

*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 Number SR-Phlx-2014-07 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-Phlx-2014-07. 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 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-Phlx-2014-07 and should be submitted on or before March 3, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-71473; File No. SR-NASDAQ-2014-009]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Proposed Rule Change Relating to the Listing and Trading of the Shares of the First Tactical High Yield ETF of First Trust Exchange-Traded Fund IV**

February 4, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 22, 2014, The NASDAQ Stock Market LLC ("Nasdaq" or the "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 Nasdaq. 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**

Nasdaq proposes to list and trade the shares of the First Trust Tactical High Yield ETF (formerly known as the First Trust High Yield Long/Short ETF) (the "Fund") of First Trust Exchange-Traded Fund IV (the "Trust") under Nasdaq Rule 5735 ("Managed Fund Shares"). The shares of the Fund are collectively referred to herein as the "Shares."

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at Nasdaq'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, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below, and is set forth in Sections A, B, and C below.

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

**1. Purpose**

The Exchange proposes to reflect changes to the means of achieving the

investment objectives of the Fund.<sup>3</sup> The Commission has approved the listing and trading of Shares under NASDAQ Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange.<sup>4</sup> The Exchange believes the proposed rule change reflects no significant issues not previously addressed in the Prior Release. The Fund is an actively managed exchange-traded fund ("ETF"). The Shares are offered by the Trust, which was organized as a Massachusetts business trust on September 15, 2010. The Trust, which is registered with the Commission as an investment company, has filed a registration statement on Form N-1A ("Registration Statement") relating to the Fund with the Commission.<sup>5</sup> First Trust Advisors L.P. ("First Trust Advisors") is the investment adviser ("Adviser") to the Fund.

The Exchange now proposes two modifications to the description of the measures the Adviser would utilize to implement the Fund's investment objectives.<sup>6</sup> The Adviser seeks to make the modifications described below to certain representations in the Prior Release.

First, the Exchange proposes to modify a representation reflected in the Prior Release by increasing the percentage of the Fund's net assets that may be invested in bank loans. In

<sup>3</sup> See Securities Exchange Act Release No. 68972 (February 22, 2013), 78 FR 13721 (February 28, 2013) (SR-NASDAQ-2012-147) (order approving listing and trading of First Trust High Yield Long/Short ETF).

<sup>4</sup> The Commission approved NASDAQ Rule 5735 (formerly Nasdaq Rule 4420(o)) in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039). The Commission previously approved the listing and trading of the Shares of the Fund. See Securities Exchange Act Release No. 68972 (February 22, 2013), 78 FR 13721 (February 28, 2013) (SR-NASDAQ-2012-147) ("Prior Order"). See also Securities Exchange Act Release No. 68581 (January 4, 2013), 78 FR 2295 (January 10, 2013) (SR-NASDAQ-2012-147) ("Prior Notice," and together with the Prior Order, the "Prior Release").

<sup>5</sup> See Post-Effective Amendment No. 23 to Registration Statement on Form N-1A for the Trust, dated February 8, 2013 (File Nos. 333-174332 and 811-22559). On February 27, 2013, July 3, 2013 and September 4, 2013, the Trust made filings under Rule 497 under the Securities Act of 1933 (collectively, the "497 Filings") for the Fund. The descriptions of the Shares and the Fund contained herein are based, in part, on information in the Registration Statement and the 497 Filings. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (the "1940 Act"). See Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812-13795) (the "Exemptive Order").

<sup>6</sup> The Adviser represents that it has managed and will continue to manage the Fund in the manner described in the Prior Release, and will not implement the changes, as described herein, until the instant proposed rule change is operative.

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

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).

accordance with the Prior Release, the Fund may invest up to 15% of its net assets in "bank loans," which, as described in the Prior Release, may include loan interests that are not secured by any specific collateral of the borrower, loan interests that have a lower than first lien priority on collateral of the borrower, loans to foreign borrowers, loans in foreign currencies and other loans with characteristics that the Adviser believes qualify as bank loans. Going forward, the Exchange proposes that the Fund would be permitted to invest up to 40% of its net assets in bank loans.

The proposed change is intended to provide greater flexibility to the Adviser as it tactically allocates proceeds across the high yield debt market and across the debt capital structure of select companies. Additionally, this proposed change would provide the Adviser with increased flexibility to manage the Fund's duration in periods of rising rates. The Adviser represents that the Fund would continue to invest 85% or more of the portfolio in securities that the Adviser deems to be sufficiently liquid at the time of investment. In addition, consistent with the Prior Release, the Adviser would continue to monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained.

