

subsidiary. The Exchange shall not disseminate fingerprints or information to the extent prohibited by applicable law.

(c) The Exchange shall evaluate information received from the Attorney General or his or her designee and otherwise administer this rule in accordance with Exchange fingerprint procedures as in effect from time to time and the provisions of applicable law. Fingerprint-based background information, such as a felony or serious misdemeanor conviction, will be a factor in making employment decisions; engaging or retaining any temporary personnel, independent contractors, or service providers; or permitting any fingerprinted person access to facilities and records.

#### Supplementary Material

.10 *Fingerprints and the Issuance of Identification Badges.* The Exchange intends, with limited exceptions, to obtain fingerprints from, and fingerprint-based background information with respect to, all employees, temporary personnel, independent contractors, and service providers who receive Exchange-issued photo badges or other identification permitting them access to facilities and records for more than one day ("Long-Term Badges"). The Exchange has the capacity electronically to immediately limit or terminate the access to facilities and records that Long-Term Badges permit, and reserves the right to do so. On a case-by-case basis, the Exchange may determine not to obtain fingerprints from a person to whom a Long-Term Badge is issued, based on the decision of a committee of Exchange officers who oversee application of the rule that there exists an exception to obtaining the fingerprints, as contemplated by the rule.

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## 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 Exchange 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 these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The events of September 11, 2001, including the resulting temporary disruption in the securities markets, have led national securities exchanges and other industry participants to carefully re-evaluate their security measures, with the objectives of enhancing investor protection, business continuity, and workplace safety.

The Exchange believes that fingerprint-based background checks of prospective and current employees, temporary personnel, independent contractors, and service providers of the Exchange and each of its principal subsidiaries, will assist the Exchange in satisfying those objectives and its other responsibilities under the Act by better preventing certain persons with criminal backgrounds from gaining access to facilities and records. As a condition of employment, new employees already undergo rigorous pre-hire review and screening, including education and employment verification and individual reference checks, under the direction of human resources professionals. Criminal records in local court files also may be reviewed based on locations of residence and employment provided by the candidate. This process, however, is dependent upon the candidate providing complete and accurate information.

Fingerprint-based background checks would enhance the ability to screen adequately employees and non-employees to determine better, in accordance with applicable law, whether there are unacceptable risks associated with granting such persons access to facilities and records. Through access to state-of-the-art information systems administered and maintained by the Federal Bureau of Investigation ("FBI") and its Criminal Justice Information Services Division, the Exchange would receive centrally-maintained "criminal history record information," which is arrest-based data and derivative information, and may include personal descriptive data; FBI number; conviction status; sentencing, probation and parole information; and such other information as the FBI may now or hereafter make available to the Exchange. This information is supplied to the FBI by various local, state, federal and/or international criminal justice agencies. Thus, the information obtained through fingerprint-based background checks would provide a

more exhaustive and reliable profile of a candidate's criminal record, and thereby better facilitate risk assessment, than a physical review of court records based on information provided by the candidate.

Access to the FBI's nationwide database is particularly crucial with respect to the screening of temporary personnel, independent contractors, and service providers who are not employees of the Exchange or its principal subsidiaries and who therefore are not subject to the pre-hire review described above, but whose work frequently requires the same or similar access to facilities and records as that provided to employees of the Exchange or its principal subsidiaries. In furtherance of its commitment to utilize and improve technology and systems applications to better serve investors, disseminate market information, and ensure reliable order handling and execution for all market participants, the Exchange regularly retains outside vendors whose specialized expertise is required for the development, installation and servicing of this technology. Such vendors complement the work of Exchange technology staff in providing the investment community with an efficient and technologically advanced marketplace. Examples of persons from whom fingerprints may be obtained under the proposed rule change include the following,<sup>5</sup> all of whom are anticipated to need Exchange-issued photo badges or other identification permitting them access to facilities and records for more than one day: personnel providing temporary services to the Exchange but who are employed and provided by a staffing service and non-employee technicians whose work with Exchange software and equipment, although temporary, necessitates broad access to Exchange facilities.

The proposed access to criminal history information is consistent with federal law. Section 17(f)(2) of the Act<sup>6</sup> and Rule 17f-2 thereunder<sup>7</sup> require, subject to certain exemptions, a variety of securities industry personnel to be fingerprinted, including every member of a national securities exchange; brokers, dealers, transfer agents, and clearing agencies; and employees of such entities. Although section 17(f)(2) does not require the Exchange or other self-regulatory organizations to fingerprint their own employees,

<sup>5</sup> The proposed rule change would not be applicable to personnel of the Securities and Exchange Commission.

<sup>6</sup> 15 U.S.C. 78q(f)(2).

<sup>7</sup> 17 CFR 240.17f-2.