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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69195; File No. SR-NASDAQ-2012-137)

March 20, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 3 Thereto, to Establish the Market Quality Program

On December 7, 2012, The NASDAQ Stock Market LLC (“Exchange” or “NASDAQ”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish the Market Quality Program (“MQP” or “Program”) on a pilot basis.³ On December 20, 2012, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the Federal Register on December 31, 2012.⁴ The Commission initially received two comment letters on the proposed rule change.⁵ On February 7, 2013, the Exchange submitted Amendment No. 2 to the proposed rule change. On February 8, 2013, the Exchange

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange states that SR-NASDAQ-2012-137 replaces SR-NASDAQ-2012-043, which was withdrawn by the Exchange. See Securities Exchange Act Release Nos. 66765 (Apr. 6, 2012), 77 FR 22042 (Apr. 12, 2012) (SR-NASDAQ-2012-043) and 68378 (Dec. 6, 2012), 77 FR 74042 (Dec. 12, 2012). See also Notice, infra note 4, at 77141, n.3.

⁴ Securities Exchange Act Release No. 68515 (Dec. 21, 2012), 77 FR 77141 (Dec. 31, 2012) (“Notice”).

⁵ See Letter from Rey Ramsey, President & CEO, TechNet, dated Jan. 22, 2013 (“TechNet Letter”) and Letter from Daniel G. Weaver, Ph.D., Professor of Finance, Rutgers Business School, dated Jan. 30, 2013 (“Weaver Letter”).

withdrew Amendment No. 2 and filed Amendment No. 3 to the proposed rule change.⁶ On February 14, 2013, the Commission extended the time period during which it must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to March 31, 2013.⁷ The Commission subsequently received one additional comment letter on the proposed rule change.⁸ This order grants approval of the proposed rule change, as modified by Amendment Nos. 1 and 3.⁹

I. Description of the Proposal

As set forth in more detail in the Notice,¹⁰ the Exchange is proposing to amend its rules to add NASDAQ Rule 5950 (Market Quality Program) to establish an MQP listing fee and related

⁶ The Exchange withdrew Amendment No. 2 due to a technical error in the amendment. In Amendment No. 3, the Exchange clarified that: (i) the Exchange may limit on a Program-wide basis the number of Exchange-Traded Funds (“ETFs”) per MQP Company that can participate in the MQP, and that the Exchange would not be limiting the number of actual shares issued by an MQP Company for a particular ETF participating in the Program; (ii) the Exchange will provide in the monthly public report to the Commission relating to the MQP (a) information on the market quality of MQP Securities after they exceed the threshold and “graduate” from the Program pursuant to proposed Rule 5950(d)(1)(A), and (b) its analysis of the information to be included in the report and its assessment of the efficacy of the MQP; and (iii) the Exchange will provide to the Commission data and analyses about comparable ETFs that are listed on the Exchange but that are not in the MQP, as well as any other MQP-related data and analyses requested by Commission staff for the purpose of evaluating the efficacy of the MQP. Amendment No. 3 provides clarification to the proposed rule change, and because it does not materially affect the substance of the proposed rule change, Amendment No. 3 does not require notice and comment.

⁷ See Securities Exchange Act Release No. 68925 (Feb. 14, 2013), 78 FR 12116 (Feb. 21, 2013).

⁸ See Letter from Albert J. Menkveld, Associate Professor of Finance, VU University Amsterdam, dated Feb. 18, 2013 (“Menkveld Letter”).

⁹ Today the Commission also is granting exemptive relief from Rule 102 under Regulation M concerning the MQP. See Securities Exchange Act Release No. 69196 (March 20, 2013) (Order Granting a Limited Exemption from Rule 102 of Regulation M Concerning the NASDAQ Stock Market LLC Stock’s Market Quality Program Pilot Pursuant to Regulation M Rule 102(e)).

¹⁰ See Notice, supra note 4.

market maker incentive program, and to adopt interpretation IM-2460-1 to exempt the MQP from NASDAQ Rule 2460 (Payment for Market Making), on a pilot basis. The MQP will be a voluntary program, and participation in the program will be at the discretion of each MQP Company (as defined below), subject to the requirements set forth in the proposed rule.

A. Proposed NASDAQ Rule 5950 (Market Quality Program)

The Exchange states that the proposed MQP is a voluntary program designed to promote market quality in certain securities listed on the Exchange (“MQP Securities”).¹¹ MQP Securities will consist of ETF securities issued by an MQP Company¹² and listed on the Exchange pursuant to NASDAQ Rule 5705.¹³ In addition to the standard (non-MQP) Exchange listing fee applicable to an MQP Security set forth in the NASDAQ Rule 5000 Series (consisting of NASDAQ Rules 5000 - 5999), an MQP Company may incur a fee (“MQP Fee”), on behalf of an MQP Security, to participate in the Program.¹⁴ The Exchange represents that an MQP Fee will be used for the purpose of incentivizing one or more Market Makers¹⁵ in the MQP Security

¹¹ See proposed Rule 5950 Preamble.

¹² The term “MQP Company” means the trust or company housing the ETF or, if the ETF is not a series of a trust or company, then the ETF itself. See proposed Rule 5950(e)(5).

¹³ See proposed Rule 5950(e)(1) (defining the term “MQP Security” to mean an ETF security issued by an MQP Company that meets all of the requirements to be listed on the Exchange pursuant to Rule 5705). The term “Exchange Traded Fund” includes Portfolio Depositary Receipts and Index Fund Shares, which are defined in NASDAQ Rule 5705. See proposed Rule 5950(e)(2).

¹⁴ See proposed Rules 5950 Preamble and 5950(b)(2). MQP Fees for MQP Securities will be paid by the Sponsors associated with the MQP Companies. See proposed Rule 5950(e)(5). See also proposed Rule 5950(b)(2)(C)(i) (requiring that the MQP Fee in respect of an ETF be paid by the Sponsor(s) of the ETF). The term “Sponsor” means the registered investment adviser that provides investment management services to an MQP Company or any of the adviser’s parents or subsidiaries. See proposed Rule 5950(e)(5).

¹⁵ The term “Market Maker” has the meaning given in NASDAQ Rule 5005(a)(24). See proposed Rule 5950(e)(3).

(“MQP Market Maker”) to enhance the market quality of the MQP Security.¹⁶ Subject to the conditions set forth in the proposed rule, this incentive payment will be credited (“MQP Credit”) to one or more MQP Market Makers that make a high-quality market in the MQP Security pursuant to the MQP.¹⁷

1. Application and Withdrawal

An MQP Company that wants to have its MQP Security participate in the MQP, and a Market Maker that wants to participate in the MQP, will each be required to submit an application in the form prescribed by the Exchange.¹⁸ The Exchange can, on a program-wide basis, limit the number of MQP Securities that any one MQP Company may have in the MQP.¹⁹ In determining whether to limit the number of MQP Securities per MQP Company, the Exchange will consider all relevant information, including whether a restriction, if any, is consistent with the goals of the MQP and in the best interest of the Exchange, the MQP Company, and investors.²⁰ The Exchange can also, on a program-wide basis, limit the number of

¹⁶ See proposed Rule 5950 Preamble.

¹⁷ See proposed Rule 5950 Preamble. The MQP Credit will be paid to eligible MQP Market Maker(s) based on quoting and trading activity in the MQP Security, as discussed in further detail below. See *infra* notes 47-55 and accompanying text.

¹⁸ See proposed Rule 5950(a)(1).

¹⁹ See proposed Rule 5950(a)(1)(A). The Exchange clarified that this provision is intended to allow the Exchange, on a Program-wide basis, to limit the number of ETFs that any one MQP Company may have in the MQP, and that this provision would not allow the Exchange to limit the number of actual shares issued by any MQP Company for a particular ETF participating in the MQP. See Amendment No. 3, *supra* note 6.

