



OFFICE OF THE  
INVESTOR ADVOCATE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

October 3, 2016

**Submitted Electronically**

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F St NE  
Washington D.C. 20549-1090

**RE: File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103  
Proposed Rule Changes to: (1) Extend the Time Within Which a Member or  
Member Organization or an ATP Holder Must File a Uniform Termination Notice  
for Securities Industry Registration; and (2) Harmonize the Requirement of When  
OTP Holders and OTP Firms Must File a Uniform Termination Notice for  
Securities Industry Registration With the Rules of Other Exchanges and FINRA**

Dear Mr. Fields:

The Office of the Investor Advocate is responsible, among other things, for analyzing the potential impact on investors of proposed rules of self-regulatory organizations (“SROs”). In furtherance of this objective, we routinely review and examine the impact on investors of significant rulemakings of SROs, including the NYSE MKT LLC (“MKT”) and the NYSE Arca, Inc. (“Arca” and, together with MKT, the “Exchanges”). We are expected to identify areas in which investors would benefit from changes in regulations, and we are empowered to make recommendations to the Commission.<sup>1</sup> As appropriate, we make formal recommendations and/or utilize the public comment process to help ensure that the interests of investors are fully considered as rules are adopted.<sup>2</sup>

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<sup>1</sup> 15 U.S.C. § 78d(g)(4). This letter expresses solely the views of the Investor Advocate and the Ombudsman. It does not necessarily reflect the views of the Commission, the Commissioners, or staff of the Commission, and the Commission disclaims responsibility for this letter and all analyses, findings, and conclusions contained herein.

<sup>2</sup> To enable our consideration of other commenters’ views, we submit this letter after the expiration of the official comment period. However, this letter is intended as a comment letter and should not be construed as a recommendation to the Commission that requires a formal response within three months pursuant to Section 4(g)(7) of the Exchange Act, 15 U.S.C. § 78d(g)(7). The comments set forth herein may be incorporated into a future formal recommendation.

We appreciate this opportunity to provide comments in regard to the issues raised in File Nos. SR-NYSEMKT-2016-52<sup>3</sup> and SR-NYSEArca-2016-103.<sup>4</sup> As identified in our Report on Objectives for Fiscal Year 2017, the Office of the Investor Advocate, including the SEC Ombudsman, has a strong interest in proposed rule changes involving information contained in the online Central Registration Depository (“CRD”) because it plays such a key role in protecting investors. Regulators rely on data in CRD for licensing and enforcement activities and much of the information in CRD is ultimately made available to the public through BrokerCheck, a free research tool available on the Financial Industry Regulatory Authority’s (“FINRA’s”) website.<sup>5</sup>

## I. Introduction

In File Nos. SR-NYSEMKT-2016-52 and SR-NYSEArca-2016-103 (the “Notices”), the Exchanges have proposed to replace their requirements for member brokers<sup>6</sup> to electronically file a Form U5 upon termination of certain registered employees or other persons.<sup>7</sup> Currently, the Exchanges require the filing of Form U5 within ten (10) days of termination.<sup>8</sup> Under the proposed rules, they would require the filing “promptly . . . , but not later than 30 days” after the date of termination.<sup>9</sup> Similarly, the proposed rules would require that any amendment to a Form U5 must also be promptly filed electronically with CRD, but not later than 30 calendar days after learning of the facts or circumstances giving rise to the amendment.<sup>10</sup> The Notices explain that the proposed rule text is based on the existing requirements of other exchanges and FINRA, and therefore would harmonize the time frame for complying with the termination filing requirement with the rules of those other SROs.<sup>11</sup>

The Office of the Investor Advocate has reviewed the Notices and the comments received to date. In short, we object to the proposed amendments because they are not in the public

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<sup>3</sup> See Securities Exchange Act Release No. 78198 (June 30, 2016), 81 Fed. Reg. 44363 (noticed July 7, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16025.pdf> [hereinafter MKT Notice].

<sup>4</sup> See Securities Exchange Act Release No. 78381 (July 21, 2016), 81 Fed. Reg. 49286 (noticed July 27, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-07-27/pdf/2016-17667.pdf> [hereinafter Arca Notice].

<sup>5</sup> See OFFICE OF THE INV. ADVOC., REP. ON OBJECTIVES FOR FISCAL YEAR 2017, 32-33 (June 30, 2016), <https://www.sec.gov/advocate/reportspubs/annual-reports/sec-office-investor-advocate-report-on-objectives-fy2017.pdf>.

