

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

No written comments were solicited or received with respect to the proposed rule change.

**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, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange argues that waiver of this requirement is consistent with the protection of investors and the public interest because the proposed change will permit the Fund to more efficiently implement its risk strategy, and, depending on market conditions, to hedge market risk or to provide an opportunity for enhanced returns, which may be to the benefit of investors. The Commission notes that, other than the change proposed herein, no other changes are being made with respect to the Fund, and all other representations made in the First Prior Release and Second Prior Release remain unchanged. The proposal would: (1) Permit the Fund to invest in U.S. exchange-traded stock index futures on broad based indexes, such as futures on the S&P 500 Index; (2) confine all futures contracts in which the Fund may invest to be traded only on U.S. futures exchanges that are members of the ISG; and (3) limit the Fund's investments in futures contracts to 10% of the Fund's net assets. The Commission believes that the proposed change raises no new or novel regulatory issues and would allow the Fund to employ an additional strategy

that would be consistent with the strategy of other Managed Fund Shares without undue delay.<sup>13</sup> Thus, the Commission believes that waiver of the 30-day operative delay with respect to the proposed change to the Fund is consistent with the protection of investors and the public interest. The Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing.<sup>14</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission 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 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2016-66 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-NYSEArca-2016-66. 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/>

<sup>13</sup> See, e.g., Securities Exchange Act Release No. 77620 (April 14, 2016), 81 FR 23339 (April 20, 2016) (SR-BATS-2015-124) (order approving listing and trading of the REX VolMAXX Long VIX Weekly Futures Strategy ETF and the REX VolMAXX Inverse VIX Weekly Futures Strategy ETF of the Exchange Traded Concepts Trust) and *supra*, note 9.

<sup>14</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[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 such filing will also 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-NYSEArca-2016-66 and should be submitted on or before June 15, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-12239 Filed 5-24-16; 8:45 am]

BILLING CODE 8011-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-77853; File No. SR-MIAX-2016-11]

**Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 100 Concerning Professional Customers**

May 19, 2016.

Pursuant to the provisions of 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 May 6, 2016, Miami International Securities Exchange LLC ("MIAX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a 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

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

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 is filing a proposal to amend the definition of Priority Customer in Exchange Rule 100 (Definitions), and to make a technical change to correct a typographical error in the rule text.

The text of the proposed rule change is available on the Exchange's Web site at [http://www.miaxoptions.com/filter/wotitle/rule\\_filing](http://www.miaxoptions.com/filter/wotitle/rule_filing), at MIAX'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, 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

The Exchange proposes to amend the definition of "Priority Customer" in Rule 100 (Definitions) and to add Interpretations and Policies .01 thereto to specify the manner in which the Exchange will calculate the number of orders submitted by a MIAX participant to determine if such orders should be designated as Priority Customer<sup>3</sup> or Professional Interest<sup>4</sup> orders. The Exchange believes that the proposed rule change would provide additional clarity in the Exchange's Rules and serve to promote the purposes for which the Exchange originally adopted its Priority Customer and Professional

<sup>3</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 listed options orders per day on average during a calendar month for its own beneficial account(s). The term "Priority Customer Order" means an order for the account of a Priority Customer. See Exchange Rule 100 (Definitions).

<sup>4</sup> The term "Professional Interest" means (i) an order that is for the account of a person or entity that is not a Priority Customer, or (ii) an order or non-priority quote for the account of a Market Maker. See Exchange Rule 100 (Definitions).

Interest rules. This filing is based upon proposals recently submitted by Chicago Board Options Exchange, Incorporated ("CBOE")<sup>5</sup> and NASDAQ OMX PHLX LLC ("PHLX")<sup>6</sup> and approved by the Commission.

