

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87486; File No. SR-NASDAQ-2019-061)

November 7, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Nasdaq Official Closing Price for Nasdaq-Listed Exchange-Traded Products

I. Introduction

On August 8, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to how the Nasdaq Official Closing Price (“NOCP”) will be determined for a Nasdaq-listed security that is an exchange-traded product (“ETP”). The proposed rule change was published for comment in the Federal Register on August 23, 2019.³ On October 4, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission received one comment letter from the Exchange on the proposed rule change.⁶ On October 25,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 86705 (August 19, 2019), 84 FR 44343 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 87230, 84 FR 54714 (October 10, 2019). The Commission designated November 21, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ See letter from Phil Mackintosh, Chief Economist, Nasdaq, Inc., dated October 10, 2019, available at <https://www.sec.gov/comments/sr-nasdaq-2019-061/srnasdaq2019061->

2019, the Exchange filed Amendment No. 1 to the proposed rule change.⁷ The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

Currently, for a Nasdaq-listed ETP that participates in the Nasdaq closing cross, the closing cross price will be the NOCP.⁸ For a Nasdaq-listed ETP that does not have a closing cross, the Nasdaq last sale price will be the NOCP.⁹ According to the Exchange, thinly-traded ETPs are less likely to have a closing cross, which can result in a closing price that is based on a stale price that is no longer reflective of the value of the security.¹⁰ Specifically, if an ETP is thinly-traded, it is possible that the NOCP would be based on a Nasdaq last sale price that may not necessarily reflect the current value of the security.¹¹ The Exchange now proposes to amend Nasdaq Rule 4754(b)(4) to amend how it would determine the NOCP for a Nasdaq-listed ETP¹² that does not have a closing cross.¹³

[6293523-193399.pdf](#) (“Nasdaq Letter”).

⁷ In Amendment No. 1, the Exchange provided additional justification for its proposed methodology for determining the NOCP for Nasdaq-listed ETPs and specified that it will implement the proposed rule change within 30 calendar days following Commission approval. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-061/srnasdaq2019061-6353201-195587.pdf>.

⁸ See Nasdaq Rule 4754(b)(4).

⁹ See Notice, *supra* note 3, at 44344-45.

¹⁰ See id. at 44344.

¹¹ See id.

¹² As used in proposed Nasdaq Rule 4754(b)(4), an ETP would mean a series of Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, or Trust Issued Receipts (as defined in Nasdaq Rules 5705(a), 5705(b), 5735, and 5720, respectively); securities linked to the performance of indexes and commodities (including currencies) (as defined in Nasdaq Rule 5710); Index-Linked Exchangeable Notes, Equity Gold Shares, Trust Certificates, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed

Under proposed Nasdaq Rule 4754(b)(4)(A), the NOCP for a Nasdaq-listed ETP that does not have a closing cross would be the time-weighted average midpoint (“T-WAM”) of the national best bid and national best offer (“NBBO”), with certain parameters. Specifically, the T-WAM price would be a time-weighted average midpoint value calculation that uses eligible quotes during the time period of 3:58:00 p.m. to 3:59:55 p.m., based on quotes observed every second.¹⁴ The T-WAM calculation would only use eligible quotes, and an eligible quote would be defined as a quote whose spread is no greater than a value of 10% of the midpoint price. Quoted spreads within the T-WAM time period that are greater than 10% of the midpoint price would be excluded from the T-WAM calculation. Crossed NBBO markets would also be excluded from the T-WAM calculation.

As proposed, if there are no eligible quotes to use in the T-WAM calculation or if the ETP is halted, the Exchange would use the consolidated last sale price prior to 4:00:00 p.m. as the NOCP. For an ETP that is already listed on Nasdaq, if there are no eligible quotes to use in

Trust Securities, or Currency Warrants (as defined in Nasdaq Rule 5711(a)-(k)). The proposal would not apply to NextShares (as defined in Nasdaq Rule 5745) and corporate securities. See Notice, supra note 3, at 44344 n.4.

¹³ The Exchange is not proposing to change the process for determining the price level at which the closing cross will occur. See id. at 44344 n.9. Nasdaq-listed ETPs that have closing crosses will continue to be priced using the current process for calculating the closing cross price. See id. at 44344.

