

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-64251]

Technical Amendment to Rule 19b-4: Filings with Respect to Proposed Rule Changes by Self-Regulatory Organizations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is amending Rule 19b-4(a) under the Securities Exchange Act of 1934 (the “Exchange Act”) so that references to “business day” in Section 19(b) of the Exchange Act and Rule 19b-4 thereunder refer to a day other than a Saturday, Sunday, Federal holiday, a day that the U.S. Office of Personnel Management (“OPM”) has announced that Federal agencies in the Washington, DC area are closed to the public, a day on which the Commission is subject to a Federal government shutdown in the event of a lapse in appropriations, or a day on which the Commission’s Washington, DC office is otherwise not open for regular business.

EFFECTIVE DATE: April 13, 2011

FOR FURTHER INFORMATION CONTACT: Richard Holley III, Assistant Director, at (202) 551-5614, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:

I. Filing of SRO Proposed Rule Changes

A. Background

Section 19(b)(1) of the Exchange Act¹ requires self-regulatory organizations (“SROs”), including national securities exchanges, registered securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board,² to file with the Commission any proposed rule change,³ which must be submitted on Form 19b-4⁴ in accordance with the General Instructions thereto. Once a proposed rule change has been filed, the Commission is required to publish it in the Federal Register to provide an opportunity for public comment.⁵ A proposed rule change generally may not take effect unless it is either approved by the Commission pursuant to Section 19(b)(2) of the Exchange Act⁶ or is designated by the SRO to become

¹ 15 U.S.C. 78s(b)(1).

² See Section 3(a)(26) of the Exchange Act, 15 U.S.C. 78c(a)(26) (defining the term “self-regulatory organization” to mean any national securities exchange, registered securities association, registered clearing agency, and, for purposes of Section 19(b) and other limited purposes, the Municipal Securities Rulemaking Board).

³ Section 19(b)(1) of the Exchange Act defines a “proposed rule change” as “any proposed rule, or any proposed change in, addition to, or deletion from the rules of” an SRO. 15 U.S.C. 78s(b)(1). Section 3(a)(27) of the Exchange Act defines “rules” to include “the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing... and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.” 15 U.S.C. 78c(a)(27). Rule 19b-4(b) under the Exchange Act defines “stated policy, practice, or interpretation” to mean, in part, “[a]ny material aspect of the operation of the facilities of the self-regulatory organization” or “[a]ny statement made generally available” that “establishes or changes any standard, limit, or guideline” with respect to the “rights, obligations, or privileges” of persons or the “meaning, administration, or enforcement of an existing rule.” 17 CFR 240.19b-4(b).

⁴ 17 CFR 249.819.

⁵ See 15 U.S.C. 78s(b)(1). The SRO is required to prepare the notice of its proposed rule change on Exhibit 1 of Form 19b-4 that the Commission then publishes in the Federal Register.

⁶ See 15 U.S.C. 78s(b)(2). However, as provided in Section 19(b)(2)(D) of the Exchange Act, 15 U.S.C. 78s(b)(2)(D), a proposed rule change may be “deemed to have been approved by the Commission” if the Commission fails to take action on a proposal that is subject to Commission approval within the statutory time frames specified in Section 19(b)(2).

effective upon filing pursuant to Section 19(b)(3)(A) of the Exchange Act.⁷ The Commission’s Division of Trading and Markets, on behalf of the Commission, is responsible for the day-to-day review of SRO proposed rule changes.⁸

There may be days, in addition to Saturday, Sunday and Federal holidays, on which the Commission’s Washington, DC offices are not open for regular business. For example, a lapse in appropriations or an announcement by OPM that Federal agencies are closed for business may cause the Commission’s Washington DC offices to not be open for regular business. To make clear that “business day” does not include those days, the Commission is hereby adopting a technical amendment to Rule 19b-4 to state what constitute “business days” for purposes of Section 19(b) under the Exchange Act and Rule 19b-4 concerning SRO proposed rule changes.

B. References to “Business Days” in Section 19 and Rule 19b-4

Section 19(b) of the Exchange Act provides the time frames within which the Commission must act in connection with reviewing and processing SRO proposed rule changes. Some time frames are tied to calendar days; others are tied to business days.

In particular, Section 19(b)(10)(B) of the Exchange Act provides that the Commission may, within seven business days after receipt of a filing, reject as improperly filed a filing that does not comply with the rules of the Commission relating to the required form of a proposed rule change.⁹ That provision currently is the only reference to “business day” contained in Section 19.

