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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92134; File No. SR-NASDAQ-2021-046]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Equity 7, Section 114(f)

June 9, 2021.

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 27, 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 amend the Exchange's Pricing Schedule at Equity 7, Section 114(f) ("Pricing Schedule").

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 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 amend the Exchange's Pricing Schedule at Equity 7, Section 114(f) applicable to the Designated Liquidity Provider ("DLP")³ Program. The Exchange proposes to amend the rebates applicable for DLPs in Nasdaq-listed securities with monthly incentives that are directly tied to meeting market quality metrics ("MQMs"). Specifically, the Exchange proposes to (1) add Exchange Traded Fund Shares listed on Nasdaq pursuant to Nasdaq Rule 5704, Proxy Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5750, and Managed Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5760 to the list of securities that may be designated as a Qualified Security, as long as it has at least one DLP; (2) amend Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5), as well as to address secondary DLPs ("Secondary DLPs"); (3) change the current schedule under Equity 7, Section 114(f)(5) from three tiers to five tiers, establish both standard

rebates ("Standard Rebate") and enhanced rebates ("Enhanced Rebate"), as well as address Secondary DLPs; and (4) change the existing Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B), as well as add a new tier to the schedule.

Description of the Changes

The proposal amends the rebates applicable for DLPs in Nasdaq-listed securities with monthly incentives that are directly tied to meeting MQMs.⁴ The Exchange believes that these changes will encourage DLPs to maintain better market quality in Nasdaq-listed securities, and, in particular, in lower volume securities where transaction-based compensation (*i.e.*, rebates) may not be sufficient. The Exchange currently offers a DLP Program, which applies to transactions in a Qualified Security⁵ by one of its DLPs associated with its DLP Program market participant identifier ("MPID").

Add Exchange Traded Fund Shares, Proxy Portfolio Shares and Managed Portfolio Shares To List That May Be Designated as a Qualified Security

The Exchange proposes to amend Equity 7, Section 114(f)(1)(A) to add Exchange Traded Fund Shares listed on Nasdaq pursuant to Nasdaq Rule 5704,⁶ Proxy Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5750 and Managed Portfolio Shares listed on Nasdaq pursuant to Nasdaq Rule 5760 to the list of securities that may be designated as a Qualified Security, as long as it has at least one DLP. Nasdaq Rule 5704 (Exchange Traded Fund Shares), Nasdaq Rule 5750 (Proxy Portfolio Shares) and Nasdaq Rule 5760 (Managed Portfolio Shares) were all fairly recently adopted and should be added to the existing list that already includes: Nasdaq Rule 5705—Exchange Traded Funds: Portfolio Depository Receipts and Index Fund Shares; Nasdaq Rule 5710—Securities Linked to the Performance of Indexes and Commodities (Including Currencies); Nasdaq Rule 5720—Trust Issued Receipts; Nasdaq Rule 5735—Managed Fund Shares; and Nasdaq Rule 5745—

³ Equity 7, Section 114(f)(2) defines a "Designated Liquidity Provider" or "DLP" as a registered Nasdaq market maker for a Qualified Security (defined below) that has committed to maintain minimum performance standards. A DLP will be selected by Nasdaq based on factors including, but not limited to, experience with making markets in exchange-traded products, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws. Nasdaq may limit the number of DLPs in a security, or modify a previously established limit, upon prior written notice to members.

⁴ The Exchange is also making a technical change in the second sentence of Equity 7, Section 114(f)(5)(B) to change "Rebate" to "rebate".

⁵ Equity 7, Section 114(f)(1) says a security may be designated as a "Qualified Security" if: (a) It is an exchange-traded product listed on Nasdaq pursuant to Nasdaq Rules 5705, 5710, 5720, 5735, or 5745; and (b) it has at least one DLP.

⁶ The inclusion of Nasdaq Rule 5704 to the list of securities that may be designated as a Qualified Security is not a substantive change, but being added as a clarification because the securities listed under Nasdaq Rule 5704 are already covered by Nasdaq Rules 5705 and 5735.

²¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Exchange-Traded Managed Fund Shares (“NextShares”). Both Proxy Portfolio Shares and Managed Portfolio Shares are semi-transparent exchange-traded funds (“ETFs”) that also need support from a market quality perspective just like traditional ETFs. Since these products are new and incubating, the Exchange believes the DLP changes will be beneficial to these ETFs as well.