²⁰ See proposed Rule 5950(a)(1)(B). Factors that could be considered by the Exchange include, but are not limited to, the current and expected liquidity characteristics of MQP Securities; the projected initial and continuing market quality needs of MQP Securities; and the trading characteristics of MQP Securities (*e.g.*, quoting, trading, and volume). See proposed Rule 5950(a)(1)(B)(i).

MQP Market Makers permitted to register in an MQP Security.²¹ If such a limit is established, the Exchange will allocate available MQP Market Maker registrations in a first-come-first-served fashion based on successful completion of an MQP Market Maker application.²²

The Exchange will provide notification on its website regarding: (i) the acceptance of an MQP Company (on behalf of an MQP Security) and an MQP Market Maker into the MQP; (ii) the total number of MQP Securities that any one MQP Company may have in the MQP; (iii) the names of MQP Securities and the MQP Market Maker(s) in each MQP Security, and the dates that an MQP Company, on behalf of an MQP Security, commenced participation in and withdrew or was terminated from the MQP; and (iv) any limit on the number of MQP Market Makers permitted to register in an MQP Security.²³

After an MQP Company, on behalf of an MQP Security, has been in the MQP for not less than two consecutive quarters but less than one year, it can voluntarily withdraw from the MQP on a quarterly basis.²⁴ An MQP Company seeking to withdraw from the MQP must notify the Exchange in writing not less than one month prior to withdrawing from the MQP. The Exchange can determine to allow an MQP Company to withdraw from the MQP earlier.²⁵ In making this determination, the Exchange may take into account the volume and price movements in the MQP

²¹ See proposed Rule 5950(c)(3).

²² See proposed Rule 5950(c)(3)(A).

²³ See proposed Rule 5950(a)(1)(C) and proposed Rule 5950(c)(3). The Exchange also will include on its website a statement about the MQP that sets forth a general description of the MQP as implemented on a pilot basis and a fair and balanced summation of the potentially positive aspects of the MQP (e.g., enhancement of liquidity and market quality in MQP Securities) as well as the potentially negative aspects and risks of the MQP (e.g., possible lack of liquidity and negative price impact on MQP Securities that withdraw or are terminated from the MQP), and indicates how interested parties can get additional information about products in the MQP. See proposed Rule 5950(a)(1)(C)(iv).

²⁴ See proposed Rule 5950(a)(2)(A).

²⁵ Id.

Security; the liquidity, size quoted, and quality of the market in the MQP Security; and any other relevant factors.²⁶ After an MQP Company, on behalf of an MQP Security, has been in the MQP for one year or more, it can voluntarily withdraw from the MQP on a monthly basis, provided that it has notified the Exchange in writing not less than one month prior to withdrawing from the MQP.²⁷ After an MQP Company, on behalf of an MQP Security, has been in the MQP for one year, the MQP and all obligations and requirements of the MQP will automatically continue on an annual basis, unless: (a) the Exchange terminates the MQP by providing not less than one month prior notice of intent to terminate; (b) the MQP Company, on behalf of an MQP Security, withdraws from the MQP pursuant to the proposed rule; (c) the MQP Company is terminated from the MQP pursuant to proposed Rule 5950(d);²⁸ or (d) the pilot Program is not extended or made permanent pursuant to a proposed rule change approved by the Commission under Section 19(b)²⁹ of the Exchange Act.³⁰

²⁶ Id.

²⁷ See proposed Rule 5950(a)(2)(B).

²⁸ Proposed Rule 5950(d) states, in part, that the MQP will terminate in respect of an MQP Security under the following circumstances: (A) an MQP Security sustains an average daily trading volume (consolidated trades in all U.S. Markets) of one million shares or more for three consecutive months; (B) an MQP Company, on behalf of an MQP Security, withdraws from the MQP, is no longer eligible to be in the MQP pursuant to the proposed rule, or its Sponsor ceases to make MQP Fee payments to the Exchange; (C) an MQP Security is delisted or is no longer eligible for the MQP; (D) an MQP Security does not have at least one MQP Market Maker for more than one quarter; or (E) an MQP Security does not, for two consecutive quarters, have at least one MQP Market Maker that is eligible for the MQP Credit.

²⁹ 15 U.S.C. 78s(b).

³⁰ See proposed Rule 5950(a)(3).

After an MQP Market Maker has been in the MQP for not less than one quarter, the MQP Market Maker can withdraw from the MQP on a quarterly basis. The MQP Market Maker must notify the Exchange in writing one month prior to withdrawing from the MQP.³¹

The Exchange will provide notification on its website when it receives notification that an MQP Company, on behalf of an MQP Security, or an MQP Market Maker intends to withdraw from the MQP, including the date of actual withdrawal or termination from the MQP.³²

2. MQP Company Eligibility and Fee Liability

For an MQP Company, on behalf of an MQP Security, to be eligible to participate in the MQP, the following conditions must be satisfied: (i) the Exchange must have accepted the MQP Company's application in respect of the MQP Security and must have accepted the application of at least one MQP Market Maker in the same MQP Security; (ii) the MQP Security must meet all requirements to be listed on the Exchange as an ETF; (iii) the MQP Security must meet all Exchange requirements for continued listing at all times the MQP Security is in the MQP; and (iv) while an MQP Company lists an MQP Security, the MQP Company must, on a product-specific website for each product, indicate that the product is in the MQP and provide the link to the Exchange's MQP website.³³

An MQP Company participating in the MQP will incur an annual basic MQP Fee of \$50,000 per MQP Security ("Basic MQP Fee"), which must be paid to the Exchange prospectively each quarter.³⁴ An MQP Company may also, on an annual basis, voluntarily select to incur an annual supplemental MQP Fee per MQP Security ("Supplemental MQP Fee"), which

³¹ See proposed Rule 5950(a)(2)(C).

³² See proposed Rule 5950(a)(2)(D).

³³ See proposed Rule 5950(b)(1).

³⁴ See proposed Rule 5950(b)(2)(A). MQP Fees for MQP Securities will be paid by the Sponsors associated with the MQP Companies. See supra note 14.

must be paid to the Exchange prospectively each quarter.³⁵ The Basic MQP Fee and Supplemental MQP Fee cannot exceed \$100,000 per year when combined.³⁶ The amount of the Supplemental MQP Fee, if any, for each MQP Security will be determined by the MQP Company initially and will remain the same for one year.³⁷ The Exchange will provide notification on its website regarding the amount, if any, of any Supplemental MQP Fee determined by an MQP Company per MQP Security.³⁸

The Basic MQP Fee and Supplemental MQP Fee, if any, will be in addition to the standard (non-MQP) NASDAQ listing fee applicable to the MQP Security and will not offset the standard listing fee.³⁹ The Exchange will prospectively bill each MQP Company for the quarterly MQP Fee for each MQP Security.⁴⁰ Basic MQP Fees and the Supplemental MQP Fees will be credited to the NASDAQ General Fund.⁴¹

3. MQP Market Maker Eligibility and MQP Credit Distribution

For a Market Maker to be eligible to participate in the MQP, the Exchange must have accepted the Market Maker's application in respect of an MQP Security and must have accepted the application of the MQP Company in respect of the same MQP Security.⁴² In addition, to be

³⁵ See proposed Rule 5950(b)(2)(B). As noted above, MQP Fees for MQP Securities will be paid by the Sponsors associated with the MQP Companies. See supra notes 14 and 34.

³⁶ Id.

³⁷ See proposed Rule 5950(b)(2)(B)(i).

³⁸ See proposed Rule 5950(b)(2)(B)(ii).

³⁹ See proposed Rule 5950(b)(2)(C).

⁴⁰ See proposed Rule 5950(b)(2)(D). As discussed above, the MQP Fee for an MQP Security will be paid by the Sponsor(s) associated with the MQP Company. See supra note 14.

⁴¹ See proposed Rule 5950(b)(2)(E).

