

Dated: September 29, 2016.

**Brent J. Fields,**

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78959; File No. SR-NYSEMKT-2016-71]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 8313 Relating to the Exchange's Ability to Publicly Release Disciplinary Complaints, Decisions and Other Information Modeled on the Text of FINRA Rule 8313; Amending Rules and Adopting a New Rule 9291 Relating to the Imposition of Temporary or Permanent Cease and Desist Orders To Correspond to Recent Amendments by FINRA; and Making Certain Technical and Conforming Changes to Rule 9310

September 28, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on September 19, 2016, NYSE MKT LLC ("Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("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 amendments to Rule 8313 relating to the Exchange's ability to publicly release disciplinary complaints, decisions and other information modeled on the text of Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 8313; (2) amendments to Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 and a new Rule 9291 relating to the imposition of temporary or permanent cease and desist orders to correspond to recent amendments by FINRA to its Rule 9100, 9200, 9550, and

9800 Series; and (3) certain technical and conforming changes to Rule 9310..[sic] The proposed rule change is available on the Exchange's Web site 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

The Exchange proposes:

(1) Amendments to Rule 8313 (Release of Disciplinary Decisions) relating to the Exchange's ability to publicly release disciplinary complaints, decisions and other information, modeled on the text of FINRA Rule 8313;<sup>4</sup>

(2) amendments to Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 and a new Rule 9291 relating to temporary or permanent cease and desist orders to correspond to recent amendments by FINRA to its Rule 9100, 9200, 9550, and 9800 Series; and

(3) certain technical and conforming changes to Rule 9310.<sup>5</sup>

<sup>4</sup> References to rules are to NYSE MKT rules unless otherwise indicated.

<sup>5</sup> In addition, the Exchange proposes the following technical and conforming changes to the harmonized rules: (1) Including the terms "member," "member organization," "ATP Holder," "covered person," and "person" as defined in the NYSE MKT rules where appropriate in the following Rules to reflect the Exchange's equities and options membership: 8313, 9120, 9269, 9291, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, and 9840; (2) substituting the term "Exchange" for "FINRA"; (3) changing certain cross-references to FINRA rules to cross-references to Exchange rules; (4) substituting a reference to the Exchange's Chief Regulatory Officer for a reference to a senior officer at FINRA; and (5) changing certain references to Adjudicators to make them consistent with references to Adjudicators throughout the Rule 9000 Series.

#### Background

In 2016, NYSE MKT adopted disciplinary rules that are, with certain exceptions, substantially the same as the Rule 8000 Series and Rule 9000 Series of its affiliate the New York Stock Exchange LLC (the "NYSE") and FINRA, and which set forth rules for conducting investigations and enforcement actions.<sup>6</sup> The NYSE MKT disciplinary rules were implemented on April 15, 2016.<sup>7</sup>

In adopting the NYSE and FINRA disciplinary rules, NYSE MKT retained its longstanding practice of publishing all final disciplinary decisions, other than minor rule violations, on its Web site and accordingly adopted the NYSE's version of Rule 8313.<sup>8</sup> The NYSE had declined to adopt the text of FINRA Rule 8313, which provides that disciplinary complaints and decisions that meet certain criteria will be either published or made available upon request.<sup>9</sup> At the time, the Exchange was not directly performing enforcement-related regulatory functions, having entered into a Regulatory Services Agreement with FINRA in 2010 to perform those functions, among others, on the Exchange's behalf.<sup>10</sup>

In adopting the NYSE and FINRA disciplinary rules, the Exchange adopted NYSE's and FINRA's rules and procedures for imposing temporary or permanent cease and desist orders. In particular, the Exchange adopted NYSE and FINRA Rule 8310 as NYSE MKT Rule 8310, which, among other things, allows the Exchange to impose a temporary or permanent cease and desist order.<sup>11</sup> NYSE MKT Rule 9290, based on NYSE and FINRA Rule 9290, provides for expedited disciplinary proceedings.<sup>12</sup> Rule 9556, based on NYSE and FINRA Rule 9556, provides procedures and consequences for a failure to comply with temporary and permanent cease and desist orders. The

<sup>6</sup> See Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR-NYSEMKT-2016-30) ("2016 Notice").

<sup>7</sup> See NYSE MKT Information Memorandum 16-02 (March 14, 2016).

<sup>8</sup> 2016 Notice, 81 FR at 11321.

<sup>9</sup> See Securities Exchange Act Release Nos. 69045 (March 5, 2013), 78 FR 15394, 15395 (March 11, 2013) (SR-NYSE-2013-02).

<sup>10</sup> See Securities Exchange Act Release No. 62354 (June 22, 2010), 75 FR 36730, 36731 (June 28, 2010) (SR-NYSEAmex-2010-57), as corrected by 75 FR 38860 (July 6, 2010) (SR-NYSEAmex-2010-57) (C1-2010-15649).

<sup>11</sup> 2016 Notice, 81 FR at 11321.

<sup>12</sup> *Id.* at 11328. Under Rule 9290, for any disciplinary proceeding, the subject matter of which also is subject to a temporary cease and desist proceeding initiated pursuant to Rule 9810 or a temporary cease and desist order, hearings are required to be held and decisions rendered at the earliest possible time. *See id.*

<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.

Exchange also adopted the NYSE and FINRA Rule 9800 Series, which sets forth the procedures for issuing temporary cease and desist orders, as the NYSE MKT Rule 9800 Series.<sup>13</sup>

In 2015, FINRA adopted a series of amendments to its substantive and procedural rules governing temporary and permanent cease and desist orders.<sup>14</sup> In particular, FINRA amended its Rule Series 9800 to, among other things, revise the evidentiary standard for finding a violation to “a showing of likelihood of success on the merits.”<sup>15</sup> FINRA also amended its Rules 9120, 9268, 9269, 9270, 9291,<sup>16</sup> 9551, 9552,<sup>17</sup> 9554, 9555, 9556, 9557, 9558, 9559, 9810,<sup>18</sup> 9830, 9840, 9850 and 9860 to adopt a new expedited proceeding for failure to comply with a temporary cease and desist order or a permanent cease and desist order; harmonized the provisions governing how documents are served in temporary cease and desist proceedings and related expedited proceedings; clarified the process for issuing permanent cease and desist orders; eased FINRA’s administrative burden in temporary cease and desist proceedings; and made conforming changes throughout its Code of Procedure.<sup>19</sup>

On January 1, 2016, the Exchange reintegrated certain regulatory functions previously performed on its behalf by

FINRA.<sup>20</sup> Among other things, the Exchange now directly performs enforcement-related regulatory functions, including investigating potential violations of Exchange rules, and bringing enforcement actions and conducting disciplinary proceedings arising out of such investigations.

#### Proposed Rule Change

Amendments to Rule 8313 Governing Release of Disciplinary Complaints, Decisions and Other Information Based on FINRA Rule 8313

Rule 8313 currently provides that the Exchange shall publish a copy of final disciplinary actions under the Rule 9000 Series, other than minor rule violations, on its Web site. The Exchange proposes to restructure Rule 8313 and add four subsections and text modeled on FINRA Rule 8313, as described below. The scope of proposed Rule 8313 would be limited to publication of materials relating to the disciplinary process set forth in the Rule 8000 and 9000 Series. In that regard, the Exchange has determined not to adopt the FINRA rule in all respects at this time.

#### General Standards

The Exchange proposes to add a new subsection (a) to Rule 8313 entitled “General Standards” and text that would set forth general standards for the release to the public of disciplinary complaints, decisions or information.

