

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71350; File No. SR-FINRA-2014-002)

January 17, 2014

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt FINRA Rule 7640A (Data Products Offered By Nasdaq)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 9, 2014, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to adopt FINRA Rule 7640A (Data Products Offered By Nasdaq) to (1) describe FINRA’s practices relating to the distribution of market data for over-the-counter (“OTC”) transactions in NMS stocks generated through the operation of the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”) by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) and its affiliate, The NASDAQ Stock Market LLC (“Nasdaq”); and (2)

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

identify Nasdaq rules relating to products that distribute FINRA/Nasdaq TRF data to third parties, and specifically Nasdaq Rules 7039 (Nasdaq Last Sale Data Feeds), 7047 (Nasdaq Basic) and 7037 (Nasdaq FilterView Service).

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change 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. FINRA 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

Background

The FINRA Trade Reporting Facilities ("TRFs") are facilities solely for the reporting of OTC transactions in NMS stocks that allow the TRF "Business Members," which themselves are affiliates of self-regulatory organizations ("SROs"), to retain commercial use of the market data

reported to the respective TRFs.<sup>4</sup> The operation of each TRF is governed by a Limited Liability Company Agreement (the “LLC Agreement”) between FINRA and the respective Business Member. (The LLC Agreements, which were submitted as part of the rule filings to establish the respective TRFs and were subsequently amended and restated, appear in the FINRA Manual.) Under the LLC Agreement, FINRA is the “SRO Member” and has sole regulatory responsibility for the TRF, including real-time monitoring and T+1 surveillance, development and enforcement of trade reporting rules and submission of proposed rule changes to the Commission. The Business Member under the LLC Agreement is primarily responsible for the management of the TRF’s business affairs, which may not be conducted in a manner inconsistent with the regulatory and oversight functions of FINRA. Among other things, the Business Member establishes pricing for the TRF and is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from operation of the TRF. The Business Member also provides the “user facing” front-end technology used to operate the TRF and transmit in real time trade report data directly to the NMS securities information processors (“SIPs”) and to FINRA for audit trail purposes.

Under the terms of the business arrangement between FINRA and the Business Members, each TRF owns data resulting from its operation. Each Business Member has a non-exclusive, irrevocable, worldwide, perpetual, royalty-free right and license to use market data generated by

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<sup>4</sup> There currently are two TRFs in operation: the FINRA/Nasdaq TRF and the FINRA/NYSE TRF. The establishment of each TRF was subject to a proposed rule change filed with the Commission. See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (Order Approving File No. SR-NASD-2005-087); and Securities Exchange Act Release No. 55325 (February 21, 2007), 72 FR 8820 (February 27, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-011).

its TRF, other than data generated exclusively for regulatory purposes (“covered market data”),<sup>5</sup> consistent with all applicable laws, rules and regulations, and has a contractual right to sell covered market data to third parties.<sup>6</sup> Accordingly, although the TRFs are facilities of FINRA, the Business Members have the right under the contractual arrangements establishing the TRFs to develop market data products using covered market data. As each Business Member is an affiliate of an SRO, use of TRF data is conducted through the Business Member’s affiliated SRO, is subject to a separate proposed rule change filed with the Commission by the affiliate in its SRO capacity and must satisfy the appropriate statutory standards.

In addition to real-time interaction with Business Member staff when operational issues arise, FINRA currently executes its SRO oversight functions by performing a three-part regularly recurring review of TRF operations. First, before initial operation of the TRF can commence, the Business Member is required to certify in writing that TRF operations will comply with all relevant FINRA rules and federal securities laws, and on a quarterly basis thereafter, the Business Member must submit its current TRF procedures and a certification of compliance with those procedures. Second, FINRA staff conducts monthly conference calls with each Business Member to review TRF operations. These monthly calls follow an established agenda, which includes, among other things, whether there were any system outages or issues since the prior monthly conference call (and if so, to confirm that they were reported to FINRA and the SEC, as applicable), the status of pending systems changes, and TRF market data products, including data

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<sup>5</sup> For purposes of proposed Rule 7640A, “covered market data” would be defined as market data generated by the FINRA/Nasdaq Trade Reporting Facility, other than data generated exclusively for regulatory purposes.