##### Background

In general, certain customers that are not "industry professionals", Market Makers or brokers and dealers of securities are granted certain marketplace advantages on most U.S. options exchanges over other market participants, including over those customers that are industry professionals, Market Makers or broker-dealers. The U.S. options exchanges generally categorize persons or entities that are not brokers or dealers in securities that place more than 390 orders per day on average during a calendar month for their own beneficial account(s) to be "industry professionals". Various exchanges refer to persons or entities that meet or exceed the 390 orders per day threshold as "professionals" or "professional customers",<sup>7</sup> while other exchanges refer to orders placed for such customers' beneficial account(s) to be "professional orders" or "professional interests".<sup>8</sup> Various exchanges adopted similar rules relating to orders placed by or for these industry professionals for many of the same reasons, including, but not limited to the desire to create more competitive marketplaces and attract retail order flow.<sup>9</sup> In addition,

<sup>5</sup> See Securities Exchange Act Release No. 77450 (March 25, 2016), 81 FR 18668 (March 31, 2016) (Order Approving SR-CBOE-2016-005).

<sup>6</sup> See Securities Exchange Act Release No. 77449 (March 25, 2016), 81 FR 18665 (March 31, 2016) (Order Approving SR-PHLX-2016-10).

<sup>7</sup> See BATS Exchange, Inc. ("BZX") Rule 16.1(a)(45) (Professional); BOX Options Exchange LLC ("BOX") Rule 100(a)(50) (Professional); CBOE Rule 1.1(ggg) (Professional); C2 Rule 1.1; BX Chapter I, Sec. 1(49) (Professional); PHLX Rule 1000(b)(14) (Professional); and Nasdaq Options Market ("NOM") Chapter I, Sec. 1(a)(48) (Professional). See also NYSE MKT LLC ("NYSE MKT") Rule 900.2NY(18A) (Professional Customer); and NYSE Arca, Inc. ("Arca") Rule 6.1A(4A) (Professional Customer).

<sup>8</sup> See ISE Rule 100(a)(37C) (Professional Order); ISE Gemini, LLC ("Gemini") Rule 100(a)(37C) (Professional Order); and MIAX Rule 100 (Professional Interest).

<sup>9</sup> See, e.g., Securities Exchange Act Release No. 60931 (November 4, 2009), 74 FR 58355, 58356 (November 12, 2009) (Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Related to Professional Orders) (SR-CBOE 2009-078); Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694, 5694 (January 30, 2009) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to Professional Account Holders) (SR-ISE-2006-026); Securities Exchange Act Release No. 61802 (March 30, 2010), 75 FR 17193, 17194 (April 5, 2010) (Notice of Filing

of Amendment No. 2 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 2 Thereto, Relating to Professional Orders) (SR-PHLX-2010-005); Securities Exchange Act Release No. 61629 (March 2, 2010), 75 FR 10851, 10851 (March 9, 2010) (Notice of Filing of Proposed Rule Change Relating to the Designation of a "Professional Customer") (SR-NYSEMKT-2010-018).

several of the exchanges noted in their original professional order rule filings, their beliefs that disparate professional order rules and a lack of uniformity in the application of such rules across the options markets would not promote the best regulation and may, in fact, encourage regulatory arbitrage.<sup>10</sup> Similar to other U.S. options exchanges, the Exchange grants its Priority Customers certain marketplace advantages over other market participants pursuant to the Exchange's Fee Schedule<sup>11</sup> and Rules.<sup>12</sup> In general, Priority Customers receive allocation and execution priority above equally priced competing interests of Market Makers, broker-dealers, and other market participants. In addition, Priority Customer Orders are generally exempt from transaction fees.

The Exchange currently defines a "Professional Interest" in relevant part as an order that is for the account of a person or entity that is not a Priority Customer.<sup>13</sup> The Exchange's Priority Customer and Professional Interest rules were adopted to distinguish non-broker

<sup>10</sup> See, e.g., Securities and Exchange Act Release No. 62724 (August 16, 2010), 75 FR 51509 (August 20, 2010) (Notice of Filing of a Proposed Rule Change by the NASDAQ Stock Market LLC To Adopt a Definition of Professional and Require That All Professional Orders Be Appropriately Marked) (SR-NASDAQ-2010-099); Securities and Exchange Act Release No. 65500 (October 6, 2011), 76 FR 63686 (October 13, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Definition of Professional and Require That All Professional Orders Be Appropriately Marked) (SR-BATS-2011-041); Securities Exchange Act Release No. 65036 (August 4, 2011), 76 FR 49517, 49518 (August 10, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Definition of "Professional" and Require That Professional Orders Be Appropriately Marked by BOX Options Participants) (SR-BX-2011-049); Securities Exchange Act Release No. 60931 (November 4, 2009), 74 FR 58355, 58357 (November 12, 2009) (Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Related to Professional Orders) (SR-CBOE 2009-078); see also Securities Exchange Act Release 73628 (November 18, 2014), 79 FR 69958, 69960 (November 24, 2014) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Professional Orders) (SR-CBOE-2014-085).