⁴² See proposed Rule 5950(c)(1)(A). The Exchange also could accept the MQP applications of multiple MQP Market Makers in the same MQP Security, subject to any

eligible to receive a periodic MQP Credit out of the NASDAQ General Fund, MQP Market Makers must, when making markets in an MQP Security, meet the applicable Market Maker obligations pursuant to NASDAQ Rule 4613⁴³ and must also meet or exceed the following requirements on a monthly basis with respect to an MQP Security: (i) for at least 25% of the time when quotes can be entered in the Regular Market Session,⁴⁴ as averaged over the course of a calendar month, maintain at least 500 shares of attributable, displayed quotes or orders at the National Best Bid (“NBB”) or better, and at least 500 shares of attributable, displayed quotes or orders at the National Best Offer (“NBO”) or better; and (ii) for at least 90% of the time when quotes can be entered in the Regular Market Session, as averaged over the course of a month, maintain at least 2,500 shares of attributable, displayed posted liquidity on the NASDAQ Market

limitation on the number of MQP Market Makers established pursuant to the proposed rule. Id.

⁴³ NASDAQ Rule 4613 states that market making obligations applicable to NASDAQ members that are registered as Market Makers include, among other things, the following quotation requirements and obligations: for each security in which a member is registered as a Market Maker, the member shall be willing to buy and sell the security for its own account on a continuous basis during regular market hours and shall enter and maintain a two-sided trading interest (“Two-Sided Obligation”) that is identified to NASDAQ as the interest meeting the obligation and is displayed in NASDAQ’s quotation montage at all times. Interest eligible to be considered as part of a Market Maker’s Two-Sided Obligation shall have a displayed quotation size of at least one normal unit of trading (or a larger multiple thereof); provided, however, that a Market Maker may augment its Two-Sided Obligation size to display limit orders priced at the same price as the Two-Sided Obligation. Unless otherwise designated, a “normal unit of trading” shall be 100 shares. After an execution against its Two-Sided Obligation, a Market Maker must ensure that additional trading interest exists in NASDAQ to satisfy its Two-Sided Obligation either by immediately entering new interest to comply with this obligation to maintain continuous two-sided quotations or by identifying existing interest on the NASDAQ book that will satisfy this obligation. See Notice, supra note 4, at 77148, n.68.

⁴⁴ The term “Regular Market Session” has the meaning given in NASDAQ Rule 4120(b)(4)(D). See proposed Rule 5950(e)(6).

Center⁴⁵ that are priced no wider than 2% away from the NBB, and at least 2,500 shares of attributable, displayed posted liquidity on the NASDAQ Market Center that are priced no wider than 2% away from the NBO.⁴⁶

MQP Credits for each MQP Security will be calculated monthly and credited out of the NASDAQ General Fund quarterly on a pro rata basis to one or more eligible MQP Market Makers.⁴⁷ Each MQP Credit will be allocated 50% to a “Quote Share Payment” that is based on

⁴⁵ The term “NASDAQ Market Center” has the meaning given in NASDAQ Rule 4751(a). See proposed Rule 5950(e)(4).

⁴⁶ See proposed Rule 5950(c)(1)(B). The Exchange provides the following examples to illustrate these market quality requirements:

Regarding the first market quality standard (25%), in an MQP Security where the NBBO is \$25.00 x \$25.10, for a minimum of 25% of the time when quotes can be entered in the Regular Market Session as averaged over the course of a month, an MQP Market Maker must maintain bids at or better than \$25.00 for at least 500 shares and must maintain offers at or better than \$25.10 for at least 500 shares. Thus, if there were 20 trading days in a given month and the MQP Market Maker met this requirement 20% of the time when quotes can be entered in the Regular Market Session for 10 trading sessions and 40% of the time when quotes can be entered in the Regular Market Session for 10 trading sessions then the MQP Market Maker would have met the requirement 30% of the time in that month.

Regarding the second market quality standard (90%), in an MQP Security where the NBBO is \$25.00 x \$25.10, for a minimum of 90% of the time when quotes can be entered in the Regular Market Session as averaged over the course of a month, an MQP Market Maker must post bids for an aggregate of 2,500 shares between \$24.50 and \$25.00, and post offers for an aggregate of 2,500 shares between \$25.10 and \$25.60. Thus, if there were 20 trading days in a given month and the MQP Market Maker met this requirement 88% of the time when quotes can be entered in the Regular Market Session for 10 trading sessions and 98% of the time when quotes can be entered in the Regular Market Session for 10 trading sessions then the MQP Market Maker would have met the requirement 93% of the time in that month.

See Notice, supra note 4, at 77148-49, n.71.

⁴⁷ See proposed Rule 5950(c)(2). If only one MQP Market Maker meets its obligations under the proposal with respect to an MQP Security, the entire MQP Credit available for that MQP Security will be distributed by the Exchange to that MQP Market Maker out of the NASDAQ General Fund. If multiple MQP Market Makers satisfy their obligations with respect to an MQP Security, the available MQP Credit for the quarter will be distributed pro rata among them. See Notice, supra note 4, at 77150. If no MQP Market

“Qualified Quotes,” and 50% to a “Trade Share Payment” that is based on “Qualified Trades.”⁴⁸

A “Qualified Quote” represents attributable and displayed liquidity (either quotes or orders) entered by an MQP Market Maker in an MQP Security that is posted within 2% of the NBBO.⁴⁹

A “Qualified Trade” represents a liquidity-providing execution in an MQP Security by an MQP Market Maker of a Qualified Quote on the NASDAQ Market Center.⁵⁰ Quote Share Payments will be based in equal proportions on: (a) average quoted size at or better than the NBBO; and (b) average time spent quoting at or better than the NBBO.⁵¹ Trade Share Payments will be based upon each MQP Market Maker’s share of total Qualified Trades in an MQP Security executed on the NASDAQ Market Center.⁵² Quote Share Payments and Trade Share Payments will be composed of Basic MQP Fees and Supplemental MQP Fees, if any.⁵³

An MQP Credit will be credited quarterly to an MQP Market Maker on a pro rata basis for each month during the preceding quarter that an MQP Market Maker is eligible to receive a credit pursuant to the proposed rule.⁵⁴ The calculation to establish the eligibility of an MQP Market Maker will be done on a monthly basis.⁵⁵

4. Termination of the MQP

Maker is eligible to receive an MQP Credit, the MQP Fee relating to the MQP Security will remain in the Exchange’s General Fund. See id. at 77147.

⁴⁸ See proposed Rule 5950(c)(2)(A).

⁴⁹ See proposed Rule 5950(c)(2)(A)(i).

⁵⁰ See proposed Rule 5950(c)(2)(A)(ii).

⁵¹ See proposed Rule 5950(c)(2)(B)(ii).

⁵² See proposed Rule 5950(c)(2)(B)(i).

⁵³ See proposed Rule 5950(c)(2)(B)(iii). As discussed above, MQP Credits will be credited out of the NASDAQ General Fund. See supra note 47 and accompanying text.

⁵⁴ See proposed Rule 5950(c)(2)(C).

⁵⁵ Id. For example, if during a quarter an MQP Market Maker was eligible to receive a credit for two out of three months, the MQP Market Maker would receive a quarterly pro rata MQP Credit for those two months. Id.

The MQP will terminate in respect of an MQP Security under any of the following circumstances: (i) the MQP Security sustains an average daily trading volume (consolidated trades in all U.S. markets) (“ATV”) of 1,000,000 shares or more for three consecutive months; (ii) an MQP Company, on behalf of an MQP Security, withdraws from the MQP, is no longer eligible to be in the MQP, or its Sponsor ceases to make MQP Fee payments to the Exchange; (iii) the MQP Security is delisted or is no longer eligible for the MQP; (iv) the MQP Security does not have at least one MQP Market Maker for more than one quarter; or (v) the MQP Security does not, for two consecutive quarters, have at least one MQP Market Maker that is eligible for MQP Credit.⁵⁶ Any MQP Credits remaining upon termination of the MQP in respect of an MQP Security will be distributed on a pro rata basis to the MQP Market Makers that made a market in the MQP Security and were eligible to receive MQP Credits pursuant to the proposed rule.⁵⁷ Termination of an MQP Company, MQP Security, or MQP Market Maker from the MQP will not preclude the Exchange from allowing re-entry into the MQP where the Exchange deems proper.⁵⁸

5. Pilot Basis

To provide the Exchange, the Commission, and other interested parties an opportunity to evaluate the impact of the MQP on the quality of markets in MQP Securities, the Exchange has proposed to implement the MQP as a one-year pilot program that will commence when the MQP is implemented by the Exchange’s acceptance of an MQP Company, on behalf of an MQP Security, and relevant MQP Market Maker into the MQP. The MQP will end one year after

⁵⁶ See proposed Rule 5950(d)(1).

