

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69323; File No. SR-MIAX-2013-14)

April 5, 2013

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish Fees for the MIAX Top of Market (ToM) Data Product

Pursuant to the provisions of 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 March 25, 2013, Miami International Securities Exchange LLC (“MIAX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the “Fee Schedule”) to establish fees applicable to Distributors (described below) of the Top of MIAX (“ToM”) market data product, a direct data feed that features the Exchange’s best bid and offer, with aggregate size and last sale information on the MIAX system. While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on April 1, 2013.

The text of the proposed rule change is provided in Exhibit 5. The text of the proposed rule change is also available on the Exchange’s website at

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

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

[http://www.miaxoptions.com/filter/wotitle/rule\\_filing](http://www.miaxoptions.com/filter/wotitle/rule_filing), at MIAX's principal office, 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, the Exchange 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. The Exchange 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

The purpose of the proposed rule change is to establish fees for Distributors of ToM. ToM provides Distributors with a direct data feed that includes the Exchange's best bid and offer, with aggregate size, and last sale information, based on displayable order and quoting interest on the Exchange. The ToM data feed includes data that is identical to the data sent to the processor for the Options Price Regulatory Authority ("OPRA"). The ToM and OPRA data leave the MIAX system at the same time, as required under Section 5.2(c)(iii)(B) of the Limited Liability Company Agreement of the Options Price Reporting Authority LLC (the "OPRA Plan"), which prohibits the dissemination of proprietary information on any more timely basis than the same information is furnished to the OPRA System for inclusion in OPRA's consolidated dissemination of options information.<sup>3</sup>

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<sup>3</sup> The Exchange previously filed to adopt the ToM market data product, including a detailed description of ToM. See Securities Exchange Act Release No. 69007 (February 28, 2013), 78 FR 14617 (March 6, 2013) (SR-MIAX-2013-05).

### Monthly Fees for ToM

The Exchange proposes to charge monthly fees to Distributors of the ToM market data product. The Fee Schedule will reflect that a “Distributor” of TOM data is any entity that receives a feed of ToM data either directly from MIAX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity), and that all Distributors would be required to execute a MIAX Distributor Agreement. The monthly Distributor Fee charged will depend on whether the Distributor is an “Internal Distributor” or an “External Distributor,” as defined below.

#### Internal Distributor

An Internal Distributor is an organization that subscribes to the Exchange for the use of ToM, and is permitted by agreement with the Exchange to provide ToM data to internal users (i.e., users within their own organization). Internal Distributors would be charged a monthly fee of \$1,000 per organization.

#### External Distributor

An External Distributor is an organization that subscribes to the Exchange for the use of ToM, and is permitted by agreement with the Exchange to provide ToM data to both internal users and to external users (i.e., users outside of their own organization). External Distributors will be charged a monthly fee of \$5,000 per organization.

Market Data Fees for ToM will be reduced for new Distributors for the first month during which they subscribe to ToM, based on the number of trading days that have been held during such month as of the date on which they subscribe. Such new 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 begin to receive the ToM feed divided by the total number of trading days in the affected calendar month.

In addition to MIAX's best bid and offer, with aggregate size and last sale information, Distributors that subscribe to ToM will also receive: opening imbalance condition information; opening routing information; Expanded Quote Range<sup>4</sup> information, as provided in MIAX Rule 503(f)(5); Post-Halt Notification,<sup>5</sup> as provided in MIAX Rule 504(d), and Liquidity Refresh,<sup>6</sup> condition information, as provided in MIAX Rule 515(c)(1)(iii)(A).

This additional information (the "administrative information") is included in the ToM feed as secondary information. The administrative information is also currently available to MIAX Market Makers via connectivity with the MIAX Express Interface ("MEI"),<sup>7</sup> for which they are assessed connectivity fees. In order to accommodate those who wish to receive the administrative information but who do not wish to subscribe to the ToM product, the Exchange

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<sup>4</sup> Where there is an imbalance at the price at which the maximum number of contracts can trade that is also at or within the highest valid width quote bid and lowest valid width quote offer, the System will calculate an Expanded Quote Range ("EQR"). The EQR will be recalculated any time a Route Timer or Imbalance Timer expires if material conditions of the market (imbalance size, ABBO price or size, liquidity price or size, etc.) have changed during the timer. Once calculated, the EQR will represent the limits of the range in which transactions may occur during the opening process. See Exchange Rule 503(f)(5).

<sup>5</sup> After the Exchange has determined to end a trading system halt, the System will broadcast to subscribers of the Exchange's data feeds, a Post-Halt Notification. See Exchange Rule 504(d).