<sup>6</sup> The Notices and the rules of the Exchanges refer to members, member organizations, ATP Holders, OTP Holders or OTP Firms.

<sup>7</sup> The Notices and the rules of the Exchanges refer to members, ATP Holders, OTPs, registered employees or approved persons.

<sup>8</sup> See MKT Notice, *supra* note 3, at 44364; Arca Notice, *supra* note 4, at 49287.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

interest and may contribute to, rather than prevent, fraudulent and manipulative acts and practices in the markets. While we generally support a harmonized approach among all the various SROs, we suggest that the appropriate route to harmonization would be to shorten the filing time frames of the other SROs rather than lengthening the time frames for these Exchanges.

## II. Background

FINRA's predecessor, the National Association of Securities Dealers, originally developed the CRD database in conjunction with the North American Securities Administrators Association ("NASAA") to centralize registration for the broker-dealer industry.<sup>12</sup> When implemented in 1981, CRD consolidated a multi-state, paper-based registration process into a single, nationwide filing process and computer system.<sup>13</sup> Information in CRD is obtained through forms (the "Uniform Forms") that registered representatives, broker-dealers, and regulators complete as part of the securities industry registration and licensing process.<sup>14</sup>

Six different Uniform Forms are used to file information with CRD, including the Form U5 (Uniform Termination Notice for Securities Industry Registration).<sup>15</sup> Among the important information required to be submitted as part of the notice of termination, the Form U5 requires the submitter to indicate the date of termination and select a reason for termination: Voluntary; Discharged; Permitted to Resign; Deceased; or Other.<sup>16</sup> Not surprisingly, if one of the more troubling reasons is selected – Discharged, Permitted to Resign, or Other – the Form U5 requires that further explanation be provided on the form.

In 1996, FINRA's predecessor obtained Commission approval for the mandatory electronic filing of Form U5.<sup>17</sup> It appears that at the time, more than two decades ago, FINRA proposed specific time frames, usually 30 days, for the filing of information on these forms.<sup>18</sup>

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<sup>12</sup> See, e.g., NASAA, CRD & IARD, <http://www.nasaa.org/industry-resources/investment-advisers/crd-iard/> (last visited Sept. 29, 2016).

<sup>13</sup> See OFFICE OF INV'R. EDUC. AND ADVOCACY, STUDY AND RECOMMENDATION ON IMPROVED INVESTOR ACCESS TO REGISTRATION INFORMATION ABOUT INVESTMENT ADVISERS AND BROKER-DEALERS, 13-14 (Jan. 2011), <https://www.sec.gov/news/studies/2011/919bstudy.pdf>

<sup>14</sup> See *id.*

<sup>15</sup> See *id.* The other five forms include: Form U4 (Uniform Application for Securities Industry Registration or Transfer); Form U6 (Uniform Disciplinary Action Reporting Form); Form BD (Uniform Application for Broker-Dealer Registration), a Commission form; Form BDW (Uniform Request for Broker-Dealer Withdrawal), also a Commission form; and Form BR (Uniform Branch Office Registration Form).

<sup>16</sup> See FIN. INDUS. REGULATORY AUTH., FORM U5, <https://www.finra.org/sites/default/files/form-u5.pdf>.

<sup>17</sup> See Securities Exchange Act Release No. 37439 (July 15, 1996), 61 Fed. Reg. 37950 (July 22, 1996) (SR-NASD-96-21), <https://www.gpo.gov/fdsys/pkg/FR-1996-07-22/pdf/96-18457.pdf>. The rule proposal also made mandatory the electronic filing of Form U4 (Uniform Application for Securities Industry Registration or Transfer).

<sup>18</sup> See *id.*

The Commission generally found that mandatory electronic filing with the CRD database “will provide more efficient processing of registration-related filings and will allow for easy access to information in these filings by all industry and regulatory participants”,<sup>19</sup> but did not appear to explicitly address the specific filing time frames in the approval order. Our ongoing review of the record has not yet been able to determine when the Exchanges’ predecessors adopted their current 10-day filing time frames, but it appears to at least predate MKT’s adoption of the requirement that its members make such filing electronically in the CRD in 2003.<sup>20</sup> We would encourage the Commission to continue examining the record of these changes.

The electronically filed Form U5 remains valuable today. State regulators review Form U5 information when making licensing decisions when a registered representative moves from one firm to another.<sup>21</sup> FINRA reviews Form U5s in order to identify and initiate investigations of firms and brokers that may pose a risk.<sup>22</sup> Firms utilize this information when making hiring decisions. And, perhaps most important, the information alerts retail investors about potential red flags in a broker’s employment history. If Form U5 information is not timely updated in CRD, all of these stakeholders will have incomplete information, including indicia of unethical or fraudulent behavior, upon which to make important decisions.