The Exchange also proposes to delete a representation reflected in the Prior Release, which states that consistent with the Exemptive Order, the Fund would not invest in options contracts, futures contracts or swap agreements (the "Derivatives Representation").

On December 6, 2012, the staff of the Commission's Division of Investment Management ("Division") issued a no-action letter ("No-Action Letter") relating to the use of derivatives by actively-managed ETFs.<sup>7</sup> The No-Action Letter noted that, in March of 2010, the Commission announced in a press release that the staff was conducting a review to evaluate the use of derivatives by mutual funds, ETFs, and other investment companies and that, pending completion of this review, the staff would defer consideration of exemptive requests under the 1940 Act relating to, among others, actively-managed ETFs that would make significant investments in derivatives.

The No-Action Letter stated that the Division staff will no longer defer

consideration of exemptive requests under the 1940 Act relating to actively-managed ETFs that make use of derivatives provided that they include representations to address some of the concerns expressed in the Commission's March 2010 press release. These representations are: (i) That the ETF's board periodically will review and approve the ETF's use of derivatives and how the ETF's investment adviser assesses and manages risk with respect to the ETF's use of derivatives; and (ii) that the ETF's disclosure of its use of derivatives in its offering documents and periodic reports is consistent with relevant Commission and staff guidance. The No-Action Letter stated that the Division would not recommend enforcement action to the Commission under sections 2(a)(32), 5(a)(1), 17(a), 22(d), and 22(e) of the 1940 Act, or rule 22c-1 under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Trust's Exemptive Order<sup>8</sup>) invest in options contracts, futures contracts or swap agreements provided that they comply with the representations stated in the No-Action Letter, as noted above.

In view of the No-Action Letter, the Exchange is proposing to delete the Derivatives Representation and to permit the Fund to use "Derivative Instruments," as defined and described below.

The Exchange now proposes that to pursue its investment objectives it be permitted to invest in interest rate swaps, total return swaps, credit default swaps, options, options on futures contracts, futures contracts, forward contracts, structured notes, non-U.S. currency swaps, currency options, forward currency contracts and non-deliverable forward currency contracts (collectively, "Derivative Instruments"). The use of Derivative Instruments may allow the Fund to seek to enhance return, to hedge some of the risks of its investments in securities, as a substitute for a position in an underlying asset, to reduce transaction costs, to maintain full market exposure (which means to adjust the characteristics of its investments to more closely approximate those of the markets in which it invests), to manage cash flows, to preserve capital or to manage its foreign currency exposures.<sup>9</sup>

The Fund generally expects that no more than 30% of the value of the Fund's net assets would be invested in

Derivative Instruments; however, there would be no limitation on the Fund's investments in Derivative Instruments to be used by the Fund solely for hedging purposes.<sup>10</sup>

The Prior Release stated that the Fund's investments would not be used to enhance leverage. In view of the Exchange's proposal to permit the Fund to use Derivative Instruments, the Fund's investments in Derivative Instruments could potentially be used to enhance leverage. However, the Fund's investments in Derivative Instruments would be consistent with the Fund's investment objectives and would not be used to seek to achieve a multiple or inverse multiple of an index.

Further, the Fund's investments in Derivative Instruments would be valued at market value or, in the absence of market value with respect to any Derivative Instrument, at fair value in accordance with valuation procedures adopted by the Trust's Board of Trustees and in accordance with the 1940 Act.

Investments in Derivative Instruments would be made in accordance with the 1940 Act and consistent with the Fund's investment objectives and policies. The Fund would comply with the regulatory requirements of the Commission to maintain assets as "cover," maintain segregated accounts, and/or make margin payments when it takes positions in Derivative Instruments involving obligations to third parties (*i.e.*, instruments other than purchase options). If the applicable guidelines prescribed under the 1940 Act so require, the Fund would earmark or set aside cash, U.S. government securities, high grade liquid debt securities and/or other liquid assets permitted by the Commission in a segregated custodial account in the amount prescribed.<sup>11</sup>

