

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98051; File No. SR-EMERALD-2023-13)

August 3, 2023

Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Increase Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

I. Introduction

On June 7, 2023, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change (File Number SR-EMERALD-2023-13) to increase fees for the MIAX Emerald Top of Market (“ToM”) market data product and establish fees for the MIAX Emerald Complex Top of Market (“cToM”) market data product. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on June 26, 2023.<sup>4</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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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> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 97767 (June 20, 2023), 88 FR 41442 (“Notice”).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

## II. Background and Description of the Proposed Rule Change

The Exchange proposes to increase fees for the ToM market data product and establish fees for the cToM market data product.<sup>6</sup> According to the Exchange, the ToM feed provides subscribers with top of book quotations based on options orders and quotes entered into the System<sup>7</sup> and resting on the Exchange's Simple Order Book<sup>8</sup> as well as administrative messages.<sup>9</sup> The cToM feed provides subscribers with the same information as TOM as it relates to the Strategy Book<sup>10</sup> (i.e., best bid and offer for a complex strategy, with aggregate size, based on displayable orders in the complex strategy on the Exchange), plus additional information specific to complex orders (i.e., identification of the complex strategies currently trading on the Exchange, complex strategy last sale information, and the status of securities underlying the complex strategy).<sup>11</sup>

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<sup>6</sup> The Exchange initially filed the proposed fee change on December 28, 2022, with an effective date of January 1, 2023. See Securities Exchange Act Release No. 96625 (January 10, 2023), 88 FR 2688 (January 17, 2023) (SR-EMERALD-2022-37). That filing was withdrawn by the Exchange and the Exchange filed new proposed fee changes with additional justification (SR-EMERALD-2023-04) on February 23, 2023. See Securities Exchange Act Release No. 97078 (March 8, 2023), 88 FR 15813 (March 14, 2023). The Exchange subsequently withdrew that filing and replaced it with SR-EMERALD-2023-10 on April 11, 2023. See Securities Exchange Act Release No. 97326 (April 19, 2023), 88 FR 25043 (April 25, 2023). The Exchange subsequently withdrew that filing and replaced it with the instant filing to provide additional information and a revised justification for the proposal, which is discussed herein. See Notice, supra note 4, at 41442.

<sup>7</sup> The term "System" means the automated trading system used by the Exchange for the trading of Securities. See Exchange Rule 100.

<sup>8</sup> The term "Simple Order Book" means "the Exchange's regular electronic book of orders and quotes." See Exchange Rule 518(a)(15).

<sup>9</sup> See Notice, supra note 4, at 41443.

<sup>10</sup> The "Strategy Book" is each Exchange's electronic book of complex orders and complex quotes. See Exchange Rule 518(a)(17).

<sup>11</sup> See Notice, supra note 4, at 41443. The Exchange states that cToM is a distinct market data product from ToM. The Exchange also states that ToM subscribers are not required to subscribe to cToM, and that cToM subscribers are not required to subscribe to ToM. See id. at 41443-44.

The Exchange proposes to increase the fee for Internal Distributors<sup>12</sup> from \$1,250 per month to \$2,000 per month and External Distributors<sup>13</sup> from \$1,750 per month to \$3,000 per month for the ToM data feed.<sup>14</sup> The Exchange also proposes to assess a fee on Internal Distributors of \$2,000 per month and External Distributors of \$3,000 per month for the cToM feed.<sup>15</sup> The Exchange will assess the increased ToM and new cToM fees on Internal and External Distributors in each month the Distributor is credentialed to use ToM or cToM, and will reduce such fees for new Distributors for the first month during which they subscribe to ToM or cToM based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use ToM or cToM.<sup>16</sup>

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>17</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>18</sup> the Commission summarily may temporarily suspend the change in the rules of a self-

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<sup>12</sup> A “Distributor” of MIAX Emerald data is any entity that receives a feed or file of data either directly from MIAX Emerald or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). See Fee Schedule, Section 6(a). All members or non-members that determine to receive any market data feed from the Exchange, or its affiliates, must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (“Exchange Data Agreement”). See Notice, supra note 4, at 41451. Pursuant to the Exchange Data Agreement, “Internal Distributors” are restricted to the “internal use” of any market data they receive, meaning they may only distribute the Exchange’s market data to their officers and employees and their affiliates. See id.