Amend Monthly Performance Criteria for Rebates and Address Secondary DLPs

The Exchange also proposes to amend Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5). Currently, to qualify for the basic rebate, which is being renamed the “Primary DLP Rebate,” under Equity 7, Section 114(f)(4), a DLP must be at the national best bid (best offer) (“NBBO”) at least 20% of the time on average in the assigned exchange-traded product (“ETP”). As amended, a Primary DLP will need to meet all four of the Standard MQMs in the assigned ETP as measured by Nasdaq to qualify for the Standard Rebate and all four of the Enhanced MQMs in the assigned ETP as measured by Nasdaq to qualify for the Enhanced Rebate. These MQMs are measured on average in the assigned ETP during regular market hours:⁷ (1) Time at the NBBO will be 20% for the Standard Rebate and 50% for the Enhanced Rebate; (2) time within 5 basis points of NBBO will be 50% for the Standard Rebate and 75% for the Enhanced Rebate; (3) notional depth will be \$100,000 (within 150 basis points of NBBO) for the Standard Rebate and \$100,000 (within 50 basis points of NBBO) for the Enhanced Rebate; and (4) average spread will be less than 125 basis points for the Standard Rebate and less than 25 basis points for the Enhanced Rebate.

Nasdaq is proposing these changes to the DLP Program to modernize it so that it becomes a program that is more market quality focused rather than transaction-based. The new MQMs are intended to encourage DLPs to uphold better quality markets in Nasdaq-listed ETPs and also ensure a scalable business model to support new and incubating ETPs that often trade less on a daily basis (*i.e.*, certain rebates will be on a fixed amount rather than on a per executed share basis).

⁷ Equity 7, Section 114(h)(9) says “The term “regular market hours” means 9:30 a.m. through 4:00 p.m., or such shorter period as may be designated by Nasdaq on a day when the securities markets close early.”

Additionally, the Exchange proposes to amend Equity 7, Section 114(f)(4) to address Secondary DLPs. If there are two DLP assignments for a Nasdaq-listed ETP, the Secondary DLP will be determined by using the factors in Section 114(f)(2). The Secondary DLP will qualify for rebates in ETPs if it meets two of the four Enhanced MQMs noted above. The Exchange believes that allowing two DLPs will work to further support the market quality in lower average daily volume (“ADV”) ETPs and increase resiliency in market quality performance. By incentivizing more than one market maker to meet the increased MQMs, lower ADV ETPs now have more market makers who are incentivized to provide quote quality and layering of notional depth, which can be a benefit if the Primary DLP has an unforeseen quoting or technology issue. Also, by adding the MQMs, the Primary and Secondary DLP are incentivized to not only provide quotes at the NBBO but also other important quote quality metrics around the NBBO.

Amend Rebate Tiers To Include Standard and New Enhanced Rebates and Update Schedule From Three to Five Tiers, and Address Secondary DLPs

Currently, the Exchange provides rebates in Equity 7, Section 114(f)(5)(A) that are in lieu of or in addition to, as specified [sic], other rebates or fees provided under Equity 7, Sections 114 and 118. The Exchange proposes to change the current schedule of three tiers⁸ to an updated schedule with five tiers and will clarify that the rebates will only apply to MPIDs where a member is a Primary DLP.

The proposed amended schedule contains five tiers based on monthly ADV and includes both a Standard Rebate and an Enhanced Rebate for Primary DLPs. Tier 1 will apply to ETPs with monthly ADV greater than 1 million in the prior month with a Standard Rebate of \$0.0034 per executed share and with an Enhanced Rebate of \$0.0036 per executed share. Tier 2 will apply to ETPs with monthly ADV between 250,001 and 1 million in the prior month with a Standard Rebate of \$0.0040 per executed share and with an Enhanced Rebate of \$0.0042 per executed share. Tier 3 will apply to

⁸ The current three tiers are: (1) \$0.0070 per executed share for ETPs with monthly ADV less than 500,000 in the prior month; (2) \$0.0042 per executed share for ETPs with monthly ADV between 500,000 and 5 million in the prior month; and (3) \$0.0036 per executed share for ETPs with monthly ADV greater than 5 million in the prior month. Enhanced Rebates are not addressed in the current schedule.

