SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-74304; File Nos. SR-MIAX-2014-30 and SR-MIAX-2014-39]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Order Disapproving Proposed Rule Changes to List and Trade Options on Shares of the iShares ETFs and Market Vectors ETFs

February 19, 2015

I. Introduction

On June 17, 2014, Miami International Securities Exchange LLC ("MIAX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to list and trade options on shares of the iShares MSCI Brazil Capped ETF, iShares MSCI Chile Capped ETF, iShares MSCI Peru Capped ETF, and iShares MSCI Spain Capped ETF (collectively "iShares ETFs"). The proposed rule change was published for comment in the Federal Register on July 3, 2014.[3] On August 13, 2014, the Commission extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to October 1, 2014.[4] On September 25, 2014, the Commission instituted proceedings to determine whether to approve or disapprove the proposed

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 72492 (June 27, 2014), 79 FR 38099 (SR-MIAX-2014-30) ("iShares ETFs Proposal").

4 See Securities Exchange Act Release No. 72835, 79 FR 49140 (August 19, 2014).

rule change.[5] The Commission received a letter from MIAX on the proposal.[6] On December 17, 2014, the Commission issued a notice of designation of a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.[7]

In addition, on July 28, 2014, the Exchange filed with the Commission a proposed rule change to list and trade options on shares of the Market Vectors Brazil Small-Cap ETF, Market Vectors Indonesia Index ETF, Market Vectors Poland ETF, and Market Vectors Russia ETF (collectively "Market Vectors ETFs"). The proposed rule change was published for comment in the Federal Register on August 12, 2014.[8] On September 25, 2014, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.[9] The Commission received a letter from MIAX on the proposal.[10] On January 27, 2015, the Commission issued a notice of designation of a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.[11] This order disapproves the iShares ETFs Proposal and the Market Vectors ETFs Proposal.

II. Description of the Proposal

The Exchange proposes to list for trading on the Exchange options on shares of the

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5 See Securities Exchange Act Release No. 73211, 79 FR 59338 (October 1, 2014).

6 See Letter to Elizabeth M. Murphy, Secretary, Commission, from Brian O'Neill, Vice President and Senior Counsel, MIAX, dated October 22, 2014 (providing comment on SR-MIAX-2014-30 and SR-MIAX-2014-39) ("MIAX Letter").

7 See Securities Exchange Act Release No. 73856, 79 FR 77075 (December 23, 2014).

8 See Securities Exchange Act Release No. 72777 (August 6, 2014), 79 FR 47165 (SR-MIAX-2014-39) ("Market Vectors ETFs Proposal").

9 See Securities Exchange Act Release No. 73212, 79 FR 59332 (October 1, 2014).

10 See MIAX Letter, supra note 6.

11 See Securities Exchange Act Release No. 74150, 80 FR 5597 (February 2, 2015).

iShares and Market Vectors ETFs. According to the Exchange, the iShares ETFs are registered pursuant to the Investment Company Act of 1940 as management investment companies designed to hold a portfolio of securities that track the MSCI Brazil 25/50 Index ("Brazil Index"), which consists of stocks traded primarily on BM&FBOVESPA; MSCI Chile Investable Market Index (IMI) 25/50 ("Chile Index"), which consists of stocks traded primarily on the Santiago Stock Exchange; MSCI All Peru Capped Index ("Peru Index"), which consists of stocks traded primarily on Bolsa de Valores de Lima; and MSCI Spain 25/50 Index ("Spain Index"), which consists of stocks traded primarily on Bolsa de Madrid.[12]

Similarly, according to the Exchange, the Market Vectors ETFs are registered pursuant to the Investment Company Act of 1940 as management investment companies designed to hold a portfolio of securities that track the Market Vectors Brazil Small-Cap Index ("Brazil Small-Cap Index"), which consists of stocks traded primarily on BM&FBOVESPA; the Market Vectors Indonesia Index ("Indonesia Index"), which consists of stocks traded primarily on the Indonesia Stock Exchange; the Market Vectors Poland Index ("Poland Index"), which consists of stocks traded primarily on the Warsaw Stock Exchange; and the Market Vectors Russia Index ("Russia Index"), which consists of stocks traded primarily on the Moscow Exchange.[13]

MIAX Rule 402 establishes the Exchange's initial listing standards for equity options (the "Listing Standards") pursuant to which the Exchange can list and trade options on the shares

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[12] See iShares ETFs Proposal, supra note 3. Morgan Stanley Capital International Inc. ("MSCI") created and maintains the Brazil Index, Chile Index, Peru Index, and Spain Index.