Proposed Rule 8313(a)(1) would retain, as modified, the current text of Rule 8313. The word “publish” would be replaced with “release to the public” to conform to the FINRA rule. The phrase “final disciplinary action” would be deleted as unnecessary in light of the more detailed provisions throughout the proposed Rule. The proposed Rule would provide that the Exchange shall release to the public a copy of and, at the Exchange’s discretion, information with respect to, any disciplinary complaint or disciplinary decision issued by the Exchange, as defined in proposed Rule 8313(e) under the Rule 9000 Series, other than minor rule violations, on its Web site. Proposed Rule 8313(a)(1) would also provide that, in response to a request, the Exchange shall also release to the requesting party a copy of any identified disciplinary complaint or disciplinary decision issued by the Exchange, as defined in proposed Rule 8313(e). These proposed amendments are modeled on FINRA Rule 8313(a)(1) and would be substantially similar to the FINRA rule.

Proposed Rule 8313(a)(2) provides that the Exchange shall release to the public a copy of, and at the Exchange’s discretion information with respect to, any statutory disqualification decision, notification, or notice issued by the Exchange pursuant to the Rule 9520 Series that will be filed with the Securities and Exchange Commission (“SEC” or “Commission”) and any temporary cease and desist order or decision issued by the Exchange pursuant to the Rule 9800 Series. Proposed Rule 8313(a)(2) is modeled on FINRA Rule 8313(a)(2) but would substitute the term “Exchange” for “FINRA.”

Proposed Rule 8313(a)(3) provides that the Exchange shall release to the public information with respect to any suspension, cancellation, expulsion, or bar that constitutes final Exchange action imposed pursuant to Rules 9552, 9554,<sup>21</sup> 9555, 9556, and 9558, as well as information with respect to any suspension imposed pursuant to Rule 9557. Proposed subsection (a)(3) would also provide that the Exchange shall release to the public a copy of, and information with respect to, any decision issued pursuant to Rule 9559 that constitutes final Exchange action. Further, the proposed subsection would provide that the Exchange shall release to the public information with respect to the summary suspension or expulsion of a member organization or the summary revocation of the registration of a covered person for a failure to pay fines, other monetary sanctions, or costs pursuant to Rule 8320. Proposed Rule 8313(a)(3) is modeled on FINRA Rule 8313(a)(3) but would (1) exclude failure to pay Exchange fees from its scope;<sup>22</sup> (2) substitute the term “Exchange” for “FINRA”; and (3) use the terms “member organization” and “covered person” rather than “member” and “person associated with a member,” which have different meanings under FINRA and Exchange rules.<sup>23</sup>

<sup>21</sup> FINRA’s version of Rule 8313 also includes a reference to FINRA Rule 9553, which relates to failure to pay FINRA dues, fees and other charges. In 2016, the Exchange adopted the text of FINRA Rule 8320, which addresses the non-payment of fines and monetary sanctions, but did not adopt FINRA Rule 9553. See 2016 Notice, 81 FR at 11321 and note 16 [sic], *supra*. Instead, the Exchange adopted Rule 41, which relates to failure to pay Exchange fees and other amounts due to the Exchange. See 2016 Notice, 81 FR at 11317. Inasmuch as the scope of the proposed rule change would be limited to publication of materials relating to the disciplinary process under the Rule 8000 and 9000 Series, the Exchange proposes to include Rule 8320 but not Rule 41 within the scope of proposed Rule 8313(a)(3).

<sup>22</sup> See note 21, *supra*.

<sup>23</sup> Under FINRA Rules, a “member” means an individual, partnership, corporation or other legal

<sup>13</sup> *Id.* at 11332.

<sup>14</sup> See Securities Exchange Act Release Nos. 75333 (June 30, 2015), 80 FR 38783 (July 7, 2015) (SR-FINRA-2015-019) (“2015 FINRA Notice”), 75629 (August 6, 2015), 80 FR 48379 (August 12, 2015) (SR-FINRA-2015-019) (“2015 FINRA Filing”).

<sup>15</sup> *Id.* at 48379.

<sup>16</sup> FINRA also amended its Rules 9348 (Powers of the National Adjudicatory Council on Review) and 9351 (Discretionary Review by FINRA Board). The Exchange did not adopt either rule and instead, like the NYSE, retained the substance of its appeals process.

<sup>17</sup> FINRA also amended Rule 9553, which concerns failure to pay fees, dues, assessments or other charges. The Exchange, following the NYSE, did not adopt FINRA Rule 9553 in 2016. See 2016 Notice, 81 FR at 11330.

<sup>18</sup> FINRA also amended Rule 9820 (Appointment of Hearing Officers and Hearing Panel) to expand the pool of persons eligible to serve on hearing panels in order to ease certain administrative burdens on FINRA’s Office of Hearing Officers. See 2015 FINRA Filing, 80 FR at 48380. The Exchange is not adopting these changes.

<sup>19</sup> *Id.* at 48379. The Exchange’s affiliate NYSE recently (1) amended the text of its Rule 8313; (2) amended its Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 and adopted a new Rule 9291 relating to temporary or permanent cease and desist orders to correspond to the recent FINRA amendments to its Rule 9100, 9200, 9550, and 9800 Series; and (3) made certain technical and conforming amendments to its Rule 9310. See Securities Exchange Act Release No. 78664 (August 24, 2016), 81 FR 59678 (August 30, 2016) (SR-NYSE-2016-40).

<sup>20</sup> See 2016 Notice, 81 FR at 11312, n. 11.

Proposed Rule 8313(a)(4) provides that the Exchange may release to the public a copy of, and information with respect to, any decision or notice issued pursuant to the Rule 9600 Series, and any other decision appealable to the SEC under Exchange Act Section 19(d). Proposed Rule 8313(a)(4) is modeled on FINRA Rule 8313(a)(5). FINRA Rule 8313(a)(5) also contains cross references to FINRA Rule 6490 and the FINRA Rule 9700 Series. FINRA Rule 6490 (Processing of Company-Related Actions) applies to issuers of non-exchange listed equity and debt securities quoted on the OTC marketplace. FINRA's Rule 9700 Series provides redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by FINRA. FINRA Rule 6490 has no analogue in the Exchange's Rules. The Exchange does not propose to include either Rule 18—Equities, which addresses compensation in connection with an Exchange system failure, or Rule 905NY, which addresses Exchange liability for use of its options trading platform, within the scope of Rule 8313. As noted above, the Exchange has determined to limit the scope of Rule 8313 to publication of materials relating to the disciplinary process under the Rule 8000 and 9000 Series.<sup>24</sup> The Exchange would also

entity admitted to membership in FINRA under Articles III and IV of the FINRA By-Laws. See FINRA Rule 0160(b)(10). Article III, Sec. 1(a) of the FINRA By-Laws generally limits membership to registered brokers, dealers, municipal securities brokers or dealers, or government securities brokers or dealers. NYSE MKT's equivalent term is "member organization." See Rule 2(b)(i)—Equities (defining "member organization" as a registered broker or dealer (unless exempt pursuant to the Act) that is a member of FINRA or another registered securities exchange). Under Rule 2(a)—Equities, the term "member" means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the floor of the Exchange or any facility thereof. A "member" is not a registered broker-dealer and does not have employees; only member organizations have employees. An "ATP Holder," on the other hand, may be a natural person or an organization, and can thus be a member or member organization. See Rule 900.2NY(5). Further, a natural person who is an ATP Holder may have registered or non-registered employees. See *id.* For purposes of the proposed amendments to its disciplinary rules, the Exchange proposes to continue using the phrase "covered person" to indicate employees of a member organization or ATP Holder. See 2016 Notice, 81 FR at 11318. The Exchange also proposes to use the term "ATP Holder" where appropriate in the proposed rules.