ETPs with monthly ADV between 150,001 and 250,000 in the prior month with a Standard Rebate of \$200 per month and with an Enhanced Rebate of \$350 per month. Tier 4 will apply to ETPs with monthly ADV between 50,001 and 150,000 in the prior month with a Standard Rebate of \$225 per month and with an Enhanced Rebate of \$450 per month. Tier 5 will apply to ETPs with monthly ADV less than 50,001 in the prior month with a Standard Rebate of \$300 per month and with an Enhanced Rebate of \$500 per month. The Tier 3–5 rebates will be in addition to any other rebates the Primary DLP qualifies for under Equity 7, Sections 114 and 118.

Currently, the Exchange’s DLP Program incentivizes DLPs with a transaction-style rebate with one market quality requirement (time at inside at least 20%). While this does benefit some ETPs, it may not be satisfactory for lower volume ETPs, which are often new and incubating products that need a different support model from the Nasdaq. The Exchange believes the changes will better position these ETPs for success and benefit the issuers and market makers by offering a fixed rebate for meeting more market quality requirements in lower volume ETPs.

Nasdaq believes that by allowing a hybrid-style rebate program (transaction and fixed rebate), the Exchange can better support the market makers’ business model. The Exchange believes that the amended DLP Program and market quality requirements will serve to better align the Exchange incentives with a more scalable and reliable model for DLPs, as well as increase market quality performance in Nasdaq-listed ETPs. The Exchange decided to retain a per executed share rebate model for ETPs with an ADV greater than 250,001. Based on issuer and market maker feedback, it was evident that for more actively traded ETPs this model may provide greater incentives for DLPs while still holding DLPs to more stringent MQMs.

The Exchange also proposes that if there is more than one DLP to an assigned ETP, then the Secondary DLP receives \$150 per month or an additional \$0.0003 per executed share, depending upon the tier, which will be in addition to any other rebate the Secondary DLP is eligible for under Equity 7, Sections 114 and 118. The Exchange believes that by allowing two DLPs (the Secondary DLP will be determined by using the factors in Equity 7, Section 114(f)(2)) will work to further support the market quality in lower ADV ETPs and increase resiliency in market quality performance.

Change Existing Additional Tape C ETP Incentives and Add New Tier

In addition, the Exchange proposes to change the existing Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B), as well as add a new tier. The rebates are provided to an eligible member for each displayed share that adds liquidity in a Tape C ETP that meets the criteria of Equity 7, Section 114(f)(1)(A) and will only apply to the MPID where a member is a DLP.

The Exchange proposes to amend the Incremental Tape C ETP Rebate for Tier 1 (applicable to members with a minimum monthly average of 10 assigned ETPs as a DLP) to decrease from \$0.0003 per executed share to \$0.0002 per executed share. The Exchange proposes to amend the Incremental Tape C ETP Rebate for Tier 2 (applicable to members with a minimum monthly average of 25 assigned ETPs as a DLP) to decrease from \$0.0004 per executed share to \$0.0003 per executed share. The Exchange proposes to amend the Incremental Tape C ETP Rebate for Tier 3 (applicable to members with a minimum monthly average of 50 assigned ETPs as a DLP) to decrease from \$0.0005 per executed share to \$0.0004 per executed share. Finally, the Exchange proposes to add a Tier 4 that will have an Incremental Tape C ETP Rebate of \$0.0005 per executed share applicable to members with a minimum monthly average of 100 assigned ETPs as a DLP. In addition, the Exchange will eliminate the existing language at the end of the rule.⁹ The Exchange is updating the Tape C ETP rebate to better reflect the growing number of ETP listings on Nasdaq. The Exchange is proposing to eliminate the existing language at the end of Equity 7, Section 114(f)(5)(B) that follows the Additional Tape C ETP Incentives schedule because the Exchange believes it was not an effective part of the DLP Program, and that the amended rebates will be more impactful to ETF issuers and market makers.

2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,¹⁰ in general, and further the objectives of Sections 6(b)(4) and

⁹ The rule language currently says "If a current DLP has less than 10 DLP assignments, but increases the number of ETPs for which it is a DLP by 100%, the DLP will receive an incremental additional Tape C ETP rebate of \$0.0001. A DLP receiving its first assignment will count as a 100% increase. This incremental rebate is only available for the first 100% increase and thus is not available for subsequent increases of 100%."