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ See 17 CFR 200.30-3 (Delegation of authority to Director of the Division of Trading and Markets).

⁹ 15 U.S.C. 78s(b)(10)(B). This period may be extended to 21 calendar days if, not later than 7 business days after the date of receipt by the Commission, the Commission notifies the SRO that it needs additional time due to the Commission’s determination that the proposed rule change is unusually lengthy, complex, or raises novel regulatory issues. If it is not rejected, Section

References to “business days” are also found in Rule 19b-4 under the Exchange Act. For example, subparagraph (l) provides a two business day deadline by which an SRO must post a proposed rule change on its website after filing it with the Commission, and subparagraph (m) provides a two business day deadline by which an SRO must update its website to reflect changes to the text of its rules.¹⁰

Other references to business days, including in paragraphs (f)(6) and (k) of Rule 19b-4, refer to the filing by the SRO of materials with the Commission, which the Commission must then review in the normal course of its oversight of the SRO rule change process. Specifically, Rule 19b-4(f)(6) allows an SRO to designate certain proposed rule changes as effective upon filing if, among other things, the SRO provides written notice of its intent to file, along with a brief description and proposed rule text (a “prefiling”), to the Commission at least five business days prior to filing. In addition, Rule 19b-4(k) specifies when a proposed rule change is received by the Commission and provides that if the conditions of Rule 19b-4 and Form 19b-4 are satisfied, a proposed rule change will be received by and accepted as filed on a business day if it is filed on or before 5:30 p.m. (Eastern time).¹¹ Any filing submitted after 5:30 p.m. on a business day will be accepted by the Commission but will have as its date of filing the next business day.¹² Rule 19b-4 does not, however, define what constitutes a “business day.”

19(b)(10)(A) of the Exchange Act provides that the date of filing of a proposed rule change is the “date on which the Commission receives the proposed rule change.” 15 U.S.C. 78s(b)(10)(A).

¹⁰ See 17 CFR 240.19b-4(l) and (m), respectively. An SRO is required to post and maintain a complete version of its rules on its website. See 17 CFR 240.19b-4(m)(1).

¹¹ 17 CFR 240.19b-4(k).

¹² See id.

While the Commission’s Washington DC headquarters is routinely closed for business on weekends (Saturdays and Sundays) and designated Federal holidays,¹³ the Commission’s Washington DC headquarters also may be closed for other reasons. For example, Federal agencies may be closed in various situations, including, but not limited to, adverse weather, the observance of special events in the District of Columbia (including, but not limited to, presidential inaugurations or funeral observances), or any other conditions or events that cause Federal agencies to not open for regular business. These types of closings may be non-agency specific and would generally affect most Federal agencies in the Washington, DC metropolitan area. For these types of closings, the OPM disseminates the Federal government’s operating status for the Washington, DC area as “CLOSED” and publishes that operating status on its website at www.opm.gov.¹⁴

In addition, the Commission could be subject to a Federal government-wide shutdown in the event of a lapse in Congressional appropriations resulting in the temporary cessation of non-essential Federal government operations. Other circumstances may uniquely and specifically affect the Commission’s Washington, DC headquarters, causing the Commission to not be open for regular business at a time when other Federal agencies in the Washington, DC metropolitan area may or may not be open for regular business. Examples of these kinds of circumstances might include a disturbance at or problems with the Commission’s headquarters facilities that cause it to close temporarily for regular business.¹⁵

¹³ See Rule 104 of the Commission’s Rules of Practice, 17 CFR 201.104 (Business Hours).

¹⁴ These days differ from days when OPM disseminates an “OPEN” status, regardless of whether unscheduled leave or telework options are available or whether delayed arrival or early departure is in effect. See OPM’s Washington, DC, Area Dismissal and Closure Procedures, available at: <http://www.opm.gov/oca/compmemo/dismissal.pdf>.

II. Amendment to Rule 19b-4(a)

The Commission is adding new subparagraph (2) to Rule 19b-4(a) to specify that references to “business days” in Section 19 of the Exchange Act and Rule 19b-4 mean any day other than a Saturday, Sunday, Federal holiday, a day that OPM has announced that Federal agencies in the Washington, DC area are closed to the public, a day on which the Commission is subject to a Federal government shutdown in the event of a lapse in appropriations, or a day on which the Commission’s Washington, DC office is otherwise not open for regular business.¹⁶ The purpose of the amendment is to clarify the treatment of days where the Commission is not open and how such days impact an SRO’s proposed rule change submitted pursuant to Rule 19b-4 and an SRO’s obligation to post on its website a proposed rule change that has been filed with the Commission, as well as determining the “business days” upon which the five day prefiling and seven day rejection periods are measured.

