the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change 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.* Please include File Number SR–CBOE–2020–111 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–CBOE–2020–111. 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 (*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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. All submissions should refer to File Number SR–CBOE–2020–111 and should be submitted on or before December 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–26403 Filed 11–30–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90510]

Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") With Respect to Futures Contracts on the SPIKES™ Index

November 24, 2020.

AGENCY: Securities and Exchange Commission.

ACTION: Exemptive order.

SUMMARY: The Minneapolis Grain Exchange, Inc. (or any successor thereto) (''MGEX'') has expressed an interest in listing and trading contracts for sale for future delivery on the SPIKES™ Index (''SPIKES'') (such futures contracts (and any options thereon) hereinafter referred to as the ''Product''). After careful consideration, the Securities and Exchange Commission (''SEC'' or ''Commission'') believes that the Product has the potential to offer competition with the only comparable incumbent volatility product in the market, and is therefore conditionally exempting the Product from the definition of ''security future'' for all purposes other than as follows: First, the anti-fraud and anti-manipulation provisions under the Exchange Act will continue to apply; second, MGEX will continue to be subject to the requirement to register with the Commission as a national securities exchange (which may be done pursuant to a notice filing) and comply with related amendment and supplemental filing requirements; and third, MGEX will continue to be required, in its capacity as a national securities exchange, to make available to the Commission (or its representatives) books and records relating to transactions in the Product, upon request, and to make itself available to inspection and examination by the Commission (or its representatives), upon request. However, because registration as a notice-registered national securities exchange is intended only as a means to facilitate the Commission's ability to exercise its books and records and examination authority over the Product, MGEX will be exempt from compliance with all other requirements applicable to national securities exchanges. Taken together, these actions will allow the Product to trade as a futures contract on MGEX, a designated contract market (''DCM'') and derivatives clearing organization (''DCO'') that is subject to the jurisdiction of the Commodity Futures Trading Commission (''CFTC''), consistent with the terms and conditions set forth below.

DATES: This exemptive order is effective as of December 1, 2020.

FOR FURTHER INFORMATION CONTACT: Carol McGee, Assistant Director, or Andrew Bernstein, Senior Special Counsel, at (202) 551–5870, Office of Derivatives Policy, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8010.

I. Introduction

A. Overview of the SPIKES Index

On October 12, 2018, the Commission issued an order granting approval of a proposed rule change to allow the Miami International Securities Exchange LLC (''MIAX'') to list and trade options on SPIKES.[1] Although that order permits MIAX to treat SPIKES as a broad-based index, as defined under MIAX's rules, solely for purposes of determining the position limits, exercise limits, and margin requirements that apply to each options trade, the Commission stated explicitly that it was not determining whether SPIKES is a ''narrow-based security index,'' as defined in Section 3(a)(55)(B) of the Exchange Act.[2]

SPIKES measures the expected 30-day volatility of the SPDR® S&P 500® ETF Trust (''SPY''), and is calculated using a variance swap methodology that includes live prices of existing exchange-traded options on the SPY to calculate volatility. Specifically, the SPIKES formula relies on the prices of standard monthly SPY options that expire on the third Friday of each calendar month.[3] The formula uses

[1] *See* Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES™ Index, Exchange Act Release No. 84417 (Oct. 12, 2018), 83 FR 52865 (Oct. 18, 2018) (SR–MIAX–2018–14) (''SPIKES Options Approval Order'').

[2] *See* SPIKES Options Approval Order, 82 FR at 52867 n. 36.

[3] *See* The SPIKES Volatility Index: Methodology Guide (*available at: https://www.miaxoptions.com/sites/default/files/spikes-files/SPIKES_Methodology_Guide.pdf*) (''SPIKES Methodology'').

Continued

those prices to linearly interpolate between the variances of two monthly SPY option expirations—near-term (the closest expiration more than two full days into the future) and next-term (the monthly expiration following the near-term). This expiration selection method is intended to avoid using highly irregular SPY option prices close to the options settlement date.[4] When the near-term expiration is too close to expiry (less than two full days), rolling to the third-closest expiration occurs.[5]

The number of options included in the SPIKES calculation varies, and depends on the prices of live out-of-the-money (''OTM'') SPY options.[6] In order to determine which SPY options are OTM, the methodology requires identification of the at-the-money (''ATM'') SPY options for both the near-term and next-term options by calculating the absolute value of the call cash reference price minus the put cash reference price for all SPY options for which both call and put prices are available, and then selecting the strike price where that value is closest to zero (or in the case of a tie, using the lower strike).[7] Once the ATM price has been identified, each OTM SPY option successively further away from the money is included in the calculation (for both the near-term and next-term) until two consecutive options with a cash reference price of five cents or less is reached, at which point all remaining far OTM options are excluded.[8] The included OTM options are then weighted and used in the SPIKES formula to calculate the annualized expected volatility of the SPY, which is quoted in percentage points.[9]

The Commission understands that SPY options are used as inputs to the SPIKES formula, which is designed to interpolate the expected volatility of a single ATM option that expires in precisely 30 days. That formula requires the use of multiple live SPY options to determine the price (and ultimately the volatility) of what is essentially a synthetic SPY option that is both ATM and expires in exactly 30 days, updated on a real-time basis on each trading day beginning at 9:30 a.m. and ending at 4:15 p.m. (New York time).[10]