<sup>24</sup> For the same reasons, the Exchange also does not propose to adopt FINRA Rule 8313(a)(6), which provides that that FINRA may release to the public a copy of, and information with respect to, any complaint, decision, order, notification or notice issued under FINRA rules, where the release of such information is deemed by FINRA's CEO (or such other senior officer as the CEO may designate)

substitute the term "Exchange" for "FINRA."<sup>25</sup>

#### Release Specifications

The Exchange proposes to add a new subsection (b) to Rule 8313 entitled "Release Specifications" modeled on FINRA Rules 8313(b)(1) and (2).

Proposed Rule 8313(b)(1) provides that copies of, and information with respect to, any disciplinary complaint released to the public pursuant to paragraph (a) of the proposed Rule shall indicate that a disciplinary complaint represents the initiation of a formal proceeding by the Exchange in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. The proposed Rule would be the same as FINRA Rule 8313(b)(1) except that the proposed Rule would substitute the term "Exchange" for "FINRA."

Proposed Rule 8313(b)(2) provides that copies of, and information with respect to, any disciplinary decision or other decision, order, notification, or notice released to the public pursuant to paragraph (a) of the proposed Rule prior to the expiration of the time period provided for an appeal or call for review as permitted under Exchange rules or the Exchange Act, or while such an appeal or call for review is pending, shall indicate that the findings and sanctions imposed therein are subject to review and modification by the Exchange or the SEC. The proposed Rule would be the same as FINRA Rule 8313(b)(2) except that the proposed Rule would substitute the term "Exchange" for "FINRA."

#### Discretion To Redact Certain Information or Waive Publication

The Exchange has determined that, subject to limited exceptions, disciplinary information should be released to the public in unredacted form. The Exchange proposes to add a new subsection (c) to Rule 8313 entitled "Discretion to Redact Certain Information or Waive Publication," modeled on FINRA Rule 8313(c)(1) and (2).

With respect to the limited exceptions, proposed Rule 8313(c)(1)

to be in the public interest, in such format as he or she finds appropriate.

<sup>25</sup> The Exchange is not proposing to adopt rule text similar to FINRA Rule 8313(a)(4), which provides that FINRA may release to the public a copy of, and information with respect to, any decision or notice issued pursuant to NASD Rules 1015 and 1016 governing appeals from adverse membership and continuing membership decisions. As noted above, the Exchange has determined to limit the scope of Rule 8313 to publication of materials relating to the disciplinary process under the Rule 8000 and 9000 Series.

would provide that the Exchange reserves the right to redact, on a case-by-case basis, information that contains confidential customer information, including customer identities, or information that raises significant identity theft, personal safety, or privacy concerns that are not outweighed by investor protection concerns. The proposed Rule would be the same as FINRA Rule 8313(c)(1) except that the proposed Rule would substitute the term "Exchange" for "FINRA."

Similarly, proposed Rule 8313(c)(2) provides that, notwithstanding paragraph (a) of the proposed rule, the Exchange may determine, in its discretion, to waive the requirement to release a copy of, or information with respect to, any disciplinary complaint, disciplinary decision or other decision, order, notification, or notice under those extraordinary circumstances where the release of such information would violate fundamental notions of fairness or work an injustice. The proposed Rule would be the same as FINRA Rule 8313(c)(1) [sic] except that the proposed Rule would substitute the term "Exchange" for "FINRA."

#### Notice of Appeals of Exchange Decisions

The Exchange proposes to add a new subsection (d) to Rule 8313 entitled "Notice of Appeals of Exchange Decisions to the SEC" modeled on FINRA Rule 8313(d). Proposed Rule 8313(d) provides that the Exchange must provide notice to the public when a disciplinary decision of the Exchange is appealed to the SEC and that the notice shall state whether the effectiveness of the decision has been stayed pending the outcome of proceedings before the Commission. The proposed Rule would be the same as FINRA Rule 8313(d)(1) except that the proposed Rule would substitute the term "Exchange" for "FINRA."

#### Definitions

Finally, the Exchange proposes to add a new subsection (e) to Rule 8313 entitled "Definitions." Proposed Rule 8313(e) would set forth definitions of the terms "disciplinary complaint" and "disciplinary decision" as used in the Rule, modeled on the definitions contained in FINRA Rule 8313(e).

First, Rule 8313(e)(1) would define the term "disciplinary complaint" to mean any complaint issued pursuant to the Rule 9200 Series. The proposed text is identical to FINRA Rule 8313(e)(1).

Second, Rule 8313(e)(2) would define the term "disciplinary decision" to mean any decision issued pursuant to the Rule 9000 Series, including,

decisions issued by a Hearing Officer, Hearing Panel, Extended Hearing Panel, or the Board of Directors, and orders accepting offers of settlement, and Letters of Acceptance, Waiver and Consent. Under proposed subsection (e)(2), the term would not include decisions issued pursuant to the Rule 9550 Series, Rule 9600 Series, or Rule 9800 Series, or decisions, notifications, or notices issued pursuant to the Rule 9520 Series, which are addressed by paragraphs (a)(2), (a)(3) and (a)(4) of the proposed Rule. Finally, Rule 8313(e)(2) provides that minor rule violation plan letters issued pursuant to Rules 9216 and 9217 are not subject to the proposed Rule. The proposed Rule would be the same as FINRA Rule 8313(e)(2) except that the proposed Rule would substitute the term “Exchange” for “FINRA.”

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The Exchange believes that greater access to information regarding disciplinary actions provides valuable guidance and information to member organizations, associated persons, other regulators, and investors.<sup>26</sup> Further, releasing detailed disciplinary information to the public can serve to deter and prevent future misconduct and improve overall business standards in the securities industry as well as allowing investors to consider firms’ and representatives’ disciplinary histories when considering whether to engage in business with them.<sup>27</sup> Publishing more detailed information than the Exchange currently does would also allow member organizations to utilize that information to educate associated persons as to compliance matters, highlight potential violations and related sanctions, as well as inform the firms’ compliance procedures involving similar business lines, products, or industry practices. Finally, the Exchange believes that any member organization or individual facing allegations of rule violations would also have access to more information to gain greater insight on related facts and sanctions.<sup>28</sup>

#### Harmonization With FINRA Rules Relating to Temporary or Permanent Cease and Desist Orders

The Exchange also proposes to harmonize its disciplinary rules and procedures relating to the imposition of temporary and permanent cease and desist orders with approved FINRA

amendments. To effectuate these changes, the Exchange proposes the following amendments to Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, and 9830, 9840, 9850, and 9860. The Exchange also proposes to adopt a new Rule 9291 based on FINRA’s recently adopted Rule 9291.

- The Exchange proposes to amend the Rule 9120 definitions applicable to the Rule 9000 Series as follows:

- The Exchange proposes to amend the definition of “Hearing Panel” in Rule 9120(s) to encompass a Hearing Panel constituted under the Rule 9800 Series to conduct a temporary cease and desist proceeding.

- The Exchange proposes to amend the definition of “Interested Staff” in Rule 9120(t)(A) to encompass any staff that issues a petition under the Rule 9000 Series.<sup>29</sup>

- The Exchange proposes to amend the definition of “Panelist” in Rule 9120(v) to encompass the use of the term in the Rule 9550 Series and the Rule 9800 Series.