The new text in Rule 19b-4(a)(2) applies to several aspects of the Commission’s operations concerning the processing of SRO proposed rule change filings. First, pursuant to Rule 19b-4(k), proposed rule filings submitted electronically by SROs via its Electronic Form 19b-4 Filing System (“EFFS”) on a day other than a business day of the Commission will be accepted by the Commission, but will have as their date of filing the next business day, as defined. For example, if the Commission is subject to a Federal government shutdown in the event of a lapse in appropriations from a Monday through a Friday, and resumes operations the following Monday, an SRO proposed rule change that was submitted electronically during the week the Federal government was shut down would, for purposes of Section 19(b) and Rule 19b-4, receive a filing date of the Monday the Federal government resumes operations.

¹⁶ The Commission is also redesignating paragraph (a) of Rule 19b-4 as paragraph (a)(1).

In the event of a day that the Office of Personnel Management has announced that Federal agencies in the Washington, DC area are closed to the public, a government shutdown in the event of a lapse in appropriations, or other circumstances that cause the Commission to not be open for regular business, the Commission would expect, to the extent feasible, to disseminate through EDFS a general notification viewable by all SROs reflecting that any proposed rule changes that an SRO submits through EDFS on such day or days will not be “filed” until the Commission is open for regular business.

Further, under Rule 19b-4(f)(6), an SRO is required to submit a prefiling at least five business days prior to filing a full 19b-4(f)(6) proposed rule change with the Commission. Under new paragraph (a)(2) to Rule 19b-4, for purposes of counting the five business day review period, any day that is not a business day of the Commission is not counted. For example, if an SRO submits a prefiling before 5:30 p.m. on Monday, February 1, and OPM announces that Federal agencies in the Washington, DC area, including the Commission, are closed due to inclement weather on Tuesday, February 2 and Wednesday, February 3, and the Commission subsequently reopens on Thursday, February 4, then February 2 and 3 would not be counted as “business days” that have elapsed for purposes of the five day prefiling period specified in Rule 19b-4(f)(6).

Separately, for purposes of the two business day period within which an SRO must post a proposed rule change on its website after filing it with the Commission, or the two business day period within which an SRO must update its website to reflect changes to the text of its rules, any non-business day of the Commission is not counted.¹⁷ For example, if an SRO files a proposed rule change with the Commission on April 1 (a business day) on or before 5:30 p.m.,

¹⁷ See 17 CFR 240.19b-4(l) and (m), respectively.

and the Commission subsequently is not open for regular business on April 2 and 3, then April 2 and 3 would not be counted as “business days” that have elapsed for purposes of the website posting requirement in Rule 19b-4(l).

Finally, under Section 19(b)(10)(B) of the Exchange Act, the Commission generally has seven business days after the date of receipt of a filing to reject as improperly filed a filing that does not comply with the rules of the Commission relating to the required form of a proposed rule change.¹⁸ Under new paragraph (a)(2) to Rule 19b-4, for purposes of counting the seven business day Commission review period, any non-business day of the Commission is not counted. For example, if the Commission is not open for regular business on February 1 and 2, but the Commission reopens on February 3, and an SRO had submitted a proposed rule change filing on February 1, February 1 and 2 would not be counted as “business days” that have elapsed for purposes of the seven day period provided under Section 19(b)(10)(B) because those days would not be business days.

The amendment to Rule 19b-4(a)(2) is limited solely to Section 19(b) under the Exchange Act and Rule 19b-4 thereunder concerning SRO proposed rule changes. By excluding as business days those days on which the Commission is not open for regular business, and therefore lacks personnel to review proposed rule changes, the amendment facilitates the statutory purposes and statutory requirements for a full and adequate review. Without the rule change, an SRO’s proposal might go into effect (e.g., in the case of an immediately effective filing submitted pursuant to Section 19(b)(3)(A) of the Exchange Act) in the absence of Commission review, publication in the Federal Register, or an opportunity for public comment, all of which are contemplated by the Exchange Act. Accordingly, the amendment is intended to

¹⁸ See supra note 9.

