

would be required to provide for alternative actions or arrangements with respect to their contractual relationships with business constituents, banks, and counter-parties upon the occurrence of a material business disruption to either party. The Exchange's Information Memo announcing adoption of the rule would provide the guidance described above with regard to clarification of this requirement.

As discussed in more detail below, the proposed amendments to this provision of the rule received additional comments upon its publication in the **Federal Register**. The Exchange is responding to those comments in this Amendment No. 4.

- **BCPs Should be Reasonably Designed to Enable a Firm to Continue its Business**

As originally proposed, a literal reading of proposed NYSE Rule 446, could have suggested that the rule would require members and member organizations to create, maintain, and periodically review a BCP that would have to be effective in enabling them to continue their business in the event of a future significant business disruption.

While the Exchange did not intend to propose a rule which limits the scope of its members' and member organizations' responsibilities in establishing such plans, the rule text did not make clear the NYSE's intention when it first proposed the Rule "that members and member organizations should be obligated to develop a business continuity and contingency plan that is reasonably designed, in light of particular characteristics of the firm, to allow the firm to recover as early as practicable in the event of a future significant business interruption.

Amendment No. 3, as proposed, made clear that the rule would require the creation of not only a written business continuity and contingency plan, but also a reasonably effective plan, to enable a firm to recover as early as practicable in the event of a future significant business interruption.

Amendment No. 4

- **Business Constituent, Bank, and Counter-party Impact**

As noted above, the Exchange had received comments upon the publication of the changes proposed in Amendment No. 3. A commenter suggested that the requirement to provide for alternative actions or arrangements places an undue burden on members and member organizations, might upset existing contracts, and presupposes that all such actions or arrangements are sufficiently critical to require consideration of alternatives.

The commenter suggested that the Exchange "remove the sentence suggesting a requirement to provide for alternatives so as not to confuse the goal of making assessments with the goal of planning alternatives."¹⁷

The Exchange disagrees with the commenter that the provision is unduly burdensome or that it might upset existing contracts. The provision would require only that a member or member organization consider and include in its BCP alternative steps that the firm would take in the event that a member's or member organization's critical business constituents, bank, or counter-parties were inaccessible. The rule would not mandate that a member or member organization enter into supplemental contracts or conditional agreements. For example, if a member or member organization were to determine that a telecommunications company was a critical business constituent, the member or member organization would then be required to identify procedures or actions that could be followed in the event that this business constituent was unavailable. Alternatively, the member or member organization could enter into a supplemental agreement with another telecommunications service to provide back-up services. The rule would permit each member or member organization to adopt an approach in dealing with its business constituents, banks, and counter-parties that is best suited to the member's or member organization's particular operations, structure, business, and location. It would require a member or member organization only to assess the effect of a significant business disruption on its business constituents, banks, and counter-parties and determine appropriate actions if faced with any such situation.

The Exchange, however, recognizes that certain business constituent, banking, and counter-party relationships might not be critical to a firm's business or operations. Therefore, in response to comments, the Exchange is amending the category of "business constituent, bank, and counter-party impact" in proposed NYSE Rule 446(c)(7) to read, "[c]ritical business constituents, banks, and counter-parties." Members and member organizations would be responsible for identifying those relationships that they deem critical for purposes of complying with the rule. The Exchange will consider, based on its experience in working with the rule following its adoption, whether to enumerate specific relationships that it views as critical to all members and member organizations.

- **BCPs Should be Reasonably Designed to Enable a Firm to Continue its Business**

The commenters expressed concern that the language added by Amendment No. 3 to proposed NYSE Rule 446(a) would create a new obligation on a member or member organization to continue its business after a significant business disruption.¹⁸ This is not the intention of the proposal. The proposal would not deprive a member or member organization of its autonomy to choose to cease its operations at any time, provided it did so in a manner consistent with applicable laws and Commission and Exchange rules. Nevertheless, to clarify that the rule would not create a new obligation for members and member organizations to continue their businesses, the Exchange is amending the proposed rule.

Specifically, the proposed rule text stating that "[s]uch procedures must be reasonably designed to enable the member or member organization to continue its business in the event of future significant business disruptions" is being amended to read, "[s]uch procedures must be reasonably designed to enable the member or member organization to meet its existing obligations to customers. In addition, such procedures must address its existing relationships with other broker-dealers and counter-parties." The general principle that firms are not required to remain in business is further recognized in a related amendment that the Exchange is now proposing to make with respect to the categories that a member's or member organization's plan must, at a minimum, address. In particular, following discussions with Commission staff and NASD staff, the Exchange is amending proposed NYSE Rule 446(c) to require a plan to address how a member or member organization would assure customers' prompt access to their funds and securities in the event that the member determines it is unable to continue its business. This new category is intended to address how customers holding funds or securities at the member or member organization would be able to access their funds and/or securities if a member or member organization were unable to continue its business following a significant business disruption.

Commenters also questioned an amendment made by the Exchange to the proposed rule text. As originally proposed, Rule 446(a) would have required that a member or member organization have a plan identifying procedures "to be followed in the event

¹⁷ See SIA/BMA Letter 2.

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