<sup>10</sup> The Fund will limit its direct investments in futures, options on futures and swaps to the extent necessary for the Adviser to claim the exclusion from regulation as a "commodity pool operator" with respect to the Fund under Rule 4.5 promulgated by the Commodity Futures Trading Commission ("CFTC"), as such rule may be amended from time to time. Under Rule 4.5 as currently in effect, the Fund will limit its trading activity in futures, options on futures and swaps (excluding activity for "bona fide hedging purposes," as defined by the CFTC) such that it will meet one of the following tests: (i) aggregate initial margin and premiums required to establish its futures, options on futures and swap positions will not exceed 5% of the liquidation value of the Fund's portfolio, after taking into account unrealized profits and losses on such positions; or (ii) aggregate net notional value of its futures, options on futures and swap positions will not exceed 100% of the liquidation value of the Fund's portfolio, after taking into account unrealized profits and losses on such positions.

<sup>11</sup> With respect to guidance under the 1940 Act, see 15 U.S.C. 80a-18; Investment Company Act Release No. 10666 (April 18, 1979), 44 FR 25128

<sup>7</sup> See No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management.

<sup>8</sup> See footnote 5.

<sup>9</sup> In particular, the Adviser contemplates that the Fund would sell futures on U.S. Treasury obligations as an alternative to engaging in short sales to gain short exposure to the U.S. Treasury market.

The Fund would include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of Derivative Instruments, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged.<sup>12</sup>

Based on the above, the Exchange seeks this modification to reflect the No-Action Letter. The Adviser believes that the ability to invest in Derivative Instruments would provide it with additional flexibility to meet the Fund's investment objectives.

The Fund would continue to comply with all initial and continued listing requirements under NASDAQ Rule 5735.

The Adviser represents that there is no change to the Fund's investment objectives. Except for the changes proposed herein, all other facts presented and representations made in the Rule 19b-4<sup>13</sup> filings underlying the Prior Release remain unchanged.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act<sup>14</sup> in general and Section 6(b)(5) of the Act<sup>15</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule changes are designed to prevent fraudulent and manipulative acts and practices in that the Shares would continue to be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NASDAQ Rule 5735. The first proposed rule change would permit the Fund to invest up to 40% (rather than up to 15%) of its net assets in bank loans, however, the Adviser represents that the Fund would continue to invest 85% or more of its portfolio in securities that the Adviser deems to be sufficiently

liquid at the time of investment and would continue to monitor portfolio liquidity on an ongoing basis.

The second proposed rule change is consistent with the No-Action Letter and would permit the Fund to invest in Derivative Instruments. The Fund generally expects that no more than 30% of the value of the Fund's net assets would be invested in Derivative Instruments; however, there would be no limitation on the Fund's investments in Derivative Instruments to be used by the Fund solely for hedging purposes. The Fund's investments in Derivative Instruments would be consistent with the Fund's investment objectives and would not be used to seek to achieve a multiple or inverse multiple of an index. Investments in Derivative Instruments would be made in accordance with the 1940 Act and would be consistent with the Fund's investment objectives and policies.

The proposed rule changes are designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Adviser represents that there is no change to the Fund's investment objectives. The Adviser represents that the purpose of the proposed changes is to provide it with greater flexibility in meeting the Fund's investment objectives by permitting (1) the Fund to invest a greater portion of its net assets in bank loans and (2) the Fund to invest a portion of its net assets in Derivative Instruments. In addition, consistent with the Prior Release, the net asset value ("NAV") per Share would continue to be calculated daily and the NAV and "Disclosed Portfolio" (as defined in the Prior Release) would be made available to all market participants at the same time.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an actively managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

As noted above, the additional flexibility to be afforded to the Adviser under the proposed rule change is intended to enhance the Adviser's ability to meet the Fund's investment objectives. Further, as noted in the Prior Release, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members of the ISG or with which the Exchange has entered into a comprehensive surveillance

sharing agreement. In addition, as indicated in the Prior Release, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value (as defined in the Prior Release), the Disclosed Portfolio (as defined in the Prior Release), and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>16</sup>

## 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days after publication (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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 Number SR-NASDAQ-2014-009 on the subject line.

(April 27, 1979); *Dreyfus Strategic Investing*, Commission No-Action Letter (June 22, 1987); *Merrill Lynch Asset Management, L.P.*, Commission No-Action Letter (July 2, 1996).

<sup>12</sup> To mitigate leveraging risk, the Fund will segregate or "earmark" liquid assets or otherwise cover the transactions that may give rise to such risk.