¹⁴ The Exchange states that it has considered using the last sale for an ETP that does not have a closing cross, but determined that even if the last sale occurs during the last two minutes leading into the closing cross, it is not necessarily reflective of the best price to use for the NOCP (e.g., a wide quote and a last sale that is based on either the bid or the offer would not be as accurate as the midpoint of the prevailing quotes at that time). See Amendment No. 1, supra note 7, at 3. According to the Exchange, using the proposed T-WAM methodology would eliminate a valuation based on a last sale transaction occurring against an excessively wide NBBO, and even when spreads are wide, the midpoint of the spread is usually close to the fair value of the underlying basket of the ETP. See id. The Exchange also states that this rationale is based, in part, on conversations with issuers, who are supportive of the proposal. See id.

the T-WAM calculation and no consolidated last sale prices that day, the NOCP would be the previous day's NOCP. For an ETP that transferred its listing to Nasdaq, if there are no eligible quotes to use in the T-WAM calculation and no consolidated last sale prices that day, the NOCP would be the previous day's closing price as disseminated by the primary listing market that previously listed the ETP. For an ETP that is a new Nasdaq listing, if there are no eligible quotes to use in the T-WAM calculation and no consolidated last sale prices that day, the NOCP would not be disseminated.

The Exchange proposes to implement the proposed rule change within 30 calendar days following Commission approval and will announce the implementation date via Nasdaq Equity Trader Alert.¹⁵

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁶ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit

¹⁵ See Notice, supra note 3, at 44345 and Amendment No. 1, supra note 7, at 4.

¹⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(8) of the Act,¹⁸ which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

As noted above, the proposal would amend how the Exchange would determine the NOCP for a Nasdaq-listed ETP that does not have a closing cross. The Commission notes that the primary listing market's closing price for a security is relied upon by market participants for a variety of reasons, including, but not limited to, calculation of index values, calculation of the net asset value of mutual funds and exchange-traded products, the price of derivatives that are based on the security, and certain types of trading benchmarks such as volume weighted average price strategies. The Commission believes that the proposed methodology for determining the NOCP for a Nasdaq-listed ETP that does not have a closing cross could provide a NOCP that is more reflective of the current value of the ETP than a potentially stale last sale price, especially for a thinly-traded ETP.¹⁹ In particular, the Nasdaq last sale trade for an ETP that occurred earlier in a trading day or even from a prior trading day may no longer be reflective of the value of the ETP, which should be priced relative to the value of its components.²⁰ The Commission

¹⁸ 15 U.S.C. 78f(b)(8).

¹⁹ See Notice, supra note 3, at 44344-45. Moreover, according to the Exchange, when there is no closing cross at 4:00:00 p.m., the Exchange's internal research has shown that using the T-WAM of the time period between 3:58:00 p.m. and 3:59:55 p.m. results in a price that reflects a fair current valuation and is reflective of the price that was calculated by the closing cross. See id. at 44344 n.12 and 44345. See also Nasdaq Letter, supra note 6 (providing more details regarding the Exchange's internal research relating to this proposal).

²⁰ See Notice, supra note 3, 44345. According to the Exchange, the proposal would not apply to NextShares because its reference trading price is reset to 100 every day for quoting purposes and the actual net asset value does not correspond to this reference

therefore believes that the Exchange's proposal is reasonably designed to achieve the Act's objectives to protect investors and the public interest. Accordingly, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-061 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-2019-061. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

price, and therefore the midpoints are not applicable in determining a more accurate fair value of the basket. See id. at 44344 n.4. The proposal also would not apply to corporate securities because, unlike ETPs, they do not have a net asset value along with an arbitrage component that keeps the prices in line. See id.

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-2019-061, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. As discussed above, in Amendment No. 1, the Exchange provided additional justification for its proposed methodology for determining the NOCP for Nasdaq-listed ETPs and specified that it will implement the proposed rule change within 30 calendar days following Commission approval. The Commission notes that Amendment No. 1 does not materially alter the substance of the proposal and provides additional clarity and justification to the proposal. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²¹ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

²¹ 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2019-061), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

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Assistant Secretary

²² Id.

²³ 17 CFR 200.30-3(a)(12).