¹⁰ 15 U.S.C. 78f(b).

6(b)(5) of the Act,¹¹ in particular, in that they provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities and do not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange also notes that its ETP listing business operates in a highly-competitive market in which market participants, which include both DLPs and ETP issuers, can readily transfer their listings or opt not to participate, respectively, if they deem fee levels, liquidity incentive programs, or any other factor at a particular venue to be insufficient or excessive. The proposed rule change reflects a competitive pricing structure designed to incentivize issuers to list new products and transfer existing products to the Exchange and market participants to enroll and participate as DLPs on the Exchange, which the Exchange believes will enhance market quality in qualified ETPs listed on the Exchange.

Add Exchange Traded Fund Shares, Proxy Portfolio Shares and Managed Portfolio Shares To List That May Be Designated as a Qualified Security

The Exchange believes that the change to expand the list of securities that may be designated as a "Qualified Security" to include Exchange Traded Fund Shares under Nasdaq Rule 5704, Proxy Portfolio Shares under Nasdaq Rule 5750 and Managed Portfolio Shares under Nasdaq Rule 5760, as long as they have at least one DLP, is reasonable and would be consistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased clarity and transparency of the Pricing Schedule. The inclusion of Exchange Traded Fund Shares is not a substantive change, but being added as a clarification because the securities listed under Nasdaq Rule 5704 are already covered by Nasdaq Rules 5705 and 5735 and this simply clarifies that such a security may be designated as a "Qualified Security." The addition of Proxy Portfolio Shares and Managed Portfolio Shares to the list of securities that may be designated as a "Qualified Security" is reasonable because low ADV semi-transparent ETPs also need support from a market quality perspective just like traditional ETPs. Since these products are new and incubating, the Exchange believes the DLP changes will be beneficial to these ETFs as well.

¹¹ 15 U.S.C. 78f(b)(5).

Amend Equity 7, Section 114(f)(4) To Revise the Monthly Performance Criteria Related to Specific Rebates Provided Under Equity 7, Section 114(f)(5), and To Address Secondary DLPs

The Exchange believes that amending Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5) by better aligning the behavior required to qualify for rebates with the nature of the rebates provided is reasonable because the Exchange must from time to time assess the effectiveness of the incentives it provides to market participants in return for the beneficial behavior required to receive the incentive. In this case, the Exchange is amending the program so that a Primary DLP will need to meet all four of the Standard MQMs in the assigned ETP as measured by Nasdaq to qualify for the Standard Rebate and all four of the Enhanced MQMs in the assigned ETP as measured by Nasdaq to qualify for the Enhanced Rebate. These MQMs are measured on average in the assigned ETP during regular market hours: (1) Time at the NBBO will be 20% for the Standard Rebate and 50% for the Enhanced Rebate; (2) time within 5 basis points of NBBO will be 50% for the Standard Rebate and 75% for the Enhanced Rebate; (3) notional depth will be \$100,000 (within 150 basis points of NBBO) for the Standard Rebate and \$100,000 (within 50 basis points of NBBO) for the Enhanced Rebate; and (4) average spread will be less than 125 basis points for the Standard Rebate and less than 25 basis points for the Enhanced Rebate.

The Exchange believes that the proposed eligibility criteria are an equitable allocation and are not unfairly discriminatory because the Exchange will apply the same criteria to all DLPs. The Exchange also believes that the proposed eligibility criteria are an equitable allocation and are not unfairly discriminatory among Exchange members because any member may become a market maker and take the steps necessary to also become a DLP, including meeting the proposed minimum criteria under Equity 7, Section 114(f)(4).¹² The DLP Program is limited to Exchange market makers because of their unique role in the markets, including their obligation to provide liquidity in the securities in which they are registered. Thus, the DLP Program is a further extension of

¹² The Exchange will select DLPs based on the factors in Equity 7, Section 114(f)(2).

the market maker's role in providing liquidity in specific securities, to the benefit of all market participants.