<sup>11</sup> See, e.g., MIAX Options Fee Schedule.

<sup>12</sup> Priority Customer Orders have priority over Professional Interest and all Market Maker interest at the same price. See Exchange Rule 514(d) (Priority of Quotes and Orders); see also 515A (MIAX Price Improvement Mechanism ("PRIME") and PRIME Solicitation Mechanism) (a)(2)(iii) (PRIME Auction Order Allocation) and (b)(2)(iii) (PRIME Solicitation Mechanism Order Allocation).

<sup>13</sup> See supra note 4.

dealer individuals and entities that have access to information and technology that enable them to professionally trade listed options in a manner similar to brokers or dealers in securities, from retail investors for order priority and/or transaction fees purposes. In general, Professional Interest orders are treated in the same manner as the orders of broker-dealers under the Exchange's Rules, including but not limited to, rules governing execution priority and fees.<sup>14</sup> MIAX's average daily order threshold of 390 orders per day is substantially similar to the distinction made by professional order rules of other exchanges and was materially based upon the preexistent professional order rules of other exchanges.<sup>15</sup>

In September 2014, the Exchange clarified its Priority Customer Order and Professional Interest distinctions by issuing a Regulatory Circular to its Members<sup>16</sup> summarizing the requirements for determining the designation of orders as Priority Customer or Professional Interest. For example, the Regulatory Circular codified the Exchange's interpretation that for order counting purposes, a "parent" order that is broken up into multiple "child" orders by an individual at a broker or dealer, or by an algorithm housed at a broker or dealer, at a single price, should count as one single order. This interpretation was a clarification of Exchange Rules based on the Exchange's past interpretations of the definitions of Priority Customer and Professional Interest under Rule 100.

The Exchange's Regulatory Circular, however, has not clarified the Exchange's Priority Customer and Professional Interest rules completely. The advent of new multi-leg spread products and the proliferation of the use of complex orders and algorithmic execution strategies by both institutional and retail market participants continue to raise questions as to what constitutes an "order" for professional order counting purposes. For example, do multi-leg spread orders or strategy orders constitute a single order or multiple orders for professional order counting purposes? The Exchange's Rules do not fully address these issues and there is no common interpretation across the U.S. options markets. The Exchange believes that additional clarity is needed regarding professional order counting.

Accordingly, the Exchange is proposing

<sup>14</sup> See Exchange Rule 100 (Professional Interest). See also *supra* notes 11 and 12.

<sup>15</sup> See *supra* notes 7 and 8.

<sup>16</sup> See MIAX Regulatory Circular 2014-69 (Priority Customer and Professional Interest Order Summary).

to amend its definition of a Priority Customer and to add Interpretations and Policies .01 to such definition to address how various new execution and order strategies should be treated under the Exchange's Rules.

Moreover, the Exchange believes that the proposed rule change would better serve to accomplish the Exchange's goals for its Priority Customer and Professional Interest rules. Based upon current order counting methodology under these Rule 100 definitions, many market participants who are not broker-dealers but nevertheless use sophisticated execution strategies and trading algorithms such that they would typically be considered "industry professionals" or "professional traders" are not captured by the Exchange's Professional Interest rule and are instead treated as Priority Customers. The Exchange believes that these types of market participants have access to technology and market information akin to broker-dealers, unlike typical retail market participants. The Exchange's Priority Customer and Professional Interest rules were designed to differentiate between the foregoing market participants. The Exchange therefore believes that a new Interpretations and Policies to the definition of Priority Customer under Rule 100 is warranted to ensure that Priority Customers are afforded the marketplace advantages that they are intended to be afforded over other types of market participants on the Exchange.