⁵⁷ See proposed Rule 5950(d)(2). As discussed above, if no Market Maker is eligible to receive MQP Credits pursuant to the proposed rule, the MQP Fee will remain in the Exchange’s General Fund. See supra note 47.

⁵⁸ See proposed Rule 5950(d)(3).

implementation, unless extended pursuant to a proposed rule change approved by the Commission under Section 19(b) of the Exchange Act.⁵⁹

During the pilot period, the Exchange will periodically provide information to the Commission about market quality in respect of the MQP. Specifically, the Exchange will submit monthly reports to the Commission about market quality in respect of the MQP (and will make these monthly reports public). The reports will include data and analysis with respect to MQP Securities that are in the Program, as well as data and analysis about the market quality of MQP Securities that exceed the one million ATV threshold and “graduate” from the Program pursuant to proposed Rule 5950(d)(1)(A).⁶⁰ The reports will compare, to the extent practicable, securities before and after they are in the MQP, and will include information regarding the MQP such as: (i) Rule 605 metrics;⁶¹ (ii) volume metrics; (iii) the number of MQP Market Makers; (iv) spread size; and (v) the availability of shares at the NBBO.⁶² These reports also will include the Exchange’s analysis of the information and assessment of the efficacy of the MQP.⁶³ In addition, the Exchange will provide similar data and analyses to the Commission about comparable ETFs that are listed on the Exchange but that are not in the MQP, as well as any other MQP-related data and analyses requested by Commission staff for the purpose of evaluating the efficacy of the MQP.⁶⁴ The Exchange will post the monthly reports on its

⁵⁹ See proposed Rule 5950(f).

⁶⁰ See Amendment No. 3, supra note 6.

⁶¹ 17 CFR 242.605.

⁶² See Notice, supra note 4, at 77149. See also Amendment No. 3, supra note 6.

⁶³ See Amendment No. 3, supra note 6.

⁶⁴ See Notice, supra note 4, at 77149. See also Amendment No. 3, supra note 6.

website.⁶⁵ The first report will be submitted within sixty days after the MQP becomes operative.⁶⁶

B. Proposed Interpretation IM-2460-1(Market Quality Program)

As part of its proposal to establish the MQP by adding Rule 5950, the Exchange is amending NASDAQ Rule 2460 (Payments for Market Making), which prohibits direct or indirect payment by an issuer to a Market Maker, to adopt a new interpretive provision to the rule.⁶⁷ Specifically, the Exchange is proposing to adopt new interpretation IM-2460-1 (Market Quality Program) to provide that Rule 2460 will not be applicable to a member that is accepted into the MQP pursuant to proposed Rule 5950 (or to a person that is associated with that member) for its conduct in connection with the MQP.⁶⁸

C. Information Bulletin and Surveillance

The Exchange will issue to its members an information bulletin about the MQP prior to operation of the Program.⁶⁹

⁶⁵ See Notice, supra note 4, at 77149.

⁶⁶ Id.

⁶⁷ In relevant part, Rule 2460 provides that “[n]o member or person associated with a member shall accept any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith.”

⁶⁸ See proposed IM-2460-1. The Exchange notes that, based on discussions with the Financial Industry Regulatory Authority (“FINRA”), it expects FINRA to file a proposed rule change to exempt the MQP from FINRA Rule 5250. See Notice, supra note 4, at 77141, n.7. Similar to NASDAQ Rule 2460, FINRA Rule 5250 (formerly NASD Rule 2460) prohibits FINRA members from directly or indirectly accepting payment from an issuer of a security for acting as a market maker. See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (SR-NASD-97-29) (“NASD Rule 2460 Approval Order”).

⁶⁹ See Notice, supra note 4, at 77149.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the MQP Securities on the Exchange during all trading sessions and to detect and deter violations of the Exchange's rules and applicable federal securities laws. Trading of the MQP Securities through the Exchange will be subject to FINRA's surveillance procedures for derivative products including ETFs.⁷⁰ The Exchange may obtain information through the Intermarket Surveillance Group ("ISG") from other exchanges that are members or affiliates of ISG and from listed MQP Companies and public and non-public data sources such as, for example, Bloomberg.

II. Summary of Comment Letters

The Commission received three comment letters in support of the proposed rule change.⁷¹

One commenter believes that the proposed MQP would be an important, positive first step towards addressing the lack of liquidity for many securities in today's market.⁷² This commenter states its belief that the MQP is designed to encourage liquidity where it generally has not flourished, and would make securities that participate in the Program more attractive to a broader range of investors.⁷³ This commenter also believes that the MQP has the potential to benefit promising tech companies that today may lack liquid, quality markets.⁷⁴

⁷⁰ FINRA surveils trading on the Exchange pursuant to a regulatory services agreement with the Exchange. The Exchange states that it is responsible for FINRA's performance under this regulatory services agreement. See Notice, supra note 4, at 77149, n.79.

⁷¹ See TechNet Letter, Weaver Letter, and Menkveld Letter, supra notes 5 and 8.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

Another commenter states that it fully supports NASDAQ's proposal and urges the Commission to adopt a stance allowing direct payment between issuers and market makers.⁷⁵ This commenter states that direct payments from issuers to market makers are used in a number of markets outside of the U.S., and argues that such programs are very successful, resulting in lower transaction costs, lower volatility, and higher depth for investors.⁷⁶ This commenter points to academic studies finding that such programs applied to common stocks generally improve market quality and benefit social welfare.⁷⁷ This commenter cites an article finding that narrower spreads arising from designated market makers with an affirmative obligation to set spreads narrower than would exist otherwise will induce both uninformed and informed traders to trade more, which in turn will lead to increased price efficiency and faster price discovery.⁷⁸ This commenter also discusses his own study of payments from issuers of common stock to market makers and concludes that market makers entering into these types of agreements provide liquidity buffers against supply and demand shocks.⁷⁹ This commenter states that there have been no reports of manipulation attempts by issuers or abuses by market makers relating to paid-for market making

⁷⁵ See Weaver Letter, supra note 5, at 1

⁷⁶ See id. at 1, 3-4 (citing Euronext, Deutsche Borse, NASDAQ OMX's European exchanges, and the Oslo Stock Exchange as markets where such programs have been successful).

⁷⁷ See id. at 1- 2 (citing to the following studies: D.G. Weaver and A. Anand, "The Value of the Specialist: Empirical Evidence from the CBOE" Journal of Financial Markets, Vol. 9, no. 2, 100-118 (2006); D.G. Weaver, A. Anand, and C. Tanggaard "Paying for Market Quality" Journal of Financial and Quantitative Analysis, Vol. 44, 1427-1457 (2009) ("Weaver Study"); H. Bessembinder, J. Hao, and M. Lemmon "Why Designate Market Makers? Affirmative Obligations and Market Quality" Working paper, University of Utah (2006) ("Bessembinder Study"); and A. Charitou and M. Panayides, "Market Making in International Capital Markets" International Journal of Managerial Finance, Vol. 5, 50-80 (2009).

⁷⁸ See id. at 3 (citing to the Bessembinder Study, supra note 77).

