

initial and continued listing criteria applicable to Managed Fund Shares.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws and that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Fund and the First Trust Subsidiary must be in compliance with Rule 10A-3 under the Exchange Act.<sup>30</sup>

(6) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

(7) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser and master demand notes.

(8) The equity securities (including shares of ETFs and closed-end funds) in which the Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange. The Fund

and the First Trust Subsidiary will not invest in any non-U.S. equity securities (other than shares of the First Trust Subsidiary).

(9) The Fund will not invest directly in Commodities. The Fund expects to gain exposure to these investments exclusively by investing in the First Trust Subsidiary.

(10) The Fund's investment in the First Trust Subsidiary may not exceed 25% of the Fund's total assets.

(11) The Fund's and the First Trust Subsidiary's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund may invest in inverse ETFs, but it will not invest in leveraged or inverse leveraged ETFs.

(12) Pursuant to the Exemptive Order, the Fund will not invest directly in options contracts, futures contracts, or swap agreements. However, this restriction will not apply to the First Trust Subsidiary. With respect to the futures contracts held indirectly through the First Trust Subsidiary, not more than 10% of the weight of such futures contracts in the aggregate shall consist of instruments whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in the Notice.<sup>31</sup>

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>32</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>33</sup> that the proposed rule change (SR-NASDAQ-2013-107) be, and it hereby is, approved.

<sup>31</sup> The Commission notes that it does not regulate the market for futures in which the Fund plans to take positions. Limits on the positions that any person may take in futures may be directly set by the CFTC or by the markets on which the futures are traded. The Commission has no role in establishing position limits on futures even though such limits could impact an exchange-traded product that is under the jurisdiction of the Commission.

<sup>32</sup> 15 U.S.C. 78f(b)(5).

<sup>33</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>34</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70636; File No. SR-Topaz-2013-05]

### Self-Regulatory Organizations; Topaz Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to PIM and Penny Pilot Periods

October 9, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 27, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the "Exchange" or "Topaz") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 the Substance of the Proposed Rule Change

Topaz is proposing to amend its rules to correct date references related to two pilot programs being conducted on the Exchange: the PIM Pilot and Penny Pilot, each as defined below. The Exchange is also proposing to revise a provision describing how the Exchange notifies Members about which option classes are eligible to trade in the Penny Pilot. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and the 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

<sup>34</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>30</sup> 17 CFR 240.10A-3.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange is proposing to amend its rules to correct two incorrect date references related to the expiration of pilot programs currently being conducted on the Exchange. In particular, the Exchange proposes to amend the pilot periods specified for a pilot program related to the minimum size requirement for orders sent to the Exchange's Price Improvement Mechanism ("PIM Pilot"), and a pilot program permitting certain options classes to be quoted and traded in pennies ("Penny Pilot"). The Exchange's rules related to both of these pilot programs each mistakenly state a pilot period end date that was prior to Topaz's registration as a national securities exchange.<sup>3</sup>

With respect to the PIM Pilot, Topaz rules provide that during the specified pilot period there will be no minimum size requirement for orders to be eligible for the PIM. Supplementary Material .03 to Rule 723 states that this pilot was scheduled to expire on July 18, 2013, which is a date prior to the Exchange's registration as a national securities exchange. The Exchange notes that Supplementary Material .05 to Rule 723 currently references the correct pilot end date of July 18, 2014, which is consistent with the pilot period on the International Securities Exchange, LLC ("ISE").<sup>4</sup> The Exchange is therefore proposing to update Supplementary Material .03 to extend the PIM Pilot through July 18, 2014 as was intended. The Exchange notes that by clarifying this date reference it is not making any substantive changes to the operation of the PIM Pilot, which will continue in its current form.

With respect to the Penny Pilot, Topaz rules provide that during the specified pilot period certain participating options classes may be quoted and traded in increments as low

as \$0.01.<sup>5</sup> Supplementary Material .01 to Rule 710 states that the Penny Pilot was scheduled to expire on June 30, 2013, which is a date prior to Exchange's registration as a national securities exchange. The Exchange notes that the second paragraph of Supplementary Material .01 to Rule 710 currently references the correct pilot end date of December 31, 2013, which is consistent with the pilot period on other options exchanges.<sup>6</sup> The Exchange is therefore proposing to update the first paragraph of Supplementary Material .01 to Rule 710 to extend the Penny Pilot through December 31, 2013. This filing does not propose any substantive changes to the Penny Pilot: all classes currently participating will remain the same and all minimum increments will remain unchanged.

With this proposed rule change, the Exchange also proposes to revise the provision describing how the Exchange specifies which option classes trade in the Penny Pilot. Currently, the rule requires that the Exchange specify which options trade in the Penny Pilot and in what increments in a Regulatory Information Circular that has been filed with the Commission pursuant to Rule 19b-4 under the Exchange Act and distributed to its Members. The Exchange now proposes to revise that provision to indicate that information regarding the option classes trading in the Penny Pilot will be communicated to Members through a Market Information Circular. The Exchange will also post on its Web site the replacement option classes that are selected for the Penny Pilot.<sup>7</sup> By revising this provision, the Exchange will eliminate the requirement to file a Regulatory Information Circular with the Commission pursuant to Rule 19b-4.