- Finally, the Exchange proposes to amend the definition of “Respondent” in Rule 9120(y) to provide that in a proceeding governed by the Rule 9800 Series, the term “Respondent” means a member organization or covered person that has been served with a notice initiating a cease and desist proceeding.

- Rule 9268 sets forth the timing and the contents of a decision of the Hearing Panel or Extended Hearing Panel and the procedures for a dissenting opinion, service of the decision, and any requests for review. The Exchange proposes to amend Rule 9268(b), which sets forth the contents of a panel decision, by adding a new subsection (7), providing that when the sanctions include a permanent cease and desist order, the decision should include a statement that is consistent with the requirements of Rule 9291(a) concerning the content, scope, and form of a permanent cease and desist order. The proposed change is identical to that recently adopted by FINRA to its version of Rule 9268.

<sup>29</sup> The Exchange adopted the NYSE’s streamlined definition of “Interested Staff” in Rule 9120(t) and, as a result, the NYSE MKT and FINRA definitions of “Interested Staff” are organized differently. See 2016 Notice, 81 FR at 11322. However, both definitions encompass supervisory personnel up to the most senior level, including the CRO, when staff reporting to such supervisory personnel directly participated in a matter. See Securities Exchange Act Release No. 76436 (November 13, 2015), 80 FR 72460, 72462 (November 19, 2015) (June 27, 2013) (SR–NYSE–2015–35). The proposed change to Rule 9120(t)(A) would bring any staff that issues a petition under the Rule 9000 Series within the ambit of the definition, and thus remain consistent with the FINRA definition, as amended, in the 2015 FINRA Filing.

- Rule 9269 governs the process for the issuance and review of default decisions when a Respondent fails to timely answer a complaint or fails to appear at a pre-hearing conference or hearing where due notice has been provided. The Exchange proposes to amend Rule 9269(a), governing issuance of default decisions, to add a new subsection (4) that provides that the Office of Hearing Officers shall provide a copy of the default decision to each member organization or ATP Holder with which a Respondent is associated. The proposed change is identical to recently adopted FINRA Rule 9269(a)(4), except for conforming references to member organizations.

- Rule 9270 provides a settlement procedure for a Respondent who has been notified that a proceeding has been instituted against him or her. The Exchange proposes two amendments to this Rule. First, the Exchange would amend Rule 9270(c), which details the content and signature requirements for offers of settlement, to add a new subsection (7) providing that, if applicable, the offer should describe in detail a proposed permanent cease and desist order to be imposed that is consistent with the requirements of proposed Rule 9291(a) concerning the content, scope, and form of a permanent cease and desist order. This proposed amendment is substantially the same as recently adopted FINRA Rule 9270(c)(6).<sup>30</sup>

Second, the Exchange proposes to add the phrase “including, if applicable, a permanent cease and desist order” to Rule 9270(f)(1), governing uncontested offers of settlement, and a sentence to Rule 9270(f)(3) providing that Enforcement shall provide a copy of an issued order of acceptance to each member organization or ATP Holder with which a Respondent is associated. The proposed amendments are identical to FINRA Rules 9270(e)(1) and 9270(e)(3), respectively, except for conforming references to the Exchange’s Enforcement group, member organizations and ATP Holders.

- The Exchange proposes to amend the notice and service requirements for expedited proceedings under the Rule 9550 Series, by providing for service upon counsel and service by email. Specifically, the Exchange proposes to make amendments to subsection (b) of the following Rules, consistent with recent changes to the counterpart FINRA rules, regarding service on

<sup>30</sup> The Exchange also proposes a non-substantive amendment at the end of Rule 9270(c)(5) to delete the word “and”, and non-substantive amendments at the end of Rule 9270(c)(6) to delete a period, add a semicolon, and add the word “and.”

<sup>26</sup> See Securities Exchange Act Release Nos. 69178 (March 19, 2013), 78 FR 17975, 17976 (March 25, 2013) (SR–FINRA–2013–018) and 69825 (June 21, 2013), 78 FR 38771, 38775 (June 27, 2013) (SR–FINRA–2013–018).

<sup>27</sup> See Release No. 69178, 78 FR at 17976.

<sup>28</sup> See *id.*

counsel or other representative and the requirements for service by email:

- The Exchange proposes to add a clause to the first sentence of subsection (b) of Rule 9551 (Failure to Comply with Public Communication Standards), which governs expedited proceedings relating to a member or member organization's departure from the public communication standards of Rule 2210, providing that Regulatory Staff shall alternatively serve counsel representing the member or member organization, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member or member organization with the required notice under the Rule and that the notice can also be provided by email.

The Exchange proposes to delete the sentence, "When counsel for the member or member organization or other person authorized to represent others under Rule 9141 agrees to accept service of such notice, then Regulatory Staff may serve notice on counsel or other person authorized to represent others under Rule 9141 as specified in Rule 9134," and add a sentence to the end of subsection (b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with subsections (a)(1) and (3) and (b)(1) and (2) of Rule 9134.

The Exchange would also add text providing that the papers served on counsel for a member or member organization, or other person authorized to represent others under Rule 9141, by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with Rule 9134(a)(1) and (3). Finally, the Exchange would add a sentence specifying that service is complete upon sending the notice by email, mailing the notice by U.S. Postal Service first class mail, first class certified mail, first class registered mail, or Express Mail, sending the notice through a courier service, or delivering it in person, except that, where duplicate service is required, service is complete when the duplicate service is complete;

- Rule 9552 (Failure to Provide Information or Keep Information Current), which sets forth procedures for expedited proceedings relating to a member organization or covered person's failure to provide information

or keep information current, would be amended to add a clause to the first sentence of subsection (b) providing that Regulatory Staff shall alternatively serve counsel representing the member organization or covered person, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member organization or covered person with the required notice under the Rule and that the notice can also be provided by email.

The Exchange proposes to delete the sentence, "When counsel for the member organization or covered person, or other person authorized to represent others under Rule 9141 agrees to accept service of such notice, then Regulatory Staff may serve notice on counsel or other person authorized to represent others under Rule 9141 as specified in Rule 9134," and add a sentence to the end of Rule 9552(b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134.

Further, the proposed rule text would provide that papers served on a person by email shall be sent to the person's last known email address and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. The proposed amendment would specify that papers served on counsel for a member organization or covered person, or other person authorized to represent others under Rule 9141, by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with Rule 9134(a)(1) and (3). Finally, the proposed amendment would provide that service is complete upon sending the notice by email, mailing the notice by U.S. Postal Service first class mail, first class certified mail, first class registered mail, or Express Mail, sending the notice through a courier service, or delivering it in person, except that, where duplicate service is required, service is complete when the duplicate service is complete;

- The Exchange proposes to add a clause to the first sentence of subsection (b) of Rule 9554 (Failure to Comply with an Arbitration Award or Related Settlement or an Order of Restitution or Settlement Providing for Restitution),

which governs expedited proceedings relating to noncompliance with an arbitration award, settlement agreement, or restitution order, providing that Regulatory Staff shall alternatively serve counsel representing the member organization or covered person, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member organization or covered person with the required notice under the Rule and that the notice can also be provided by email.

The Exchange would also delete the sentence, "When counsel for the member organization or covered person, or other person authorized to represent others under Rule 9141 agrees to accept service of such notice, then Regulatory Staff may serve notice on counsel or other person authorized to represent others under Rule 9141 as specified in Rule 9134," and add a sentence to the end of Rule 9554(b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134.

Further, the proposed amendment would specify that papers served on a person by email shall be sent to the person's last known email address and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134.