<sup>6</sup> Under the TRF contracts, FINRA has a non-exclusive, irrevocable, worldwide, perpetual, royalty-free right and license to use the data generated by the TRF to fulfill its contractual rights and obligations, as well as its obligations as an SRO.

latency and whether the Business Member has or is developing any new products that would use TRF data. Third, FINRA oversees a regular assessment cycle and extensive review of TRF operations, as measured against the TRF business requirements document and coding guidelines established by FINRA, by an outside independent audit firm. FINRA also will require the Business Members to begin submitting on a quarterly basis an attestation that (1) identifies all products that use TRF data, and (2) certifies that the Business Member has no other products that use TRF data and that any future products that use TRF data will be developed in consultation with FINRA.

Under the TRF framework, the Business Member must ensure, among other things, that the distribution and sale of market data products that use TRF data are consistent with the requirements of the Act. In addition to FINRA's general oversight of TRF operations, and in furtherance of FINRA's SRO responsibilities with respect to OTC market data, FINRA requires that each Business Member (and its SRO affiliate) make specific commitments and undertakings with respect to its products that use TRF data. Among other things, the Business Member must represent that, consistent with the Commission's interpretation of Rule 603(a) under SEC Regulation NMS, it will not transmit any TRF transaction data to a vendor or user any sooner than the TRF transmits the data to the SIPs.<sup>7</sup> The Business Member also must have in place

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<sup>7</sup> Rule 603(a), 17 CFR 242.603(a), provides as follows:

(1) Any exclusive processor, or any broker or dealer with respect to information for which it is the exclusive source, that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor shall do so on terms that are fair and reasonable.

(2) Any national securities exchange, national securities association, broker, or dealer that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor,

procedures and controls to ensure that its products that use TRF data are not distributed prior to dissemination of TRF data to the SIPs, including monitoring for compliance with this obligation.

In this regard, NASDAQ OMX, as the Business Member for the FINRA/Nasdaq TRF, has implemented a tool to monitor for potential latency by comparing the time of dissemination of FINRA/Nasdaq TRF data to the SIPs and to Nasdaq's proprietary data feeds that use corresponding TRF data (e.g., the Nasdaq Last Sale feeds) that is capable of detecting whether data was distributed to a proprietary vendor or user sooner than to the SIP. In addition, NASDAQ is developing the capability to monitor overall performance of respective data feeds on a real-time basis. FINRA and NASDAQ OMX are also in the process of developing escalation procedures in the event that certain latency thresholds are met. It is anticipated that these tools and procedures would be used for purposes of monitoring for potential latency for any future products developed by NASDAQ OMX that use and distribute TRF data on a real-time basis (provided such data is also required to be provided to the SIPs).

Proposed FINRA Rule 7640A

FINRA is proposing to adopt new Rule 7640A to address the distribution of FINRA/Nasdaq TRF data in market data products developed by NASDAQ OMX, as the Business Member, and its wholly owned SRO subsidiary, Nasdaq.<sup>8</sup> As noted above, the

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broker, dealer, or other persons shall do so on terms that are not unreasonably discriminatory.

Rule 603 would not prevent the distribution of data that is not required to be provided to the SIPs, provided that such distribution is not unreasonably discriminatory and is otherwise consistent with the Exchange Act.

<sup>8</sup> If NYSE Market, Inc., as the FINRA/NYSE TRF Business Member, and New York Stock Exchange LLC, its SRO affiliate, develop products using FINRA/NYSE TRF data, FINRA will file a separate proposed rule change to adopt a similar rule in the FINRA Rule 7600B Series applicable to the FINRA/NYSE TRF.

FINRA/Nasdaq TRF is a facility of FINRA, and FINRA/Nasdaq TRF data is OTC data for which FINRA is responsible under the Act. However, any market data products would be distributed and sold by NASDAQ OMX, the Business Member, through Nasdaq, its SRO subsidiary, not FINRA. As such, paragraphs (a) and (b) of proposed Rule 7640A codify the contractual arrangements between FINRA and NASDAQ OMX and provide for the overall structure relating to the FINRA/Nasdaq TRF and the permissible use of FINRA/Nasdaq TRF data. For example, proposed paragraph (b) provides that fees for market data products that use covered market data are charged by Nasdaq under Nasdaq rules. Such fees must be adopted pursuant to a proposed rule change submitted to the Commission pursuant to Section 19(b) of the Act, and Nasdaq must demonstrate that the fees are consistent with the requirements of the Act, including that they are reasonable, equitably allocated and not unfairly discriminatory. Paragraph (c) of proposed Rule 7640A identifies Nasdaq rules relating to products that use FINRA/Nasdaq TRF data, and specifically Nasdaq Rules 7039, 7047 and 7037.