B. Statutory Authority

The Commodity Futures Modernization Act of 2000 (''CFMA'') [11] authorized the trading of security futures, which are defined in Section 3(a)(55)(A) of the Exchange Act [12] and Section 1a(44) of the Commodity Exchange Act (''CEA'') [13] to include a contract of sale for future delivery of a single security or of a narrow-based security index,[14] including any interest therein or based on the value thereof, other than certain exempt securities. A security future is considered to be a ''security'' for purposes of the Federal securities laws, including the Exchange Act [15] and the Securities Act of 1933 (''Securities Act''),[16] and a futures contract for purposes of the CEA.[17] Thus, the regulatory framework established by the CFMA provides the Commission and the CFTC with joint jurisdiction over security futures products.[18]

A futures contract on the SPIKES is a futures contract that is based on the value of a single security (*i.e.,* the SPY) [19] and therefore satisfies the statutory definition of security future in Section 3(a)(55) of the Exchange Act. Nevertheless, the Commission has determined to use its authority in Section 36 of the Exchange Act to exempt a futures contracts on the SPIKES from the definition of ''security future'' under the Exchange Act, subject to the exceptions and conditions set forth below.[20]

C. Exemptive Relief Under Section 36

Section 36(a)(1) of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.[21] After careful consideration, the Commission finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exercise its authority to exempt the Product from the definition of security future in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act, other than certain specified provisions, including: (1) The anti-fraud and anti-manipulation provisions under the Exchange Act, (2) the obligation of MGEX to register with the Commission as a national securities exchange; (3) the obligation of MGEX to make available to the Commission (or its representatives) books and records relating to transactions in the Product, upon request; and (4) the obligation of MGEX to make itself available to inspection and examination by the Commission (or its representatives), upon request.

As a result of this exemptive order, market participants will be able to transact in the Product as a futures contract on MGEX, a DCM and DCO that is subject to the jurisdiction of the CFTC, consistent with the terms and conditions set forth below. The Commission believes that permitting the Product to trade as a futures contract, as opposed to as a security future, should foster competition as it could serve as

Weekly SPY options are not used in the SPIKES calculation.

[4] *See id.*

[5] *See id.*

[6] In-the-money SPY options are not included in the SPIKES calculation. *See id.*

[7] *See id.* The ''cash reference price'' is the price of a particular SPY option, as determined using the ''price dragging'' technique set forth in the SPIKES methodology. MIAX describes ''price dragging'' as the proprietary method used for determining the ongoing price for each individual option used in the calculation of SPIKES. Pursuant to that process, all prices are initially set to zero. If there is a trade, the price of the option is always set to the trade price. If there is not yet a trade, on the opening quote, the opening bid is used as the current price. For newly-placed ask (bid) quotes, if the ask (bid) is lower (higher) than the current ongoing reference price, the option price is set to ask (bid). MIAX believes that this process ''should materially reduce erratic movements of the [SPIKES] value as quotations on [OTM] options are rapidly altered during times of low liquidity.'' *See* Notice of Filing of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES™ Index, Exchange Act Release No. 83619 (July 11, 2018), 83 FR 32932, 32934 (''SPIKES Options Notice'').

[8] *See* SPIKES Methodology, *supra* note 3.

[9] *See* SPIKES Options Notice, 83 FR at 32933.

[10] *See* SPIKES Options Approval Order, 83 FR at 52865–66.

[11] Public Law 106–554, 114 Stat. 2763 (2000).

[12] 15 U.S.C. 78c(a)(55)(A).

[13] 7 U.S.C. 1a(44).

[14] The term ''narrow-based security index'' is defined in Section 1a(35)(A) of the CEA and Section 3(a)(55)(B) of the Exchange Act. 7 U.S.C. 1a(35)(A) and 15 U.S.C. 78c(a)(55)(B).

[15] *See* Section 3(a)(10) of the Exchange Act. 15 U.S.C. 78c(a)(10).

[16] *See* Section 2(a)(1) of the Securities Act. 15 U.S.C. 77b(a)(1).

[17] *See* Section 1a(44) of the CEA. 7 U.S.C. 1a(44).

[18] Section 3(a)(56) of the Exchange Act and Section 1a(45) of the CEA define ''security futures product'' to mean a security future or any put, call, straddle, option, or privilege on any security future. 15 U.S.C. 78c(a)(56) and 7 U.S.C. 1a(45).

[19] As previously discussed, the SPIKES calculation uses live OTM SPY options to interpolate the price of a single synthetic precisely 30-day ATM SPY option which, in turn, is used to calculate the precisely 30-day volatility of the SPY. Thus, a futures contract on SPIKES could, in the alternative, be viewed as a future based on the value of such single synthetic 30-day ATM SPY option.

[20] In the alternative, if SPIKES were considered to be an index composed of options on the SPY, a futures contract based on SPIKES would be a security future because SPIKES is a narrow-based security index under the definition set forth in Section 3(a)(55)(B) of the Exchange Act. *See, e.g.,* Joint Final Rules: Application of the Definition of Narrow-Based Security Index to Debt Securities Indexes and Security Futures on Debt Securities, Exchange Act Release No. 54106 (July 6, 2006), 71 FR 39534, 39536–37 (July 13, 2006).

[21] 15 U.S.C. 78mm(a)(1).

an alternative to the only comparable incumbent volatility product in the market. Facilitating greater competition among these types of products should provide market participants with access to a wider range of financial instruments to trade on and hedge against volatility in the markets, particularly the S&P 500. In addition, the introduction of an additional volatility product in the market should lower transaction costs for market participants. Further, because SPY options are traded on 16 different national securities exchanges, the Commission would expect there to be a large number of market participants able to act as market makers in the Product. Moreover, the fact that SPY options are multi-listed should provide resiliency by reducing the likelihood that a disruption on one or more options exchanges could lead to a disruption in trading in the Product.

The Commission understands, however, that the Product will need to trade, clear, and settle as a futures contract on a CFTC-regulated DCM and DCO in order to achieve such benefits to the market. This order, and the exemption of the Product from the definition of ''security future,'' subject to the terms and conditions discussed below, is intended to achieve that result.