<sup>13</sup> “External Distributors” may distribute the Exchange’s market data to persons who are not their officers, employees, or affiliates, and may charge their own fees for the distribution of such market data. See id.

<sup>14</sup> See Notice, supra note 4, at 41443.

<sup>15</sup> See id. at 41444.

<sup>16</sup> New cToM Distributors will be assessed a pro-rata percentage of the fees described above, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM, divided by the total number of trading days in the affected calendar month. See id.

<sup>17</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>18</sup> 15 U.S.C. 78s(b)(1).

regulatory organization (“SRO”) 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 Act. The Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange states its belief that the proposed fees overall are fair and reasonable as a form of “cost recovery plus the possibility of a reasonable return” for the Exchange’s aggregate costs of offering the ToM and cToM data feeds.<sup>19</sup> Specifically, the Exchange states the fees are based on a “cost-plus model” used to determine a reasonable fee structure that is informed by the Exchange’s understanding of different use of products by different types of participants.<sup>20</sup> According to the Exchange, employing a methodology that is the “result of an extensive review and analysis,” it estimates the total projected annual cost of providing the ToM and cToM data feeds to be \$665,296.<sup>21</sup> To arrive at these figures, the Exchange states that it undertook a thorough internal analysis of nearly every expense in the Exchange’s general expense ledger to determine whether each such expense related to the provision of ToM and cToM data feeds, and, if such expense did so relate, what portion (or percentage) of such expense supported the provision of ToM and cToM data feeds.<sup>22</sup> The

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<sup>19</sup> See id. 41450.

<sup>20</sup> See id. at 41450. In addition, the Exchange states that the proposed monthly cToM fees for Internal and External Distributors are identical to the fees that the Exchange proposes to charge for ToM. See id. at 41444. The Exchange also states that cToM was provided free of charge for the past four years, since the cToM market data product was established on the Exchange, the Exchange absorbed all costs associated with compiling and disseminating cToM during that time, and the Exchange now proposes to establish fees for cToM to recoup its ongoing costs going forward. See id. at 41443.

<sup>21</sup> See id. at 41446. The Exchange states that the Cost Analysis is based on the Exchange’s 2023 fiscal year of operations and projections. See id. at 41449. The Exchange has calculated the annual cost for producing ToM to subscribers to be \$317,753, and \$347,543 for cToM. See id. at 41443.

<sup>22</sup> See id. at 41446.

Exchange states that it determined the total cost for the Exchange and its affiliated markets for each cost driver<sup>23</sup> through a company-wide this process that included discussions with senior management, Exchange department heads, and the Finance Team.<sup>24</sup> The Exchange further states that it determined what portion of the cost allocated to the Exchange pursuant to this methodology is to be allocated to each core service, including the appropriate allocation to market data.<sup>25</sup> The Exchange states that through this allocation methodology, the Exchange “applied an estimated allocation of each cost driver to each core service” and “[e]ach of the [resulting] cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocation to the Exchange pursuant to the initial allocation.”<sup>26</sup>

The Exchange states that the \$665,296 aggregate annual costs for providing the ToM and cToM data feeds is the sum of to the following individual line-item costs: (1) Human Resources at \$354,553; (2) Network Infrastructure (fiber connectivity) at \$9,428; (3) Data Center at \$20,630; (4) Hardware and Software Maintenance and Licenses at \$22,202; (5) Depreciation at \$21,167; and (6) Allocated Shared Expenses at \$237,316.<sup>27</sup> The Exchange represents that it estimates that the proposed fees will result in an annual revenue of approximately \$804,000,

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<sup>23</sup> The Exchange defines “cost drivers” within the filing as the costs necessary to deliver each of the core services, see infra note 25, including infrastructure, software, human resources (i.e., personnel), and certain general and administrative expenses. See Notice supra note 4, at 41445.

<sup>24</sup> See id. at 41445. The Exchange states that because the Exchange’s parent company currently owns and operates four separate and distinct marketplaces, the Exchange’s parent company determines the actual cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers. See id. According to the Exchange, its allocation methodology ensures that no portion of any cost would be allocated twice or double-counted between the Exchange and its affiliated markets. See id.

<sup>25</sup> See id. at 41446. The Exchange describes “core services” as services provided by the Exchange, including transactions, market data, membership services, physical connectivity, and ports (which provides order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). See id.

<sup>26</sup> Id.

