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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72350; File No. SR-NASDAQ-2014-020)

June 9, 2014

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change Relating to Listing and Trading of Exchange-Traded Managed Fund Shares

I. Introduction

On February 26, 2014, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt Nasdaq Rule 5745, which would govern the listing and trading of Exchange-Traded Managed Fund Shares (“ETMF Shares” or “ETMFs”), and to amend related references under Nasdaq Rules 4120, 5615, IM-5615-4, and 5940. The proposed rule change was published for comment in the Federal Register on March 12, 2014.³ The Commission received four comments on the proposal.⁴ On April 23, 2014, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71657 (Mar. 6, 2014), 79 FR 14092 (“Notice”).

⁴ See Letters to the Commission from Christopher Davis, President, Money Management Institute, dated March 27, 2014 (“MMI Letter”); Robert Tull, President, Robert Tull & Co., dated March 31, 2014 (“Tull Letter”); Avi Nachmany, Co-Founder, Director of Research, E.V.P, Strategic Insight, dated April 1, 2014 (“Strategic Insight Letter”); and Eric Noll, President and Chief Executive Officer, ConvergeX Group, LLC, dated April 1, 2014 (“ConvergeX Letter”).

⁵ 15 U.S.C. 78s(b)(2).

determine whether to disapprove the proposed rule change.⁶ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposal

As described in the Notice, the Exchange proposes to adopt new Nasdaq Rule 5745 to permit the listing and trading of ETMF Shares. Similar to Managed Fund Shares as defined in Nasdaq Rule 5735,⁸ ETMF Shares would be issued in specified aggregate unit quantities in return for a deposit of a specified basket of securities and/or a cash amount with a value equal to the product of the ETMF's net asset value per Share ("NAV") and the number of Shares issued. When aggregated in the same specified unit quantities, ETMF Shares could be redeemed in exchange for a specified basket of securities and/or cash with a value per Share equal to the ETMF's NAV.

Unlike Managed Fund Shares, ETMF Shares would trade on Nasdaq using a new trading protocol called "NAV-Based Trading." In NAV-Based Trading, all bids, offers, and execution prices would be expressed as a premium/discount (which may be zero) to the ETMF's next-determined NAV (e.g., NAV-\$0.01; NAV+\$0.01). An ETMF's NAV would be determined each business day, normally as of 4:00 p.m. Eastern Time. Trade executions using NAV-Based Trading would be binding at the time orders are matched on Nasdaq's facilities, with the

⁶ See Securities Exchange Act Release No. 72007, 79 FR 24045 (Apr. 29, 2014). The Commission determined that it was appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission designated June 10, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR-NASDAQ-2008-039).

transaction prices contingent upon the determination of the ETMF's NAV at the end of the business day.

Member firms would utilize existing order types and interfaces to transmit ETMF Share bids and offers to Nasdaq, which would process ETMF Share trades like trades in shares of conventional ETFs and other listed securities. In the systems used to transmit and process transactions in ETMF Shares, Nasdaq expects an ETMF's next-determined NAV to be represented by a proxy price (e.g., 100.00) and a premium/discount of a stated amount to the next-determined NAV to be represented by the same increment/decrement from the proxy price used to denote NAV (e.g., NAV-\$0.01 would be represented as 99.99; NAV+\$0.01 as 100.01).⁹

To avoid potential investor confusion, Nasdaq would work with member firms and providers of market data services to seek to ensure that representations of intraday bids, offers and execution prices for ETMFs that are made available to the investing public follow the "NAV-\$0.01/NAV+\$0.01" (or similar) display format, rather than displaying proxy prices. Nasdaq expects all ETMFs listed on the Exchange to have a unique identifier associated with their ticker symbols, which would indicate that their Shares are traded using NAV-Based Trading. Nasdaq makes available to member firms and market data services certain proprietary

⁹ Order transmission and processing systems currently in common use by exchanges and member firms are generally not designed to accommodate pricing arrangements, such as NAV-Based Trading, in which bids, offers and execution prices are determined by reference to a price or value that is unknown at the time of trade execution. Compared to the alternative of building and maintaining (and requiring member firms to build and maintain) a dedicated NAV-Based Trading order transmission and processing system, the Exchange believes that the proposed approach (using, for processing purposes, a proxy price to represent next-determined NAV) offers major advantages in terms of cost, efficiency and time to implement. To convert proxy prices used to represent intraday bids, offers and execution prices into prices expressed in relation to the next-determined NAV, member firms would subtract from the reported proxy price (*e.g.*, 99.99) the proxy for NAV (e.g., 100.00) and insert "NAV" in front of the calculated number expressed in dollars (e.g., $99.99 - 100.00 = -0.01$, expressed as "NAV-\$0.01").

