

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88932; File No. SR-NASDAQ-2020-019)

May 22, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Make Certain Amendments to Eliminate the Requirement that the Intraday Indicative Value Be Disseminated for Certain Series of Index Fund Shares and All Series of Managed Fund Shares

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 14, 2020, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to eliminate the requirement that the Intraday Indicative Value be disseminated as set forth under Nasdaq Rule 5705(b) (“Index Fund Shares”) for certain series of Index Fund Shares and under Nasdaq Rule 5735 (“Managed Fund Shares”) for all series of Managed Fund Shares. Additionally, the Exchange proposes to define the term “Portfolio Holdings” as it pertains to Index Fund Shares. Finally, the Exchange proposes to amend Nasdaq Rule 4120 (Limit Up-Limit Down Plan and Trading Halts) as it pertains to dissemination of the Intraday Indicative Value.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on 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 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 Rules 5705(b) and 5735 relate to the listing and trading of Index Fund Shares and Managed Fund Shares, respectively, on the Exchange. Among a number of other requirements, numerous subparagraphs of each of these rules require that an intraday estimate of the value of a share of each series (the "Intraday Indicative Value" or "IIV") of Index Fund Shares and Managed Fund Shares be disseminated and updated at least every 15 seconds.³ The Exchange is proposing to eliminate the requirement to disseminate an IIV for all series of Managed Fund Shares⁴ listed on the Exchange and for those series of Index Fund Shares that also publish their Portfolio Holdings (as defined below) on a daily basis.

³ See subparagraphs (3)(C), (6)(A), and (9)(B)(i)e. of Nasdaq Rule 5705(b). See also subparagraphs (c)(3), (c)(4), (d)(2)(A), (d)(2)(C)(ii), and (d)(2)(D) of Nasdaq Rule 5735.

⁴ The Exchange notes that Nasdaq Rule 5735(d)(2)(B)(i) requires that the Disclosed Portfolio for a series of Managed Fund Shares be disseminated at least once daily and be made available to all market participants at the same time. Further, Nasdaq

As part of this proposal, the Exchange is also proposing to adopt proposed Nasdaq Rule 5705(b)(1)(F) to define the term “Portfolio Holdings” to mean the holdings of a particular series of Index Fund Shares that will form the basis for the calculation of its net asset value (“NAV”) at the end of the business day.⁵ Existing Nasdaq Rules require issuers of Managed Fund Shares to provide IIV and daily disclosure of the Disclosed Portfolio.⁶ Similarly, existing Exchange Rules require issuers of Index Fund Shares to disseminate an IIV for each fund, but do not universally require daily disclosure of a fund’s underlying holdings.

The dissemination of an IIV, together with disclosure of the fund’s underlying holdings, was designed to allow investors to determine the value of the underlying portfolio of such funds on a daily basis and provide a close estimate of that value throughout the trading day. However, as consistently highlighted in the adopting release of Rule 17 CFR 270.6c-11 (“Rule 6c-11”)⁷ under the Investment Company Act of 1940⁸ (the “1940 Act”), the Commission has

5735(d)(2)(C)(ii) requires that the Exchange consider suspension of trading in and commence delisting proceedings for a series of Managed Fund Shares where the Disclosed Portfolio is not made available to all market participants at the same time. As such, the Exchange is proposing to eliminate the IIV dissemination requirements entirely from Nasdaq Rule 5735.

⁵ For purposes of Nasdaq Rule 5705(b), Portfolio Holdings would include various information, to the extent applicable, as listed in proposed subparagraphs (1)(F)(i) through (1)(F)(xi). The proposed definition of Portfolio Holdings is substantively identical to the definition of “Disclosed Portfolio” as set forth in Nasdaq Rule 5735(c)(2).

⁶ See subparagraphs (c)(2), (d)(1)(B), and (d)(2)(B)(i) of Nasdaq Rule 5735. The term “Disclosed Portfolio” (as defined in Nasdaq Rule 5735(c)(2)) means the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company’s calculation of net asset value at the end of the business day.

⁷ See Investment Company Act Release No. 10695 (September 25, 2019), 84 FR 57162 (October 24, 2019) (the “Adopting Release”).