<sup>13</sup> 17 CFR 240.19b-4.

<sup>14</sup> 15 U.S.C. 78f.

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

<sup>16</sup> The Commission notes that Nasdaq included the following additional statement in its Form 19b-4: "The Exchange believes the proposed rule change will permit the Adviser additional flexibility in achieving the Fund's investment objectives, thereby offering investors additional investment options."

*Paper Comments*

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASDAQ-2014-009. 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 the filing also will be available for inspection and copying at the principal office of Nasdaq. 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-NASDAQ-2014-009 and should be submitted on or before March 3, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-71485; File No. S7-27-11]

**Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment**

**I. Introduction**

The Securities and Exchange Commission ("Commission") is extending certain temporary exemptive relief contained in a prior Commission order ("Exchange Act Exemptive Order")<sup>1</sup> in connection with the revision of the Exchange Act definition of "security" to encompass security-based swaps. These temporary exemptions were provided by the Commission on July 1, 2011 and are set to expire on February 11, 2014 ("Expiring Temporary Exemptions").

As described in more detail below, the Commission is extending the expiration date for the Expiring Temporary Exemptions. Specifically, for those Expiring Temporary Exemptions that are not directly linked to pending security-based swap rulemakings, the Commission is extending the expiration date until the earlier of such time as the Commission issues an order or rule determining whether any continuing exemptive relief is appropriate for security-based swap activities with respect to any of these Exchange Act provisions or until three years following the effective date of this Order. For each Expiring Temporary Exemption that is related to pending security-based swap rulemakings, the Commission is extending the expiration date until the compliance date for the related security-based swap-specific rulemaking.

The approach for extending the exemptions related to security-based swap rulemakings reflected in this Order is intended to facilitate a timely phased-in determination regarding the application of the relevant provisions of the Exchange Act to security-based swaps based on the development of the relevant rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")<sup>2</sup> as

<sup>1</sup> See Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of "Security" to Encompass Security-Based Swaps, Exchange Act Release No. 64795 (Jul. 1, 2011), 76 FR 39927 (Jul. 7, 2011) ("Exchange Act Exemptive Order").

<sup>2</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124, Stat. 1376 (2010).

the Commission moves toward finalizing those rules. This approach also provides the Commission flexibility while Dodd-Frank Act rulemaking is still in progress to determine whether continuing relief should be provided for any Exchange Act provisions that are not directly linked to specific security-based swap rulemaking.

**II. Discussion***A. Background*

Title VII of the Dodd-Frank Act amended the Exchange Act definition of "security" to expressly encompass security-based swaps.<sup>3</sup> The expansion of the definition of the term "security" has changed the scope of the Exchange Act regulatory provisions that apply to security-based swaps and has raised certain complex questions that require further consideration.

On July 1, 2011, the Commission issued an order granting temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with the revision of the Exchange Act definition of "security" to encompass security-based swaps.<sup>4</sup> The overall approach of the Exchange Act Exemptive Order was directed toward maintaining the *status quo* during the implementation process for the Dodd-Frank Act, by preserving the application of particular Exchange Act requirements that were already applicable in connection with instruments that became "security-based swaps" following the effective date of the Dodd-Frank Act,<sup>5</sup> but deferring the applicability of additional Exchange Act requirements in connection with those instruments explicitly being defined as "securities" as of the effective date.<sup>6</sup> The Expiring Temporary Exemptions generally provide for the following exemptions from Exchange Act: (a) Temporary exemptions in connection with security-based swap activity by certain "eligible contract participants"; and (b) temporary exemptions specific to security-based swap activities by registered brokers and dealers.<sup>7</sup> These Expiring Temporary Exemptions<sup>8</sup> are

<sup>3</sup> Exchange Act Section 3(a)(10), 15 U.S.C. 78c(a)(10), as revised by Section 761(a)(2) of the Dodd-Frank Act.

<sup>4</sup> See Exchange Act Exemptive Order.

<sup>5</sup> *Id.* The Title VII amendments of the Dodd-Frank Act generally became effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act).

<sup>6</sup> See Exchange Act Exemptive Order at 5-6.

<sup>7</sup> See Exchange Act Exemptive Order at 39-44.

<sup>8</sup> The Exchange Act Exemptive Order provided a temporary exemption from Sections 5 and 6 of the Exchange Act until the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities. The Exchange Act Exemptive Order also provided that

Continued

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