### III. Analysis

The Exchange Act requires that the rules of a national securities exchange be designed, in relevant part, to prevent fraudulent and manipulative acts and practices and, in general, protect investors and the public interest.<sup>23</sup> In our view, the proposed rules undermine investor protection because they will permit and potentially encourage less timely Form U5 filings. By enlarging the gap between termination and regulatory filing, it is more likely that bad actors will obtain new employment in the securities industry and thereby continue certain fraudulent and manipulative acts that may have been uncovered by their former employer. Thus, instead of designing the rules to *prevent* fraudulent and manipulative acts and practices, as required by the Exchange Act, the proposed rules go in the opposite direction.

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<sup>19</sup> *See id.*

<sup>20</sup> *See* Securities Exchange Act Release No. 48067 (June 19, 2003), 68 Fed. Reg. 39601 (July 2, 2003), <https://www.federalregister.gov/d/03-16713>. The 2003 Commentary .01 to Amex Rule 340 merely required, for example, members and member organizations to “submit” the Form U5 within ten days, without reference to the electronic CRD database. *Id.* Commentary .09 to Rule 341 and Rule 359 appear to have been updated to include the same time frame. *Id.*

<sup>21</sup> *See, e.g.*, North American Securities Administrators Association, Comment Letter on Proposed Rule Change Amending Rules 340, 341, and 359 to Extend the Time Within Which a Member or Member Organization or an ATP Holder Must File a Uniform Termination Notice for Securities Industry Registration (Aug. 3, 2016), <https://www.sec.gov/comments/sr-nysemkt-2016-52/nysemkt201652-1.pdf>.

<sup>22</sup> *See* FINRA, Regulatory Notice 11-06, Reporting Requirements, 2 (Feb. 2011), <http://www.finra.org/sites/default/files/NoticeDocument/p122888.pdf>.

<sup>23</sup> *See* 15 U.S.C. § 78f(b)(5).

It should not be surprising if an individual who was terminated for cause by one member firm attempts to seek employment and registration at other firms before a Form U5 describing the reason for the termination has been electronically filed on CRD by the former employer. As described above, state regulators review Form U5 information when making licensing decisions, FINRA reviews Form U5s for investigative purposes, firms review the forms when making hiring decisions, and Form U5 information in BrokerCheck alerts retail investors about potential red flags in a broker's employment history. A bad broker has considerable incentive to race to a new firm before any negative disclosures come to light in a Form U5 filing by a previous employer. The longer the gap between termination and the disclosure of the grounds for termination, the greater the likelihood of resulting harm to the public.

As proposed by the Exchanges, the significant investor protection that currently comes from the Exchanges' established time frames for filing the Form U5 would be delayed an additional 20 days without any offsetting benefit to investors or the public interest. In the Notices, the Exchanges speculate that the addition of the word "promptly" may lead to Form U5s being filed sooner than under the current 10-day requirement.<sup>24</sup> However, in our view, it is unlikely that the rule changes would lead to faster filings, given that it is difficult to imagine any negative consequences to the submitter for filing the Form U5 30 days after termination.<sup>25</sup>

The Exchanges claim that the changes will reduce potential confusion and make the Exchanges' rules easier for their members to navigate.<sup>26</sup> This may be true, but it does not follow, as they claim, that harmonization of rules will facilitate investor protection in this instance. The bottom line is that, if there is any benefit to their members from the proposed filing requirement, it comes at the expense of investor protection.

In response to NASAA's comment letter opposing the amendments, the Exchanges suggest their current requirements now reflect a burden on competition for them vis-à-vis other SROs with more lenient time frames.<sup>27</sup> It is difficult to understand how this is possible if, as they claim, their new rules will encourage members to file faster. If the term "promptly" can reasonably be expected to cause the Exchanges' members to file Form U5s even sooner than they currently do, then the change would deprive the Exchanges of their competitive advantage and increase the burden on their members.

The Exchanges also suggest that a longer reporting timeline is counterbalanced by the fact that FINRA recently reduced the time period, from 15 days to three days, for the public

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<sup>24</sup> See MKT Notice, *supra* note 3, at 44364; Arca Notice, *supra* note 4, at 49287.

<sup>25</sup> See *id.*

<sup>26</sup> See MKT Notice, *supra* note 3, at 44365; Arca Notice, *supra* note 4, at 49288.