<sup>6</sup> If a Market Maker quote was all or part of the MIAX Best Bid or Offer ("MBBO") and the Market Maker's quote was exhausted by the partial execution of the initiating order, the System will pause the market for a time period not to exceed one second to allow additional orders or quotes refreshing the liquidity at the MBBO to be received ("liquidity refresh pause"). See Exchange Rule 515(c)(1)(iii)(A).

<sup>7</sup> MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit electronic quotes to MIAX.

submitted a separate proposed rule change concurrently with the instant proposed rule change,<sup>8</sup> to establish a new category of MIAX participant, an Administrative Information Subscriber “AIS,” to make the administrative information available to AIS’ via AIS Port connectivity with MIAX, and to establish testing, connectivity and AIS Port Fees for such participants who wish only to receive the administrative information via connectivity with the MIAX System.

## 2. Statutory Basis

MIAX believes that its proposal to amend its Fee Schedule is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Section 6(b)(4) of the Act,<sup>10</sup> in particular, in that it provides an equitable allocation of reasonable fees among distributors of ToM, because all Distributors in each of the respective category of Distributor (*i.e.*, Internal and External) will be assessed the same fees as other Distributors in their category.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data:

“[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.”<sup>11</sup>

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<sup>8</sup> See SR-MIAX-2013-13.

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

In July, 2010, Congress adopted H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees or other charges are immediately effective upon filing regardless of whether such dues, fees or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The Exchange believes that these amendments to Section 19 of the Act reflect Congress's intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a "due, fee or other charge imposed by the self-regulatory organization," the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. MIAX believes that the amendment to Section 19 reflects Congress's conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission's prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission's determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive

forces. The Exchange therefore believes that the fees for ToM are properly assessed on non-member Distributors.

The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, No. 09-1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data:

“In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’ ”<sup>12</sup>

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

MIAX believes that the proposed fee is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee is based on pricing that exists in the fee schedules of other exchanges.

Moreover, the decision as to whether or not to subscribe to ToM is entirely optional to all parties. Potential subscribers are not required to purchase the ToM market data feed, and MIAX is not required to make the ToM market data feed available. Subscribers can discontinue their

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<sup>12</sup> NetCoalition, at 15 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

use at any time and for any reason, including due to their assessment of the reasonableness of fees charged. The allocation of fees among Subscribers is fair and reasonable because, if the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

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

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

Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the NetCoalition Court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. MIAX believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a representative example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little.

Without trade executions, exchange data products cannot exist. Data products are valuable to many end subscribers only insofar as they provide information that end subscribers

expect will assist them or their customers in making trading decisions. The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it.

Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to the broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. "No one disputes that competition for order flow is 'fierce'."<sup>13</sup> However, the existence of fierce competition for order flow implies a high

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<sup>13</sup> NetCoalition at 24.

degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying

lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of aftermarket alternatives to the manufacturer-supplied system.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including eleven existing options markets. Each SRO market competes to produce transaction reports via trade executions. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO is currently permitted to produce proprietary data products, and many in addition to MIAX currently do, including NASDAQ, CBOE, ISE, NYSE Amex, and NYSEArca. Additionally, order routers and market data vendors

can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end subscribers. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end subscribers will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. MIAX and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, BATS Trading and Direct Edge. Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never

before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

The Court in NetCoalition concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's NetCoalition order because, in the Court's view, the Commission had not adequately demonstrated that the proprietary data at issue in the case is used to attract order flow. MIAX believes, however, that evidence not then before the court clearly demonstrates that availability of data attracts order flow. Due to competition among platforms, MIAX intends to improve its platform data offerings on a continuing basis, and to respond promptly to customers' data needs.

The intensity of competition for proprietary information is significant and MIAX believes that this proposal itself clearly evidences such competition. MIAX is offering ToM in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new Member Applicants and customers. MIAX competitors continue to create new market data products and innovative pricing in this space. MIAX expects to see firms challenge its pricing on the basis of MIAX's explicit fees being higher than the zero-priced fees from other competitors such as BATS. In all cases, MIAX expects firms to make decisions on how much and what types of data to consume on the basis of the total cost of interacting with MIAX or other exchanges. Of course, the explicit data fees are only one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this proprietary information is highly competitive and continually evolves as products develop and change.

The Exchange notes that the ToM market data and fees will compete with similar products offered by other markets such as NASDAQ OMX PHLX, LLC ("PHLX") and the

International Stock Exchange LLC (“ISE”). For example, PHLX and ISE offer market data products that are similar to ToM: data feeds that show the top of the market entitled Top of PHLX Options (“TOPO”) and the ISE TOP Quote Feed.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>14</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 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-MIAX-2013-14 on the subject line.

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-MIAX-2013-14. 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-MIAX-2013-14 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>15</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).