⁸ 15 U.S.C. 80a-1.

expressed concerns regarding the accuracy of IIV estimates for certain Exchange-Traded Funds (“ETFs”).⁹

Specifically, the Commission noted that an IIV may not accurately reflect the value of an ETF that holds securities that trade less frequently as such IIV can be stale or inaccurate.¹⁰ Similarly, the Commission also expressed concerns with the IIV of ETFs with frequently traded component securities because “in today’s fast moving markets, given the dissemination lags, an IIV may not accurately reflect the value of an ETF that holds frequently traded component securities.”¹¹ Additionally, the Commission indicated that even in circumstances when an IIV may be reliable, retail investors do not have easy access to free, publicly available IIV information.¹² Further, in instances when IIV may be free and publicly available, it can be delayed by up to 45 minutes.¹³

Aside from the fact that the disseminated IIV may provide investors with stale or misleading data, the Commission also stated that market makers and authorized participants typically calculate their own intraday value of an ETF’s portfolio with proprietary algorithms that use an ETF’s daily portfolio disclosure and available pricing information.¹⁴ Such information allows those market participants to support the arbitrage mechanism for ETFs.

⁹ An Exchange-Traded Fund means a registered open-end investment company: (i) that issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount if any; and (ii) Whose shares are listed on a national securities exchange and traded at market-determined prices. See supra note 7.

¹⁰ Id. at 62.

¹¹ Id.

¹² Id. at 66.

¹³ Id.

¹⁴ Id. at 63.

The arbitrage mechanism is designed to help keep the market price of ETF shares at or close to the NAV per share of an ETF, and is important because it helps to ensure ETF investors are treated equitably when buying and selling fund shares.¹⁵ Therefore, as market participants who engage in arbitrage typically calculate their own intraday value of an ETF's portfolio based on the ETF's daily portfolio disclosure and pricing information and use an IIV only as a secondary check to their own calculation,¹⁶ the Commission noted that IIV was not necessary to support the arbitrage mechanism.¹⁷

Given this, combined with shortcomings of the IIV noted above, the Commission concluded that ETFs will not be required to disseminate an IIV under Rule 6c-11.¹⁸ As such, Exchange listing rules are the only reason that a series of Managed Fund Shares is required to disseminate an IIV. Similarly, Exchange listing rules are the only reason that a series of Index Fund Shares that also publishes its Portfolio Holdings on a daily basis is required to disseminate an IIV.

The Exchange believes that the limitations and shortcomings of IIV as it pertains to ETFs relying on Rule 6c-11 and highlighted in the Adopting Release are equally applicable to all Managed Fund Shares listed on the Exchange and Index Fund Shares for which the Portfolio Holdings are disclosed on a daily basis. The Exchange further agrees with the conclusion of the Adopting Release that the "IIV is not necessary to support the arbitrage mechanism for ETFs that provide daily portfolio holdings disclosure."

¹⁵ Id. at 12.

¹⁶ Id. at 63.

¹⁷ Id. at 65.

¹⁸ Id. at 61.

The transparency that comes from daily portfolio holdings disclosure provides market participants with sufficient information to facilitate the intraday valuation of the shares of an ETF, including Managed Fund Shares and Index Fund Shares for which Portfolio Holdings are disclosed daily, which, ignoring the many criticisms of IIV in the Adopting Order, renders IIV at the very least duplicative and unnecessary. The Commission has previously approved a proposed rule change by Cboe BZX Exchange, Inc. (“Cboe BZX”) that is substantively identical to the proposed amendments to Nasdaq Rules 5705(b) and 5735.¹⁹

Therefore, the Exchange is proposing to eliminate the requirement for the dissemination of the IIV for all series of Managed Fund Shares and for Index Fund Shares for which Portfolio Holdings are disclosed on a daily basis.

In addition, the Exchange is proposing to amend Nasdaq Rule 4120(a)(9) to remove certain references to Managed Fund Shares as it relates to halting a series of Managed Fund Shares for not disseminating an IIV. Managed Fund Shares are not required to disseminate and [sic] underlying index value and, as a result of this rule proposal, would not be required to disseminate an IIV. Nasdaq believes that including Managed Fund Shares as a security that can be halted for not disseminating an underlying index value or an IIV is no longer necessary. The Exchange notes that this proposal does not seek to remove certain references to Index Fund Shares because Nasdaq Rule 4120(a)(9) only applies to Index Fund Shares if dissemination of an underlying index value or IIV is required.