The proposed amendment would also specify that papers served on counsel for a member organization or covered person, or other person authorized to represent others under Rule 9141, by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) of Rule 9134.

Finally, the proposed amendment would provide that service is complete upon sending the notice by email, mailing the notice by U.S. Postal Service first class mail, first class certified mail, first class registered mail, or Express Mail, sending the notice through a courier service, or delivering it in person, except that, where duplicate service is required, service is complete when the duplicate service is complete;

- The Exchange proposes to add a clause to the first sentence of subsection (b) of Rule 9555 (Failure to Meet the Eligibility or Qualification Standards or

Prerequisites for Access to Services), which governs expedited proceedings in connection with the failure to meet the eligibility or qualification standards or prerequisites for access to services offered by the Exchange, providing that Exchange staff shall alternatively serve counsel representing the member organization or covered person, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member organization or covered person with the required notice under the Rule and that the notice can also be provided by email.

The Exchange would also delete the sentence, "When counsel for the member organization or covered person, or other person authorized to represent others under Rule 9141 agrees to accept service of such notice, then Exchange staff may serve notice on counsel or other person authorized to represent others under Rule 9141 as specified in Rule 9134," and add a sentence to the end of Rule 9554(b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134.

Further, the proposed amendment would specify that papers served on a person by email shall be sent to the person's last known email address and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. The proposed amendment would also specify that the papers served on counsel for a member organization or covered person, or other person authorized to represent others under Rule 9141, by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with Rule 9134(a)(1) and (3).

Finally, the proposed amendment would provide that service is complete upon sending the notice by email, mailing the notice by U.S. Postal Service first class mail, first class certified mail, first class registered mail, or Express Mail, sending the notice through a courier service, or delivering it in person, except that, where duplicate service is required, service is complete when the duplicate service is complete;

○ The Exchange proposes to amend subsection (b) of Rule 9556 (Failure to

Comply with Temporary and Permanent Cease and Desist Orders), which governs expedited proceedings relating to noncompliance with a temporary or permanent cease and desist order, to add the word "email" to the list of service methods in the first sentence. The proposed Rule would therefore permit Regulatory Staff to serve the member organization or covered person subject to a notice issued under the Rule (or upon counsel representing the member organization or covered person, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept) by email in addition to overnight courier or personal delivery.

The Exchange would also add a sentence to subsection (b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Further, the proposed amendment would specify that papers served on a person by email shall be sent to the person's last known email address and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. The proposed amendment would also specify that the papers served on counsel for a member organization or covered person, or other person authorized to represent others under Rule 9141 by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with Rule 9134(a)(1) and (3).

Finally, the Exchange proposes to amend the last sentence of subsection (b) to provide that service is complete upon "sending" rather than "mailing," which word would be deleted; adding the phrase "email or" to the list of service methods; and adding an exception clause providing that "except that, where duplicate service is required, service is complete upon sending the duplicate service";

○ Rule 9557 (Procedures for Regulating Activities Under Rules 470, 471, 4110—Equities, 4120—Equities and 4130—Equities Regarding a Member or Member Organization Experiencing Financial or Operational Difficulties), which allows the Exchange to issue a notice directing a member organization to comply with the provisions of Rule 470 (Capital Requirements for Members

and Member Organizations), 471 (Business Expansion Restrictions and Business Reduction Requirements), 4110—Equities (Capital Compliance), 4120—Equities (Regulatory Notification and Business Curtailment) or 4130—Equities (Regulation of Activities of Section 15C Member Organizations Experiencing Financial and/or Operational Difficulties) or restrict its business activities, either by limiting or ceasing to conduct those activities consistent with Rule 470, 471, 4110—Equities, 4120—Equities or 4130—Equities, would be amended to add a clause to the first sentence of subsection (b) providing Exchange staff shall alternatively serve counsel representing the member or member organization, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member or member organization and that the notice can also be provided by email. The Exchange would also amend the second sentence of subsection (b) referencing the rules to which papers served by overnight courier or personal delivery must conform by adding a reference to Rule 9134(b)(1) before the existing reference to paragraph (b)(2) of Rule 9134.

The Exchange would also add a sentence to subsection (b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Further, the proposed amendment would specify that papers served on counsel for a member or member organization or other person authorized to represent others under Rule 9141 by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) of Rule 9134.

Finally, the last sentence of subsection (b) would be amended to reflect that service is complete upon "sending" rather than "mailing," which word would be deleted; adding the phrase "email or" to the list of service methods; and adding an exception clause providing that "except that, where duplicate service is required, service is complete upon sending the duplicate service"; and

○ Subsection (b) of Rule 9558 (Summary Proceedings for Actions Authorized by Section 6(d)(3) of the Exchange Act), which allows the

Exchange's Chief Regulatory Officer to provide written authorization to Exchange staff to issue a written notice for a summary proceeding for an action authorized by Section 6(d)(3) of the Act, would be amended to add a clause to the first sentence providing Exchange staff shall alternatively serve counsel representing the member organization or covered person, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the member organization or covered person and adding "email" to the list of service methods.

The Exchange would also add a sentence to subsection (b) providing that papers served on a member or member organization by email shall be sent to the email address on file with the Exchange and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134.

Papers served on a person by email shall be sent to the person's last known email address and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. Further, the proposed amendment would specify that papers served on counsel for a member organization or covered person, or other person authorized to represent others under Rule 9141 by email shall be sent to the email address that counsel or other person authorized to represent others under Rule 9141 provides and shall also be served by either overnight courier or personal delivery in conformity with Rule 9134(a)(1) and (3).

Finally, the last sentence of subsection (b) would be amended to reflect that service is complete "sending" rather than "mailing," which word would be deleted; adding the phrase "email or" to the list of service methods; and adding an exception clause providing that "except that, where duplicate service is required, service is complete upon sending the duplicate service."

- With the exception of conforming changes to reflect the Exchange's membership, omission of service by facsimile,<sup>31</sup> and omission of a reference to "the email address listed in the FINRA Contact System submitted to FINRA pursuant to Article 4, Section III

<sup>31</sup> See 2015 FINRA Filing, 80 FR at 48380 ("FINRA proposed to explicitly allow service by facsimile and on counsel, as well as by email, across all temporary cease and desist and expedited proceedings").

of the FINRA By-Laws,"<sup>32</sup> the text of the proposed amendments to NYSE MKT Rules 9551, 9552, 9554, 9555, 9556, 9557, and 9558 is substantially similar to that of FINRA Rules 9551, 9552, 9554, 9555, 9556, 9557, and 9558.

- The Exchange proposes amending Rule 9556(g) to add the phrase, "imposed after the process described in paragraphs (a) through (f) of" (and delete the word "under") before the phrase, "this Rule," to conform to the recent changes to FINRA Rule 9556(g). The Exchange believes that the proposed change adds greater specificity to the Rule.

- The Exchange also proposes adding a new subsection (h) to Rule 9556 titled "Subsequent Proceedings," permitting Regulatory Staff (with prior written authorization from the CRO) to file a petition seeking a hearing if the subject of a temporary or permanent cease and desist order fails to comply with that order and has previously been served with a notice under Rule 9556(a) for a failure to comply with any provision of the same temporary or permanent cease and desist order.