⁷⁹ See id. at 2 (citing to the Weaver Study, supra note 77).

arrangements abroad, and argues that the implementation of paying market makers to improve market quality in other countries probably improved investor confidence, as evidenced by the increase in volume and order size observed by researchers.⁸⁰ The commenter further argues that the payments made to MQP Market Makers under the Exchange's proposal will not be of sufficient size to provide enough incentive for manipulation.⁸¹

Another commenter is supportive of an MQP pilot study and believes that the MQP could create value for an issuer by enabling an issuer to essentially guarantee liquidity in its stock.⁸² The commenter views the proposed MQP as a form of "liquidity insurance" through which shareholders in the issuer agree ex ante to pay for a minimum liquidity guarantee to insure against uncertain future liquidity.⁸³ The commenter states that if future liquidity for a security is less uncertain, more investors should participate in the market for the security, creating a beneficial equilibrium of increased liquidity and increased investor participation.⁸⁴ Thus, the commenter asserts, the MQP could be a way to jump-start trading in a particular product at launch, and if there is intrinsic interest in the product, the product launch should have a better chance of being successful.⁸⁵ This commenter cites his own study of designated market maker contracts for common stocks at Euronext for the finding that such contracts on average improve the liquidity level, reduce liquidity risk, and reduce the size of pricing errors in such stocks,

⁸⁰ See id. at 4 and 6.

⁸¹ See id. at 7.

⁸² See Menkveld Letter, supra note 8, at 2.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

among other things,⁸⁶ and states that his study complements the generally favorable evidence from other European markets on designated market maker contracts.⁸⁷

This commenter further notes that the risk that insider information at an issuer could reach an MQP Market Maker is low because the terms of the Program are fixed and specific, there is no need for communication between an issuer and the MQP Market Maker after the Program is in place, the Exchange monitors the performance of the MQP Market Makers, and the securities proposed for inclusion in the MQP (ETPs) are baskets of securities and therefore less likely to be affected by such insider information risk.⁸⁸ Finally, this commenter suggests that the pilot have a staggered introduction of MQP Securities with a randomized sequence, and a long enough pre-and post-event period (e.g., three months) for each introduction to identify an effect, and that the Exchange provide the Commission with detailed reporting of all trades and quotes in all securities for a pre-event period and a post-event period (with MQP Market Maker trades and quotes flagged).⁸⁹

III. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto, and finds that the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges. In particular, as discussed

⁸⁶ See id. at 1-2 (citing to A. J. Menkveld & T. Wang, “How do designated market makers create value for small-caps?” Manuscript, VU University, Amsterdam (2011)).

⁸⁷ See id. at 2 (citing to the Weaver Study, supra note 77; M. Nimalendran & G. Petrella, “Do ‘Thinly-Traded’ Stocks Benefit from Specialist Intervention?” Journal of Banking and Finance, Vol. 27, 1823-54 (2003); and K. Venkataraman & A. Waisburd, “The Value of the Designated Market Maker” Journal of Financial and Quantitative Analysis, Vol. 42, 735-58 (2007)).

⁸⁸ Id. at 3.

⁸⁹ Id. at 4-5.

below, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,⁹⁰ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,⁹¹ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, 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 that the rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Further, as required by Section 3(f) of the Act, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation.⁹²

The MQP, as proposed to be implemented on a pilot basis, is designed to benefit investors, issuers and market participants by improving the market quality for ETFs that participate in the MQP. As proposed by the Exchange, to remain in the MQP and to receive quarterly MQP Credit payments out of the NASDAQ General Fund, each MQP Market Maker will be required to comply with monthly quoting requirements that are higher than the standard quoting requirements applicable to market makers in ETFs on the Exchange.⁹³ Each MQP Market Maker that complies with these heightened quoting obligations will receive a share of the MQP Credit based upon its size quoted, and time spent quoting, at or better than the NBBO, and

⁹⁰ 15 U.S.C. 78f(b)(4).

⁹¹ 15 U.S.C. 78f(b)(5).

⁹² See 15 U.S.C. 78c(f).

⁹³ Specifically, with respect to the monthly quoting requirement, an MQP Market Maker must quote at least 500 shares of attributable, displayed liquidity at the NBB or NBO 25% of the time during the Regular Market Session, and at least 2,500 shares of attributable, displayed liquidity within 2% of the NBB or NBO 90% of the time during the Regular Market Session.

based on its liquidity-providing executions of such quotes. In addition, the Program is separately designed to incentivize MQP Market Makers to compete with each other to receive the MQP Credit payments, as the payments will be distributed based on each MQP Market Maker's average quoted size and time spent quoting at or better than the NBBO as compared to other MQP Market Makers, and its share of total Qualified Trades in an MQP Security executed on the Exchange. Thus, the proposal is designed to incentivize MQP Market Makers to quote more often, and in greater quoted size, at the NBBO, potentially improving the market quality of the MQP Securities that participate in the MQP. This potential improved market quality, were it to occur, could benefit investors in the form of enhanced liquidity, narrowed spreads, and reduced transaction costs.⁹⁴

In addition, because the quoted bid-ask spread in a security represents one of the main drivers of transaction costs for investors, and because high price volatility should generally deter investors from trading low-liquidity ETFs, the MQP, were the potential benefits of the program to occur, should facilitate a more-efficient and less-uncertain trading environment for investors.⁹⁵

⁹⁴ In support of the proposal, the Exchange argues that the MQP will, among other things, lower transaction costs and enhance liquidity in both ETFs and their components, making both more attractive to a broader range of investors, and that, in so doing, the MQP will help companies access capital to invest and grow. See Notice, supra note 4, at 77142. The Exchange asserts that being included in a successful ETF can provide the stocks of these companies with enhanced liquidity and exposure, enabling them to attract investors and access capital markets to fund investment and growth. See id. at 77142, n.12 and 77145, n.37-38 and accompanying text (citing to the testimony of Eric Noll, Executive Vice President, NASDAQ OMX, Before the Securities Subcommittee of the Senate Banking Committee October 19, 2011). Two commenters agree with the Exchange that the MQP will benefit the operating companies underlying ETFs in the MQP, in addition to the ETFs themselves. See Weaver Letter, supra note 5, at 4-5, and Menkveld Letter, supra note 8, at 3-4. As constructed, any potential benefit to operating companies from the MQP could be derived from the company being included within an index or other benchmark that underlies an ETF that participates in the MQP.

⁹⁵ Transaction costs are generally defined as the penalty that an investor pays for transacting. Transaction costs have four components: commissions; bid/ask spread;

Furthermore, were the potential benefits of the MQP to occur, improving the liquidity of certain low-volume ETFs may help those ETFs better compete with more established ETFs that cover the same underlying assets and that have an advantage over new market entrants because they have already attracted a significant amount of liquidity.⁹⁶

While the Commission believes that the Program has the potential to improve market quality of the MQP Securities participating in the Program, the Commission is concerned about unintended consequences of the Program. For example, the MQP could have the potential to distort market forces because the Program may act to artificially influence trading in ETFs that otherwise would not be traded. Similarly, the Commission recognizes concerns about the potential negative impact on an MQP Security, such as reduced liquidity and wider spreads, when an MQP Company withdraws or is terminated from the Program. While the Commission

market impact; and opportunity cost. See Grinold, Kahn. Active Portfolio Management, Second Edition, Chapter 16. An increase in bid-ask spreads will inevitably increase the transaction costs of an investor. In addition, transactions in low-liquidity securities have a higher market impact when compared to other more liquid securities. See Albert Kyle's (1985) measure of market impact (Kyle's Lambda), defining an inverse relationship between volume and price impact. Therefore, the lower the volume of the ETF or stock, the higher the market impact of any transaction in that stock. This last effect acts as a disincentive to trading that security. Therefore, an environment where an ETF trades more often and with a larger number of shares will reduce transaction costs both through the narrowing of spreads and lower market impact.