data feeds (“Nasdaq Data Feeds”) that are designed to supplement the market information disseminated through the consolidated tape (“Consolidated Tape”). The Exchange would use a Nasdaq Data Feed to disseminate intraday price and quote data for ETMFs in real time in the “NAV-\$0.01/NAV+\$0.01” (or similar) display format. Member firms could use the Nasdaq Data Feed to source intraday ETMF prices for presentation to the investing public in the “NAV-\$0.01/NAV+\$0.01” (or similar) display format. Alternatively, member firms could source intraday ETMF prices in proxy price format from the Consolidated Tape and use a simple algorithm to convert prices into the “NAV-\$0.01/NAV+\$0.01” (or similar) display format.

All ETMF bids, offers and trade executions would be reported intraday in real time by the Exchange to the Consolidated Tape¹⁰ and separately disseminated to member firms and market data services through a Nasdaq Data Feed. The Exchange would also provide the member firms participating in each ETMF Share trade with a contemporaneous notice of trade execution, indicating the number of ETMF Shares bought or sold and the executed premium/discount to NAV.¹¹

All executed ETMF Share trades would be recorded and stored intraday by Nasdaq to await the calculation of the ETMF’s end-of-day NAV and the determination of final trade pricing. After the Reporting Authority calculates an ETMF’s NAV and provides this information to the Exchange, Nasdaq would price each ETMF Share trade entered into during the day at the ETMF’s NAV plus/minus the trade’s executed premium/discount. Using the final

¹⁰ Due to systems limitations, the Consolidated Tape would report intraday execution prices and quotes for ETMFs using a proxy price format. As noted, Nasdaq would separately report real-time execution prices and quotes to member firms and providers of market data services in the “NAV-\$0.01/NAV+\$0.01” (or similar) display format, and otherwise seek to ensure that representations of intraday bids, offers and execution prices for ETMFs that are made available to the investing public follow the same display format.

¹¹ All orders to buy or sell an ETMF Share that are not executed on the day the order is submitted would be automatically cancelled as of the close of trading on such day.

trade price, each executed ETMF Share trade would then be disseminated to member firms and market data services through the Nasdaq Data Feed used to report ETMF Share trades, and confirmed to the member firms participating in the trade to supplement the previously provided information to include final pricing. After the pricing is finalized, Nasdaq would deliver the ETMF Share trading data to NSCC for clearance and settlement, following the same processes used for the clearance and settlement of trades in conventional ETFs and other exchange-traded securities.

Proposed Listing Rules for Exchange-Traded Managed Fund Shares

Proposed Nasdaq Rule 5745(b)(1) provides that Nasdaq will file separate proposals under Section 19(b) of the Act before the listing of ETMF Shares. Proposed Nasdaq Rule 5745(b)(2) provides that transactions in ETMF Shares will occur during Nasdaq's Regular Market Session through 4:00 p.m.¹² Proposed Nasdaq Rule 5745(b)(3) provides that ETMF Shares will trade on Nasdaq at market-determined premiums or discounts to the next-determined NAV, and that the minimum price variation for quoting and entry of orders in ETMF Shares will be \$0.01. Proposed Rule Nasdaq 5745(b)(4) provides that Nasdaq will implement written surveillance procedures for ETMF Shares. Proposed Nasdaq Rule 5745(b)(5) provides that, for ETMF Shares based on an international or global portfolio, the statutory prospectus or the application for exemption from provisions of the 1940 Act for such series of ETMF Shares must state that such series must comply with the federal securities laws in accepting securities for deposit and satisfying redemptions with securities, including that the securities accepted for deposit and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 ("Securities Act").

¹² Nasdaq Rule 4120(b)(4) defines the Regular Market Session as the trading session from 9:30 a.m. to 4:00 p.m. or 4:15 p.m. ETMF Shares would trade until 4:00 p.m.

Proposed Definitions. Proposed Nasdaq Rule 5745(c)(1) defines the term “ETMF Share” as a security that: (1) represents an interest in a registered investment company organized as an open-end management investment company that invests in a portfolio of securities and other assets selected and managed by the ETMF’s investment adviser consistent with the ETMF’s investment objectives and policies; (2) is issued in specified aggregate unit quantities in return for a deposit of a specified portfolio of securities and/or a cash amount with a value per Share equal to the ETMF’s NAV; (3) when aggregated in the same specified unit quantities, may be redeemed in exchange for a specified portfolio of securities and/or cash with a value per Share equal to the ETMF’s NAV; and (4) is traded on Nasdaq or another national securities exchange using NAV-Based Trading, including pursuant to UTP.

