

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-70418; File No. SR-NASDAQ-2013-115)

September 16, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Fees and Fee Waivers for Certain Exchange Traded Products

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 3, 2013 The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to adopt fees for certain exchange traded products and to expand existing fee waivers to include these securities.

The text of the proposed rule change is available at the Exchange’s website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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

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

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

NASDAQ recently adopted rules to list a number of new types of exchange traded products.<sup>3</sup> However, at the time, NASDAQ did not specify fees applicable to certain of these products. Specifically, while Rule 5710(j) provides that Linked Securities, including the New Linked Securities, are treated as "Other Securities" for fee purposes, no fees were specified for the other products approved for listing under those new standards (the "Other New Products").<sup>4</sup> As such, the Other New Products are subject to the fees set forth in Rule 5910, which describes the fees charged to securities listed on the Global Market not otherwise identified in the Rule 5900 Series.

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<sup>3</sup> Securities Exchange Act Release No. 66648 (March 23, 2012), 77 FR 19428 (March 30, 2012) (SR-NASDAQ-2012-013). In this filing, NASDAQ adopted standards to list the following Exchange Traded Products: Equity Index-Linked Securities, Commodity-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities, and Multifactor Index-Linked Securities (collectively, the "New Linked Securities"); Index-Linked Exchangeable Notes; Equity Gold Shares; Trust Certificates; Commodity-Based Trust Shares; Currency Trust Shares; Commodity Index Trust Shares; Commodity Futures Trust Shares; Partnership Units; Trust Units; Managed Trust Securities; and Currency Warrants.

<sup>4</sup> Fees for Other Securities are set forth in Rule 5930. The proposed rule change would not change the treatment of Linked Securities, although it would modify the title and text of Rule 5930 to provide additional transparency to the fact that Linked Securities are subject to that Rule.

NASDAQ now proposes to modify its fee schedule to provide that the fees set forth in Rule 5940<sup>5</sup> are applicable to any security listed under the Rule 5700 Series for which no other fee schedule is specified.<sup>6</sup> As such, the Other New Products, which qualify for listing under Rules 5711 and 5720, would be subject to the fees contained in Rule 5940, rather than the higher fees under Rule 5910.<sup>7</sup> In addition, the proposed change would result in Trust Issued Receipts, listed under Rule 5720, and Index Warrants, listed under Rule 5725, also being subject to the lower fee schedule in Rule 5940. NASDAQ believes that these lower fees are appropriate as the Other New Products, Trust Issued Receipts and Index Warrants are generally similar to the exchange traded funds currently charged fees under Rule 5940.<sup>8</sup>

In addition, NASDAQ rules currently provide that the entry and application fees payable under Rules 5910 and 5920 are not applicable to a company with respect to any securities that are listed on another national securities exchange if the company transfers its listing exclusively to NASDAQ.<sup>9</sup> Similarly, IM-5900-4 provides that NASDAQ will waive a portion of the annual

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<sup>5</sup> Rule 5940 sets forth the fees applicable to Portfolio Depository Receipts, Index Fund Shares, and Managed Fund Shares.

<sup>6</sup> NASDAQ also proposes to change the title of Rule 5940 to reflect this broader applicability.

<sup>7</sup> The entry fee under Rule 5940 is \$5,000 and annual fees range from \$6,500 to \$14,500. The entry fees under Rule 5910 ranges [sic] from \$125,000 to \$225,000 and annual fees range from \$35,000 to \$99,500.

<sup>8</sup> NASDAQ also notes that NYSE Arca charges the issuers of the Other New Products and Trust Issued Receipts under its fee schedule for Derivative Securities Products, which is the same fee schedule applicable to exchange traded funds. See footnote 3 to NYSE Arca Equities: Listing Fees. Index Warrants listed on NYSE Arca also are not subject to the fee schedule applicable to common and preferred stock, but are treated as Structured Products. See footnote 4 to NYSE Arca Equities: Listing Fees. Similarly, BATS Exchange charges all exchange traded products a different fee schedule than operating companies. See BATS Rules 14.13(a)(A)(1)(C) and 14.13(a)(A)(2)(C).