- Under the proposed Rule, the petition shall be served in accordance with Rule 9556(b) and filed with the Office of Hearing Officers.<sup>33</sup> The proposed Rule would also require the petition to explicitly identify the provision of the permanent or temporary cease and desist order that is alleged to have been violated; contain a statement of facts specifying the alleged violation; describe with particularity the sanctions that Regulatory Staff seeks to have imposed; and note that a hearing under Rule 9559 is requested. Regulatory Staff may seek the imposition of any fitting sanction.<sup>34</sup>

- Proposed Rule 9556(h)(3) provides that, in contrast to other Rule 9556 proceedings, a Respondent's compliance with the temporary or permanent cease and desist order is not a ground for dismissing the Rule 9556(h) proceeding. Thus, a Respondent's compliance with a temporary or permanent cease and desist order after a Rule 9556(h) proceeding has been initiated would not

<sup>32</sup> See *id.* The proposed rule change permitting email service in Rules 9551, 9552, 9554, 9555, 9556, 9557, and 9558 is the same as that contained in the corresponding FINRA rules, except the proposed rules provide that papers served on a member organization by email shall be sent to "the email address on file with the Exchange" instead of "the email address listed in the FINRA Contact System submitted to FINRA pursuant to Article 4, Section III of the FINRA By-Laws." The Exchange's membership department collects and maintains email contact information for member organizations.

<sup>33</sup> Proposed Rule 9556(h)(1).

<sup>34</sup> *Id.* at (2).

prevent an adjudicator from reviewing the matter and imposing a fitting sanction for the Respondent's violation.

- Finally, Proposed Rule 9556(h)(4) provides that Regulatory Staff can withdraw the petition without prejudice and can refile a petition based on allegations concerning the same facts and circumstances that are set forth in the withdrawn petition. As with the FINRA rule on which it is based, the proposed provision provides the Exchange with the flexibility to withdraw the petition where, for instance, the Respondent evidences a good faith intent to comply with the temporary or permanent cease and desist order without the need to adjudicate the petition, while preserving the Exchange's right to refile the petition if the Respondent fails to do so.<sup>35</sup> Proposed Rule 9556(h) is substantially similar to FINRA Rule 9556(h).

- Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series) sets forth uniform hearing procedures for all expedited proceedings under the Rule 9550 Series. The Exchange proposes to amend Rule 9559 to reflect the new expedited proceedings set forth in proposed Rule 9556(h). The proposed changes are substantially similar to those recently adopted by FINRA for its Rule 9559. Specifically:

- Rule 9559(a) would be amended to add the phrase "or who is served with a petition instituting an expedited proceeding under Rule 9556(h)."

- Rule 9559(c), which governs stays, would be amended to add a new subparagraph (1)(B) specifying that stays under subsection (c) would not apply to a petition instituting an expedited proceeding under Rule 9556(h).

- Rule 9559(d), governing the appointment and authority of hearing officers and hearing panels, would similarly be amended to add references to proceedings under Rule 9556(h).

- Rule 9559(f), governing time of hearing, would be amended to add a new subsection (2) providing that a hearing shall be held within ten days after a Respondent is served a petition seeking an expedited proceeding issued under Rule 9556(h), adding a reference to Rule 9556(h) to current subsection (2), and renumbering the remaining subsections.

- Rule 9559(g), governing notice of hearing, would be amended to add a new subsection (2) providing that a Hearing Officer shall issue a notice stating the date, time, and place of the hearing at least six days prior to the

<sup>35</sup> See 2015 FINRA Notice, 80 FR at 38785.

hearing in the case of an action brought pursuant to Rule 9556(h), adding a reference to Rule 9556(h) to current subsection (2), and renumbering the remaining subsections.

○ Rule 9559(h) governing transmission of documents would be amended as follows to reflect the new expedited proceeding the Exchange proposes under Rule 9556(h) for enforcing violations of a temporary or permanent cease and desist orders [sic]. The changes closely parallel FINRA's amendments to its version of Rule 9559(h) to bring Rule 9556(h) proceedings within the scope of the rule and distinguish them from actions brought under Rule 9556 and already reflected in the rule.

The first sentence of subsection (h)(1) would be amended to add the clause "not less than six days before the hearing in an action brought under Rule 9556(h)" after "Not less than two business days before the hearing in an action brought under Rule 9557," to specifically bring proposed proceedings under Rule 9556(h) within the scope of the Rule. The clause "not less than seven days before the hearing in an action brought under Rules 9556 and 9558" that would follow the proposed addition would be amended to carve out Rule 9556(h) proceedings by adding the words "except Rule 9556(h)" after "Rules 9556" and before "and 9558." Subsection (h)(1) would be further amended to reflect that "the respondent who has received a petition pursuant to Rule 9556(h)" would also be provided with all documents that were considered in issuing the notice, and that these documents could be provided by email or personal delivery in addition to overnight courier. The Exchange also proposes to add the sentence "Documents served by email shall also be served by either overnight courier or personal delivery" before the last sentence in Rule 9559(h)(1).

The last sentence of subsection (h)(1) would be amended to delete the word "such" and add the word "the" before "criteria," and to add the clause "in this paragraph" after the word "criteria."

Rule 9559(h)(2) would be amended to provide that exhibit and witness lists shall be served by email or personal delivery in addition to overnight courier. Finally, the Exchange proposes to add a sentence to the end of subsection (h)(2) providing that "Documents served by email shall also be served by either overnight courier or personal delivery."

○ Rule 9559(m), governing failure to appear at a pre-hearing conference or hearing or to comply with a Hearing Officer order requiring production of

information, would be amended to add a new subsection (2) providing that a Hearing Officer may issue a default decision against a Respondent who is the subject of a petition<sup>36</sup> filed pursuant to Rule 9556(h), and may deem the allegations against that Respondent admitted. The contents of a default decision shall conform to the content requirements of Rule 9559(p). A Respondent may, for good cause shown, file a motion to set aside a default. Upon a showing of good cause, the Hearing Officer that entered the original order shall decide the motion. If the Hearing Officer is not available, the Chief Hearing Officer shall appoint another Hearing Officer to decide the motion. If a default decision is not called for review pursuant to Rule 9559(q), the default decision shall become the final Exchange action.

○ Finally, Rule 9559(n) governing sanctions, costs and remands would be amended to add references to Rule 9556(h) proceedings. Rule 9559(n) would also be amended to add a new subsection (2) providing that, in an action brought under Rule 9556(h), the Hearing Officer may impose any fitting sanction. The remaining subsections of the Rule would be renumbered. These proposed changes are identical to those recently adopted in FINRA Rule 9559.

• Rule 9810 (Initiation of Proceeding) sets forth procedures for initiating temporary cease and desist proceedings. The Exchange proposes various amendments to the Rule to harmonize it with FINRA Rule 9810, as follows:

○ Rule 9810(a) governing service and filing of a notice would be amended to add text providing that a proceeding can alternatively be initiated by service upon counsel representing the Respondent, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the Respondent. Rule 9810(a) would also be amended to specifically provide for service by email, and text would be added to the Rule providing that if service is made by email, Enforcement shall send an additional copy of the notice by personal service or overnight commercial courier and that service is complete upon sending the notice by email or overnight courier or delivering

it in person, except that, where duplicate service is required, service is complete when the duplicate service is complete. Finally, the Rule would be amended to provide that the notice shall be effective when service is complete.

○ Rule 9810(b) sets forth the requirements for the contents of the notice, and would be amended to add a new subsection (2) providing that the notice also be accompanied by a memorandum of points and authorities setting forth the legal theories upon which Enforcement relies. Current subsection (2) would be renumbered. The Exchange also proposes to clarify the required contents of the notice by specifying that the notice shall state whether Enforcement is requesting the Respondent to be required to take action, refrain from taking action "or both."

○ The Exchange proposes to add a new subsection (c) to Rule 9810 entitled "Authority to Approve Settlements," providing that if the Parties agree to the terms of the proposed temporary cease and desist order, the Hearing Officer shall have the authority to approve and issue the order.