⁹⁶ This phenomenon can be described as economies of scale in the management of ETFs. Given that most ETFs track an index, it costs little more to run a fund with \$20 billion in assets under management than one with \$200 million in assets under management. As a result, ETFs that have established large asset holdings can be offered to investors with lower management fees, which in turn reinforces the cycle of growth for the large ETFs. See Latzko, David A., "Economies of Scale in Mutual Fund Administration." Pennsylvania State University, York Campus, 1998 (available at <http://www.personal.psu.edu/~dx131/research/articles/mutual.pdf>) (analyzing economies of scale in mutual fund administration). See also Rompotis, Gerasimos Georgiou, "The German Exchange Traded Funds (December 4, 2012). The IUP Journal of Applied Finance, Vol. 18, No. 4, October 2012, pp. 62-82 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184748) (analyzing economies of scale in German ETFs).

is mindful of these concerns, the Commission believes, for the reasons described below, that certain aspects of the Program could help mitigate these concerns.⁹⁷

First, the proposal contains disclosure provisions that will help to alert and educate potential and existing investors in the MQP Securities about the Program. Specifically, the Exchange will disclose on its website the following information: (i) the identities of the MQP Companies, MQP Securities, and MQP Market Makers accepted into the MQP; (ii) any limits the Exchange may impose on the number of MQP Securities per MQP Company or MQP Market Makers per MQP Security in the MQP; (iii) for each MQP Security, the amount of the Supplemental MQP Fee, if any, per MQP Security that would be in addition to the fixed Basic MQP Fee of \$50,000; (iv) any notification received by the Exchange that an MQP Company, on behalf of an MQP Security, or MQP Market Maker intends to withdraw from the MQP; and (v) the dates that an MQP Company, on behalf of an MQP Security, commences participation in and is withdrawn or terminated from the MQP. The Exchange also will include on its website a statement about the MQP that sets forth a fair and balanced summation of the potentially positive and negative aspects of the MQP. Furthermore, an MQP Company will be required to disclose on a product-specific website that the MQP Security is participating in the MQP and will be required to provide a link on that website to the Exchange's MQP website. This disclosure will help to inform investors and other market participants which securities are participating in the MQP, which and how many MQP Market Makers are assigned to each MQP Security, the amount of MQP Fees an MQP Company will incur as a result of participating in the MQP, the amount of MQP Credits the MQP Market Makers could potentially receive from the Exchange

⁹⁷ The concurrent exemptive relief the Commission is issuing today from Rule 102 under Regulation M concerning the MQP also contains additional disclosure requirements. See Securities Exchange Act Release No. 69196 (March 20, 2013), supra note 9.

under the MQP, and the potential benefits and risks of the MQP. A wide variety of ETFs are currently listed and trading today, and the Commission believes that such disclosure could be helpful for investors and other market participants to discern which ETFs listed on the Exchange are and are not subject to the MQP and to make informed investment decisions with respect to ETFs.

Second, the Program is targeted at a subset of ETFs, namely those ETFs that are generally less liquid and which the Exchange believes might benefit most from the Program.⁹⁸ Specifically, as proposed, ETFs that are otherwise eligible for the Program will not be eligible if they have an ATV of 1,000,000 shares or more for three consecutive months. Likewise, the Program will terminate with respect to a particular MQP Security if the MQP Security sustains an ATV of 1,000,000 shares or more for three consecutive months.

Finally, as proposed by the Exchange, the MQP will be limited to a one-year pilot. The Commission believes that it is important to implement the MQP as a pilot. Operating the MQP as a pilot will allow assessment of whether the MQP is in fact achieving its goal of improving the market quality of MQP Securities, prior to any proposal or determination to make the Program permanent.⁹⁹ In addition, approval on a pilot basis will allow the assessment, prior to any proposal or determination to make the program permanent, of whether the MQP has any unintended impact on the MQP Securities, securities not in the MQP, or the market or market participants generally.

⁹⁸ The Exchange has stated that the proposal is designed to provide market quality support to smaller, less frequently traded ETFs. See Notice, supra note 4, at 77145.

⁹⁹ The Exchange has indicated that if the MQP is successful, it will seek to expand the program to small cap stocks and other similar products that may need liquidity enhancement. See Notice, supra note 4, at 77145. The Exchange would be required to file any similar proposal applicable to small cap companies pursuant to Section 19(b) of the Exchange Act and the rules and regulations thereunder. Such a filing would be published for comment in the Federal Register pursuant to Section 19(b) and Rule 19b-4.

The Exchange has represented that during the pilot it will submit monthly reports to the Commission about market quality in respect of the MQP and that these reports will be posted on the Exchange’s public website and will compare securities before and after they are in the MQP, to the extent practicable, and provide information regarding MQP Security volume metrics, the number of MQP Market Makers in MQP Securities, quotation spread and size statistics, and data and analysis about the market quality of MQP Securities that exceed the threshold and “graduate” from the Program pursuant to proposed Rule 5950(d)(1)(A), among other information and analyses.¹⁰⁰ The Exchange also has represented that it will provide to the Commission similar data and analyses about comparable products listed on the Exchange that are not participating in the MQP, as well as any other MQP-related data and analyses the Commission staff requests from the Exchange for the purpose of evaluating the efficacy of the MQP.¹⁰¹ This information will help the Commission, the Exchange, and other interested persons to evaluate whether the MQP has resulted in the intended benefits it is designed to achieve, any unintended consequences resulting from the MQP, and the extent to which the MQP alleviates or aggravates the concerns the Commission has noted, including previously-stated Commission concerns relating to issuer payments to market makers.¹⁰²

For example, the Exchange and the Commission will look to assess what impact, if any, there is on the market quality of MQP Securities that withdraw or are otherwise terminated from the MQP.¹⁰³ One way for an MQP Security to be terminated from the MQP is if it exceeds the

¹⁰⁰ See supra notes 60-64 and accompanying text.

¹⁰¹ Id.

¹⁰² See infra notes 108-111 and accompanying text.

¹⁰³ See Notice, supra note 4, at 77140 (stating that the 1,000,000 ATV threshold would “better provide NASDAQ and the Commission with an opportunity to observe the

1,000,000 ATV threshold included within the rules.¹⁰⁴ The Exchange states that past trading data indicate that “graduation” from the MQP during the pilot at a 1,000,000 ATV threshold should occur more frequently than at a 2,000,000 ATV threshold, which was the threshold proposed in its original filing relating to the MQP (which was later withdrawn).¹⁰⁵ The Commission recognizes that the MQP may not, in the one-year pilot period, produce sufficient data (i.e., a large number of MQP Securities that enter and exit the MQP) to allow a full assessment of whether termination (or withdrawal) of an MQP Security from the Program has resulted in any unintended consequences on the market quality of the MQP Security or

impact, if any, on MQP Securities that exceed the threshold and ‘graduate’ from the Program”).

¹⁰⁴ See proposed Rule 5950(d)(1)(A).

¹⁰⁵ See supra note 3. The Exchange provided statistics on the number of ETFs that would have graduated annually at the 1 million ATV and 2 million ATV volume thresholds from the MQP had it been in existence over the period of 2001 to 2012. Specifically, (i) in 2001, 2 ETPs would have graduated from the MQP under the 2 million ATV threshold, while 3 ETPs would have graduated under the 1 million ATV threshold; (ii) in 2002, 1 ETP would have graduated under the 2 million ATV threshold, while 4 ETPs would have graduated under the 1 million ATV threshold; (iii) in 2003, 3 ETPs would have graduated under the 2 million ATV threshold, while 5 ETPs would have graduated under the 1 million ATV threshold; (iv) in 2004, 2 ETPs would have graduated under the 2 million ATV threshold, while 5 ETPs would have graduated under the 1 million ATV threshold; (v) in 2005, 7 ETPs would have graduated under the 2 million ATV threshold, while 14 ETPs would have graduated under the 1 million ATV threshold; (vi) in 2006, 10 ETPs would have graduated under the 2 million ATV threshold, while 20 ETPs would have graduated under the 1 million ATV threshold; (vii) in 2007, 23 ETPs would have graduated under the 2 million ATV threshold, while 24 ETPs would have graduated under the 1 million ATV threshold; (viii) in 2008, 38 ETPs would have graduated under the 2 million ATV threshold, while 48 ETPs would have graduated under the 1 million ATV threshold; (ix) in 2009, 20 ETPs would have graduated under the 2 million ATV threshold, while 27 ETPs would have graduated under the 1 million ATV threshold; (x) in 2010, 10 ETPs would have graduated under the 2 million ATV threshold, while 16 ETPs would have graduated under the 1 million ATV threshold; (xi) in 2011, 12 ETPs would have graduated under the 2 million ATV threshold, while 16 ETPs would have graduated under the 1 million ATV threshold; and (xii) in 2012, 3 ETPs would have graduated under the 2 million ATV threshold, while 5 ETPs would have graduated under the 1 million ATV threshold. See Notice, supra note 4, at 77145. These statistics, however, assume that all eligible securities actually participate in the Program.