In addition, proposed Nasdaq Rule 5745(c)(2) defines the term “Intraday Indicative Value” (“IIV”) as the estimated indicative value of an ETMF Share based on current information regarding the value of the securities and other assets held by the ETMF. Proposed Nasdaq Rule 5745(c)(3) defines the term “Composition File” as the specified portfolio of securities and/or cash that an ETMF will accept as a deposit in issuing ETMF Shares and the specified portfolio of securities and/or cash that an ETMF will deliver in a redemption of ETMF Shares. The current Composition File would be disseminated through the National Securities Clearing Corporation (“NSCC”) once each business day before the open of trading in ETMF Shares on Nasdaq on such day. To maintain the confidentiality of current portfolio trading, an ETMF’s Composition File generally would not be a pro rata reflection of the ETMF’s securities positions. Each security included in the Composition File would be a current holding of the ETMF, but the Composition File generally would not include all of the securities in the ETMF’s portfolio or match the weightings of the included securities in the portfolio. The Composition File also may

consist entirely of cash, in which case it would not include any of the securities in the ETMF's portfolio.

Proposed Nasdaq Rule 5745(c)(4) defines the term "Reporting Authority" as Nasdaq, an institution or a reporting service designated by Nasdaq as the official source for calculating and reporting information relating to such series of ETMF Shares, including, but not limited to, the IIV, the amount of any cash distribution to holders of ETMF Shares, NAV, the Composition File or other information relating to the issuance, redemption or trading of ETMF Shares. A series of ETMF Shares may have more than one Reporting Authority, each having different functions.

Initial and Continued Listing. Proposed Nasdaq Rule 5745(d) sets forth the initial and continued listing criteria applicable to ETMF Shares. Proposed Nasdaq Rule 5745(d)(1)(A) provides that, for each series of ETMF Shares, Nasdaq will establish a minimum number of ETMF Shares required to be outstanding at the time of commencement of trading. In addition, under proposed Nasdaq Rule 5745(d)(1)(B), Nasdaq must obtain a representation from the issuer of each series of ETMF Shares that the NAV for such series will be calculated on each business day that the New York Stock Exchange is open for trading and that the NAV will be made available to all market participants at the same time. Under proposed Nasdaq Rule 5745(d)(1)(C), the Reporting Authority that provides the Composition File must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the ETMF's portfolio positions and changes in positions.

Proposed Nasdaq Rule 5745(d)(2)(A) provides that each series of ETMF Shares could continue to be listed and traded if the IIV for the ETMF Shares is widely disseminated by one or more major market data vendors at intervals of not more than 15 minutes during the Regular Market Session when the ETMF Shares trade on Nasdaq. According to the Exchange, the

purpose of IIVs in NAV-Based Trading is to enable investors to estimate the next-determined NAV so they can determine the number of ETMF Shares to buy or sell if they want to transact in an approximate dollar amount (e.g., if an investor wants to acquire approximately \$5,000 of an ETMF, how many Shares should the investor buy?).¹³ For this purpose, Nasdaq believes that dissemination of IIVs at intervals of not more than 15 minutes should generally be sufficient. The Exchange states that more frequent dissemination of IIVs may increase fund costs without apparent benefit and could focus unwarranted investor attention on these disclosures. Moreover, for certain strategies, more frequent IIV disclosure could provide unintended information about current portfolio trading activity to market participants who possess the requisite analytical capabilities, computation power and motivation to reverse engineer the ETMF's portfolio positions. As proposed, an ETMF would be permitted to disseminate IIVs at intervals of less than 15 minutes, but would not be required to do so to maintain trading on the Exchange.

Proposed Nasdaq Rule 5745(d)(2)(B) provides that Nasdaq will consider the suspension of trading in, or removal from listing of, a series of ETMF Shares under any of the following circumstances: (1) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of ETMF Shares, there are fewer than 50 beneficial holders of the series of ETMF Shares for 30 or more consecutive trading days; (2) if the ETMF's IIV or NAV is no longer calculated or if its IIV, NAV or Composition File is no longer available to all market participants at the same time; (3) if the ETMF has failed to submit any filings required by the Commission or if Nasdaq is aware that the ETMF is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission with respect to the series of

¹³ Because, in NAV-Based Trading, prices of executed trades are not determined until the reference NAV is calculated, buyers and sellers of ETMF Shares during the trading day would not know the final value of their purchases and sales until the end of the trading day.