○ Current subsection (c) of Rule 9810 governing filing of the underlying complaint would become subsection (d). The Exchange also proposes to add a sentence providing that service of the complaint can be made in accordance with the service provisions in paragraph (a).

• Rule 9830 (Hearing) sets forth hearing procedures for temporary cease and desist proceedings. The Exchange proposes the following changes to harmonize the Rule with FINRA's recent amendments:

○ Rule 9830(a) would be amended to specify that either the Chief Hearing Officer or Deputy Chief Hearing Officer can extend the date of hearing for good cause shown and eliminate the need for consent of the parties.

○ Rule 9830(b) would be amended to add text specifying that the Office of Hearing Officers can also serve notice of a hearing upon counsel representing the Respondent, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the Respondent, and to specify that service can be by email. The Rule would also be amended to add text specifying that if service is made by email, the Office of Hearing Officers shall send an additional copy of the notice by personal service or overnight commercial courier. Service is complete upon sending the notice by email or overnight courier or delivering it in

<sup>36</sup>The first paragraph of Rule 9559(m) would also be amended to add "or petition" after the word "notice" to reflect proposed expedited proceedings under Rule 9556(h). In the penultimate sentence of the first paragraph, the comma after "In such cases" would be deleted, and a colon would be added in its place. The remainder of the sentence, together with the last sentence of the current rule, would be renumbered as new subsection (1).

person, except that, where duplicate service is required, service is complete when the duplicate service is complete.

○ Rule 9830(e) would be amended to add text specifying that, prior to the hearing, the Hearing Officer may order a Party to furnish to all other Parties and the Hearing Panel such information as deemed appropriate, including any or all of the pre-hearing submissions described in Rule 9242(a). The Rule would also provide that documentary evidence submitted by the Parties would not become part of the record, unless the Hearing Officer or Hearing Panel orders some or all of the evidence included pursuant to Rule 9830(g). The Exchange would also change the phrase, “its consideration” to “the Hearing Panel’s consideration,” to add greater specificity.

• Rule 9840 (Issuance of Temporary Cease and Desist Order by Hearing Panel) sets forth the basis, including the evidentiary standard, for issuance of a temporary cease and desist order. The Exchange proposes the following changes to harmonize the Rule with FINRA’s recent amendments:

○ Rule 9840(a) would be amended to specify that either the Chief Hearing Officer or Deputy Chief Hearing Officer can extend the ten day period for issuance of a decision stating whether a cease and desist order shall be imposed for good cause shown and eliminate the need for consent of the parties. Rule 9840(a)(1) would be amended to revise the evidentiary standard in temporary cease and desist proceedings to “a showing of likelihood of success on the merits.” This was one of the main changes recently effectuated by FINRA.<sup>37</sup> Rule 9840(a)(2) would be amended to add “alleged” before the term “violative conduct” in keeping with the recent FINRA amendment.

○ Rule 9840(b)(1) and (3) would be amended to apply to any successor of a Respondent, where the Respondent is a member organization. This proposed change is similar to the proposed change with respect to Rule 9291, discussed above [sic]. Subsection (3) would also be amended to remove the words “is to” and “or” and add the

words “or both” to the end of the clause.

○ Rule 9840(c) would be amended to provide that, alternatively, a temporary cease and desist order would remain effective and enforceable until a settlement offer is accepted pursuant to Rule 9270.

○ Rule 9840(d) would be amended to specify that the Hearing Panel’s decision and any temporary cease and desist order should be served by the Office of Hearing Officers on Enforcement and the Respondent or upon counsel representing the Respondent, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the Respondent. The Rule would also be amended to specify that service can be by email and that if service is made by email, the Office of Hearing Officers shall send an additional copy of the decision and any temporary cease and desist order by personal service or overnight commercial courier. Under the proposed Rule, service is complete upon sending the notice by email or overnight courier or delivering it in person, except that, where duplicate service is required, service is complete when duplicate service is complete. The Office of Hearing Officers provides a copy of the temporary cease and desist order to each member organization or ATP Holder with which a Respondent is associated.

○ Finally, the Exchange proposes to add a new subsection (e) headed “Delivery Requirement” that provides that where a Respondent is a member organization or ATP Holder, Respondent shall deliver a copy of a temporary cease and desist order, within one business day of receiving it, to its covered persons.

• Rule 9850 (Review by Hearing Panel) sets forth the process for a Party to petition the Hearing Panel to modify, set aside, limit or suspend a temporary cease and desist order. The Exchange proposes the following changes to harmonize the Rule with FINRA’s recent amendments:

○ The first sentence of Rule 9850 would be amended to add a clause specifying that the Office of Hearing Officers can also serve a temporary cease and desist order upon counsel representing the Respondent, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the Respondent.

○ Rule 9850 would be amended to add a sentence providing that the Hearing Panel that presided over the

temporary cease and desist order proceeding shall retain jurisdiction to modify, set aside, limit, or suspend the temporary cease and desist order, unless at the time the application is filed a Hearing Panel has already been appointed in the underlying disciplinary proceeding commenced under Rule 9211 in which case the Hearing Panel appointed in the disciplinary proceeding has jurisdiction.

○ Rule 9850 would also be amended to specify that either the Chief Hearing Officer or Deputy Chief Hearing Officer can extend the time for the Hearing Panel to respond to a request under the Rule for good cause shown and eliminate the need for consent of the parties.

○ Rule 9850 would be amended to add text specifying that the Hearing Panel’s response can also be served upon counsel representing the Respondent, or other person authorized to represent others under Rule 9141, when counsel or other person authorized to represent others under Rule 9141 agrees to accept service for the Respondent, and that email is a permitted method of service. A sentence would also be added before the last sentence in the Rule providing that if service is made by email, the Office of Hearing Officers shall send an additional copy of the temporary cease and desist order by personal service or overnight commercial courier.

• Rule 9860 (Violation of Temporary Cease and Desist Orders) provides that a Respondent who violates a temporary cease and desist order may have its association or membership suspended or canceled under Rule 9556. The Exchange proposes to amend the Rule to add that a Respondent may also be subject to any fitting sanction under Rule 9556.

• Finally, the Exchange proposes to adopt the text of FINRA Rule 9291 governing the content, scope, form and delivery requirements of permanent cease and desist orders. Under proposed Rule 9291(a), when a decision issued under Rule 9268 or Rule 9269 or an order of acceptance issued under Rule 9270 imposes a permanent cease and desist order, the decision shall: Order a Respondent (and any successor of a Respondent, where the Respondent is a member organization) to cease and desist permanently from violating a specific rule or statutory provision; set forth the violation; and describe in reasonable detail the act or acts the Respondent (and any successor of a Respondent, where the Respondent is a member organization) shall take or refrain from taking.

<sup>37</sup> See 2015 FINRA Notice, 80 FR at 38784. The current evidentiary standard for imposing a temporary cease and desist order, set forth in Rule 9840(a)(1), is “a preponderance of the evidence that the alleged violation specified in the notice has occurred.” As explained in the 2015 FINRA Notice, the “preponderance of the evidence” standard sets too high an evidentiary threshold for this critical investor-protection tool. Indeed, it is the identical standard for proving a violation in the concurrent underlying disciplinary proceeding. This poses administrative challenges that create a strong disincentive to seek a temporary cease and desist order. See *id.*

The proposed Rule would also require Respondents that are member organizations or ATP Holders to deliver a copy of a permanent cease and desist order, within one business day of receiving it, to its covered persons.<sup>38</sup> With the exception of conforming changes to reflect the Exchange's membership, the text of the proposed Rule is the same as FINRA Rule 9291. The Exchange currently does not have a similar rule.

