

a proposed rule change to require its members to establish and maintain business continuity plans. The Commission published the original proposal in the **Federal Register** on September 9, 2002.³ In response to comments received, the NASD submitted amendments to the proposed rule change on December 12, 2002;⁴ January 8, 2003;⁵ and February 19, 2003.⁶ The Commission published Amendment Nos. 1, 2, and 3 for comment in the **Federal Register** on March 10, 2003.⁷ In response to additional comments received, the NASD submitted Amendment No. 4 to the proposal on September 4, 2003,⁸ and Amendment No. 5 on September 17, 2003.⁹ The Commission is publishing this notice of Amendment Nos. 4 and 5 to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing certain amendments to the proposed rule change, which requires member firms to create and maintain business continuity plans and provide the NASD with certain information to be used in the event of future significant business disruptions.¹⁰ Among other things, Amendment No. 4 clarifies that the proposed rule change would not mandate that members stay in business in the event of a significant business disruption. The new amendment also would impose a disclosure requirement

on members. In addition, the amendment would require each member to review and, if necessary, update its emergency contact information. Below is the text of the proposed rule change. The base rule text is that proposed in Amendment No. 3. Proposed new language added by Amendment Nos. 4 and 5 is in italics; text deleted by Amendment Nos. 4 and 5 is in brackets.

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3500. Emergency Preparedness

3510. Business Continuity Plans

(a) Each member must create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption. Such procedures must be reasonably designed to enable the member to [continue its business in the event of future significant business disruptions] *meet its existing obligations to customers. In addition, such procedures must address the member's existing relationships with other broker-dealers and counter-parties.* The business continuity plan must be made available promptly upon request to NASD staff.

(b) Each member must update its plan in the event of any material change to the member's operations, structure, business or location. Each member must also conduct an annual review of its business continuity plan to determine whether any modifications are necessary in light of changes to the member's operations, structure, business, or location.

(c) The elements that comprise a business continuity plan are flexible and may be tailored to the size and needs of a member. Each plan, however, must at a minimum, address:

- (1) Data back-up and recovery (hard copy and electronic);
- (2) All mission critical systems;
- (3) Financial and operational assessments;
- (4) Alternate communications between customers and the member;
- (5) Alternate communications between the member and its employees;
- (6) *Critical* [B]business constituents, banks, and counter-parties[y impact];
- (7) Regulatory reporting; [and]
- (8) Communications with regulators; and[.]

(9) How the member will assure customers' prompt access to their funds and securities in the event that the member determines that it is unable to continue its business.

Each member must address the above-listed categories to the extent applicable and necessary [to enable the member to continue its business in the event of a

future significant business disruption]. If any of the above-listed categories is not applicable, the member's business continuity plan need not address the category. The member's business continuity plan, however, must document the rationale for not including such category in its plan. If a member relies on another entity for any one of the above-listed categories or any mission critical system, the member's business continuity plan must address this relationship.

(d) Members must designate a member of senior management to approve the plan and he or she shall be responsible for conducting the required annual review. The member of senior management must also be a registered principal.

(e) Each member must disclose to its customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. At a minimum, such disclosure must be made in writing to customers at account opening, posted on the member's Internet Web site (if the member maintains a Web site), and mailed to customers upon request.

(f) For purposes of this rule, the following terms shall have the meanings specified below:

(1) "Mission critical system" means any system that is necessary, depending on the nature of a member's business, to ensure prompt and accurate processing of securities transactions, including, but not limited to, order taking, order entry, execution, comparison, allocation, clearance and settlement of securities transactions, the maintenance of customer accounts, access to customer accounts and the delivery of funds and securities.

(2) "Financial and operational assessment" means a set of written procedures that allows a member to identify changes in its operational, financial, and credit risk exposures.

3520. Emergency Contact Information

(a) Each member shall report to NASD, via such electronic or other means as NASD may require, prescribed emergency contact information for the member. Among other things, the emergency contact information for the member includes designation of two emergency contact persons. Each emergency contact person shall be a member of senior management and a registered principal of the member.

(b) Each member must promptly update its emergency contact information, via such electronic or other means as NASD may require, in the event of any material change. *Each*

³ Securities Exchange Act Release No. 46444 (August 30, 2002), 67 FR 57257 ("Original Notice").

⁴ See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division of Market Regulation ("Division"), Commission, dated December 11, 2002 ("Amendment No. 1").

⁵ See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, Commission, dated January 8, 2003 ("Amendment No. 2").

⁶ See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, Commission, dated February 19, 2003 ("Amendment No. 3").

⁷ Securities Exchange Act Release No. 47441 (March 4, 2003), 68 FR 11432.

⁸ See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, Commission, dated September 3, 2003 ("Amendment No. 4").

⁹ See letter from Brian J. Woldow, Office of General Counsel, NASD, to Katherine A. England, Division, Commission, dated September 16, 2003 ("Amendment No. 5").

¹⁰ A similar rule change has been proposed by the New York Stock Exchange ("NYSE"). See Securities Exchange Act Release No. 46443 (August 20, 2002), 67 FR 57264 (September 9, 2002) (original NYSE proposal); Securities Exchange Act Release No. 47584 (March 27, 2003), 68 FR 16334 (September 9, 2002) (Amendment No. 3 to NYSE proposal).