II. Exemptive Relief

A. Scope

Pursuant to Section 36 of the Exchange Act, the Commission is exempting the Product from the definition of ''security future'' in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act other than as follows. First, such definitional exemption does not apply to the anti-fraud and anti-manipulation provisions of the Exchange Act (including related investigative, enforcement, and procedural authority) in Sections 9, 10, 15(c), 20, 20A, 21, 21A, 21B, 21C, 21D, 26, and 27,[22] and the rules and regulations thereunder. Moreover, and as discussed in detail below, trading in the Product will remain subject to the anti-fraud provisions of Section 17(a) of the Securities Act.[23]

Given that the price of a futures contract on the SPIKES is based on the value of the SPY and is derived using SPY options as inputs to a formula that creates a synthetic SPY option, the Commission believes it must retain the ability to exercise enforcement authority when necessary to protect the integrity of the securities markets to the extent that fraudulent or manipulative trading activity occurs in connection with transactions in the Product that could impact trading in the underlying securities (*i.e.,* SPY or SPY options), or vice versa. Accordingly, the Commission is retaining this authority to, among other things, help prevent the possibility of market participants using fraudulent or manipulative transactions in the Product as a surrogate for transactions in the underlying securities in order to evade the Commission's anti-fraud and anti-manipulation authority. Similarly, the Commission also would expect to use its anti-fraud and anti-manipulation authority in the event that a market participant were to use transactions in the securities markets to engage in fraudulent or manipulative activities related to the Product.

Second, the exemption from the definition of security future does not apply to the requirement to register with the Commission as a national securities exchange, as set forth in Section 5 of the Exchange Act, and the rules and regulations thereunder, and the requirements applicable to national securities exchanges, as set forth in Section 6 of the Exchange Act, and the rules and regulations thereunder, including Section 6(g), which applies to an exchange that lists and trades only security futures products. Specifically, Section 6(g) of the Exchange Act provides that an exchange that lists or trades security futures products may register as a national securities exchange solely for the purposes of trading security futures products if: (1) The exchange is a board of trade, as that term is defined by Section 1a(6) of the CEA,[24] that has been designated a contract market by the CFTC and such designation is not suspended by order of the CFTC; and (2) such exchange does not serve as a market place for transactions in securities other than security futures products or futures on exempted securities or groups or indexes of securities or options thereon that have been authorized under Section 2(a)(1)(C) of the CEA.[25] Because MGEX satisfies the two conditions set forth in Section 6(g), it could avail itself of that provision to notice register as a national securities exchange by completing and submitting Form 1–N pursuant to Exchange Act Rule 6a–4(a)(1).[26] By notice registering as a national securities exchange under Section 6(g), MGEX would also be subject to the ongoing requirements under Exchange Act Rule 6a–4 regarding amendments to MGEX's notice of registration on Form 1–N,[27] as well as periodic filings regarding certain supplemental material related to the trading of security futures products on MGEX.[28]

The Commission believes that registration as a national securities exchange is necessary in order to facilitate the use of the Commission's anti-fraud and anti-manipulation authority with respect to the Product. Registration will allow the Commission to access the information it needs to determine whether fraudulent or manipulative activity has occurred, the scope of such activity, and the parties engaging in it. Accordingly, MGEX will remain subject to the provisions in Section 17(a) of the Exchange Act, and the rules and regulations thereunder. Thus, the exemption from the definition of security future does not apply to the obligation of MGEX, in its capacity as a national securities exchange, to make and keep records relating to transactions in the Product, furnish such copies thereof, and to make and disseminate such reports available to the Commission (or its representatives), upon request.[29] In particular, Exchange Act Rule 17a–1 requires each national securities exchange to: (1) Keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity; (2) keep all such documents for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Exchange Act Rule 17a–6;[30] and (3) upon request of

[22] 15 U.S.C. 78(i), (j), *o*(c), t, t–1, u, u–1, u–2, u–3, u–4, z, and aa.

[23] 15 U.S.C. 77q(a). *See infra* note 53 and accompanying text (discussing the application of Section 17(a) of the Securities Act to the Product).

[24] The cross-reference in Section 6(g) of the Exchange Act to the definition of ''board of trade'' cites to Section 1a(2) of the CEA which is no longer accurate due to subsequent amendments made to Section 1a of the CEA that modified the paragraph numbering.

[25] 15 U.S.C. 78f(g).

[26] *See* 17 CFR 240.6a–4(a)(1). Rule 6a–4(a)(2) also requires that promptly after the discovery that any information filed on Form 1–N was inaccurate when filed, the exchange shall file with the Commission an amendment correcting such inaccuracy. *See* 17 CFR 240.6a–4(a)(2).

[27] *See* 17 CFR 240.6a–4(b).

[28] *See* 17 CFR 240.6a–4(c).

[29] 15 U.S.C. 78q(a).

[30] Exchange Act Rule 17a–6 applies to national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board, and allows for the destruction or disposal of records by these entities prior to the five-year retention period of Exchange Act Rule 17a–1 if done according to a plan for destruction or disposal that is filed with and approved by the Commission. 17 CFR 240.17a–6.

any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of the rule.[31]

Similarly, MGEX will remain subject to Section 17(b) of the Exchange Act, and the rules and regulations thereunder.[32] Thus, the exemption from the definition of security future does not apply to the obligation of MGEX, in its capacity as a national securities exchange, to make itself available to inspection and examination by the Commission (or its representatives), upon request.