¹⁹ See Securities Exchange Act Release No. 88558 (April 3, 2020), 85 FR 20012 (April 9, 2020) (SR-CboeBZX-2020-007) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Eliminate the Requirement That an Intraday Indicative Value Be Disseminated as Set Forth Under Rule 14.11(c) for Certain Series of Index Fund Shares and Under Rule 14.11(i) for All Series of Managed Fund Shares).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ in particular, in that it is consistent with the Section 6(b)(5) requirements that the rules of an exchange be 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 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.

The proposed amendment seeks to eliminate the requirement that Managed Fund Shares and Index Fund Shares for which the Portfolio Holdings are disclosed daily disseminate an IIV for the same reasons articulated in the Adopting Order for Rule 6c-11, which does not require the dissemination of IIV. The Exchange believes that the proposed amendment will eliminate the dissemination of potentially stale and misleading IIV information to market participants, as was also noted in the Adopting Order. Further, as the proposed rule text would only eliminate the requirement for series of Index Fund Shares²² and Managed Fund Shares²³ that provide full daily portfolio transparency, such full daily portfolio transparency would provide market participants with a tool to calculate the IIV of a series of Managed Fund Shares or Index Fund Shares, which the Exchange believes generally mitigates the need for the dissemination of an IIV. Nonetheless,

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

²² As provided in proposed Rules 5705(b)(3)(C) and 5705(b)(6)(A), a series of Index Fund Shares would only be exempt from IIV dissemination requirements where there is daily public website disclosure of Portfolio Holdings.

²³ See supra note 4.

nothing in this proposal limits the ability of such Index Fund Shares or Managed Fund Shares from disseminating the IIV should they choose to do so. Further, the Exchange notes that its rules still include certain circumstances in which an issuer would be required to disseminate an IIV.²⁴

As a result of the proposed rule change, the Exchange believes issuers may benefit from cost savings because of the eliminated requirement to disseminate an IIV. The reduced cost could also result in lower barriers to entry for new issuers and new series of Managed Fund Shares and Index Fund Shares for which the Portfolio Holdings are disclosed daily, which will result in enhanced competition among products and issuers of such funds, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.

Finally, with respect to the proposed change to Nasdaq Rule 4120(a)(9) to remove Managed Fund Shares, the Exchange believes that this strengthens the consistency among Nasdaq's rules and benefits investors and the marketplace by making clear rules that lessen potential confusion for market participants.

²⁴ For example, a series of Index Fund Shares that does not provide daily portfolio transparency would still be required to disseminate an IIV. Additionally, IIV dissemination will continue to be required for certain products that are not subject to the 1940 Act. Moreover, the Exchange notes that Nasdaq Rules related to the listing and trading of other product types (that is, products that are not listed pursuant to Nasdaq Rule 5705(b) or 5735) require the dissemination of an IIV, which the Exchange is not proposing to eliminate at this time. Specifically, the Exchange is only proposing to remove the requirement of IIV dissemination as it pertains to certain Index Fund Shares and all Managed Fund Shares because such product types represent the vast majority of products listed on the Exchange and may consider proposing to eliminate the IIV dissemination requirement for other product types in a future proposal.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that issuers may benefit from cost savings and lower barriers to entry because of the eliminated requirement to disseminate an IIV. In turn, the proposed rule change will enable increased product competition among issuers of such funds, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁵ and Rule 19b-4(f)(6) thereunder.²⁶

²⁵ 15 U.S.C. 78s(b)(3)(A).

²⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)²⁷ normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁸ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. The Exchange states that the proposed rule change will lead to listing standards that are substantially similar to the rules of Cboe BZX that the Commission has recently approved.²⁹ The Commission notes that the proposed rule change raises no novel or unique issues not already considered by the Commission. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.³⁰

At any time within 60 days of the filing of such 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)³¹ of the Act to determine whether the proposed rule change should be approved or disapproved.

²⁷ 17 CFR 240.19b-4(f)(6).

²⁸ 17 CFR 240.19b-4(f)(6)(iii).

²⁹ See supra note 19.

³⁰ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78s(b)(2)(B).

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. Please include File Number SR-NASDAQ-2020-019 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-NASDAQ-2020-019. 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, 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. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2020-019 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.³²

J. Matthew DeLesDernier
Assistant Secretary

³² 17 CFR 200.30-3(a)(12).