otherwise.¹⁰⁶ However, the Commission believes that the proposal strikes a reasonable balance between (i) setting the threshold for “graduation” from the MQP high enough to encourage participation in the MQP and (ii) setting the threshold low enough to have a sufficient number of MQP Securities graduate from the Program within the pilot period so that the Exchange, the Commission, and other interested persons can assess the impact, if any, of the MQP, including “graduation” of MQP Securities from the Program.

Furthermore, the pilot structure of the MQP will provide information to help determine whether any provisions of the MQP should be modified. For example, based on data from the pilot, the Exchange may determine that the 1,000,000 ATV termination threshold is not an appropriate threshold on which to base eligibility for the MQP or that the Program should be time-limited.¹⁰⁷

The Commission believes that the design of the MQP and the public disclosure requirements, coupled with implementation of the proposal on a pilot basis, should help mitigate potential concerns the Commission has noted above relating to any unintended or negative effects of the MQP on the ETF market and investors.

¹⁰⁶ One commenter suggests that the pilot have a staggered introduction of MQP Securities with a randomized sequence, and a long enough pre- and post-event period (e.g., three months) for each introduction to identify any effects of the MQP. See Menkveld Letter, supra note 8, at 4; see also supra note 89. The Commission believes that the way the Exchange has structured the pilot is reasonable and consistent with the Act. As discussed above, the Exchange has represented that it will (a) provide reports to the Commission that include information about MQP Securities that exceed the threshold and “graduate” from the Program (and make these reports public) and (b) provide information to the Commission about other ETPs not in the Program and any other MQP-related data and analysis Commission staff requests. Such information should be useful in the evaluation of the effects of the MQP.

¹⁰⁷ One commenter, addressing whether a 2,000,000 ATV threshold would be appropriate, noted that such a termination threshold would be “an arbitrary number that is no better or worse than any other large number” and that the threshold may need to be adjusted after the MQP has been implemented. See Weaver Letter, supra note 5, at 8.

The Commission also believes that proposed interpretation IM-2460-1, which would exempt the MQP from the Exchange’s general prohibition on payments by an issuer to a Market Maker contained in Exchange Rule 2460, is consistent with the Act. Exchange Rule 2460 is almost identical to, and is based on, FINRA Rule 5250. FINRA Rule 5250 (formerly NASD Rule 2460) was implemented, in part, to address concerns about issuers paying market makers, directly or indirectly, to improperly influence the price of an issuer’s stock and because of conflict of interest concerns between issuers and market makers.¹⁰⁸ FINRA Rule 5250 was designed to preserve “the integrity of the marketplace by ensuring that quotations accurately reflect a broker-dealer’s interest in buying or selling a security.”¹⁰⁹ Specifically, in the NASD Rule 2460 Approval Order, the Commission found that the “decision by a firm to make a market in a given security and the question of price generally are dependent on a number of factors, including, among others, supply and demand, the firm’s expectations toward the market, its current inventory position, and exposure to risk and competition. This decision should not be influenced by payments to the member from issuers or promoters. Public investors expect broker-dealers’ quotations to be based on the factors described above. If payments to broker-dealers by promoters and issuers were permitted, investors would not be able to ascertain which quotations in the marketplace are based on actual interest and which quotations are supported by issuers or promoters. This structure would harm investor confidence in the overall integrity of the marketplace.”¹¹⁰ The Commission also added that “such payments may be viewed as a

¹⁰⁸ See NASD Rule 2460 Approval Order, supra note 68, at 37107.

¹⁰⁹ See NASD Rule 2460 Approval Order, supra note 68, at 37107.

¹¹⁰ See id.

conflict of interest since they may influence the member's decision as to whether to quote or make a market in a security and, thereafter, the prices that the member would quote.”¹¹¹

The Commission believes that a number of aspects of the MQP mitigate the concerns that FINRA Rule 5250 and Exchange Rule 2460 were designed to address.¹¹² First, the Commission believes that the terms of the MQP are generally objective, clear, and transparent. The standards for the MQP are set forth in proposed NASDAQ Rule 5950 (further described above)¹¹³ and describe the application and withdrawal process, the fee and credit structure, the market quality standards that an MQP Market Maker must meet and maintain to secure an MQP Credit, and the MQP termination process. These requirements apply to all MQP Securities, MQP Companies, and MQP Market Makers.¹¹⁴

Second, the Exchange also will provide notification on its public website regarding the various aspects of the MQP. As discussed above, this notification will include: (i) the names of the MQP Companies and the MQP Market Makers that are accepted into the MQP; (ii) the specific names of the MQP Securities that are participating in the MQP; (iii) the identity of the MQP Market Makers in each MQP Security; (iv) any limits the Exchange may impose on the

¹¹¹ See id. at 37106.

¹¹² Two commenters have stated that the design and overall transparency of the Program adequately address concerns relating to manipulation. See Weaver Letter, supra note 5, at 6-7, and Menkveld Letter, supra note 8, at 3.

¹¹³ See supra Section I.A.

¹¹⁴ While the Exchange will have some amount of discretion pursuant to the proposed rules to limit the number of MQP Securities that any one MQP Company may list in the MQP, if such a limit is in the best interest of the Exchange, the MQP Company and the goals of the MQP, or investors, and/or to limit the number of MQP Market Makers in an MQP Security, the Commission believes such limits would not be unfairly discriminatory, as they would be imposed on a MQP-wide basis. In addition, the Commission believes that it is reasonable and consistent with the Act for the Exchange to have some amount of flexibility to limit the number of MQP Securities or MQP Market Makers, to protect investors and the ETF market.

number of MQP Securities per MQP Company or MQP Market Makers per MQP Security in the MQP; (v) the amount of the Supplemental MQP Fee of each MQP Security, if one is established by an MQP Company; (vi) any notification received by the Exchange that an MQP Company, on behalf of an MQP Security, or MQP Market Maker intends to withdraw from the MQP; and (v) the dates that an MQP Company, on behalf of an MQP Security, commences participation in and is withdrawn or terminated from the MQP; and (vii) a statement about the MQP that sets forth a fair and balanced summary of the potentially positive and negative aspects of the MQP. In addition, an MQP Company will be required to disclose that the MQP Security is participating in the MQP and to provide a link to the Exchange's MQP webpage on the MQP Security's website.