Taken together, these provisions are intended to provide the Commission with prompt access to the information it needs to help determine whether fraudulent or manipulative activity has occurred and whether additional steps are necessary to halt such activity. Such information also should help to inform the Commission during the course of taking necessary enforcement action against parties in connection with transactions in the Product. For example, MGEX's records of transactions in the Product should provide Commission staff with a key resource for analyzing whether manipulation has occurred (in the Product, the SPY, or SPY options). Trading records also should help the Commission and its staff analyze the amount of damages (including potential disgorgement) in connection with such enforcement matters.

However, the Commission also recognizes that Section 6 of the Exchange Act imposes other requirements on national securities exchanges that have no relation to recordkeeping or examination requirements, and are therefore unlikely to assist the Commission in utilizing its anti-fraud and anti-manipulation authority over the Product. Accordingly, the Commission is providing MGEX with an exemption from all of the Section 6 requirements applicable to national securities exchanges, other than the ones described above. For example, under this exemptive relief, MGEX will not be required to comply with: (1) The requirement in Section 6(h)(2) of the Exchange Act to only trade security futures that conform with listing standards that are filed with the Commission under Section 19(b) of the Exchange Act and meet the criteria specified in Section 2(a)(1)(D)(i) of the CEA; (2) the requirements for listing standards and conditions for trading set forth in Section 6(h)(3) of the Exchange Act (including with respect to margin); and (3) the requirement to submit proposed rule changes to the Commission, including those that would otherwise be required by Section 6(g)(4)(B) of the Exchange Act. With respect to the listing standard requirements, given that this order allows MGEX to trade the Product as a future (and not as a security future), we do not believe it necessary or appropriate to require MGEX to comply with listing standard requirements that are specific to security futures. Rather, MGEX will be able to trade the Product under the listing standards for futures contracts that are subject to the CFTC's oversight.[33]

Finally, the exemption from the definition of security future does not apply to the requirement to register with the Commission as a clearing agency, as set forth in Section 17A of the Exchange Act, and the rules and regulations thereunder, including the exemption from registration in paragraph (b)(7) of that section. Specifically, and as discussed in detail in Section II.C below, by not including Section 17A in the exemptive relief provided for in this order, MGEX will be able to avail itself of the statutory exemption from clearing agency registration in Section 17A(b)(7), which applies to certain clearing agencies that do not clear securities other than security futures.[34] This carve-out from the exemptive relief is not intended to affect MGEX's obligations under this order, but rather to clarify its ability to rely on an exemption from Section 5 of the Securities Act, as discussed in detail in Section II.C.

In crafting the scope of this exemptive order, the Commission recognizes that the CFTC has a regulatory regime that will govern every aspect of the Product on a day-to-basis, including the DCM and DCO on which it trades and clears (*i.e.,* MGEX), and the market participants that are members of that DCM and DCO. The Commission intends to exercise its authority over MGEX and the Product for the limited purposes of enforcing its anti-fraud and anti-manipulation authority in connection with trading in the Product, which it is retaining pursuant to this order. Such retained authority is in addition to the CFTC's jurisdiction over the Product and MGEX, which includes enforcing anti-fraud provisions and registration and recordkeeping obligations under the commodity laws. Accordingly, the Commission does not believe that additional requirements beyond those specified in this order are necessary given that such requirements would generally not directly impact the Commission's ability to determine whether and how to use its anti-fraud and anti-manipulation authority in connection with trading in the Product.

B. Conditions

The relief the Commission is providing in this order is predicated upon certain facts and circumstances regarding how the Product (and the securities that underlie it) are currently structured and traded. That information has allowed the Commission to reach certain conclusions that relate to, among other things, the susceptibility of the Product (or its underlying securities) to manipulation and the ability of the SPY to effectively track the S&P 500. To the extent that those facts and circumstances were to change, such modifications could potentially undermine the basis for providing relief. Accordingly, this exemptive order includes a number of conditions. Those conditions, which are described in detail below, generally fit into one of two categories, as follows: (1) Conditions related to the SPIKES calculation, including the liquidity and trading venue of the required inputs; and (2) conditions on the relationship between the SPY and the S&P 500 Index.

To the extent that one or more of these conditions is no longer satisfied, this exemptive order will no longer apply three calendar months after the end of the month in which any condition is no longer satisfied. The Commission recognizes that, to the extent that the exemptions in this order are no longer effective, market participants will need time to take the necessary steps to wind down their existing transactions in an orderly fashion, which typically requires entering into offsetting transactions. In that respect, we believe that three calendar months is a sufficient amount of time to allow for such activity to occur.[35]

[31] 17 CFR 240.17a–1.

[32] 15 U.S.C. 78q(b).

[33] The exemption from the requirements in Section 6 of the Exchange Act applies to MGEX so long as it is only lists and trades the Product (as well as futures contracts subject to the CFTC's exclusive jurisdiction). To the extent that MGEX were to expand its offerings to include a security futures product that is not subject to this exemptive order, all of the requirements in Section 6 would apply to such security futures product. In such an instance, however, the applicable exemption would continue to apply to the Product.

[34] *See infra* note 54.

