening or re-opening quotes with both the primary market “N” or “A” designation along with the NYSE Arca’s “P” designation. However, under the amended proposals, the opening, re-opening, and closing transactions would be disseminated as messages only of the primary listing market, *i.e.*, as “N” or “A” only.

<sup>33</sup> See FIF Letter, supra note 4, at 1-2.

timelines and activities for entering, operating under, and exiting the emergency powers state; and (3) the development and deployment of a communications plan designed to familiarize the industry with the proposals once approved.<sup>34</sup>

In response to the second comment letter, the Exchanges stated their belief that the FIF's three recommendations relate to the technical implementation of the proposed rules and do not require the proposed rules to be amended.<sup>35</sup> The Exchanges noted further that they have already begun working closely with industry participants on the implementation of the proposed rules.<sup>36</sup> The Exchanges represented that they had scheduled an industry test for September 21, 2013 and that they would continue to work with industry groups and the Exchanges' member organizations to ensure appropriate communications and testing opportunities.<sup>37</sup>

#### IV. Discussion and Commission Findings

After careful review of the proposals, the comment letters received, the Exchanges' response, and the proposed amendments reflecting the outcome of the industry-wide test of the changes contemplated by the proposals, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.<sup>38</sup> In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,<sup>39</sup> which requires, among

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<sup>34</sup> See id. at 2.

<sup>35</sup> See Exchanges' Response Letter, supra note 4, at 1. As noted above in this Order, the Exchanges did in fact amend the proposals in response to the results of the industry-wide test that was conducted on September 21, 2013.

<sup>36</sup> See id. at 2.

<sup>37</sup> See id.

<sup>38</sup> In approving the proposals, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

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 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. The Commission also finds that the proposed rule changes are consistent with Section 6(b)(7) of the Act,<sup>40</sup> which requires, among other things, that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members.

The Commission finds that the proposals are reasonably designed to maintain orderly trading in NYSE- and NYSEMKT-listed securities in the event those exchanges experience an emergency.<sup>41</sup> The Commission previously approved the NYSE's plan, under Rule 49, to rely on NYSE Arca as a backup trading facility that would receive and process quotations and orders in NYSE-listed securities.<sup>42</sup> At that time, the Commission noted that it had also approved proposals by other national securities exchanges to establish back-up trading arrangements.

The NYSE's proposed Rule 49 would continue to rely on NYSE Arca as a backup trading facility beginning no earlier than the next trading day after an emergency. As such, it does not represent a fundamental shift in the NYSE's approach to business continuity planning. Rather, the most significant feature of the revisions to Rule 49 would provide that, while acting as an emergency backup, NYSE Arca would disseminate quotations and orders in NYSE-listed

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<sup>40</sup> 15 U.S.C. 78f(b)(7).

<sup>41</sup> The Commission notes, as did KCG in its comment letter, that these proposals do not relate to the NYSE's role as Administrator for Network A, or the NYSE's role as the Securities Information Processor (SIP) for NYSE-listed securities.

<sup>42</sup> See NYSE Rule 49 Approval Order, supra note 10, 74 FR at 68643.

securities as quotations and orders of NYSE Arca, rather than those of NYSE, with limited exceptions. These exceptions would be the primary listing market notifications and opening or re-opening quotes, which would be disseminated as messages of both NYSE Arca and NYSE, and the opening, re-opening, and closing transactions, which would be disseminated only as messages of the NYSE. Likewise, under new NYSE MKT Rule 49 – Equities, NYSE Arca would serve as the backup for NYSE MKT, and it would disseminate quoting and trading activity in NYSE MKT-listed securities as “P,” with the same exceptions for primary listing market notifications, opening or re-opening quotes, and opening, re-opening, and closing trades.

The Exchanges have represented, and the commenters have agreed, that this proposed change would better align the Exchanges’ rules with the capabilities and preferences of the industry. In particular, the Commission understands from the Exchanges that, when firms route quotes or orders to an exchange, they expect to receive return messages, such as confirmations, under the same exchange’s designation.<sup>43</sup> For certain messages, however, such as the opening, re-opening, and closing prints, opening and re-opening quotes, and primary listing market notifications, the Exchanges have represented, based on the results of an industry-wide test and feedback from market participants, that firms’ systems may need to see the listing market designation – “N” for NYSE and “A” for MKT.<sup>44</sup>

Accordingly, the Commission believes that the proposals are intended to maintain orderly trading during an emergency and to do so in a way that is compatible with the systems of most

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<sup>43</sup> See FIF Letter, *supra* note 4, at 1.

<sup>44</sup> The NYSE also provided additional justification for utilizing a primary market print for the opening and closing transactions, including that private corporate transactional contracts involving stock purchases or valuations frequently make reference to the primary market print rather than to the CTA print and that the pricing and valuation of certain indices, funds, and derivative products require primary market prints.



industry participants.<sup>45</sup> The Commission notes, importantly, that the Exchanges recognize that they remain the SROs that are legally responsible for their primary listing market functions, even though certain messages, such as primary listing market notifications, would be disseminated with a “P” in addition to the primary listing market designation.<sup>46</sup> The Commission further notes that, under the proposals, volume associated with opening and closing transactions for NYSE-listed securities would be reported only as NYSE volume to avoid double counting.

The Commission also finds that the proposed revisions to Rule 49’s requirements concerning NYSE members and member organizations are consistent with the Act. Rule 49, as revised, would require NYSE members and member organizations wishing to trade NYSE-listed securities during an Emergency Condition to be responsible for having contingency plans to establish connectivity to NYSE Arca and for routing quotes and orders there. As the FIF Letter points out, these revised provisions should help ensure that the firms transacting in NYSE- or NYSE MKT-listed securities on NYSE Arca have experience doing so. And while the Exchanges propose to eliminate the current NYSE rule’s requirement that NYSE DMMs be subject to NYSE Arca quoting obligations for Market Makers, DMMs trading NYSE- or NYSE MKT-listed securities on NYSE Arca during an emergency would not receive any special benefits in connection with such trading. DMMs that wish to act as NYSE Arca Market Makers during an Emergency Condition would have to apply for and obtain Market Maker status on NYSE Arca in advance.

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<sup>45</sup> The Commission acknowledges that the proposed rule changes could require systems changes across the industry, and it appreciates the points that the FIF Letter raises concerning testing and implementation. The Exchanges represent that they are working with FIF and other industry participants to promote smooth adoption of the changes. Moreover, the Exchanges have stated that the proposals, as amended, incorporate feedback received from market participants who took part in an industry-wide test of the proposed changes.

<sup>46</sup> See, e.g., NYSE Notice, supra note 3, 78 FR at 48524 n.9.

Finally, the Commission finds the proposals consistent with the Act to the extent that they would subject all trading on NYSE Arca during an Emergency Condition to NYSE Arca rules, surveillance, and discipline. Current Rule 49 already establishes that NYSE Arca trading rules would apply to trading on its facility in NYSE-listed stocks during an emergency, and this would remain unchanged under the proposals. Accordingly, the Commission finds it appropriate for NYSE Arca to be the SRO responsible for enforcing its rules with respect to trading that occurs on its facility. The Commission notes again, however, that these proposed provisions do not alter the NYSE's or NYSE MKT's responsibilities as primary listing markets.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>47</sup> that the proposed rules changes (SR-NYSE-2013-54; SR-NYSEMKT-2013-66; and SR-NYSEARCA-2013-77) as amended, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>48</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>47</sup> 15 U.S.C. 78s(b)(2).

<sup>48</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(83).