The Exchange notes that despite the adoption of materially similar professional order rules across the markets, there is no consistent definition across the markets as to what constitutes an "order" for professional order counting purposes. While several options exchanges, including MIAX, have attempted to clarify their interpretations of their professional order counting rules through regulatory and information notices and circulars,<sup>17</sup> many of the options exchanges have not adopted rules regarding the application of their professional order counting methodologies. Furthermore, where exchanges have issued interpretive guidance, those interpretations have not

<sup>17</sup> See CBOE Regulatory Circular RG09-148 (Professional Orders); ISE Regulatory Information Circular 2014-007/Gemini Regulatory Information Circular 2014-011 (Priority Customer Orders and Professional Orders (FAQ)); MIAX Regulatory Circular 2014-69 (Priority Customer and Professional Interest Order Summary); NYSE Joint Regulatory Bulletin, NYSE Acra RBO-15-03, NYSE Amex RBO-15-06) (Professional Customer Orders); BOX Regulatory Circular RC-2015-21 (Professional Orders).

necessarily been consistent.<sup>18</sup> As a result, the Exchange believes that the lack of uniformity amongst the exchanges' professional order counting methodologies may not promote the best regulation and in fact may encourage regulatory arbitrage.

#### Proposal

The Exchange proposes to add additional details to the definition of Priority Customer under Rule 100, including a new Interpretations and Policies setting forth a more detailed counting regime for calculating average daily orders for Priority Customer and Professional Interest order counting purposes. Specifically, the Exchange's proposed Interpretations and Policies would make clear how to count complex orders, "parent/child" orders that are broken into multiple orders, and "cancel/replace" orders for Priority Customer and Professional Interest order counting purposes.

Proposed Interpretations and Policies .01, paragraph (a) would provide that except as noted below, each order of any order type, regardless of the options exchange on which the order is entered or to which the order is routed, shall be counted as one (1) order toward the 390-order threshold, except that Flexible Exchange Option (FLEX) orders shall not be counted. This is because FLEX orders are non-electronic orders, and the proposed rule change relates only to orders that are submitted electronically.

Proposed Interpretations and Policies .01, paragraph (b) would state that a complex order<sup>19</sup> comprised of eight (8) options legs or fewer will count as a single order toward the 390-order threshold. A complex order comprised of nine (9) options legs or more will count as multiple orders, with each options leg counting as its own separate order. Stock components of stock-option orders are explicitly excluded from the count because they do not constitute orders in listed options. The Exchange believes that complex orders with nine or more legs are more likely to be used by professional traders than traditional two, three and four leg complex orders

<sup>18</sup> Compare NYSE Joint Regulatory Bulletin, NYSE Acra RBO-15-03, NYSE Amex RBO-15-06 (Professional Customer Orders) with Interpretation and Policy .01 to Rule 1.1(ggg); Regulatory Circular RG09-148 (Professional Orders); ISE Regulatory Information Circular 2014-007/Gemini Regulatory Information Circular 2014-011 (Priority Customer Orders and Professional Orders (FAQ)); and ISE Regulatory Information Circular 2009-179 (Priority Customer Orders and Professional Orders (FAQ)).

<sup>19</sup> The Exchange notes that it does not currently accept complex orders, however as noted above, the proposed Priority Customer and Professional Interest order counting regime will count all orders regardless of the options exchange on which entered.

strategies and combinations thereof with eight legs or fewer, which are generally not algorithmically generated and are frequently used by retail investors. Thus, the types of complex orders traditionally placed by retail investors would continue to count as a single order toward the 390-order threshold while the more complex strategy orders that are typically used by professional traders would count as multiple orders.

Proposed Interpretations and Policies .01, paragraph (c) would provide details relating to the counting of “parent/child” orders. Under the proposal, a “parent” order placed for the beneficial account(s) of a person or entity not a broker or dealer that is broken into multiple subordinate “child” orders on the same side (buy/sell) and series as the “parent” order, by a broker or dealer or an algorithm housed at a broker or dealer or licensed from a broker dealer but housed with the customer, shall count as one (1) order, even if the “child” orders are routed away. Proposed paragraph (c) would permit larger “parent” orders (which may be simple orders or complex orders consisting of up to eight legs), to be broken into multiple smaller orders on the same side (buy/sell) and in the same series (or complex orders consisting of up to eight legs) in order to attempt to achieve best execution for the overall order. Proposed paragraph (c) would essentially separate orders that are part of an overall strategy from those orders that are being “worked” by a broker in order to achieve best execution or in an attempt to time the market.