#### Technical and Conforming Changes

The Exchange proposes technical and conforming changes to Rule 9310.

Rule 9310(b), which governs reviews by the Exchange Board of Directors, would be amended to specify that the determinations or penalties imposed subject to Board review would include the terms of any permanent cease and desist order.

#### 2. Statutory Basis

##### Amendments to Rule 8313

The Exchange believes that the proposed changes to Rule 8313 are consistent with Section 6(b) of the Act,<sup>39</sup> in general, and Section 6(b)(1)<sup>40</sup> in particular, in that they enable NYSE MKT to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of NYSE MKT. In particular, the Exchange believes that the proposed changes to Rule 8313 regarding release of disciplinary complaints, decisions and other information are consistent with Section 6(b) of the Act because they would establish general standards for the release of disciplinary information to the public to provide greater access to information regarding the Exchange's disciplinary actions.

For the same reasons, the Exchange believes that the proposed changes to Rule 8313 further the objectives of Section 6(b)(5) of the Act<sup>41</sup> because the changes are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In particular, the proposed amendments to

Rule 8313 further the objectives of Section 6(b)(5) of the Act by providing greater clarity, consistency, and transparency regarding the release of disciplinary complaints, decisions and other information to the public. By adopting the proposed amendments to Rule 8313 modeled on FINRA's rule, the Exchange would establish standards for the release of disciplinary information to the public in line with those in effect at FINRA that provide greater access to information regarding the Exchange's disciplinary actions and describe the scope of information subject to proposed Rule 8313. The Exchange believes that this proposed rule change promotes greater transparency to the Exchange's disciplinary process, and that the proposed rule change provides greater access to information regarding its disciplinary actions, and also provides valuable guidance and information to member organizations, associated persons, other regulators, and the investing public.<sup>42</sup>

##### Harmonization With FINRA Rules

The Exchange believes that the proposed changes to Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 and adopting a new Rule 9291 regarding the imposition of temporary or permanent cease and desist orders are consistent with Section 6(b) of the Act,<sup>43</sup> in general, and Section 6(b)(1)<sup>44</sup> in particular, in that they enable NYSE MKT to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the NYSE MKT's rules. In particular, the Exchange believes that the proposed changes are consistent with Section 6(b) of the Act because the changes would enhance the Exchange's ability to utilize its temporary cease and desist authority, thereby making it a more viable investor-protection tool and allowing the Exchange to take appropriate action against member organizations and their associated persons engaged in serious misconduct.

For the same reasons, the Exchange believes that the proposed changes to the Exchange's rules further the objectives of Section 6(b)(5) of the Act<sup>45</sup> because the changes are designed to

promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In addition, revising the evidentiary standard for obtaining temporary cease and desist orders by harmonizing the Exchange's rules with those of FINRA would better serve the investor protection purposes of the Exchange's temporary cease and desist authority and allow the Exchange to initiate and resolve temporary cease and desist proceedings more expeditiously. Further, these proposed changes, including the revised evidentiary standard, would also improve the Exchange's ability to enforce compliance with applicable laws and rules by its member organizations and persons associated with member organizations, and the Exchange's ability to prevent fraudulent and manipulative acts and practices.

The Exchange also believes that the proposed rule change supports the objectives of Section 6(b)(5) of the Act by providing greater harmonization between Exchange and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members. As previously noted, the text of Rules 9120, 9268, 9269, 9270, 9291, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 relating to the imposition of temporary or permanent cease and desist orders is substantially the same as FINRA's rule text. To the extent the Exchange has proposed changes that differ from the FINRA version of the Exchange rules, such changes are generally technical in nature and do not change the substance of the rules.

In addition, the Exchange believes that the proposed changes to Rules 9120, 9268, 9269, 9270, 9551, 9552, 9554, 9555, 9556, 9557, 9558, 9559, 9810, 9830, 9840, 9850, and 9860 and adopting a new Rule 9291 further the objectives of Section 6(b)(7) of the Act<sup>46</sup> in that they provide fair procedures for, among other things, the disciplining of members and persons associated with members<sup>47</sup> because the rules governing temporary cease and desist orders and expedited proceedings require notice and an opportunity to be heard before a neutral tribunal, in addition to the

<sup>38</sup> See proposed Rule 9291(b).

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

<sup>40</sup> 15 U.S.C. 78f(b)(1).

<sup>41</sup> 15 U.S.C. 78f(b)(5).

<sup>42</sup> See Release No. 69178, 78 FR at 17981.

<sup>43</sup> 15 U.S.C. 78f(b).

<sup>44</sup> 15 U.S.C. 78f(b)(1).

<sup>45</sup> 15 U.S.C. 78f(b)(5).

<sup>46</sup> 15 U.S.C. 78f(b)(7).

<sup>47</sup> Under the Exchange's equities rules, the equivalent to the term "member" in this context is "member organization." See note 23, *supra*.

numerous other procedural safeguards described above and included in the rules. At the same time, the proposed rule change maintains all of the existing restraints on the Exchange's temporary cease and desist authority, including rule provisions that restrict who may authorize the initiation of a temporary cease and desist proceeding; narrowly define the violations that a temporary cease and desist order can address; and limit the issuance of temporary cease and desist orders to situations where the alleged violative conduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to investors.<sup>48</sup>

Finally, making conforming amendments to Rule 9310 in connection with the proposed harmonization of the Exchange's rules governing temporary cease and desist orders and expedited proceedings supports the objectives of Section 6(b)(5) of the Act. The conforming amendments will update and add specificity to the Exchange's rules, which will promote just and equitable principles of trade and help to protect investors.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues, but rather it is designed to (1) enhance the Exchange's rules governing the release of disciplinary complaints, decisions and other information to the public, thereby providing greater clarity and consistency and resulting in less burdensome and more efficient regulatory compliance and facilitating performance of regulatory functions, and (2) provide greater harmonization among Exchange and FINRA rules of similar purpose regarding the imposition of temporary cease and desist orders and expedited proceedings, thereby enhancing the quality of the Exchange's regulatory program, resulting in less burdensome

<sup>48</sup> See Rule 9840(a)(2). Under Rule 9810(a), with the prior written authorization of the Exchange's CRO or such other senior officers as the CRO may designate, Enforcement may initiate a temporary cease and desist proceeding with respect to alleged violations of Section 10(b) of the Act, SEC Rules 10b-5 and 15c-1 through 15c-9, Rule 476(a)(6) or Rule 2010—Equities (if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations of Section 17(a) of the Securities Act); or Rule 476(a)(5) or Rule 2020—Equities. See also 2015 FINRA Notice, 80 FR at 38784.

and more efficient regulatory compliance and facilitating performance of regulatory functions.

#### *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) of the Act<sup>49</sup> and Rule 19b-4(f)(6) thereunder.<sup>50</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 for 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 Section 19(b)(3)(A) of the Act<sup>51</sup> and Rule 19b-4(f)(6) thereunder.<sup>52</sup>

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.

### **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

<sup>49</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>50</sup> 17 CFR 240.19b-4(f)(6).

<sup>51</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>52</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-71 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-2016-71. This file number should be included on the subject line if email 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 Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 Number SR-NYSEMKT-2016-71, and should be submitted on or before October 25, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>53</sup>

**Robert W. Errett,**  
Deputy Secretary.

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<sup>53</sup> 17 CFR 200.30-3(a)(12).