#### Nasdaq Last Sale Data Feeds

The Nasdaq Last Sale (“NLS”) market data product combines both Nasdaq Market Center and FINRA/Nasdaq TRF last sale data and provides real-time execution price, volume and time information for each reported sale. The NLS product currently operates on a pilot basis pursuant to Nasdaq Rule 7039. Nasdaq has submitted a companion filing, SR-NASDAQ-2014-006, proposing to make the NLS product pilot permanent.

The NLS product provides distributors access to real-time market data through multiple pricing models that allow for flexible and very broad distribution to millions of investors via the internet and television at no cost to the end user. Based upon information from NLS distributors, Nasdaq has represented that since its launch in 2008, the NLS data has been viewed by millions

of investors. Thus, FINRA believes that the NLS product has increased the availability of market data to individual investors during the pilot period.

As further detailed in its companion filing, Nasdaq has established two pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Nasdaq also has established a cap on the monthly fee, currently set at \$50,000 per month, for the NLS product.

Because the NLS product provides a subset of the same last sale data that is disseminated by the SIPs, the feeds are structured so that data is not provided to the NLS product sooner than it is provided to the SIPs. NASDAQ OMX, as the Business Member, is responsible for monitoring for data latency, and to date, using the monitoring tool described above, no latency has been detected between the dissemination of FINRA/Nasdaq TRF data to the SIPs and to the NLS product.

#### Nasdaq Basic

Nasdaq Basic under Nasdaq Rule 7047 is a real-time data feed combining Nasdaq's Best Bid and Offer ("QBBO") with Nasdaq Market Center last sale information. Nasdaq has submitted a companion filing, SR-NASDAQ-2014-005, to authorize inclusion of FINRA/Nasdaq TRF data in the product.<sup>9</sup> As described therein, the product provides information similar to that provided by the SIPs' consolidated "Level 1" products, but without information from exchanges other than Nasdaq or TRFs other than the FINRA/Nasdaq TRF.

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<sup>9</sup> Nasdaq has determined through an internal review that the Nasdaq Basic product currently includes and has included since its inception last sale transaction reports for the FINRA/Nasdaq TRF; however, current Nasdaq Rule 7047 does not reflect the inclusion of TRF data in the Nasdaq Basic product.

Nasdaq Rule 7047 sets forth a number of pricing models for Nasdaq Basic: (1) a model in which a charge is assessed for each subscriber to the product to receive unlimited access,<sup>10</sup> (2) a model in which a per query fee is assessed for subscribers who expect to make more limited use of the product, (3) an enterprise license model under which a distributor may provide Nasdaq Basic to an unlimited number of subscribers with whom the distributor has a brokerage relationship, and (4) a derived data fee under which a vendor may distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers.

Because the NLS product is the source of the FINRA/Nasdaq TRF last sale information included in Nasdaq Basic, the latency monitoring performed by the Business Member with respect to the NLS product also provides a means to monitor the dissemination of data through the Nasdaq Basic product. As noted above, to date the Business Member has detected no latency between the dissemination of FINRA/Nasdaq TRF data to the SIPs and to the NLS product.

#### Nasdaq FilterView

The Nasdaq FilterView Service (“Nasdaq FilterView”) under Nasdaq Rule 7037 allows a distributor to receive a subset of any existing real-time data feed distributed by Nasdaq. Thus, the service could be used to receive FINRA/Nasdaq TRF data derived from NLS or Nasdaq Basic. Nasdaq FilterView was originally adopted in 2006<sup>11</sup> and has not been modified since its initial establishment. Nasdaq FilterView is available for a subscription fee of \$500 per month per subset of data, in addition to the fees associated with the relevant underlying data feed. There are no incremental user charges for distributors related to use of Nasdaq FilterView.

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<sup>10</sup> The amount of the applicable monthly subscriber fee depends on whether the subscriber is a market professional or a non-professional.

<sup>11</sup> See Securities Exchange Act Release No. 54286 (August 8, 2006), 71 FR 46955 (August 15, 2006) (Notice of Filing and Immediate Effectiveness; File No. SR-NASDAQ-2006-028).

Because distribution of data through Nasdaq FilterView may be more streamlined than the distribution of data through the data feeds from which it may be derived, such as NLS or Nasdaq Basic, Nasdaq has committed to perform separate latency monitoring of the dissemination of TRF last sale information through Nasdaq FilterView. Although Nasdaq FilterView is not a distinct data product, but rather a means of receiving a modified form of other data products, Nasdaq Rule 7037 is nonetheless cross-referenced in proposed Rule 7640A.