The Exchange notes that when it filed its application to be registered as a

national securities exchange it represented that it would provide certain data to the Commission in connection with the PIM and Penny Pilots.<sup>8</sup> The Exchange will continue to provide such data to the Commission with respect to trading during the extended pilot periods. In addition, Topaz represents that it will provide the Commission with the same data that the ISE has agreed to provide with respect to any current or future pilot program conducted on the Exchange that is based on Topaz rules that are incorporated by reference to the rules of the ISE.

For example, the Exchange currently conducts a pilot program that eliminates position and exercise limits for physically-settled options on the SPDR S&P ETF Trust ("SPY Pilot"). When the ISE adopted the SPY Pilot it agreed to provide data to the Commission in a "Pilot Report" to be submitted within thirty (30) days of the end of the twelve (12) month time period following the adoption of the pilot program.<sup>9</sup> As this pilot program is being conducted on Topaz pursuant to rules incorporated by reference to ISE rules,<sup>10</sup> the Exchange will therefore be obligated to provide the same data to the Commission with respect to trading on Topaz.<sup>11</sup>

The Exchange also notes that it currently conducts another pilot program adopted in connection with the Plan to Address Extraordinary Market Volatility that suspends Rule 720 (Obvious and Catastrophic Errors) with respect to transactions executed during a Limit State or Straddle State ("Obvious Error Pilot").<sup>12</sup> Although this pilot program is not incorporated by

<sup>8</sup> See Exhibit B to Topaz Exchange Form 1 Application.

<sup>9</sup> See Securities Exchange Act Release No. 62300 (Oct. 5, 2012), 78 FR 62300 (Oct. 12, 2012) (SR-ISE-2012-81).

<sup>10</sup> Chapter 4 of the Rules of the ISE is incorporated by reference into the Topaz rulebook.

<sup>11</sup> The Pilot Report to be submitted by Topaz will detail the size and different types of strategies employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the pilot program. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange will make available to Commission staff data elements relating to the effectiveness of the pilot program.

<sup>12</sup> Rule 720 provides a process by which a transaction may be busted or adjusted when the execution price of a transaction deviates from the option's theoretical price by a certain amount.

<sup>3</sup> The Securities and Exchange Commission granted the Exchange's application for registration as a national securities exchange on July 26, 2013. See Securities Exchange Act Release No. Release No. [sic] 70050 (July 26, 2013), 78 FR 46622 (Aug. 1, 2013). The Exchange began trading on August 5, 2013.

<sup>4</sup> See Supplementary Material .03 to ISE Rule 723.

<sup>5</sup> In particular, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock ("QQQQ"), the SPDR S&P 500 Exchange Traded Fund ("SPY") and the iShares Russell 2000 Index Fund ("IWM"), is \$0.01 for all option series trading at less than \$3 per contract and \$0.05 for all option series trading at \$3 per contract or greater. QQQQ, SPY and IWM are traded in \$0.01 increments for all options series.

<sup>6</sup> See, e.g., Supplementary Material .01 to ISE Rule 710; Chicago Board Options Exchange, Inc. Rule 6.42(3); NASDAQ OMX PHLX, LLC Rule 1034(a)(i)(B).

<sup>7</sup> This revision is consistent with rules at most of the other options exchanges participating in the Penny Pilot: ISE Rule 710, Supplementary Material .01; BATS Exchange, Inc. Rule 21.5, Interpretations and Policies .01; NASDAQ OMX BX, Inc. Chapter VI, Section 5(3); NASDAQ OMX PHLX, Inc. Rule 1034(a)(i)(B); The NASDAQ Stock Market LLC Chapter VI, Section 5; NYSE MKT LLC Rule 960NY, Commentary .02; and NYSE Arca, Inc. Rule 6.72, Commentary .02.

reference to ISE rules,<sup>13</sup> the Exchange believes that it should provide the Commission the same data elements for Topaz as is required to be provided by ISE regarding how Limit and Straddle States affect the quality of the options market.<sup>14</sup>

## 2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the “Exchange Act”) for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that it is appropriate to correct the pilot dates referenced in its rules for the PIM and Penny Pilots so that Members and investors have a clear and accurate understanding of the Exchange’s rules. The Exchange notes again that the pilot end dates being proposed here are consistent with other parts of the Exchange’s rules, and with the rules of the ISE and other options exchanges.

In addition, the revision to how the Exchange will specify which options participate in the Penny Pilot promotes just and equitable principles of trade since it clarifies how Members and other market participants will be made aware of which option classes are trading in the Penny Pilot and eliminates a requirement that the Exchange specify which option classes are in the Penny Pilot through a Regulatory Information Circular that has been filed with the Commission pursuant to Rule 19b-4 under the Exchange Act. Eliminating the requirement to file the Regulatory Information Circular is appropriate because most other options exchanges do not require such a submission to the Commission.