And third, MQP Securities will be traded on the Exchange, which is a regulated market, pursuant to the current trading and reporting rules of the Exchange, and pursuant to the Exchange's established market surveillance and trade monitoring procedures. The Exchange will administer the application and acceptance of the MQP Companies and MQP Market Makers into the MQP and will manage the payment of the MQP Credit to MQP Market Makers. The Exchange has represented that the recipient MQP Market Makers of the MQP Credits and the size of the MQP Credits will be determined solely by the Exchange pursuant to objective criteria, and MQP Companies will have no role in selecting the MQP Market Maker recipients or in determining the specific amount, if any, of their MQP Credits. Furthermore, the MQP Fees will be paid into NASDAQ's General Fund, and the MQP Credits will be paid out of NASDAQ's General Fund. If no MQP Market Maker is eligible to earn an MQP Credit for a particular MQP Security during a quarter, the MQP Fee will remain in NASDAQ's General Fund, and no MQP Fees or any portion thereof will be rebated with respect to any MQP Security, regardless of the performance of the MQP Security's assigned MQP Market Makers. The Commission believes

that these factors, taken together, should help to mitigate the conflict of interest and other concerns that the Commission has previously identified¹¹⁵ relating to issuers paying for market making.¹¹⁶

The Commission believes that it is reasonable and consistent with the Act for the Exchange to limit the MQP to certain types of securities to allow the Exchange, through a pilot, to assess whether the Program will have the desired effect of improving the market quality of these securities before implementing the Program on a wider scale. The Commission believes that it is reasonable and consistent with the Act for the Exchange to limit the MQP to products under the 1,000,000 ATV threshold, to support the Exchange's stated purpose to provide market quality support to less frequently traded ETFs.

The Commission believes that the MQP Fees are an equitable allocation of reasonable fees. First, participation in the MQP is voluntary. An entity is free to determine whether it would be economically desirable to pay the MQP Fee, given the amount of the fee, the trading characteristics of the ETF (if applicable) and the anticipated benefit. If an MQP Company chooses to participate in the MQP with respect to an MQP Security, it will incur the Basic MQP Fee of \$50,000, and the MQP Company will have discretion to incur the Supplemental MQP Fee in an amount up to an additional \$50,000. The MQP Fees will be paid for by the Sponsors

¹¹⁵ See NASD Rule 2460 Approval Order, supra note 68, and supra notes 108-111. See also Securities Act Release No. 6334 (Aug. 6, 1981), 46 FR 42001 (Aug. 18, 1981), at Section IV.B (Treatment as Statutory Underwriter). In addition, only index-based ETFs are eligible to participate in the MQP. The Exchange notes that the prices of ETFs are generally linked back to the underlying securities and that the ETF trust structure acts as an insulating wall between market maker and product. See Notice, supra note 4, at 77145, n.36.

¹¹⁶ Until FINRA files a proposed rule change to exempt payments made pursuant to the MQP from FINRA Rule 5250 and the proposed rule change becomes effective, receipt of payments pursuant to the MQP by a market maker that is a FINRA member would be in violation of FINRA Rule 5250.

associated with the MQP Companies. Thus, the MQP Fees will be incurred and paid for by an issuer and its sponsor, as applicable, that have chosen to participate in, and that may potentially benefit from, the MQP.¹¹⁷ An entity that chooses not to participate will not be required to pay any additional fee beyond the standard listing fees. Further, the MQP Fees will be the same for any MQP Company wishing to participate in the program.

The Commission also believes that availability of the discretionary Supplemental MQP Fee is consistent with the Act. Each MQP Company participating in the MQP will have the choice of whether or not to incur, as well as the exact amount (up to \$50,000) of, the Supplemental MQP Fee. Not all ETFs are alike, and trading in certain products may be riskier or more costly than trading in others. The Commission believes that it is reasonable to allow each MQP Company to choose to participate in the Program and to determine whether it is desirable to incentivize MQP Market Makers through the Supplemental MQP Fee to improve the market quality of certain MQP Securities. Further, as discussed above, the payment of the Supplemental

¹¹⁷ Issuers of ETFs registered under the 1940 Act are prohibited from paying directly or indirectly for distribution of their shares (i.e., directly or indirectly financing any activity that is primarily intended to result in the sale of shares), unless such payments are made pursuant to a plan that meets the requirements of Rule 12b-1 under the 1940 Act. Although the services at issue could be primarily intended to result in the sale of fund shares, the Commission has stated that such a determination will depend on the surrounding circumstances. See Payment of Asset-Based Sales Loads by Registered Open-End Management Investment Companies, Investment Company Act Release No. 16431 (June 13, 1988) (“1988 12b-1 Release”). As the Commission has noted previously, if a fund makes payments that are ostensibly for a non-distribution purpose, and the recipient of those payments finances distribution, the question arises whether the fund’s assets are being used indirectly for distribution. The Commission has stated that there can be no precise definition of what types of expenditures constitute indirect use of fund assets, and this determination is based on the facts and circumstances of each individual case. In addition, fund directors, particularly independent directors bear substantial responsibility for making that judgment. See Bearing of Distribution Expenses by Mutual Funds, Investment Company Act Release No. 11414 (October 28, 1980).

MQP Fee will be transparent to the marketplace, as this information will be disclosed on the Exchange's website.¹¹⁸

IV. Section 11(d)(1) of the Exchange Act

Section 11(d)(1) of the Exchange Act¹¹⁹ generally prohibits a broker-dealer from extending or maintaining credit, or arranging for the extension or maintenance of credit, on shares of new issue securities, if the broker-dealer participated in the distribution of the new issue securities within the preceding 30 days. The Commission's view is that shares of open-end investment companies and unit investment trusts registered under the 1940 Act, such as ETF shares, are distributed in a continuous manner, and broker-dealers that sell such securities are therefore participating in the "distribution" of a new issue for purposes of Section 11(d)(1).¹²⁰

The Division of Trading and Markets, acting under delegated authority, granted an exemption from Section 11(d)(1) and Rule 11d1-2 thereunder for broker-dealers that have entered into an agreement with an ETF's distributor to place orders with the distributor to purchase or redeem the ETF's shares ("Broker-Dealer APs").¹²¹ The SIA Exemption allows a Broker-Dealer AP to extend or maintain credit, or arrange for the extension or maintenance of credit, to or for customers on the shares of qualifying ETFs subject to the condition that neither the Broker-Dealer AP, nor any natural person associated with the Broker-Dealer AP, directly or indirectly (including through any affiliate of the Broker-Dealer AP), receives from the fund complex any payment, compensation, or other economic incentive to promote or sell the shares

¹¹⁸ See supra note 38 and accompanying text.

¹¹⁹ 15 U.S.C. 78k(d)(1)

¹²⁰ See, e.g., Exchange Act Release Nos. 6726 (Feb. 8, 1962), 27 FR 1415 (Feb. 15, 1962) and 21577 (Dec. 18, 1984), 49 FR 50174 (Dec. 27, 1984).

¹²¹ See Letter from Catherine McGuire, Chief Counsel, Division of Trading and Markets, Securities and Exchange Commission to Securities Industry Association (Nov. 21, 2005) ("SIA Exemption").

of the ETF to persons outside the fund complex, other than non-cash compensation permitted under NASD Rule 2830(l)(5)(A), (B), or (C). This condition is intended to eliminate special incentives that Broker-Dealer APs and their associated persons might otherwise have to “push” ETF shares.

The MQP will permit certain ETFs to voluntarily incur increased listing fees payable to the Exchange. In turn, the Exchange will use the fees to make incentive payments to market makers that improve the liquidity of participating issuers’ securities, and thus enhance the market quality for the participating issuers. Incentive payments will be accrued for, among other things, executing purchases and sales on the Exchange. Receipt of the incentive payments by certain broker-dealers will implicate the condition of the SIA Exemption from the new issue lending restriction in Section 11(d)(1) of the Exchange Act discussed above. The Commission’s view is that the incentive payments market makers will receive under the proposal are indirect payments from the fund complex to the market maker and that those payments are compensation to promote or sell the shares of the ETF. Therefore, a market maker that also is a Broker-Dealer AP for an ETF (or an associated person or an affiliate of a Broker-Dealer AP) that receives the incentives will not be able to rely on the SIA Exemption from Section 11(d)(1). This does not mean that Broker-Dealer APs cannot participate in the MQP; it merely means they cannot rely on the SIA Exemption while doing so. Thus, Broker-Dealer APs that participate in the MQP will need to comply with Section 11(d)(1) unless there is another applicable exemption.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹²² that the

¹²² 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NASDAQ-2012-137), as modified by Amendment Nos. 1 and 3 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²³

Kevin M. O'Neill
Deputy Secretary

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¹²³ 17 CFR 200.30-3(a)(12).