FINRA believes that using FINRA/Nasdaq TRF data in the NLS, Nasdaq Basic and Nasdaq FilterView data products will enhance transparency and increase the information regarding trading activity that is available to market participants and investors. FINRA also believes that the products satisfy the requirement that FINRA/Nasdaq TRF transaction data not be disseminated to a vendor or user any sooner than such data is transmitted to the SIPs. NASDAQ OMX, as the Business Member, must comply with the requirements and commitments described above, including monitoring for latency, and as part of FINRA's regular oversight of the FINRA/Nasdaq TRF, FINRA monitors for such compliance.

FINRA anticipates that for any future products that use FINRA/Nasdaq TRF data, Nasdaq will submit a proposed rule change and FINRA will submit a companion filing proposing to amend Rule 7640A(c). In addition, NASDAQ OMX and Nasdaq will be required to make the specific commitments and undertakings described above regarding the inclusion of TRF data in any new product.<sup>12</sup>

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<sup>12</sup> FINRA notes that FINRA and Nasdaq occasionally provide data to the Commission, other government agencies and members of the academic community for the purpose of studying the market. While in the latter case, data generally is in an aggregated format that does not allow identification of the activity of specific market participants, FINRA on occasion may provide attributed data to the academic community pursuant to a non-disclosure agreement.

FINRA has filed the proposed rule change for immediate effectiveness and requested waiver of the 30-day operative delay. FINRA is proposing that the proposed rule change will be operative immediately upon filing.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>13</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will promote market transparency by allowing the development, consistent with the guidelines set forth in proposed Rule 7640A, of innovative market data products using FINRA/Nasdaq TRF data for distribution to FINRA/Nasdaq TRF participants, other market participants and the investing public.

FINRA also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,<sup>14</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. As noted above, the fees for the NLS, Nasdaq Basic and Nasdaq FilterView products will not be charged by FINRA under FINRA rules, but rather will be charged by Nasdaq under Nasdaq rules. Such fees must be adopted pursuant to a proposed rule change submitted to the Commission pursuant to Section 19(b) of the Act, and Nasdaq must demonstrate that the fees are consistent with the requirements of the Act, including that they are reasonable, equitably allocated and not unfairly

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<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> 15 U.S.C. 78o-3(b)(5).

discriminatory. FINRA believes that the proposed rule change is consistent with the Act because the fees for the NLS, Nasdaq Basic and Nasdaq FilterView products are not mandatory fees and will apply uniformly to all members that elect to subscribe to the products. In addition, FINRA believes that, as described more fully in Nasdaq's filings, the existence of numerous alternatives to NLS and Nasdaq Basic (or Nasdaq FilterView, through which FINRA/Nasdaq TRF data derived from NLS or Nasdaq Basic can be obtained) – including real-time consolidated data, free delayed consolidated data and proprietary data from other sources – is a strong incentive to Nasdaq to avoid setting unreasonable or discriminatory fees.

Finally, FINRA believes that use of FINRA/Nasdaq TRF market data, as set forth in proposed Rule 7640A, is consistent with Rule 603(a) of SEC Regulation NMS, which requires, among other things, that distributions of certain data by FINRA not be unreasonably discriminatory.<sup>15</sup> The Commission clarified in its adopting release that SEC Regulation NMS prohibits an SRO from transmitting quotation and transaction data to a vendor or user any sooner than it transmits the data to a network processor. As discussed above, NASDAQ OMX, as the Business Member, and Nasdaq, its SRO affiliate, must ensure that distribution of market data products that use FINRA/Nasdaq TRF data is consistent with this requirement, and FINRA will require that NASDAQ OMX and Nasdaq make specific commitments and undertakings, including monitoring for potential data latency, with respect to all FINRA/Nasdaq TRF data products.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The

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<sup>15</sup> See Rule 603(a)(2) of SEC Regulation NMS.

proposed rule change is designed to provide a framework to increase the amount of market data available from the FINRA/Nasdaq TRF while ensuring that the dissemination of such data by the Business Member is subject to the oversight of FINRA. FINRA believes that, as described more fully in Nasdaq's filings, the existence of numerous alternatives to NLS and Nasdaq Basic (or Nasdaq FilterView, through which FINRA/Nasdaq TRF data derived from NLS or Nasdaq Basic can be obtained) – including real-time consolidated data, free delayed consolidated data and proprietary data from other sources – is a strong incentive to Nasdaq to avoid setting unreasonable or discriminatory fees. Subscription to the NLS, Nasdaq Basic and Nasdaq FilterView products is wholly voluntary, and members can elect not to buy any products that, in their determination, would not add value or enhance their business model.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2014-002 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2014-002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2014-002 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).