[13] See Market Vectors ETFs Proposal, supra note 8. Market Vectors Index Solutions created and maintains the Brazil Small-Cap Index, Indonesia Index, Poland Index, and Russia Index.

of open-end investment companies, such as the iShares ETFs and Market Vectors ETFs.[14] According to the Exchange, options on the iShares ETFs and Market Vectors ETFs do not meet the Listing Standards. In particular, options on the iShares ETFs and Market Vectors ETFs do not meet the requirement that the component securities of an index or portfolio of securities on which the Exchange Traded Fund Shares are based, for which the primary market is in any one country that is not subject to a comprehensive surveillance sharing agreement ("CSSA"), not represent 20% or more of the weight of the index.[15] Accordingly, the Exchange may not list and trade options on the iShares ETFs or Market Vectors ETFs without a separate proposed rule change filed with and approved by the Commission.[16]

According to the Exchange, it has attempted, but not entered into, CSSAs with the applicable foreign markets. In its proposals, the Exchange requested that the Commission allow it to rely on agreements between the Commission and the applicable foreign regulators, in place of the requirement to have a CSSA, with respect to the listing and trading of options on shares of the iShares ETFs and Market Vectors ETFs. Specifically, the Exchange cited to the agreements

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14 MIAX Rule 402(i) provides the listing standards for options on shares or other securities ("Exchange-Traded Fund Shares") that are traded on a national securities exchange and are defined as an "NMS stock" under Rule 600 of Regulation NMS. If an option on Exchange-Traded Fund Shares meets these listing standards, it can be listed without the filing of a proposed rule change with the Commission, but the Exchange must comply with the requirements of Rule 19b-4(e). See 17 CFR 240.19b-4(e).

15 See MIAX Rule 402(i)(5)(ii)(B). The Exchange represents that each of the iShares ETFs and Market Vectors ETFs are comprised of component securities for which the primary market is a single foreign market, and that, for each ETF, MIAX does not have a CSSA with its foreign counterpart in the applicable foreign market.

16 See supra note 14.

between the Commission and the Comissao de Valores Mobiliarios ("CVM"),[17] which has responsibility for the Brazilian exchanges and over-the-counter markets; the Superintendencia de Valores y Seguros de Chile ("SVS"),[18] which has the responsibility for the Chilean securities markets; the Comision Nacional del Mercado de Valores ("CNMV"),[19] which has the responsibility for the Spanish stock exchanges; and the Federal Commission on Securities and the Capital Market of the Government of the Russian Federation ("FCSCM"), a forerunner of the Federal Commission on Securities Market of Russia, which has responsibility for the Russian stock exchanges.[20] In addition, the Exchange noted that the Indonesia Financial Services Authority, which has responsibility for the Indonesian stock exchanges; the Polish Financial Supervision Authority, which has responsibility for the Polish stock exchanges; the Superintendencia del Mercado de Valores, which has responsibility for the Peruvian stock exchanges, and the Commission are signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding.[21]

In its letter, MIAX stated its belief that the proposals were consistent with the requirements of the Act and that the Commission should approve the filings. In addition, MIAX believes that its proposals are consistent with the approach previously allowed by the

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17 See iShares ETFs Proposal, supra note 3, and Market Vectors ETFs Proposal, supra note 8 (citing to Memorandum of Understanding with the CVM dated as of July 24, 2012).

18 See iShares ETFs Proposal, supra note 3 (citing to Memorandum of Understanding with the SVS dated as of June 3, 1993).

19 See iShares ETFs Proposal, supra note 3 (citing to Memorandum of Understanding with the CNMV dated as of July 22, 2013).

20 See Market Vectors ETFs Proposal, supra note 8 (citing to the Memorandum of Understanding with the FCSCM dated December 6, 1995).

21 See iShares ETFs Proposal, supra note 3, and Market Vectors ETFs Proposal, supra note 8.

Commission. Specifically, MIAX noted that the Commission has, in the past, allowed exchanges to rely on agreements between the Commission and foreign regulators in lieu of a CSSA between an exchange and the applicable foreign market.[22] The Exchange believes the proposed rule changes are consistent with Section 6 of the Act "by avoiding the regulatory compliance issue of improperly listing the ETFs without CSSAs, or without Commission approval, while providing a clear mechanism to acquire surveillance and trading information when necessary from a foreign regulator via the Commission."[23]

III. Discussion

Under section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization ("SRO") if it finds that such proposed rule change is