For example, if a customer were to enter an order to buy 1,000 XYZ \$5 January calls at a limit price of \$1, which the customer’s broker then broke into four separate orders to buy 250 XYZ \$5 January calls at a limit price of \$1 in order to achieve a better execution, the four “child” orders would still only count as one order for Priority Customer and Professional Interest order counting purposes (whether or not the four separate orders were sent to the same or different exchanges for execution).<sup>20</sup> Similarly, in the case of a complex order, if a customer were to enter an order to buy 1,000 XYZ \$5 January(sell)/March(buy)

<sup>20</sup> Notably, however, if the customer herself were to enter the same four identical orders to buy 250 XYZ \$5 January calls at a limit price of \$1 prior to sending the orders, those orders would count as four separate orders for Priority Customer and Professional Interest order counting purposes because the orders would not have been broken into multiple “child” orders on the same side(buy/sell) and series as the “parent” order by a broker or dealer, or by an algorithm housed at a broker or dealer or licensed from a broker or dealer but housed with the customer.

calendar spreads (with a 1:1 ratio on the legs), at a net debit limit price of \$0.20, which the customer’s broker then broke into four separate orders to buy 250 XYZ \$5 January/March calendar spreads (each with a 1:1 ratio on the legs), each at a net debit limit price of \$0.20, the four “child” orders would still only count as one order for Priority Customer and Professional Interest order counting purposes (whether or not the four separate orders were sent to the same or different exchanges for execution).

On the other hand, a “parent” order (including a strategy order)<sup>21</sup> that is broken into multiple subordinate “child” orders on both sides (buy/sell) of a series and/or multiple series shall count as multiple orders, with each “child” order counted as a new and separate order per side and series. Accordingly under this provision, strategy orders, which are most often used by sophisticated traders best characterized as industry professionals, would count as multiple orders for each “child” order entered as part of the overall strategy. For example, if a customer were to enter an order with her broker by which multiple “child” orders were then sent to the Exchange on both sides (buy/sell) of a series in a particular option class, each order entered would count as a separate order for Priority Customer and Professional Interest order counting purposes. Further, if a customer were to enter an order with her broker by which multiple “child” orders were then sent to the Exchange across multiple series in a particular option class, each order entered would count as a separate order for Priority Customer and Professional Interest order counting purposes. Likewise, if the customer instructed her broker to buy a variety of calls across various option classes as part of a basket trade, each order entered by the broker in order to obtain the positions making up the basket would count as a separate order for Priority Customer and Professional Interest order counting purposes.<sup>22</sup>

<sup>21</sup> For purposes of the proposed Interpretation and Policy, the term “strategy order” is intended to mean an execution strategy, trading instruction, or algorithm whereby multiple “child” orders on both sides of a series and/or multiple series are generated prior to being sent to any or multiple U.S. options exchange(s).

<sup>22</sup> Notably, with respect to the types of “parent” orders (including strategy orders) described in paragraph (c) to the definition of Priority Customer under proposed Interpretation and Policy .01 to Rule 100, such orders would be received only as multiple “child” orders on the U.S. options exchange receiving such orders. The “parent” order would be broken apart before being sent by the participant to the exchange(s) as multiple “child” orders.

The Exchange believes that the distinctions between “parent” and “child” orders in proposed paragraph (c) are appropriate. The purpose of proposed paragraph (c) is to distinguish “child” orders of “parent” orders generated by algorithms that are typically used by sophisticated traders to continuously update their orders in concert with market updates in order to keep their overall trading strategies in balance. The Exchange believes that these types of “parent/child” orders typically used by sophisticated traders should count toward the 390-order threshold as multiple orders.

Proposed Interpretations and Policies .01, paragraph (d) would discuss the counting of orders that are cancelled and replaced toward the 390-order threshold. Specifically, proposed paragraph (d)(1) would provide that an order that cancels and replaces a prior order shall count as a second order, or multiple new orders in the case of a complex order comprised of nine (9) options legs or more, including “single-strike algorithms.” A series of cancel and replace orders in an individual strike which track the Exchange’s best bid or offer (“MBBO”) or the national best bid or offer (“NBBO”) shall count as separate new orders. Paragraph (d)(1) makes clear that a cancel message in and of itself, is not an order. For example, if a trader were to enter a non-marketable limit order to buy an option contract at a certain net debit price, cancel the order in response to market movements, and then reenter the same order once it became marketable, those orders would count as two separate orders for Priority Customer and Professional Interest order counting purposes even though the terms of both orders were the same.

