

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93950; File No. SR-NASDAQ-2021-107)

January 11, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Certain Exchange Traded Product Listing Fees

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 December 30, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“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 Substance of the Proposed Rule Change

The Exchange proposes to modify certain exchange traded product listing fees. While changes proposed herein are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 1, 2022.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The purpose of the proposed rule change is to modify certain of the Exchange's listing fees for exchange traded products ("ETPs") covered by Listing Rules 5930 and 5940, as well as to modify the Preamble to Company Listing Fees in Listing Rule 5901.

Currently, Listing Rule 5930 addresses listing fees for Linked Securities, SEEDS, and Other Securities. The proposed rule change relocates the references to the fees for Linked Securities from Listing Rule 5930 (Linked Securities, SEEDS, and Other Securities) to Listing Rule 5940 (Exchange Traded Products) such that Linked Securities will no longer be subject to the fees in Listing Rule 5930 and will instead be subject to the fees in Listing Rule 5940. The modified fees for Linked Securities will mirror the fees for many of the ETPs that are covered by Listing Rule 5940, which are detailed herein. For consistency and clarification, all references to Linked Securities and related Rule 5710 cites are also being deleted from the Preamble to Company Listing Fees in Listing Rule 5901. Also, a clarification is being made in the Preamble of changing the term "Exchange Listed Products" to "Exchange Traded Products" for consistency and clarification. Additionally, a typographical error in the heading of Listing Rule 5930(b) is proposed to be corrected by changing "Lisitng" to "Listing" for clarification.

The introduction to Listing Rule 5940 is being expanded for the sake of clarification to say that the securities covered by this rule includes not only Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, and NextShares, but also includes Exchange Traded Fund

Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Shares³ and Linked Securities.⁴

The Entry Fee under Listing Rule 5940(a)(1) is being modified to include all of the securities listed above,⁵ with the exception of NextShares (which are subject to the Entry Fee in Listing Rule 5940(a)(2)) and to eliminate the listing fee of \$5,000, which currently includes a \$1,000 non-refundable application fee. Both the elimination of the listing and application fees reflect that the market for listing ETPs is extremely competitive and ETPs may freely choose alternative listing venues. The Exchange has determined that these proposed fee changes, coupled with the fee changes discussed below, will positively impact the competition in the ETP listing space.

The All-Inclusive Annual Listing Fee under Listing Rule 5940(b) is being modified. First, the list of securities in Listing Rule 5940(b)(1) will be expanded to not only include, in addition to any other security under the Rule 5700 Series where no other fee schedule is specifically applicable listed on The Nasdaq Global Market, Portfolio Depository Receipts, Index Fund Shares, and Managed Fund Shares, but also Exchange Traded Fund Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares,

³ Exchange Traded Fund Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, and Managed Trust Shares are already subject to the fees in Listing Rule 5940(a)(1) and this change is simply being made to increase the clarity of the rule.

⁴ Per existing Listing Rule 5940 the fees in Listing Rule 5940 will also apply to securities listed under the Rule 5700 Series where no other fee schedule is specifically applicable and that provision of the rule is not being modified.

⁵ This includes securities listed under the Rule 5700 Series where no other fee schedule is specifically applicable.

Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Shares⁶ and Linked Securities.

Second, the current fee schedule that is calculated on total shares outstanding that ranges from up to 1 million shares to 250+ million shares with fees that range from \$6,000 to \$50,000 is being replaced by a single fee of \$4,000 per product.⁷ Nasdaq is simplifying the fee structure (and related rule language) of the All-Inclusive Annual Listing Fee under Listing Rule 5940(b) to create a single fee that the Exchange believes is more reasonable and equitable because the proposed per product fee structure will be the same for all products regardless of the product's total shares outstanding. Assessing the fee on a per product basis rather than on total shares outstanding, the Exchange believes more accurately reflects the level of support required. The level of support the Exchange provides does not increase significantly as the ETP's shares outstanding grows. It is more closely correlated to the number of ETPs listed and thus warrants a separate fee per product. This means that an issuer with more ETPs listed on Nasdaq will have a higher total annual listing fee under the proposed changes than an issuer with fewer ETPs listed on Nasdaq even if the issuer with fewer ETPs has more total shares outstanding.

Listing Rule 5940(b)(3) is being eliminated because the new fee structure of Listing Rule 5940(b) renders it irrelevant.

Listing Rule 5940(b)(5) is being renumbered as Listing Rule 5940(b)(8) and will otherwise remain unchanged and still say that except as otherwise set forth in Rule 5940(b), the

⁶ Exchange Traded Fund Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, and Managed Trust Shares are already subject to the fees in Listing Rule 5940(b)(1) and this change is simply being made to increase the clarity of the rule.

⁷ For the avoidance of doubt, in this filing \$4,000 per product means \$4,000 for each symbol listed on the Exchange.

