

(10) how the member or member organization will assure customers prompt access to their funds and securities in the event the member or member organization determines it is unable to continue its business.

To the extent that any of the above items is not applicable, the member's or member organization's business continuity and contingency plan must specify the item(s) and state the rationale for not including each such item(s) in its plan. If a member or member organization relies on another entity for any of the above-listed categories or any mission critical system, the member's or member organization's business continuity and contingency plan must address this relationship.

(d) Each member or member organization must disclose to its customers how its business continuity and contingency plan addresses the possibility of a future significant business disruption and how the member or member organization 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 Internet website of the member or member organization (if applicable) and mailed to customers upon request.

(e)[(d)] The term "mission critical system," for purposes of this Rule, means any system that is necessary, depending on the nature of a member's or member organization's business, to ensure prompt and accurate processing of securities transactions, including order taking, 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.

(f)[(e)] The term "financial and operational risk assessments," for purposes of this Rule, means a set of written procedures that allow members and member organizations to identify changes in their operational, financial, and credit risk exposure.

(g)[(f)] Members and member organizations must designate a senior officer, as defined in Rule 351(e), to approve the Plan, who shall also be responsible for the required annual review, as well as an Emergency Contact Person(s). Such individuals must be identified to the Exchange (by name, title, mailing address, e-mail address, telephone number, and facsimile number). Prompt notification must be given to the Exchange of any change in such designations.

\* \* \* \* \*

## 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 NYSE included statements concerning the purpose of and basis for the proposed rule change, as amended, 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 IV below. The NYSE 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 purpose of this filing is to amend SR-NYSE-2002-35, a proposed new rule that would require members and member organizations to develop, maintain, review, and update business continuity and contingency plans ("BCPs"), which establish procedures relating to an emergency or significant business disruption. As discussed in more detail below, the proposed amendments to the filing are the result of written comments received to the filing and conversations with Commission staff.

A similar proposal has been submitted by the National Association of Securities Dealers ("NASD").<sup>9</sup>

#### Background

##### • August 2002 Filing

On August 16, 2002, the Exchange filed with the Commission proposed new NYSE Rule 446 that would require members and member organizations to establish and maintain business continuity and contingency plans.<sup>10</sup> The Original Notice was published for comment in the **Federal Register** on September 9, 2002.<sup>11</sup>

##### • Amendment Nos. 1 and 2

The Commission received three comment letters in response to the original proposals of the NYSE and the NASD relating to business continuity

planning.<sup>12</sup> The Exchange filed Amendment Nos. 1 and 2 that responded to these comments.

##### • Amendment No. 3

Upon consideration of subsequent comments received from the staff of the Commission concerning proposed NYSE Rule 446, the Exchange filed Amendment No. 3 on March 27, 2003, to, among other things, clarify the intent of the proposal. Amendment No. 3 incorporated and replaced Amendment Nos. 1 and 2 in their entirety and was published in the **Federal Register** on April 3, 2003.<sup>13</sup> The Commission received one comment letter in response to the NYSE's Amendment No. 3,<sup>14</sup> and three comment letters in response to the comparable amendment filed by NASD.<sup>15</sup>

##### • Business Constituent, Bank and Counter-party Impact

Proposed NYSE Rule 446(c)(7) would require that a member's or member organization's BCP address "business constituent, bank and counter-party impact." A commenter asked for clarification of this category.<sup>16</sup> Under this proposed category, members and member organizations would be required to establish procedures that assess the impact that a significant business disruption would have on business constituents (businesses with which a member or member organization has an on-going commercial relationship pertaining to the support of the member's or member organization's operating activities), banks (lenders), and counter-parties (such as other broker-dealers or institutional customers). In addition, members and member organizations

<sup>12</sup> One commenter submitted a single letter that addressed both proposals. See letter from Melvyn Musson, Edward D. Jones & Co. ("Edward Jones"), to Jonathan G. Katz, Commission, dated September 30, 2002. A second commenter submitted two letters that addressed each proposal separately. See letters from Jerry W. Klawitter, Securities Industry Association and Bond Market Association, to Margaret H. McFarland, Deputy Secretary, Commission, dated September 30, 2002 ("SIA/BMA Letter 1"). A third commenter submitted a letter that addressed only the NASD proposal. See letter from Frances M. Stadler, Investment Company Institute, to Jonathan G. Katz, Secretary, Commission, dated September 30, 2002.

<sup>13</sup> See *supra* note 8.

<sup>14</sup> See letter from Securities Industry Association and the Bond Market Association to Jonathan G. Katz, Secretary, Commission, dated April 24, 2003 ("SIA/BMA Letter 2").

<sup>15</sup> See letter from Securities Industry Association and the Bond Market Association to Jonathan G. Katz, Secretary, Commission, dated March 31, 2003; letter from Thomas K. Heard, A.G. Edwards & Sons, Inc. to Jonathan G. Katz, Secretary, Commission, dated March 31, 2003 ("A.G. Edwards Letter"); letter from Melvyn Musson, Edward Jones, to Jonathan G. Katz, Secretary, Commission, dated March 28, 2003.

<sup>16</sup> See SIA/BMA Letter 1.

<sup>9</sup> See Securities Exchange Act Release No. 46444 (August 30, 2002), 67 FR 57257 (September 9, 2002) (notice of original NASD proposal relating to business continuity planning); Securities Exchange Act Release No. 47441 (March 4, 2003), 68 FR 11432 (March 10, 2003) (notice of Amendment Nos. 1, 2, and 3 to NASD proposal).

<sup>10</sup> On August 7, 2002, the NASD filed a similar proposal. See Securities Exchange Act Release No. 46444 (August 30, 2002), 67 FR 57257 (September 9, 2002) (SR-NASD-2002-108).

<sup>11</sup> See *supra* note 4.