The Exchange also believes these changes are an equitable allocation and are not unfairly discriminatory because the Exchange is proposing these changes to the DLP Program to modernize it so that it becomes a program that is more market quality focused rather than transaction-based (*i.e.*, the Exchange will pay fixed amount rebates that fall within Tiers 3–5). The new MQMs are intended to encourage DLPs to uphold better quality markets in Nasdaq-listed ETPs and also ensure a scalable business model to support new and incubating ETPs that often trade less on a daily basis.

The Exchange believes that its proposal to amend Equity 7, Section 114(f)(4) to address Secondary DLPs is reasonable because it allows that if there are two DLP assignments for a Nasdaq-listed ETP (the Secondary DLP will be determined by using the factors in Section 114(f)(2)) and that the Secondary DLP will qualify for rebates in ETPs if it meets two of the four Enhanced MQMs as noted above. The Exchange believes that this proposal is an equitable allocation and is not unfairly discriminatory because allowing two DLPs will work to further support the market quality in lower ADV ETPs and increase resiliency in market quality performance. Additionally, the Exchange believes that by incentivizing more than one market maker to meet the increased MQMs, lower ADV ETPs now have more market makers who are incentivized to provide quote quality and layering of notional depth, which can be a benefit if the Primary DLP has an unforeseen quoting or technology issue. Also, by adding the MQMs, the Primary and Secondary DLP are incentivized to not only provide quotes at the NBBO but also other important quote quality metrics around the NBBO.

The Exchange believes that its proposals to add additional MQMs and rebates are not unfairly discriminatory because these rebates are available to all qualifying members and reward meaningful quote quality and liquidity in ETPs. Moreover, these proposals stand to improve the overall market quality of the Exchange, to the benefit of all market participants, by allowing a hybrid-style rebate program (transaction and fixed rebate), the Exchange can better support the market makers' business model. The Exchange believes that the amended DLP Program and market quality requirements will serve to better align the Exchange incentives with a more scalable and reliable model

for DLPs, as well as increase market quality performance in Nasdaq-listed ETPs.

Amend Rebate Tiers To Include Standard and New Enhanced Rebates and Update Schedule From Three to Five Tiers, and Address Secondary DLPs

The Exchange believes that its proposal to amend the DLP Program's rebate tiers to include Standard and new Enhanced Rebates and updating the Pricing Schedule from three to five tiers, and to clarify that the rebates will only apply to MPIDs where a member is a Primary DLP, and that Tier 3–5 rebates will be in addition to any other rebates the Primary DLP qualifies for under Equity 7, Sections 114 and 118, is reasonable because it will encourage DLPs to uphold better quality markets in Nasdaq-listed ETPs through being more market quality focused rather than transaction-based. Currently, the Exchange's DLP Program incentivizes DLPs with a transaction-style rebate with one market quality requirement (time at inside at least 20%). Although this does benefit some ETPs, it may not be satisfactory for lower volume ETPs, which are often new and incubating products that need a different support model from the Exchange.

The Exchange believes that amending the DLP Program as proposed is an equitable allocation of rebates and is not unfairly discriminatory because it will allocate its rebates fairly among its market participants (*i.e.*, the Exchange will pay higher rebates to DLPs that meet higher MQMs and will pay DLPs higher fixed rebates for the ETPs with lower ADVs). It will better position these lower volume ETPs for success and will benefit issuers and market makers by offering a fixed rebate for meeting more market quality requirements in lower volume ETPs.

Specifically, the Exchange proposes to change the current schedule under Equity 7, Section 114(f)(5) from three tiers to five tiers.¹³ The proposed five tiers are based on monthly ADV and includes both a Standard Rebate and an Enhanced Rebate. The Exchange believes this proposal is an equitable allocation of rebates and is not unfairly discriminatory because by allowing for a fixed payment in lower ADV products, it provides for a more reliable business model for DLPs while adding on quote and market quality requirements and reflects an equitable allocation of rebates. Additionally, by allowing a hybrid style rebate program (transaction-based and a fixed rebate),

the Exchange can better support the market makers' business model. The Exchange believes that the DLP Program, as amended, will better align incentives with a more scalable and reliable model for DLPs and increase market quality performance in Nasdaq-listed ETPs. Additionally, retaining a per executed share rebate model for ETPs with an ADV greater than 250,001 may provide greater incentives for DLPs while still holding DLPs to more stringent MQMs.