<sup>27</sup> Letter from Elizabeth King, Gen. Counsel and Corp. Sec'y, NYSE MKT LLC, to Brent J. Fields, Sec'y, SEC (Aug. 12, 2016), <https://www.sec.gov/comments/sr-nysemkt-2016-52/nysemkt201652-2.pdf> ("...unless FINRA moves to shorter filing time frame, it would be a burden on competition for [MKT] to maintain a different filing requirement for Form U5s").

disclosure on BrokerCheck of information that is contained on a Form U5. It should be noted that, while FINRA's timelier disclosure of Form U5 information on BrokerCheck impacts the speed in which a retail investor may be alerted to red flag conduct, it has no impact on the speed in which regulators are alerted to, and can respond to, the information in the Form U5. Likewise, any firm seeking to hire the individual subject to the Form U5 will be able to immediately access the information in the Form U5 without having to wait for BrokerCheck to be updated, provided that the individual subject of the Form U5 has provided consent to the hiring firm to review their CRD record. Accordingly, two gatekeepers to investor protection – regulators and hiring firms – are able to respond quicker to red flags in Form U5s through more timely filings by member firms, irrespective of the speed that FINRA updates BrokerCheck with this information.

We generally support efforts to harmonize rule requirements between various regulators. However, if such harmonization is to be achieved in this context, we believe it should be through the other SROs and FINRA shortening the time frame for disclosure, not by delaying disclosure at MKT and Arca. We recognize that such a proposal is not currently before the Commission, but the Commission should find that the proposals currently under consideration are contrary to the mandates of the Exchange Act.

We would suggest that the Commission consider how other circumstances may have rendered a 30-day filing standard no longer consistent with the Exchange Act, even if those standards have been approved in prior rule proposals by other exchanges. Speed in the industry is increasing, not decreasing. This year, the Commission considered whether a one second delay in trading speed could even be considered *de minimus*.<sup>28</sup> Similarly, in just the last month, the Commission has proposed to shorten the security transaction settlement process from T+3 to T+2 in order to reduce operational and systemic risk in the industry.<sup>29</sup>

When FINRA received approval to make electronic filing in CRD mandatory in 1996, a 30-day Form U5 disclosure requirement may have been appropriate and consistent with the mandates of the Exchange Act. However, with current significant advances in computer and internet technology, the Commission should take a skeptical eye towards considering whether the 30-day framework is suitable anymore, given that none of this appears to have been contemplated by the Commission or FINRA in 1996. It is likely that progress and efficiencies in the industry have made it possible to require member firms to file Form U5s on an even timelier basis without significantly increasing their burden.

While we appreciate the Exchanges' desire to harmonize their Form U5 disclosure requirement with the industry and FINRA, we believe that time has come to consider other alternatives, such as moving to the 10-day filing standard currently required by these Exchanges,

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<sup>28</sup> See Commission Interpretation Regarding Automated Quotations Under Regulation NMS, Securities Exchange Act Release No. 78102 (June 17, 2016), 81 Fed. Reg. 40785 (June 23, 2016), <https://www.federalregister.gov/d/2016-14876>.

<sup>29</sup> See Amendment to Securities Transaction Settlement Cycle, Securities Exchange Act Release No. 78962 (Sept. 28, 2016), <https://www.sec.gov/rules/proposed/2016/34-78962.pdf>.

rather than the Exchanges and others moving to the more lenient 30-day filing standard. We would also be in favor of the SROs evaluating an even more expedited time frame, given the significant investor protection concerns discussed above. When a bad broker is fired, firms move very quickly to block computer access, retrieve keys and records, and do whatever is necessary to protect the firm, and it is not unreasonable to expect them to act quickly to protect the public.

#### **IV. Conclusion**

In conclusion, we have significant concerns about the impact of the proposals on investor protection and do not see how the proposals serve the public interest, so we encourage the Commission to disapprove them. We believe that the 30-day requirement will negatively influence how “promptly” member organizations will file their Form U5s. We encourage NYSE MKT, NYSE Arca, and the other SROs to consider how best to harmonize the requirement of when a member or member organization must file a Form U5, as the 30-day time frame appears to be a relic from a technological era long since passed. We also encourage the Commission to work with the SROs in evaluating the appropriate time frame for requiring such filings in today’s highly automated and programmable environment. We believe these changes are vital for the protection of retail investors as more timely disclosure of red flags impacts the decision-making of regulators, member firms, and retail investors.

Should you have any questions, please do not hesitate to contact either of us, or Senior Counsel Adam Moore, at (202) 551-3302.



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