[35] As an example of an analogous situation, the statutory definition of narrow-based security index in Section 3(a)(55) of the Exchange Act (which is used to determine whether a future on a security index is a security future) includes a similar three month grace period after an index transitions from broad- to narrow-based. *See* 15 U.S.C. 78c(a)(55)(E)

Finally, the Commission notes that some of these conditions contain numerical thresholds, the purposes of which are explained below in the discussion of each relevant condition. As a general matter, each threshold is intended to help ensure either that the securities used to calculate the SPIKES are not readily susceptible to manipulation because of their significant liquidity,[36] or that the Product continues to serve as a competitor to other financial products that measure the volatility of the S&P 500 Index because the SPY continues to closely track the index. The level of each threshold is based on historical public data relevant to the objective of the particular condition. In each instance, the thresholds seek to balance the importance of achieving the stated purpose of the relevant condition with the fact that the consequence of breaching these thresholds is that the exemptive relief would no longer apply.

i. Conditions Related to the SPIKES Calculation, Including the Liquidity and Trading Venue of the Required Inputs

The first condition of this exemptive order requires that SPIKES measure the magnitude of changes in the level of the price of the units of the SPY over a defined period of time, which magnitude is calculated using the prices of options on the SPY and represents: (a) An annualized standard deviation of percent changes in the price of the units of the SPY; (b) an annualized variance of percent changes in the price of the units of the SPY; or (c) on a non-annualized basis either the standard deviation or the variance of percent changes in the price of the units of the SPY. This condition, which is similar to one that is included in prior volatility index orders (which apply to volatility indexes that measure the expected 30-day volatility of broad-based security indexes), is designed to limit the exemption to volatility indexes calculated using one of two commonly recognized statistical measurements that show the degree to which an individual value tends to vary from an average value.[37]

The order also contains four conditions designed to measure both the volume and venue of trading in the SPY and SPY options, which are as follows: [38]

(1) The average daily dollar volume in the units of the SPY must be at least $10 billion calculated over the preceding 180 days.[39]

(2) Units of the SPY must be listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(3) The aggregate average daily notional volume in options on the SPY must be at least $400 million calculated over the preceding 180 days.[40]

(4) Options on the SPY must be listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

Although the Commission has retained its ability to exercise anti-fraud and anti-manipulation authority in connection with the Product, certain aspects of how SPIKES is designed should help to ensure that the need to use such authority is limited. For example, the fact that the SPY is one of the most liquid securities in the world, and is therefore likely to be not readily susceptible to manipulation, should minimize the possibility of market participants using the Product as a surrogate for trading in the SPY in order to avoid application of the Federal securities laws. Similarly, the significant liquidity of SPY options, in the aggregate, and the fact that such options are traded on 16 different national securities exchanges, supports the conclusion that the securities used to compute the SPIKES also should not be readily susceptible to manipulation. Finally, the fact that the SPY and its component options are traded on a national securities exchange—and must continue to be so—helps to ensure that pricing information is current, accurate, and publicly available, and that trading is appropriately surveilled.

ii. Conditions on the Relationship Between the SPY and the S&P 500 Index

As previously noted, SPIKES differs from other volatility products currently trading in the market in that while such other products measure the expected 30-day volatility of the S&P 500 Index, a broad-based security index,'' [41] SPIKES measures the expected 30-day volatility of the SPY, a single security. Although the stated investment objective of the SPY is to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index,[42] we generally do not believe it appropriate to ''look through'' to an issuer's holdings in order to treat the issuer's security as an index for purposes of determining the status of a futures contract.

At the same time, however, the Commission recognizes the importance of fostering competition in the volatility

(providing that an index that is a narrow-based security index solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months pursuant to Section 3(a)(55)(C)(iii) shall not be a narrow-based security index for the three following calendar months).

[36] The Commission has previously noted that liquidity is an important factor when determining whether a security is readily susceptible to manipulation. *See, e.g.,* Publication or Submission of Quotations Without Specified Information, Exchange Act Release No. 89891 (Sept. 16, 2020), 85 FR 68124, 68158 (Oct. 27, 2020) (''Further, the Commission believes that the exception's three thresholds of ADTV value, total assets, and shareholders' equity are tailored to appropriately capture issuers of securities that are less susceptible to fraud and manipulation based on the liquidity of the security and size of the issuer.''). *See also* Short Sales, Exchange Act Release No. 48709 (Oct. 28. 2003), 68 FR 62972, 63004 (Nov. 6, 2003) (''The proposed pilot program would suspend the operation of the proposed bid test provision for selected stocks that the Commission believes are less susceptible to manipulation because they are more liquid and have a high market capitalization.''); Concept Release on Short Sales, Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996, 58000 (Oct. 28, 1999) (''Some of the Commission's anti-manipulation rules assume that highly liquid securities are less vulnerable to manipulation and abuse than securities that are less liquid.''); Joint Order Excluding Indexes Comprised of Certain Index Options from the Definition of Narrow-Based Security Index pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934, Exchange Act Release No. 49469 (Mar. 25, 2004), 69 FR 16900, 16901 (Mar. 31, 2004) (''2004 Joint Order'') (''In addition, the Commissions believe that futures contracts on indexes that satisfy the conditions of this exclusion should not be readily susceptible to manipulation because of the composition, weighting, and liquidity of the securities in the Underlying Broad-Based Security Index and the liquidity that the options comprising the index must have to qualify for the exclusion.'').

[37] *See* 2004 Joint Order, *supra* note 36; Joint Order to Exclude Indexes Composed of Certain Index Options from the Definition of Narrow-Based Security Index Pursuant to Section 1a(25)(B)(vi) of the Commodity Exchange Act and Section 3(a)(55)(C)(vi) of the Securities Exchange Act of 1934, Exchange Act Release No. 61020 (Nov. 17, 2009), 74 FR 61116 (Nov. 23, 2009).

[38] To determine the liquidity thresholds relating to the SPY and its component options, Commission staff reviewed data from the equity consolidated data feeds, namely the UTP Trade Data Feed (UTDF) and the Consolidated Tape System (CTS), and the Options Price Reporting Authority (OPRA), as collected by the Commission's Market Information Data Analytics System (MIDAS) for the six-month period beginning in October 2019. Specifically, these thresholds were determined by identifying the level at which at least 90% of the values exceeded such level.

[39] For the 180 days ending on October 14, 2020, the average daily dollar volume in the units of the SPY was approximately $13.7 billion.