Proposed paragraph (d)(2) would provide that except as noted in proposed paragraph (d)(3), an order that cancels and replaces a subordinate “child” order on the same side and series as the “parent” order shall not count as a new order. For example, if a customer were to enter an order with her broker to buy 10,000 XYZ \$5 January calls at a limit price of \$1, which the customer’s broker then entered, but could not fill and then cancelled to avoid having to rest the order in the book as part of a strategy to obtain a better execution for the customer and then resubmitted the remainder of the order, which would be considered a “child” of the “parent” order, once it became marketable, such orders would only count as one order for Priority Customer and Professional Interest order counting purposes.

Proposed paragraph (d)(3) would state that an order that cancels and replaces a subordinate “child” order and results in multiple new sides and/or in multiple series will count as a new order per side and series. Proposed paragraph (d)(3) is aimed at identifying “child” orders of “parent” orders generated by algorithms that are typically used by sophisticated traders to continuously update their orders in concert with market updates in order to keep their overall trading strategies in balance. The Exchange believes that proposed paragraph (d)(3) is consistent with these goals. For example, if an investor were to seek to make a trade (or series of trades) to take a long position at a certain percentage limit on a basket of options, the investor may need to cancel and replace several of the “child” orders entered to achieve the overall execution strategy several times to account for updates in the prices of the underlying securities. In such a case, each “child” order placed to keep the overall execution strategy in place would count as a new and separate order even if the particular “child” order were being used to replace a slightly different “child” order that was previously being used to keep the same overall execution strategy in place. The Exchange believes that the distinctions between cancel/replace orders in proposed paragraphs (d)(2) and (d)(3) are appropriate as the orders described in proposed paragraph (d)(3) are typically generated by algorithms used by sophisticated traders to keep strategy orders continuously in line with updates in the markets. As such, the Exchange believes that in such cases, cancel/replace orders should count as multiple orders.

Finally, proposed paragraph (d)(3) would also codify the Exchange’s “pegged” order interpretation in the text of the Rules. Proposed paragraph (d)(3) would provide that an order that cancels and replaces a subordinate “child” order “pegged” to the MBBO or NBBO will count as a new order each time a cancel/replace order is used to follow the MBBO or NBBO. This interpretation is similar to the Exchange’s current interpretation of its Priority Customer and Professional Interest rules.<sup>23</sup> The Exchange believes that paragraph (d)(3) is appropriate to make clear that pegged strategy orders that are typically used by sophisticated traders should be counted as multiple orders even though such orders may cancel/replace orders on the same side (buy/sell) of the market in a

single series in order to achieve an overall order strategy.

Under current definitions of Priority Customer and Professional Interest under Rule 100, in order to properly represent orders entered on the Exchange, MIAX Members are required to mark orders as “Priority Customer” or “Professional Interest”.<sup>24</sup> This requirement will remain the same. To comply with this requirement, Members are required to review their customer activity on at least a quarterly basis to determine whether orders that are not for the account of a broker-dealer should be represented as Priority Customer or Professional Interest.<sup>25</sup> Orders for any account that had an average of more than 390 orders per day during any month of a given quarter must be represented as Professional Interest for the entire next calendar quarter. Members are required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five days after the end of each calendar quarter. While Members only will be required to review their customer accounts on a quarterly basis, if during a quarter the Exchange identifies a customer for which orders are being represented as Priority Customer but that has averaged more than 390 orders per day during a month, the Exchange will notify the Member and the Member will be required to change the manner in which it is representing the customer’s orders within five days.

The Exchange’s rules only require that Members conduct a look-back to determine whether their customers are averaging more than 390 orders per day at the end of each calendar quarter.<sup>26</sup> The Exchange therefore proposes that the proposed rule amendment become operative on July 1, 2016 in order to ensure that all orders during the quarterly review period commencing July 1, 2016 will be counted in the same manner and that the proposed order counting rules will not be applied retroactively. The Exchange will issue a Regulatory Circular 30 days prior to the operative date.