<sup>9</sup> Rules 5910(a)(7) and 5920(a)(7).

fees otherwise payable under Rules 5910 and 5920 for a company that is listed on another national securities exchange if the company transfers its listing exclusively to NASDAQ.<sup>10</sup> These rules were adopted to encourage issuers to transfer from another exchange (where they already paid listing fees) to NASDAQ and thereby enhance competition among exchanges.<sup>11</sup> NASDAQ believes that this same rationale applies to exchange traded products and therefore proposes to provide that an identical waiver applies to the entry and application fees set forth in Rules 5930 and 5940, and to expand the annual fee waiver in IM-5900-4 to also include annual fees assessed under Rules 5930 and 5940.<sup>12</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general, and with Sections 6(b)(4), (5) and (8) of the Act,<sup>14</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls; is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and

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<sup>10</sup> In the year a transfer is made, the company receives a credit in the pro-rated amount of any annual listing fees paid to the former exchange for the period of time after the transfer. This credit offsets, and cannot exceed, the annual fee otherwise due to NASDAQ for that period.

<sup>11</sup> Securities Exchange Act Release No. 51004 (January 10, 2005), 70 FR 2917 (January 18, 2005) (SR-NASD-2004-140) (waiver of initial listing fees); Securities Exchange Act Release No. 53696 (April 21, 2006), 71 FR 25273 (April 28, 2006) (SR-NASD-2006-047) (waiver of annual fees).

<sup>12</sup> NASDAQ notes that NYSE Arca and BATS each waive fees for exchange traded products that switch from another exchange. See commentary .04 to NYSE Arca Equities: Listing Fees and BATS Rules 14.13(a)(A)(1)(F).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4), (5) and (8).

does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposed fees are consistent with Section 6(b)(4) of the Act for multiple reasons. First, NASDAQ notes that it operates in a highly competitive market in which market participants can choose not to list on NASDAQ, or readily switch exchanges, if they deem listing fees excessive.<sup>15</sup> In such an environment NASDAQ must continually review the fees it charges to assure that they are reasonable and equitably allocated to remain competitive with other markets. The proposed waivers are also equitable in that they recognize that a company switching from another exchange has already paid fees to that exchange for similar services. Further, it is NASDAQ's experience that less work is required on an application for a security listed on another exchange, and the fee waiver reflects that experience. NASDAQ also believes that the proposed fees and waivers are equitable because they would apply equally to all companies listing exchange traded products under the applicable provisions of the Rule 5700 Series.

The Exchange also believes that the proposed fees and waivers are consistent with Section 6(b)(5) of the Act in that the fees are non-discriminatory. As noted, the proposed fees would apply equally to all companies listing exchange traded products under the applicable provisions of the Rule 5700 Series. In addition, applying the existing fee schedule to all unspecified exchange traded products eliminates an inconsistency in the fees currently charged by NASDAQ where some similar products are charged lower fees, and is thereby designed to

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<sup>15</sup> The Justice Department has noted the intense competitive environment for exchange listings. See "NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandon Their Proposed Acquisition Of NYSE Euronext After Justice Department Threatens Lawsuit" (May 16, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/271214.htm](http://www.justice.gov/atr/public/press_releases/2011/271214.htm).

equitably allocate fees and not permit unfair discrimination between issuers of similar products.

Finally, the Exchange believes the proposed fees and waivers are consistent with Section 6(b)(8) of the Act in that they do not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change will adopt lower fees for issuers of exchange traded products, thereby enhancing competition among exchanges.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, by adopting fees for specific types of products similar to those fees in place at NYSE Arca and BATS, and by waiving fees for transfers of exchange traded products from other exchanges, the proposed rule change will promote competition for the listing of these products.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-115 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-NASDAQ-2013-115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All

comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2013-115, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Kevin M. O'Neill  
Deputy Secretary

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