support the statutory framework in which the Commission reviews and publishes for public comment all SRO proposed rule changes to help ensure that SROs carry out the purposes of the Exchange Act.¹⁹

III. Certain Findings

Under the Administrative Procedure Act (“APA”), notice of proposed rulemaking is not required when an agency, for good cause, finds “that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²⁰ The Commission is making a technical amendment to Rule 19b-4 to provide that references to “business days” in Section 19 of the Exchange Act and Rule 19b-4 mean any day other than a Saturday, Sunday, Federal holiday, a day that the Office of Personnel Management has announced that Federal agencies in the Washington, DC area are closed to the public, a day on which the Commission is subject to a Federal government shutdown in the event of a lapse in appropriations, or a day on which the Commission’s Washington, DC office is otherwise closed for regular business due to other circumstances. The Commission finds that because the amendment is technical in nature and

¹⁹ For example, national securities exchanges are subject to Section 6 of the Exchange Act, 15 U.S.C. 78f, which requires, among other things, that the rules of the SRO be designed to “prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade... [and] to protect investors and the public interest” and that they not be designed to “permit unfair discrimination between customers, issuers, brokers, or dealers.” 15 U.S.C. 78f (b)(5). In reviewing an SRO’s proposed rule change, Section 19(b)(2)(C) of the Exchange Act, 15 U.S.C. 78s(b)(2)(C), provides the standards for Commission approval of an SRO’s proposed rule change, which direct the Commission to consider whether the proposal is consistent with the Exchange Act and the rules and regulations thereunder that are applicable to the SRO. For immediately effective filings, the Commission is authorized to suspend the proposal “if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the Exchange Act].” 15 U.S.C. 78s(b)(3)(C). Accordingly, Commission review of SRO proposed rule changes helps ensure that SRO proposed rule changes are consistent with the Exchange Act and the rules thereunder that are applicable to the SRO.

²⁰ 5 U.S.C. 553(b).

pertains to the Commission’s organization, procedure or practice, publishing the amendment for comment is unnecessary.²¹

The APA also requires publication of a rule at least 30 days before its effective date unless the agency finds otherwise for good cause.²² For the same reasons described above with respect to notice and the opportunity for comment, the Commission finds good cause for this technical amendment to take effect immediately.

IV. Consideration of Burden on Competition, and Promotion of Efficiency, Competition and Capital Formation

Section 3(f) of the Exchange Act,²³ provides that whenever the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the competitive effects of such rules, if any, and not to adopt a rule that would impose a burden on competition not necessary or appropriate in the furtherance of the purposes of the Exchange Act.²⁴

Because the amendment to Exchange Act Rule 19b-4 is technical in nature, and does not impose any additional requirements beyond those already required, we do not anticipate that the

²¹ For similar reasons, the amendment does not require analysis under the Regulatory Flexibility Act (“RFA”) or analysis of major rule status under the Small Business Regulatory Enforcement Fairness Act. See 5 U.S.C. 601(2) (for purposes of RFA analysis, the term “rule” means any rule for which the agency publishes a general notice of proposed rulemaking); and 5 U.S.C. 804(3)(C) (for purposes of Congressional review of agency rulemaking, the term “rule” does not include any rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties).

²² See 5 U.S.C. 553(d)(3).

²³ 15 U.S.C. 78c(f).

²⁴ 15 U.S.C. 78w(a)(2).

amendment would have a significant effect on efficiency, competition, or capital formation, and we do not anticipate that any competitive advantages or disadvantages would be created.

V. Statutory Basis and Text of Rules

The Commission is amending Rule 19b-4 pursuant to authority set forth in the Exchange Act, including Sections 19(b) and 23(a).

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, and 7210 et seq., 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

2. Amend Section 240.19b-4 by:
 - a. Redesignating paragraph (a) as paragraph (a)(1); and
 - b. Adding new paragraph (a)(2).

The addition reads as follows:

§240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.

* * * * *

(a) * * *

(2) For purposes of Section 19(b) of the Act and this rule, a “business day” is any day other than a Saturday, Sunday, Federal holiday, a day that the Office of Personnel Management has announced that Federal agencies in the Washington, DC area are closed to the public, a day

on which the Commission is subject to a Federal government shutdown or a day on which the Commission's Washington, DC office is otherwise not open for regular business.

* * * * *

By the Commission.

Elizabeth M. Murphy
Secretary

Date: April 7, 2011