Additionally, the Exchange is making a technical change to correct a typographical error in the definition of Priority Customer under Rule 100 such that “accounts(s)” shall be corrected to read as “account(s)”.

## 2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act<sup>27</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>28</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, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>29</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed amendment to the definition of Priority Customer under Rule 100 will promote consistent application of the rule by further defining the manner in which the Exchange will compute the average daily number of orders submitted by a MIAX participant during a calendar month for its beneficial account(s) for purposes of determining the appropriate Priority Customer or Professional Interest designation. Furthermore, the Exchange believes that specifying the manner in which the 390-order daily threshold will be calculated within its Rules will provide Members with certainty and provide them with insight as they conduct their quarterly reviews for purposes of designating orders.

The Exchange additionally believes that the proposed rule change provides a more conservative order counting regime that would identify more traders as industry professionals, which the Exchange’s definition of Priority Customer was designed to exclude, and thus create a better competitive balance for all participants on the Exchange, consistent with the Act. As the options markets have evolved to become more electronic and more competitive, the Exchange believes that the distinction between registered broker-dealers on the one hand and professional traders who are nevertheless currently treated as Priority Customers on the other hand has become increasingly blurred. More and more, the Exchange’s category of Priority Customer today includes sophisticated algorithmic traders

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *supra* note 16.

<sup>27</sup> 15 U.S.C. 78f(b).

<sup>28</sup> 15 U.S.C. 78f(b)(5).

<sup>29</sup> See *id.*

<sup>23</sup> See *supra* note 16.

including former market makers and hedge funds that trade with a frequency resembling that of broker-dealers. The Exchange believes that it is reasonable under the Act to treat those customers who meet the high level of trading activity established in the proposal differently than customers who do not meet that threshold and are more typical retail investors to ensure that professional traders do not take advantage of priority and fee benefits intended for Priority Customers.

The Exchange notes that it is not unfair to differentiate between different types of investors in order to achieve certain marketplace balances. The Rules currently differentiate between Priority Customers, broker-dealers, Market-Makers, and the like, and these differentiations have been recognized to be consistent with the Act.<sup>30</sup> The Exchange believes that the current rules of MIAX and other exchanges that accord priority to non-broker-dealer customers over broker-dealers are appropriate and consistent with the Act. The Exchange further believes that it is appropriate and consistent with the Act to accord priority to only those non-professional customers who on average do not place more than one order per minute (390 per day) under the counting regime that the Exchange proposes. The Exchange believes that such differentiations drive competition in the marketplace and are within the business judgment of the Exchange. Accordingly, the Exchange also believes that its proposal is consistent with the requirement of Section 6(b)(8) of the Act<sup>31</sup> that the rules of an exchange not impose an unnecessary or inappropriate burden upon competition in that it treats persons who should be deemed industry professionals, but who may not be so deemed under current Exchange Rules, in a manner so that they do not receive special priority benefits.

Furthermore, the Exchange believes that the proposed rule change will protect investors and the public interest by helping to assure that true Priority Customers continue to receive the appropriate marketplace benefits in the MIAX marketplace as intended, while furthering competition among marketplace professionals by treating them in the same manner as other similarly situated professional market participants. The Exchange believes that

it is consistent with Section 6(b)(5) of the Act<sup>32</sup> not to afford certain market participants that have access to information and technology similar to that of brokers and dealers of securities with marketplace advantages intended for Priority Customers. Finally, the Exchange believes that the proposed rule change sets forth a more detailed and clear regulatory regime with respect to calculating average daily order entry for Priority Customer and Professional Interest order counting purposes. The Exchange believes that this additional clarity and detail will eliminate confusion among market participants, which is in the interests of all investors and the general public.

The Exchange believes that a new set of standards and a more detailed counting regime than the Exchange's current Priority Customer and Professional Interest rules provide would allow the Exchange to better compete for order flow and help ensure deeper levels of liquidity on the Exchange. The Exchange also believes that the proposed rule change would help to remove impediments to and help perfect the mechanism of a free and open market and a national market system by increasing competition in the marketplace. Accordingly, the Exchange proposes to amend the definition of Priority Customer under Rule 100 and adopt a new Interpretations and Policies thereto.