The Exchange also believes that its proposal that if there is more than one DLP to an assigned ETP, then the Secondary DLP receives \$150 per month or an additional \$0.0003 per executed share, depending upon the tier, will be in addition to any other rebate the Secondary DLP is eligible for under Equity 7, Sections 114 and 118 is an equitable allocation of rebates and is not unfairly discriminatory because allowing two DLPs (the Secondary DLP will be determined by using the factors in Section 114(f)(2)) will work to further support the market quality in lower ADV ETPs and increase resiliency in market quality performance.

The Exchange believes that its proposals are not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its tiered pricing model is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries—from co-branded rebate cards [*sic*] to grocery stores to cellular telephone data plans—that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The Exchange also believes that its amended Pricing Schedule is not unfairly discriminatory because if successful, it stands to improve the quality of the Nasdaq market, to the benefit of all market participants. The Exchange has limited resources with which to apply to incentives, and it must allocate those limited resources in a manner that prioritizes areas of greatest need and potential effect.

Change Existing Additional Tape C ETP Incentives and Add New Tier

The Exchange believes that its proposal to amend the existing

¹³ See *supra* note 8.

Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B) and add a new tier is reasonable because it allows an eligible member for each displayed share that adds liquidity in a Tape C ETP that meets the criteria of Equity 7, Section 114(f)(1)(A) to receive a rebate and limits it those MPIDs where a member is a DLP. ETP listings in a highly competitive market in which ETP issuers and DLPs can opt to not participate or transfer listings. The additional tier reflects the growing number of ETPs listed on Nasdaq.

In addition, the Exchange believes it is reasonable to eliminate the existing language at the end of the rule because the Exchange believes it was not an effective part of the DLP Program, and that the amended rebates will be more impactful to ETF issuers and market makers. The Exchange also believes that making a technical change in the second sentence of Equity 7, Section 114(f)(5)(B) to change "Rebate" to "rebate" is reasonable since it is merely a clarification that improves the sentence.

The Exchange believes that amending the DLP Program as proposed is an equitable allocation of rebates and is not unfairly discriminatory because it will allocate its rebates fairly among its market participants (*i.e.*, the Exchange will pay higher rebates for DLPs with more ETPs assigned). Additionally, it will better position these lower volume ETPs for success and will benefit issuers and market makers.

The Exchange also believes that amending the DLP Program as proposed is an equitable allocation of rebates and is not unfairly discriminatory because it is intended to encourage DLPs to promote better market quality and liquidity in qualified Nasdaq-listed ETPs. By providing increased rebates based on better market quality and their DLP footprint, the Exchange believes that it will encourage DLPs to register, quote and trade in more ETPs on Nasdaq. Additionally, the Exchange believes the updated rebates will incentivize DLPs to register to support additional ETPs, especially lower ADV products.

The Exchange also believes that its proposal to amend the existing Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B) and add a new tier is not unfairly discriminatory because if successful, it stands to improve the quality of the Nasdaq market, to the benefit of all market participants. The Exchange has limited resources with which to apply to incentives, and it must allocate those limited resources in a manner that

prioritizes areas of greatest need and potential effect.

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. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem rebates or fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its rebates and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own rebates and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which rebate and fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the Exchange is proposing to modify the incentives provided to market makers for participation in the DLP program in an effort to improve the program by providing more targeted incentives to improve and increase market quality in ETPs that are in need of such improvement the most. The Exchange uses incentives, such as the rebates of the DLP program, to incentivize market participants to improve the market. The Exchange must, from time to time, assess the effectiveness of incentives and adjust them when they are not as effective as the Exchange believes they could be. Moreover, the Exchange is ultimately limited in the amount of rebates it may offer. The proposed new criteria and incentives are reflective of such an analysis.

The Exchange notes that participation in the DLP program is entirely voluntary and, to the extent that registered market makers determine that the rebates are not in line with the level of market-improving behavior the Exchange requires, a DLP may elect to deregister as such with no penalty. The Exchange notes that it is amending the MQMs required for a DLP to receive an increased rebate under the program, and thus there is a risk that a DLP may not qualify for any of the increased incentives under the amended program if it provides the same level market

participation, but will still qualify for their regular base rebate.