[40] For the 180 days ending on October 14, 2020, the aggregate average daily notional volume in options on the SPY was $1,369 million.

[41] *See supra* note 37.

[42] *See* State Street Global Advisors Fact Sheet: SPDR® S&P 500® ETF Trust, *available at: https://www.ssga.com/library-content/products/factsheets/etfs/us/factsheet-us-en-spy.pdf.*

markets, in a manner that is consistent with the protection of investors. Specifically, the introduction of an additional volatility product in the market should lower transaction costs for market participants. Those competitive benefits animate the Commission's decision to exempt SPIKES futures from the definition of security future—subject to certain exceptions and conditions—under these limited and factually-specific circumstances. Those facts and circumstances include, among other things, the liquidity of the SPY (and options on the SPY), as previously discussed, and the historical performance of the SPY in tracking the performance of the S&P 500 Index. Accordingly, this order includes a number of conditions designed to protect investors should significant deviations between the SPY and the S&P 500 Index materialize. The Commission believes that if any of those conditions are no longer satisfied, it could suggest a dislocation between the SPY and its underlying index large enough to call into question whether the Product would continue to be a competitor to volatility products that measure the expected 30-day volatility of the S&P 500 Index.

The first two of these conditions address the structure and holdings of the SPY, and are as follows:

• The SPY is a unit investment trust (''UIT''), as defined in Section 4(2) of the Investment Company Act of 1940, and is registered with the Commission as an investment company under the Investment Company Act of 1940.[43]

• The SPY holds a portfolio of common stocks designed to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index.

A UIT is an investment company organized under a trust indenture or similar instrument that issues redeemable securities, each of which represents an undivided interest in a unit of specified securities. By statute, a UIT is unmanaged and its portfolio is fixed.[44] Substitution of securities may take place only under certain predefined circumstances. A UIT does not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust. Exchange-Traded Funds (''ETFs'') organized as UITs (*e.g.,* the SPY) operate pursuant to exemptive orders issued by the Commission.[45] Under these circumstances, the Commission believes that the SPY's status as a UIT, together with the condition addressing its investment objective and the composition of its portfolio, appropriately limit the possibility that the SPIKES would be based on the SPY at a time when the SPY is pursuing a different investment strategy, given that the SPY, as a UIT, must be an unmanaged investment vehicle with a fixed portfolio.

Notwithstanding the legal requirements limiting the scope of the SPY's investment objective, circumstances may ultimately arise impacting the relationship between the SPY and the S&P 500 Index, particularly during times of market volatility. Accordingly, this order contains a number of conditions designed to protect investors should a tracking error between the SPY and its underlying index materialize.

Specifically, this order contains two tracking error conditions, one of which compares the net asset value (''NAV'') of the SPY to the S&P 500 Index, and the other compares the NAV of the SPY to its official closing price.[46] The Commission is bifurcating the tracking error requirements in this manner—as opposed to simply comparing the official closing price of the SPY to the S&P 500 Index—to account for situations when a tracking error is quickly resolved and able to be netted, thereby allowing the exemptive relief to remain in effect. The Commission also is including two notice requirements designed to serve as an early warning to the Commission of a deviation between the NAV of the SPY and the corresponding returns of the S&P 500 Index, or between the NAV of the SPY and its official closing price. Each of those requirements is discussed in detail below.

The first tracking error condition requires that the annualized tracking error between the NAV of the SPY and the S&P 500 Index not meet or exceed 1%.[47] This condition, however, also provides that if over two consecutive trading days the returns used to calculate annualized tracking error can be netted, such that the annualized tracking error falls below 1%, then any such exceedance shall be deemed not to have occurred on those two consecutive trading days for purposes of this condition. For purposes of this condition, the term ''annualized tracking error'' should be calculated by taking the weekly return differences between the NAV of the SPY and the S&P 500 Index for the trailing 12 months (with each week beginning and ending on a Friday), taking into account dividends (as applicable), and then multiplying the standard deviation of those return differences by the square root of 52.

The Commission believes it important to provide some flexibility in circumstances when a large tracking error between the NAV of the SPY and the S&P 500 Index is quickly resolved. As a result, this condition will not be considered to have been breached if the tracking error falls below the 1% threshold when netted consecutive weekly returns are used to recalculate annualized tracking error. In addition, the Commission has decided to use an annualized measure for this condition in order to capture only those tracking errors that are large enough or so sustained (or both) that they result in a breach of the 1% threshold for an entire year.

The second tracking error condition requires that the official closing price of the SPY not deviate from the NAV of the SPY by more than 20 basis points for five or more consecutive trading days.[48] As a general matter, ETFs (including the SPY) are structured in such a way to help ensure that the NAV per share of

[43] 15 U.S.C. 80a–4(2).

[44] *See* Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25 2019), 84 FR 57162 n. 42 (Oct. 24, 2019) (''ETF Adopting Release).

[45] *See* Exchange-Traded Funds, Investment Company Act Release No. 33140 (June 28 2018), 83 FR 37332, 37336 n. 37 (July 31, 2018) (further explaining, in the context of UITs that are ETFs, that ''[b]ecause a UIT must invest in 'specified securities,' the investment strategies that a UIT ETF can pursue are limited. All UIT ETFs today seek to track the performance of an index by investing in the component securities of the index in the same approximate proportions as in the index (*i.e.,* ''replicating'' the index). The trustee of an UIT ETF may make adjustments to the ETF's portfolio only to reflect changes in the composition of the underlying index'') (internal citations omitted).

[46] The tracking error conditions set forth below have been designed solely for the purposes of this order. The methodologies and thresholds discussed herein are specific to the facts and circumstances of this exemptive order and should not be viewed as precedent for any other purposes, including as it relates to the regulation of investment companies under the Investment Company Act of 1940.