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22 The following agreements were at issue in the orders cited by MIAX: Memorandum of Understanding with the CVM, see Securities Exchange Act Release No. 40298 (August 3, 1998), 63 FR 43435 (August 13, 1998) (SR-Amex-98-28; SR-CBOE-98-32; and SR-Phlx-98-33) (citing a separate agreement with the CVM than the agreement relied upon by MIAX in the iShares ETFs and Market Vectors ETFs Proposals); and Memorandum of Understanding with the Mexican National Commission for Banking and Securities dated as of October 18, 1990, see Securities Exchange Act Release Nos. 53824 (May 17, 2006), 71 FR 30003 (May 24, 2006) (SR-Amex-2006-43), 56324 (August 27, 2007), 72 FR 50426 (August 31, 2007) (SR-ISE-2007-72), 56778 (November 9, 2007), 72 FR 65113 (November 19, 2007) (SR-Amex-2007-100), 57013 (December 20, 2007), 72 FR 73923 (December 28, 2007) (SR-CBOE-2007-140), and 57014 (December 20, 2007), 72 FR 73934 (December 28, 2007) (SR-ISE-2007-111). See MIAX Letter, supra note 6, at 3 nn.7-9 and accompanying text. The Commission notes that these agreements are not at issue in the present proposed rule changes. MIAX also noted that it had previously filed another proposed rule change that was immediately effective using a similar approach to list options on shares of the iShares MSCI Mexico Index Fund. See Securities Exchange Act Release No. 72213 (May 21, 2014), 79 FR 30669 (May 28, 2014) (SR-MIAX-2014-19). In that instance, the Exchange relied on an agreement between The National Commission for Banking and Securities and the Commission dated as of October 18, 1990. The Commission notes that the Commission had previously determined that this agreement could be used for surveillance purposes. See Securities Exchange Act Release No. 36415 (October 25, 1995), 60 FR 55620 (November 1, 1995) (SR-CBOE-95-45).

23 See MIAX Letter, supra note 6 at 4.

consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.[24] The Commission shall disapprove a proposed rule change if it does not make such a finding.[25]

After careful consideration, the Commission does not find that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[26] In particular, the Commission does not find that the proposed rule changes are consistent with Section 6(b)(5) of the Act, which requires that the rules of a national securities exchange be designed, among other things, "to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to 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."[27]

As noted by MIAX, the Commission has permitted an SRO to rely on an agreement

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24 See 15 U.S.C. 78s(b)(2)(C)(i).

25 See 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700(b)(3) ("The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change. . . . A mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. See 17 CFR 201.700(b)(3). Any failure of a SRO to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the SRO. Id.

26 In disapproving the proposed rule changes, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

27 15 U.S.C. 78f(b)(5).

between the Commission and the applicable foreign regulator in the absence of a CSSA only if the SRO receives an assurance from the Commission that such an agreement can be relied on for surveillance purposes and provides, at a minimum, for the exchange of transaction, clearing and customer information necessary to conduct an investigation.[28] This assurance is necessary, because the Commission may enter into a variety of agreements with foreign regulators some of which may be unrelated to the sharing of surveillance information. After carefully and thoroughly reviewing the agreements cited by the Exchange in its proposals, the Commission is unable to provide the necessary assurance that such agreements can be relied on for surveillance purposes.[29] Accordingly, the Commission cannot approve MIAX's request to allow the listing and trading of options on iShares ETFs and Market Vectors ETFs, upon reliance on agreements entered into between the Commission and the applicable foreign regulators in place of a CSSA, in satisfaction of the Exchange's Listing Standards.[30] According to MIAX, such approval would be necessary to make the ETFs compliant with all of the applicable Listing Standards.[31]

The Commission notes that Rule 700(b)(3) of its Rules of Practice reiterates that "[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act . . . is on the self-regulatory organization that proposed the rule change."[32] For the reasons articulated

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28 See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952, 70959 n.101 (December 22, 1998).

29 The Commission also notes that the particular agreements referenced in MIAX's letter, which the Commission has previously allowed exchanges to rely on in lieu of a CSSA between an exchange and the applicable foreign market, are not at issue in the present proposed rule changes. See supra note 22.

30 See iShares ETFs Proposal, supra note 3, and Market Vectors ETFs Proposal, supra note 8.

31 Id.

32 17 CFR 201.700(b)(3).

above, the Commission does not believe that MIAX has met that burden in this case.

IV. Conclusion

For the foregoing reasons, the Commission does not find that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Act, that the proposed rule changes (SR-MIAX-2014-30 and SR-MIAX-2014-39) be, and hereby are, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Brent J. Fields,
Secretary.

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[33] 17 CFR 200.30-3(a)(12).