The Exchange does not believe that the proposed changes place an unnecessary burden on competition and, in sum, if the changes proposed herein are unattractive to market makers, it is likely that the Exchange will lose participation in the DLP program as a result. As noted above, the Exchange is continuing to limit eligibility for the program to Exchange market makers. The Exchange believes that Exchange market makers are best positioned to provide market improvement in DLP Program ETPs in light of their unique function in the markets. Moreover, any Exchange member may elect to take the steps necessary to become an Exchange market maker and therefore become eligible for the program if they choose. The Exchange will continue to select DLPs based on the factors in Equity 7, Section 114(f)(2). Thus, the Exchange does not believe that the proposal represents a burden on competition among Exchange members, or that the proposal will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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.¹⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (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.

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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. Please include File Number SR-NASDAQ-2021-046 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-2021-046. 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 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-2021-046 and should be submitted on or before July 6, 2021.

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

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-12475 Filed 6-14-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92133; File No. SR-FINRA-2020-038]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, to FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) That Would Require Members To File Retail Communications Concerning Private Placement Offerings That Are Subject to Those Rules' Filing Requirements

June 9, 2021.

I. Introduction

On October 28, 2020, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend FINRA Rules 5122 (Private Placements of Securities Issued by Members) and 5123 (Private Placements of Securities) that would require members to file certain retail communications concerning private placements.

The proposed rule change was published for comment in the **Federal Register** on November 6, 2020.³ On December 11, 2020, FINRA consented to an extension of the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to February 4, 2021.⁴ On January 12, 2021, FINRA responded to five comment letters received in response to the Notice and filed an amendment to the proposed rule change ("Amendment No. 1").⁵ On January 29,

2021, FINRA responded to a sixth comment letter received in response to the Notice.⁶ On February 4, 2021, the Commission filed an Order Instituting Proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁷ The Commission received no comments in response to the OIP. On April 12, 2021, FINRA responded to a seventh comment letter received in response to the Notice.⁸ On May 4, 2021, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to May 26, 2021.⁹ On May 25, 2021, FINRA consented to an extension of the time period in which the Commission must approve or disapprove the proposed rule change to June 9, 2021.¹⁰ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

For certain private placements of unregistered securities issued by a FINRA member or a control entity¹¹ ("member private placements"), FINRA Rule 5122 requires the member or control entity to provide prospective

¹ 8233135-227749.pdf. Amendment No. 1 is available at <https://www.finra.org/sites/default/files/2021-01/SR-FINRA-2020-038-Amendment1.pdf>.

² See letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 29, 2021 ("FINRA January 29 Letter"). The FINRA January 29 Letter is available at the Commission's website at <https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8311262-228459.pdf>.

³ See Exchange Act Release No. 91066 (Feb. 4, 2021), 86 FR 8970 (Feb. 10, 2021) (File No. SR-FINRA-2020-038) ("OIP").

⁴ See letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated April 12, 2021 ("FINRA April 12 Letter"). The FINRA April 12 Letter is available at the Commission's website at <https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038-8662482-235305.pdf>.

⁵ See letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 4, 2021. This letter is available at <https://www.finra.org/sites/default/files/2021-05/SR-FINRA-2020-038-Extension2.pdf>.

⁶ See letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated May 25, 2021. This letter is available at <https://www.finra.org/sites/default/files/2021-05/SR-FINRA-2020-038-Extension3.pdf>.

⁷ A "control entity" means any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons. See FINRA Rule 5122(a)(2)-(3); see also Notice at note 3.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Release No. 90302 (Nov. 2, 2020), 85 FR 71120 (Nov. 6, 2020) (File No. SR-FINRA-2020-038) ("Notice").

⁴ See letter from Joseph Savage, Vice President, Office of General Counsel Regulatory Policy, FINRA, to Daniel Fisher, Branch Chief, Division of Trading and Markets, Commission, dated December 11, 2020. This letter is available at <https://www.finra.org/sites/default/files/2021-01/SR-FINRA-2020-038-Extension1.pdf>.

⁵ See letter from Joseph P. Savage, Vice President and Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 12, 2021 ("FINRA January 12 Letter"). The FINRA January 12 Letter is available at the Commission's website at <https://www.sec.gov/comments/sr-finra-2020-038/srfinra2020038->

¹⁵ 17 CFR 200.30-3(a)(12).