[47] To determine the threshold for the comparison between the NAV of the SPY and the S&P 500 Index, Commission staff reviewed the annualized NAV tracking error, as provided by Bloomberg, between January 2008 and October 2020, which was generally below 1%.

[48] To determine the threshold for the comparison between the NAV of the SPY and the closing auction price, Commission staff reviewed Bloomberg data between January 2008 and October 2020. Based on that review, it appears that the average difference over time is close to zero. Those differences do vary on a day-to-day basis, however, with the standard deviation of those differences being approximately 10 basis points, which suggests that the closing auction price of the SPY has historically been within 20 basis points of its NAV approximately 95% of the time.

an ETF remains at or close to its market price per share.[49] Accordingly, deviations between the SPY's NAV and its official closing price that exceed 20 basis points and that persist for five or more consecutive trading days should generally not occur.[50] For purposes of both this requirement and the notice requirement discussed below, the ''official closing price'' of the SPY should be determined pursuant to the rules of its primary listing exchange.

Finally, the order is conditioned on MGEX providing the Commission with notice of certain tracking error issues. Specifically, MGEX is required to monitor the daily closing prices and the SPY's NAV and the corresponding returns of the S&P 500 Index. If (i) at any time the annualized tracking error between the NAV of the SPY and the S&P 500 Index exceeds 0.5% or (ii) for two or more consecutive trading days the official closing price of the SPY deviates from the NAV of the SPY by more than 20 basis points, MGEX must: (A) Promptly notify the Commission of such divergence, in a form and manner acceptable to the Commission, and (B) conduct an investigation in an attempt to determine its cause. As with the other tracking error conditions, the notice requirement is intended to identify situations where a divergence between the SPY and the S&P 500 could result in the Product no longer serving as a viable competitor to existing volatility products, which would undermine the basis for providing this relief.

The events that trigger the notice requirements largely mirror the two tracking error conditions described above. However, the threshold for the annualized tracking error between the NAV of the SPY and the S&P 500 Index is 0.5% for purposes of this notice requirement, rather than 1%. With respect to the deviation between the official closing price of the SPY and the NAV of the SPY, the time period is two or more consecutive trading days, rather than five or more consecutive trading days. These more restrictive thresholds reflect the fact that they trigger only a notice requirement, as opposed to resulting in the exemptive relief no longer applying. Those thresholds also are consistent with our view of the importance of providing the Commission and MGEX with an early warning of one or more divergences that could undermine the basis for the relief set forth in this exemptive order.

C. Securities Act Status

Section 5 of the Securities Act provides that any offer or sale of a security, including a security futures product, must either be registered under the Securities Act or made pursuant to an exemption from registration.[51] Section 3(a)(14) of the Securities Act provides an exemption from the registration requirements of Section 5 of the Securities Act for any security futures product that is: (i) Cleared by a clearing agency registered under section 17A of the Exchange Act or exempt from registration under subsection (b)(7) of such section 17A, and (ii) traded on a national securities exchange or a national securities association registered pursuant to section 15A(a) of the Exchange Act.[52] A security futures product that satisfies the conditions of the Section 3(a)(14) exemption remains subject to the anti-fraud provisions of Section 17 of the Securities Act.[53]

Although the statutory exemption contained in Section 3(a)(14) of the Securities Act is effective by operation of law, and therefore does not require Commission action, for the avoidance of doubt we are confirming our view that MGEX will be able to rely on that exemption to offer and sell the Product, as follows. First, MGEX will need to register with the Commission as a national securities exchange under Section 6(g) of the Exchange Act due to the fact that the exemption from the definition of security future does not apply to the registration requirements in Section 5 of the Exchange Act. Second, because the exemptive relief also does not apply to Section 17A of the Exchange Act, and the rules and regulations thereunder, MGEX (which will also clear the Product) will be able to avail itself of the statutory exemption from registration as a clearing agency in Section 17A(b)(7),[54] given that it is regulated directly by the CFTC as both a DCM and as a DCO.[55]

III. Conclusion

It is hereby ordered, pursuant to section 36 of the Securities Exchange Act of 1934 (''Exchange Act''), that a contract of sale for future delivery on the SPIKES™ Index (''SPIKES'') trading on the Minneapolis Grain Exchange, Inc. (or any successor thereto) (''MGEX'') (such futures contracts (and any options thereon) hereinafter referred to as the ''Product'') shall be exempt from the definition of ''security future'' in Section 3(a)(55) of the Exchange Act for all purposes under the Exchange Act, other than the following:

(1) The anti-fraud and anti-manipulation provisions of the Exchange Act (including related investigative, enforcement, and procedural authority) in Sections 9, 10, 15(c), 20, 20A, 21, 21A, 21B, 21C, 21D, 26, and 27,[56] and the rules and regulations thereunder;

(2) the requirement that MGEX register with the Securities and Exchange Commission (''Commission'') as a national securities exchange, as set forth in Section 5 of the Exchange Act, and the rules and regulations thereunder, and the requirements applicable to national securities exchanges, as set forth in Section 6 of the Exchange Act, and the rules and regulations thereunder, including Section 6(g) and Exchange Act Rule 6a–4 (17 CFR 240.6a–4); *provided, however,* that once registered with the Commission as a national securities exchange, MGEX shall be exempt from all other requirements contained in Section 6 of the Exchange Act solely as they relate to transactions in the Product;

(3) Section 17(a) of the Exchange Act, and the rules and regulations thereunder (including Exchange Act Rule 17a–1 (17 CFR 240.17a–1)), as it relates to the obligation of MGEX, in its capacity as a national securities exchange, to make and keep records relating to transactions in the Product, furnish such copies thereof, and to make and disseminate such reports available

[49] *See* ETF Adopting Release, 84 FR at 57165 (''[t]he combination of the creation and redemption process with secondary market trading in ETF shares and underlying securities provides arbitrage opportunities that are designed to help keep the market price of ETF shares at or close to the NAV per share of the ETF.'')

