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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69928; File No. SR-NASDAQ-2013-094)

July 3, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness to Conform Rule 5705 Governing Exchange Traded Funds to the Listing Requirements of Another Market

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on June 27, 2013, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. 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 the Substance of the Proposed Rule Change

NASDAQ is filing with the Commission a proposal to amend Rule 5705 (Exchange Traded Funds: Portfolio Depository Receipts and Index Fund Shares) regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio, averaging minimum notional value traded per month, and minimum number of component stocks. The Exchange is making these changes to conform its rules with those of another market.

The text of the proposed rule change is available from NASDAQ’s website at <http://nasdaq.cchwallstreet.com>, at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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

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

In its filing with the Commission, NASDAQ 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. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 5705(b)(3) and (b)(4) regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio,<sup>3</sup> averaging minimum notional value traded per month, and minimum number of component stocks.

The Exchange is making the proposed changes to conform its Rule 5705(b) with the rule of another market, namely NYSE Arca ("Arca"). The proposed changes are all based on, and virtually identical to, equivalent provisions in Arca Equities Rule 5.2(j)(3), Commentary .01(a)(A) and Commentary .02(a)(5) (the "Arca rule").<sup>4</sup>

By way of background, the Exchange has ETF listing provisions in Rule 5705 for different types of ETFs, including domestic and international Portfolio Depositary Receipts ("PDRs")<sup>5</sup> in subsection (a) and Index Fund Shares ("IFSs")<sup>6</sup> in subsection (b). Subsection (a)

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<sup>3</sup> "Index or portfolio" is discussed in Rule 5705(b)(3)(A)(i).

<sup>4</sup> While in all instances the rule changes proposed by the Exchange are done to conform Exchange Rule 5705(b) with Arca Equities Rule 5.2(j)(3), Commentary .01(a)(A), and in all instances are based on Arca rule language, the rule changes proposed by the Exchange are tailored to work within the existing structure of Exchange Rule 5705(b).

<sup>5</sup> The term "Portfolio Depositary Receipt" means a security: (i) that is based on a unit investment trust ("Trust") which holds the securities which comprise an index or

and (b) include listing provisions pursuant to Rule 19b-4(e) under the Act<sup>7</sup> indicating that the component stocks of (i) an index or portfolio of US Component Stocks<sup>8</sup> underlying a series of

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portfolio underlying a series of Portfolio Depositary Receipts; (ii) that is issued by the Trust in a specified aggregate minimum number in return for a “Portfolio Deposit” consisting of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above; (iii) that, when aggregated in the same specified minimum number, may be redeemed from the Trust which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof then comprising the “Portfolio Deposit”; and (iv) that pays holders a periodic cash payment corresponding to the regular cash dividends or distributions declared with respect to the component securities of the securities index or portfolio of securities underlying the Portfolio Depositary Receipts, less certain expenses and other charges as set forth in the Trust prospectus. Rule 5705(a)(1)(A).

<sup>6</sup> The term “Index Fund Share” means a security: (i) that is issued by an open-end management investment company based on a portfolio of stocks or fixed income securities or a combination thereof, that seeks to provide investment results that correspond generally to the price and yield performance or total return performance of a specified foreign or domestic stock index, fixed income securities index or combination thereof; (ii) that is issued by such an open-end management investment company in a specified aggregate minimum number in return for a deposit of specified numbers of shares of stock and/or a cash amount, a specified portfolio of fixed income securities and/or a cash amount and/or a combination of the above, with a value equal to the next determined net asset value; and (iii) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such open-end investment company which will pay to the redeeming holder the stock and/or cash, fixed income securities and/or cash and/or a combination thereof, with a value equal to the next determined net asset value. Rule 5705(b)(1)(A).

<sup>7</sup> 17 CFR 240.19b-4(e).

<sup>8</sup> The term “U.S. Component Stock” means an equity security that is registered under Sections 12(b) or 12(g) of the Act, or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act. Rule 5705(b)(1)(D).

PDRs or IFSs shall meet five criteria;<sup>9</sup> and (ii) regarding global indexes or portfolios,<sup>10</sup> underlying a series of PDRs or IFSs shall meet five criteria.<sup>11</sup> Rule 5705(a) and (b) are like the Arca rule, except that Rule 5705 (b) lacks certain language regarding listing IFSs. This proposal simply adds language to subsections (b)(3) and (b)(4) of Rule 5705 to make it similar to the Arca rule.

### The Proposed Rule Changes

First, the Exchange proposes to exclude “Derivative Securities Products” from Rule 5705(b)(3)(A)(i) a., b., and c. for U.S. Indexes or portfolios, and from Rule 5705(b)(3)(A)(ii) a., b., and c. for international or global indexes or portfolios. “Derivative Securities Products” include the following types of products: ETFs consisting of PDRs and IFSs (Rule 5705); Trust Issued Receipts (Rule 5720); Managed Fund Shares (Rule 5735); and Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Shares, (Rule 5711).<sup>12</sup> Arca’s definition of Derivative Securities Products<sup>13</sup> includes one product (Paired Trust Shares) that is not

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<sup>9</sup> Rule 5705(a)(3)(A)(i) a. through e. and (b)(3)(A)(i) a. through e.

<sup>10</sup> The components of a global (aka international) index or portfolio consists of either only Non-U.S. Component Stocks or both U.S. Component Stocks and Non-U.S. Component Stocks. The term "Non-U.S. Component Stock" means an equity security that (a) is not registered under Sections 12(b) or 12(g) of the Act, (b) is issued by an entity that is not organized, domiciled or incorporated in the United States, and (c) is issued by an entity that is an operating company (including Real Estate Investment Trusts (REITs) and income trusts, but excluding investment trusts, unit trusts, mutual funds, and derivatives). Rule 5705(a)(1)(D) and (b)(1)(E).