<sup>27</sup> See id. at 41446-47.

which is a potential profit margin of 17% over the cost of providing ToM and cToM market data feeds.<sup>28</sup>

The Exchange states its belief that a 17% rate of return is reasonable because it allows the Exchange to “recoup all of its expenses for providing the ToM and cToM data products” and that any additional revenue would represent no more than what the Exchange believes to be a reasonable rate of return.<sup>29</sup> In addition, the Exchange states its belief that the proposed fees are reasonable because they are generally less than the fees charged by competing options exchanges for comparable market data products.<sup>30</sup>

In further support of the proposal, the Exchange states its belief that the fees are reasonable, fair, and equitable, and not unfairly discriminatory, because they are designed to align fees with services provided, are allocated fairly and equitably among the various categories of users of the feeds with any differences among categories of users being justified and appropriate, and will apply uniformly to all data recipients that choose to subscribe to the ToM and cToM data feeds.<sup>31</sup> Moreover, the Exchange asserts that it is reasonable, equitable, and not unfairly discriminatory to assess Internal Distributors fees that are lower than the fees assessed for External Distributors for subscriptions to the ToM and cToM data feeds because Internal Distributors have limited, restricted usage rights to the market data, as compared to External

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<sup>28</sup> See id. at 41446, 41448.

<sup>29</sup> Id. at 41450. The Exchange also states that an approximately 17% mark-up is fair and reasonable after taking into account the costs related to creating, generating and disseminating the ToM and cToM data feeds and the fact that the Exchange will need to fund future expenditures. Id. at 41448.

<sup>30</sup> Id. at 41450.

<sup>31</sup> See id.

Distributors, which have more expansive usage rights, including rights to commercialize such market data.<sup>32</sup>

Finally, the Exchange asserts that the proposed fees would not cause any unnecessary or inappropriate burden on inter-market competition because other exchanges already have similar market data fees and they are free to adopt comparable fee structures subject to the Commission's rule filing process.<sup>33</sup> Furthermore, the Exchange asserts that the allowing the Exchange, or any new market entrant, to waive fees for a period of time to allow it to become established, such as the Exchange did with cToM, will encourage market entry and thus ultimately promote competition.<sup>34</sup> The Exchange also asserts that the proposed rule change would not cause any unnecessary or inappropriate burden on intra-market competition because the proposed fees are associated with the usage of the data feed by each market participant based on whether the market participant internally and externally distributes the Exchange data.<sup>35</sup>

To date, the Commission has not received any comment letters on the revised justifications for the increase in ToM market data fees or the establishment of the cToM market data fees.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the

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<sup>32</sup> See id. at 41451. In addition, the Exchange argues that it utilizes more resources to support External Distributors as compared to Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of the Exchange's staff. See id.

<sup>33</sup> See id. at 41452.

<sup>34</sup> See id.

<sup>35</sup> See id.

exchange.<sup>36</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”<sup>37</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;<sup>38</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>39</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>40</sup>

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the proposal to increase fees for the ToM market data feeds and establish fees for the cToM market data feeds are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange’s rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose

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<sup>36</sup> See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

<sup>37</sup> See *id.*

<sup>38</sup> 15 U.S.C. 78f(b)(4).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> 15 U.S.C. 78f(b)(8).



any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>41</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.<sup>42</sup>

#### IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>43</sup> and 19(b)(2)(B) of the Act<sup>44</sup> to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>45</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

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<sup>41</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>42</sup> For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>43</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>44</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>45</sup> Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;<sup>46</sup>
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>47</sup> and
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>48</sup>

As discussed in Section III above, the Exchange made various arguments in support of their proposal. The Commission believes that there are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>49</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable

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<sup>46</sup> 15 U.S.C. 78f(b)(4).

<sup>47</sup> 15 U.S.C. 78f(b)(5).

<sup>48</sup> 15 U.S.C. 78f(b)(8).

<sup>49</sup> 17 CFR 201.700(b)(3).

requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>50</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>51</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>52</sup>

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>53</sup>

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<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>53</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule changes.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-EMERALD-2023-13 on the subject line.

Paper Comments:

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

All submissions should refer to file number SR-EMERALD-2023-13. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-EMERALD-2023-13 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>54</sup> that File No. SR-EMERALD-2023-13, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>55</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>54</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>55</sup> 17 CFR 200.30-3(a)(57).