All-Inclusive Annual Listing Fee described will be assessed as described in Rule 5910(b)(3). Proposed Listing Rule 5940(b)(5) says that in the first calendar year of listing, a product's All-Inclusive Annual Listing Fee will be prorated based on the number of months listed. Proposed Listing Rule 5940(b)(5) and Rule 5910(b)(3)(A), both say that in the first calendar year of listing, a product's or Company's All-Inclusive Annual Listing Fee, respectively, will be prorated based on the number of months listed. The difference, as discussed above, is that proposed Listing Rule 5940(b)(5) will look to prorate the single fee of \$4,000 per product while current Rule 5910(b)(3)(A) is based on the total shares outstanding as of the date of the Company's listing. This proposed change is made for clarity and consistency with the All-Inclusive Annual Listing Fee change described above.

Proposed Listing Rule 5940(b)(6) is being added to modify how listing ETP transfers from another national securities exchange to Nasdaq will be handled regarding the All-Inclusive Annual Listing Fee. Current Listing Rule 5940(b)(5) says that except as otherwise set forth in Rule 5940(b), the All-Inclusive Annual Listing Fee described will be assessed as described in Rule 5910(b)(3). Proposed Listing Rule 5940(b)(6) says that for the year in which a product listing transfers to Nasdaq, as well as for the first full calendar year of its listing, a product will not be charged the All-Inclusive Annual Listing Fee. Currently, for the year in which a Company transfers its listing to Nasdaq, it will not be charged the All-Inclusive Annual Listing Fee.⁸ Nasdaq believes that modifying the fee waiver to extend the first full calendar year following a product's listing will further incentivize issuers to transfer ETPs to Nasdaq and, thereby, promote greater competition among ETP listing exchanges, which will be to the benefit of issuers, ETPs, and ETP investors.

⁸ See IM-5900-4.

Proposed Listing Rule 5940(b)(7) is being added to say that liquidations will be refunded a portion of the All-Inclusive Annual Listing Fee on a prorated basis based on the number of months listed during the calendar year of liquidation. Currently Nasdaq does not provide for such liquidation refunds. The Exchange is proposing this change as another way to make its fee schedule more competitive with the other exchanges, who also provide for refunds on a prorated basis.⁹

As described below, Nasdaq proposes to make the aforementioned fee changes to better reflect the Exchange's costs related to listing ETPs and would promote competition for ETP listings.

While these changes are effective upon filing, Nasdaq has designated the proposed amendments to be operative on January 1, 2022.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁹ See e.g., NYSE Arca Equities: Listing Fees as of June 30, 2021, footnote 8 (“The Annual Fees applicable to Exchange Traded Products that have liquidated and as a result are delisted from the Exchange will be prorated for the portion of the calendar year that such issue was listed on the Exchange, based on days listed that calendar year, and refunded.”).

https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Listing_Fee_Schedule.pdf

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

Nasdaq believes that it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to amend Listing Rules 5901, 5930 and 5940 to modify the listing fees for Linked Securities, to eliminate the Entry and Application Fees for certain ETPs, as well as to modify the All-Inclusive Annual Listing Fee for certain ETPs.

Specifically, the Exchange believes that modifying the fees and relocating references to Linked Securities from Listing Rule 5930 to Listing Rule 5940 is not unfairly discriminatory and represents an equitable allocation of reasonable fees since it aligns the fees for Linked Securities with the proposed fees for a broad range of ETPs discussed above, which the Exchange believes are more similar to Linked Securities than its existing location within Listing Rule 5930 that includes SEEDS and Other Securities. This also includes the proposed changes to the Preamble to Company Listing Fees in Listing Rule 5901 and references to Linked Securities and related Rule 5710 cites throughout Listing Rule 5930, as well as a clarification being made in the Preamble of changing the term “Exchange Listed Products” to “Exchange Traded Products” for consistency and clarification and to the benefit of market participants. Additionally, a typographical error in the heading of Listing Rule 5930(b) is proposed to be corrected by changing “Lisitng” to “Listing” for clarification and to the benefit of market participants.

Nasdaq believes that it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to amend Listing Rule 5940 to eliminate the Entry and Application Fees for the specified ETPs, as well as to modify the All-Inclusive Annual Listing Fee for the specified ETPs. Nasdaq believes these changes promote competition for the listing of ETPs. Additionally, Nasdaq also believes these changes are not unfairly discriminatory and represent an equitable allocation of reasonable fees because following the adoption of SEC Rule 6c-11¹²

¹² See 17 CFR 270.6c-11

the majority of ETPs are now listed under the generic listing standards of Nasdaq Rule 5704 (Exchange Traded Fund Shares) and thus no longer require as much in the way of both legal and business resources during the initial application process. Moreover, the Exchange believes that the proposed \$4,000 flat fee per product rather than the current fee based on the total shares outstanding, more accurately reflects and is more closely correlated to the level of Exchange support required, and that the level of support Nasdaq provides does not increase significantly as the ETP's shares outstanding grows. This means that an issuer with more ETPs listed on Nasdaq will have a higher total annual listing fee under the proposed changes than an issuer with fewer ETPs listed on Nasdaq even if the issuer with fewer ETPs has more total shares outstanding.