<sup>13</sup> See Securities Exchange Act Release No. 69329 (April 5, 2013), 78 FR 21657 (April 11, 2013) (SR-ISE-2013-22).

<sup>14</sup> In particular, the Exchange represents that it will conduct its own analysis concerning the elimination of obvious error rule during Limit and Straddle States and agrees to provide the Commission with relevant data to assess the impact of this proposed rule change. As part of its analysis, the Exchange will evaluate the options market quality during Limit and Straddle States, assess the character of incoming order flow and transactions during Limit and Straddle States, and review any complaints from members and their customers concerning executions during Limit and Straddle States. The Exchange also agrees to provide to the Commission data requested to evaluate the impact of the elimination of the obvious error rule, including data relevant to assessing the various analyses noted above.

## B. Self-Regulatory Organization’s Statement on Burden on Competition

The proposed rule changes are non-substantive corrections to the Exchange’s rules and therefore do not implicate the competition analysis. The proposed rule change will serve to promote regulatory clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)<sup>15</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>16</sup> 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 after its filing date, or such shorter time as the Commission may designate.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because this rule change is not proposing any substantive changes. The proposed rule change is correcting certain inaccuracies in the Exchange’s rules, conforming to how other exchanges provide notice of the options that trade in the Penny Pilot, and confirming that the Exchange will provide certain data to the Commission in connection with various pilot programs. These changes and clarifications should eliminate member confusion and provide clarity on how the rules apply. Therefore, the Commission designates the proposal operative upon filing.<sup>17</sup>

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

<sup>17</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Topaz-2013-05 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 No. SR-Topaz-2013-05. 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 Web site (<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 Web site 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 such filing also will be available for inspection and copying at the principal

proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

offices 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 No. SR-Topaz-2013-05, and should be submitted on or before November 12, 2013.

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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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70655; File No. SR-BX-2013-054]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change To Amend the Fee Schedule Under Exchange Rule 7018(a) With Respect to Transactions in Securities Priced at \$1 per Share or Greater

October 10, 2013.

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 September 27, 2013, NASDAQ OMX BX, Inc. ("BX" or "Exchange") 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 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 proposes to amend the fee schedule under Exchange Rule 7018(a) with respect to transactions in securities priced at \$1 per share or greater. The Exchange will implement the proposed rule change on October 1, 2013.

The text of the proposed rule change is also available on the Exchange's Web site at <http://nasdaqomxbx.cchwallstreet.com>, at the principal office of the Exchange, 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 Exchange is proposing to amend the credit it pays with respect to routable orders that access liquidity on the Exchange (either before or after routing to other venues). Currently, the Exchange pays a credit of \$0.0013 or \$0.0011 per share executed for orders that execute at BX if the member achieves certain volume tiers and a credit of \$0.0007 per share executed if such tiers are not reached. However, the Exchange pays a credit of \$0.0014 per share executed with respect to routable orders (specifically, orders using the Exchange's BSTG, BSCN, BMOP, BTFY, BCRT, BDRK, or BCST routing strategies) if such orders execute at the Exchange. The Exchange is reducing this credit to \$0.0011 per share executed, as a means of reducing costs in a period of persistent low trading volumes. The Exchange notes, however, that it is still providing an incentive for members to use the Exchange's routing functionality by paying a credit available to all members, regardless of their trading volumes, that exceeds the base credit of \$0.0007 per share executed otherwise available.<sup>3</sup>

###### 2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and Sections 6(b)(4) and (b)(5) of the Act,<sup>5</sup> in particular, because it provides for the equitable allocation of reasonable dues,

fees and other charges among members and issuers and other persons using any facility or system that the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers.

The proposed change is reasonable because it reflects a modest decrease of \$0.0003 per share executed in the credit paid to members with routable orders that execute at the Exchange. The resulting credit is comparable to the credit that members receive if they provide an average daily volume of at least 25,000, but less than 1 million, shares of liquidity during the month, which is a higher rate than the base rate of \$0.0007 per share executed. The change is consistent with an equitable allocation of fees and is not unfairly discriminatory because it makes the credits applicable to routable orders that execute at the Exchange more consistent with the credits paid with respect to other orders that execute at the Exchange. Although the credit exceeds the base rate of \$0.0007, the difference is not unfairly discriminatory because the credit offered with respect to routable orders is still available to all members, regardless of volume levels, and is intended to provide an incentive for BX members to make use of the Exchange's optional routing functionality.

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

The Exchange 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, as amended.<sup>6</sup> BX notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, BX must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, BX believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the decreased credit is intended to reduce the Exchange's costs, while still continuing to provide an incentive for

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

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

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

<sup>3</sup> The Exchange notes that the credits discussed above do not apply to orders that execute against midpoint pegged orders, since such orders receive price improvement in lieu of an Exchange-paid credit.

<sup>4</sup> 15 U.S.C. 78f.

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

<sup>6</sup> 15 U.S.C. 78f(b)(8).