#### *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. In this regard and as indicated above, the Exchange notes that this rule change is substantially similar to recent CBOE and PHLX filings approved by the Commission.<sup>33</sup> As discussed above, the Exchange does not believe that the current rules of MIAX and other exchanges that accord priority to non-broker-dealer customers over broker-dealers are unfairly discriminatory. Nor does the Exchange believe that it is unfairly discriminatory to accord priority to only those non-professional customers who on average do not place more than one order per minute (390 per day) under the counting regime that the Exchange proposes.

The Exchange believes that its proposal does not impose an undue burden on competition. Rather, the Exchange believes that the proposed

rule change would help to remove burdens on competition and promote a more competitive marketplace by affording certain marketplace advantages only to those for whom they are intended. The Exchange notes that one of the purposes of the rules regarding professional traders is to help ensure fairness in the marketplace and promote competition among all market participants. The Exchange believes that the proposed rule change should help establish more competition among market participants and promote the purposes underlying Exchange's Priority Customer and Professional Interest rules. The Exchange does not believe that the Act requires it to equally provide the same incentives and discounts to all market participants given as discussed above, the distinctions among such market participants as professional traders or retail investors.

Rather than burden competition, the Exchange believes that the proposed rule change promotes competition by ensuring that retail investors continue to receive the appropriate marketplace benefits in the MIAX marketplace as intended in the MIAX Rules, while furthering competition among marketplace professionals by treating them in the same manner under the Rules as other similarly situated market participants. The proposal will accomplish this by ensuring that market participants with similar access to information and technology (*i.e.* professional traders and broker-dealers) receive similar treatment under the Rules, while retail investors receive the benefits of order priority and fee waivers that are intended to apply to Priority Customers.

#### *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**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>34</sup> and Rule 19b-4(f)(6) thereunder.<sup>35</sup> Because the proposed rule change does not: (i)

<sup>34</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>35</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

<sup>30</sup> See, e.g., Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694, 5694 (January 30, 2009) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to Professional Account Holders) (SR-ISE-2006-026).

<sup>31</sup> 15 U.S.C. 78(b)(8).

<sup>32</sup> 15 U.S.C. 78(b)(5).

<sup>33</sup> See *supra* notes 5 and 6.

Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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) of the Act<sup>36</sup> to determine whether the proposed rule change 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-MIAX-2016-11 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 No. SR-MIAX-2016-11. 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 such 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 No. SR-MIAX-2016-11, and should be submitted on or before June 15, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2016-12235 Filed 5-24-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77854; File No. SR-NASDAQ-2016-061]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating To Listing and Trading of Shares of the First Trust Equity Market Neutral ETF of the First Trust Exchange-Traded Fund VIII

May 19, 2016.

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 May 4, 2016, 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 Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>37</sup> 17 CFR 200.30-3(a)(12).

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

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

### 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 Equity Market Neutral ETF (the "Fund") of First Trust Exchange-Traded Fund VIII (the "Trust") under Nasdaq Rule 5735 ("Managed Fund Shares").<sup>3</sup> The shares of the Fund are collectively referred to herein as the "Shares."

### 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 IV below. Nasdaq 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 Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares<sup>4</sup> on the Exchange. The Fund will be an actively-managed exchange-traded fund ("ETF"). The Shares will be offered by the Trust, which was

<sup>3</sup> The Commission approved Nasdaq Rule 5735 in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039). There are already multiple actively-managed funds listed on the Exchange; see, e.g., Securities Exchange Act Release Nos. 72506 (July 1, 2014), 79 FR 38631 (July 8, 2014) (SR-NASDAQ-2014-050) (order approving listing and trading of First Trust Strategic Income ETF); 69464 (April 26, 2013), 78 FR 25774 (May 2, 2013) (SR-NASDAQ-2013-036) (order approving listing and trading of First Trust Senior Loan Fund); and 66489 (February 29, 2012), 77 FR 13379 (March 6, 2012) (SR-NASDAQ-2012-004) (order approving listing and trading of WisdomTree Emerging Markets Corporate Bond Fund). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

<sup>4</sup> A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) (the "1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index, or combination thereof.

<sup>36</sup> 15 U.S.C. 78s(b)(2)(B).