Specifically, the Exchange believes that amending the All-Inclusive Annual Listing Fee under Listing Rule 5940(b)(1) (and related rule language) from the current fee schedule that is calculated on total shares outstanding that ranges from up to 1 million shares to 250+ million shares with fees that range from \$6,000 to \$50,000 to being replaced by a single fee of \$4,000 per product is not unfairly discriminatory and represents an equitable allocation of reasonable fees because it simplifies the fee schedule and promotes greater competition with the other exchange listing venues. Also, a single fee per product creates a fee schedule that is more reasonable and equitable for products and issuers of all sizes for these ETPs with issuers gaining certainty as the number of their ETPs grow. The total annual listing fee for an issuer increases as the number of ETPs that an issuer has on Nasdaq grows, and the necessary support for the additional listings increases as well. In accordance with these proposed changes, Listing Rule 5940(b)(3) will be eliminated because the new fee structure of the rule renders it irrelevant and unnecessary, and its elimination will be to the benefit of market participants.

The Exchange also believes it is not unfairly discriminatory and represents an equitable

allocation of reasonable fees to amend the introduction to Listing Rule 5940 to say that the securities covered by this rule includes not only Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, and NextShares, but also includes Exchange Traded Fund Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units and Managed Trust Shares¹³ because it clarifies that these additional ETPs are already subject to the fees in this rule and that this change is simply being made to increase the clarity of the rule.

Additionally, Nasdaq believes it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to amend Listing Rule 5940(a)(1) and (b)(1) to include Exchange Traded Fund Shares, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, and Managed Trust Shares because it clarifies that these additional ETPs are already subject to the fees in Listing Rule 5940(a)(1) and (b)(1) and that this change is simply being made to increase the clarity of the rule.

The Exchange also believes it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to add proposed Listing Rule 5940(b)(5) to clarify that in the first calendar year of listing, a product's All-Inclusive Annual Listing Fee will be prorated based on the number of months listed. Current Listing Rule 5940(b)(5) says that except as otherwise set forth in Rule 5940(b), the All-Inclusive Annual Listing Fee described will be assessed as described in Rule 5910(b)(3) -- specifically it is covered by Rule 5910(b)(3)(A). Proposed Listing Rule 5940(b)(5) and Rule 5910(b)(3)(A) both say that in the first calendar year of listing, a product's or Company's All-Inclusive Annual Listing Fee, respectively, will be prorated based

¹³ See supra note 4.

on the number of months listed. The difference, as discussed above, is that proposed Listing Rule 5940(b)(5) will look to prorate the single fee of \$4,000 per product while current Rule 5910(b)(3)(A) is based on the total shares outstanding as of the date of the Company's listing. As a result of the proposed changes, current Listing Rule 5940(b)(5) is being renumbered as Listing Rule 5940(b)(8).

Nasdaq believes it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to add proposed Listing Rule 5940(b)(6) to modify how listing transfers from another national securities exchange to Nasdaq will be handled regarding the All-Inclusive Annual Listing Fee. Currently, Listing Rule 5940(b)(5) says that except as otherwise set forth in Rule 5940(b), the All-Inclusive Annual Listing Fee described will be assessed as described in Rule 5910(b)(3). Proposed Listing Rule 5940(b)(6) says that for the year in which a product listing transfers to Nasdaq, as well as for the first full calendar year of its listing, a product will not be charged the All-Inclusive Annual Listing Fee. Nasdaq believes this proposed rule change is not unfairly discriminatory and represents an equitable allocation of reasonable fees and will further incentivize issuers to transfer ETPs to Nasdaq and promote greater competition among the ETP listing exchanges, which will be to the benefit of issuers, ETPs, and ETP investors.

Additionally, Nasdaq believes it is not unfairly discriminatory and represents an equitable allocation of reasonable fees to add proposed Listing Rule 5940(b)(7) to provide that liquidations will be refunded a portion of the All-Inclusive Annual Listing Fee on a prorated basis based on the number of months listed during the calendar year of liquidation. Currently the Exchange does not provide for such liquidation refunds. The Exchange is proposing this change as another

way to make its fee schedule more competitive with the other exchanges, who also provide for refunds on a prorated basis.¹⁴

Finally, Nasdaq notes that it operates in a highly competitive market in which market participants can readily switch exchanges if they deem the listing fees excessive. In such an environment, Nasdaq must continually review its fees to assure that they remain competitive.

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, as amended. The market for listing ETPs is extremely competitive and ETPs may freely choose alternative listing venues. Nasdaq must continually review its fees to assure that they remain competitive. Also, a single \$4,000 fee per product creates a fee schedule that is more reasonable and equitable for products and issuers of all sizes for these ETPs with issuers gaining certainty as to listing fees as the number of their ETPs grow. For these reasons, Nasdaq does not believe that the proposed rule change will result in any burden on competition for ETP listings.

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)(ii) of the Act.¹⁵

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

¹⁴ See supra footnote 9.

¹⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2021-107 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-2021-107. 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-2021-107 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.¹⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ 17 CFR 200.30-3(a)(12).