<sup>11</sup> Rule 5705(a)(3)(A)(ii) a. through e and (b)(3)(A)(ii) a. through e.

<sup>12</sup> Definitions of or discussions regarding the noted products can be found in the specified Exchange rules.

<sup>13</sup> Arca states in Equities Rule 5.2(j)(3), Commentary .01(a)(A) that Derivative Securities Products include Units (known as ETFs on the Exchange) and securities defined in Section 2 of Arca Equity Rule 8.

included in the Exchange's definition of Derivative Securities Products. As such, the Exchange and Arca definitions of Derivative Securities Products as proposed are therefore similar. In addition, the Exchange proposes in Rule 5705(b) to exclude Derivative Securities Products in exactly the same places, and in same manner, as the equivalent sections of the Arca rule.

Second, the Exchange proposes to modify Rule 5705 (b)(3)(A)(i)(b) and 5705 (b)(3)(A)(ii)(b) to indicate the appropriate value or weight of the index and the averaged minimum notional value traded per month. Specifically, these proposed sections would indicate that component stocks (excluding Derivative Securities Products) that in the aggregate account for at least 70% of the weight of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum monthly trading volume of 250,000 shares or minimum notional volume traded per month of \$25,000,000, averaged over the last six months.<sup>14</sup> The proposed changes would make Rule 5705 (b)(3)(A)(i)(b) and 5705 (b)(3)(A)(ii)(b) exactly like the equivalent sections of the Arca rule. The proposed changes allow setting the weight of the index or portfolio at 70% and averaging trading volume over six months, as allowed by the Arca rule.

Third, the Exchange proposes to modify Rule 5705 (b)(3)(A)(i)(d) and 5705 (b)(3)(A)(ii)(d) to indicate how many component stocks an index or portfolio must have at a minimum. Specifically, the proposed sections would indicate that the index or portfolio shall include a minimum of 13 component stocks; provided, however, that there shall be no minimum number of component stocks if either one or more series of IFSs or PDRs constitute, at least in part, components underlying a series of IFSs, or one or more series of Derivative Securities

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<sup>14</sup> Rule 5705 (b)(3)(A)(ii)(b), which deals with global (international) indexes or portfolios is, however, written in terms of worldwide monthly trading volume and global notional volume.

Products account for 100% of the weight of the index or portfolio.<sup>15</sup> This change would indicate that the Exchange, like Arca, does not require a set minimum number of component stocks if, for example, IFSs or PDRs (which must each meet specified Exchange listing standards in their own right) underlie a series of IFSs. Again, the proposed changes would make Rule 5705 (b)(3)(A)(i)(d) and 5705 (b)(3)(A)(ii)(d) exactly like the equivalent sections of the Arca rule.

Fourth, the Exchange proposes to modify Rule 5705 (b)(3)(A)(i)(c) and 5705 (b)(3)(A)(ii)(c) to clarify that, to the extent applicable, the five most heavily weighted component stocks would not exceed a given weight. Specifically, these proposed sections would, like the Arca rule, indicate that, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products) shall not exceed 65% of the weight of the index or portfolio.<sup>16</sup>

Fifth, the Exchange proposes to modify Rule 5705(b)(4)(A)(v) to insert “one consisting entirely of” into the existing rule text. The proposed rule text would state that an underlying index or portfolio (excluding one consisting entirely of exempted securities) must include securities from a minimum of 13 non-affiliated issuers. As with all other proposed rule changes, this is done to conform Rule 5705(b)(4)(A)(v) to the Arca rule.

All of the rule changes proposed are done solely to align Exchange Rule 5705 and the Arca rule. The Exchange believes that by conforming the rules, and allowing listing opportunities on the Exchange that are already allowed by rule on another market, the proposal

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<sup>15</sup> Rule 5705 (b)(3)(A)(ii)(d), however, which deals with global (international) indexes or portfolios, requires a minimum of 20 component stocks.

<sup>16</sup> Rule 5705 (b)(3)(A)(ii)(c), however, which deals with global (international) indexes or portfolios, is written in terms of 60% of the weight of the index or portfolio.

would offer another venue for listing and trading Index Fund Shares on equivalent terms, and thereby promote competition.<sup>17</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>18</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>19</sup> in particular, in that it is 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. For the reasons noted in the filing, the Exchange proposes to amend Rule 5705 regarding the definition of Derivative Securities Products, weight of component stocks of an index or portfolio, averaging minimum notional value traded per month, and minimum number of component stocks. The proposed changes do nothing more than match Exchange rules with what is currently available on other exchanges. The Exchange believes that by conforming its rules and allowing listing opportunities on the Exchange that are already allowed by rule on another market, the proposal would offer another venue for listing and trading Index Fund Shares products and thereby promote broader competition among exchanges.

### 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. To the contrary, where the current variance in the rules of the exchanges limits competition, the

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<sup>17</sup> No other changes are made or intended by this filing and existing listing and trading rules continue to be applicable to Index Fund Shares.

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

proposal will allow listing equivalent products on the Exchange, thereby promoting increased competition for listings among markets.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>21</sup>

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it may enable the Exchange to compete more effectively for listings, and this competition could inure to the benefit of issuers and market participants generally. For this reason, the Commission waives the operative delay and designates the proposed rule change to

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

be operative upon filing.<sup>22</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-094 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2013-094. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room on

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<sup>22</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2013-094, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Elizabeth M. Murphy  
Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).