[50] *See* ETF Adopting Release, 84 FR at 57173 n.119 (''[i]n an analysis of various asset classes during 2017–2018, end-of-day deviations between closing price of ETFs and NAV were relatively rare and generally not persistent.'') (internal citations omitted).

[51] 15 U.S.C. 77e.

[52] 15 U.S.C. 77c(a)(14).

[53] *See* Section 17(c) of the Securities Act. 15 U.S.C. 77q(c) (providing that ''[t]he exemptions provided in section 3 shall not apply to the provisions of this section'').

[54] 17 U.S.C. 78q–1(b)(7)(A). Subsection (b)(7) provides, in part, that ''[a] clearing agency that is regulated directly or indirectly by the CFTC through its association with a designated contract market for security futures products that is a national securities exchange registered pursuant to [Section 6(g) of the Exchange Act], and that would be required to register pursuant to [Section 17A(b)(1) of the Exchange Act] only because it performs the functions of a clearing agency with respect to security futures products effected pursuant to the rules of the designated contract market with which such agency is associated, is exempted from the provisions of this section and the rules and regulations thereunder.''

[55] The Commission notes that the other requirements of the exemption from registration as a clearing agency set forth in Section 17A(b)(7) of the Exchange Act do not apply with respect to transactions in the Product, given that it will be cash settled and cleared only by MGEX.

[56] 15 U.S.C. 78(i), (j), *o*(c), t, t–1, u, u–1, u–2, u–3, u–4, z, and aa.

to the Commission (or its representatives), upon request;

(4) Section 17(b) of the Exchange Act, and the rules and regulations thereunder, as it relates to the obligation of MGEX, in its capacity as a national securities exchange, to make itself available to inspection and examination by the Commission (or its representatives), upon request; and

(5) the requirement that MGEX register with the Commission as a clearing agency, as set forth in Section 17A of the Exchange Act, and the rules and regulations thereunder, including the exemption from registration in paragraph (b)(7) of that section.

Such exemptions are subject to the conditions set forth below. To the extent that one or more of these conditions is no longer satisfied, the exemptions set forth in this order will no longer apply three calendar months after the end of the month in which any condition was no longer satisfied.

(1) SPIKES measures the magnitude of changes in the level of the price of the units of the SPDR® S&P 500® ETF Trust (''SPY'') over a defined period of time, which magnitude is calculated using the prices of options on the SPY and represents: (a) An annualized standard deviation of percent changes in the price of the units of the SPY; (b) an annualized variance of percent changes in the price of the units of the SPY; or (c) on a non-annualized basis either the standard deviation or the variance of percent changes in the price of the units of the SPY.

(2) The average daily dollar volume in the units of the SPY is at least $10 billion calculated over the preceding 180 days.

(3) Units of the SPY are listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(4) The aggregate average daily notional volume in options on the SPY is at least $400 million calculated over the preceding 180 days.

(5) Options on the SPY are listed and traded on a national securities exchange registered under section 6(a) of the Exchange Act.

(6) The SPY is a ''unit investment trust,'' as defined in Section 4(2) of the Investment Company Act of 1940, and is registered with the Commission as an investment company under the Investment Company Act of 1940.

(7) The SPY holds a portfolio of common stocks designed to provide investment returns that, before expenses, correspond generally to the price and yield performance of the S&P 500 Index.

(8) The annualized tracking error between the net asset value (''NAV'') of the SPY and the S&P 500 Index does not meet or exceed 1%; *provided, however,* that if over two consecutive trading days the returns used to calculate annualized tracking error can be netted, such that the annualized tracking error falls below 1%, then any such exceedance shall be deemed not to have occurred on those two consecutive trading days for purposes of this condition. For purposes of this condition, the term ''annualized tracking error'' should be calculated by taking the weekly return differences between the NAV of the SPY and the S&P 500 Index for the trailing 12 months (with each week beginning and ending on a Friday), taking into account dividends (as applicable), and then multiplying the standard deviation of those return differences by the square root of 52.

(9) The official closing price of the SPY, as determined pursuant to the rules of its primary listing exchange, does not deviate from the NAV of the SPY by more than 20 basis points for five or more consecutive trading days.

(10) MGEX shall monitor the daily closing prices and the NAV of the SPY and the corresponding returns of the S&P 500 Index. If (i) at any time the annualized tracking error between the NAV of the SPY and the S&P 500 Index exceeds 0.5% or (ii) for two or more consecutive trading days the official closing price of the SPY, as determined pursuant to the rules of its primary listing exchange, deviates from the NAV of the SPY by more than 20 basis points, MGEX shall (A) promptly notify the Commission of such divergence, in a form and manner acceptable to the Commission, and (B) conduct an investigation in an attempt to determine its cause.

Dated: November 24, 2020.

By the Commission.

Vanessa A. Countryman,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90495; File No. SR–NYSE–2020–95]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and Make Related Changes to Rules 7.32, 7.35C, 46B, and 47

November 24, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 13, 2020, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') 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 Substance of the Proposed Rule Change

The Exchange proposes to make permanent Commentaries .01(a) and (b) and .06 to Rule 7.35A and Commentaries .01 and .03 to Rule 7.35B and make related changes to Rules 7.32, 7.35C, 46B, and 47. The proposed rule change is available on the Exchange's website at *www.nyse.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 self-regulatory organization 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 those 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 parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.