ETMF Shares; or (4) if such other event shall occur or condition exists which, in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Proposed Nasdaq Rule 5745(d)(2)(C) provides that, if the IIV of a series of ETMF Shares is not being disseminated as required, Nasdaq may halt trading during the day in which the interruption to the dissemination of the IIV occurs. If the interruption to the dissemination of the IIV persists past the trading day in which it first occurred, Nasdaq will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to a series of ETMF Shares is not calculated on each business day that the New York Stock Exchange is open for trading and disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants. If Nasdaq becomes aware that the Composition File with respect to a series of ETMF Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the Composition File is available to all market participants.

In addition, proposed Nasdaq Rule 5745(d)(2)(D) provides that, upon termination of an ETMF, the ETMF Shares issued in connection with such entity must be removed from listing on Nasdaq. Proposed Nasdaq Rule 5745(d)(2)(E) provides that voting rights must be as set forth in the applicable ETMF prospectus.

Additional Provisions. Proposed Nasdaq Rule 5745(e) provides that neither Nasdaq, the Reporting Authority nor any agent of Nasdaq shall have any liability for damages, claims, losses or expenses caused by any errors, omissions or delays in calculating or disseminating any of the following: the current portfolio value; the current value of the securities and other assets required to be deposited in connection with issuance of ETMF Shares; the amount of any

dividend-equivalent payment or cash distribution to holders of ETMF Shares; NAV; the Composition File; or other information relating to the purchase, redemption or trading of ETMF Shares, resulting from any negligent act or omission by Nasdaq, the Reporting Authority or any agent of Nasdaq, or any act, condition or cause beyond the reasonable control of Nasdaq, its agent or the Reporting Authority, including, but not limited to, an act of God, fire, flood, extraordinary weather conditions, war, insurrection, riot, strike, accident, action of government, communications or power failure, equipment or software malfunction, or any error, omission or delay in the reports of transactions in one or more underlying securities.

Proposed Nasdaq Rule 5745(f) applies only to series of ETMF Shares that are the subject of an order by the Commission exempting such series from certain prospectus delivery requirements under Section 24(d) of the 1940 Act and are not otherwise subject to prospectus delivery requirements under the Securities Act. Nasdaq would inform its members regarding application of Proposed Nasdaq Rule 5745(f) to a particular series of ETMF Shares by means of an information circular prior to commencement of trading in such series. Under the proposed rule, Nasdaq requires that members provide to all purchasers of a series of ETMF Shares a written description of the terms and characteristics of those securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such purchaser. In addition, members shall include such a written description with any sales material relating to a series of ETMF Shares that is provided to customers or the public. Any other written materials provided by a member to customers or the public making specific reference to a series of ETMF Shares as an investment vehicle must include a statement in substantially the following form: “A circular describing the terms and characteristics of (the series of ETMF Shares) has been prepared by the

(open-end management investment company name) and is available from your broker. It is recommended that you obtain and review such circular before purchasing (the series of ETMF Shares).” A member carrying an omnibus account for a non-member broker-dealer is required to inform such non-member that execution of an order to purchase a series of ETMF Shares for such omnibus account would be deemed to constitute agreement by the non-member to make such a written description available to its customers on the same terms as are directly applicable to members under this rule. Upon request of a customer, a member shall also provide a prospectus for the particular series of ETMF Shares.

Proposed Nasdaq Rule 5745(g) provides that, if the investment adviser to an ETMF issuing Shares is a registered broker-dealer or affiliated with a broker-dealer, such investment adviser shall erect a “fire wall” between the investment adviser and the broker-dealer personnel or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such ETMF’s portfolio holdings. Personnel who make decisions on the ETMF’s portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable ETMF portfolio.

Other Proposed Rule Changes

The Exchange also proposes to amend: (1) Nasdaq Rule 4120(a)(9) and (10) to add provisions applicable to ETMF Shares with respect to trading halts; (2) Nasdaq Rule 4120(b)(4)(A) and (E) to modify certain defined terms to include references to ETMF Shares; (3) Nasdaq Rule 5615(a)(5) and IM-5615-4 to add references to ETMFs for purposes of certain corporate governance requirements; and (4) Nasdaq Rule 5940(a) and (b) to add references to ETMF Shares to those securities already covered under the rule relating to both entry fees and

annual fees.¹⁴

Portfolio Disclosure

The Exchange states that, as required for traditional open-end investment companies, ETMFs would disclose their full portfolio positions at least quarterly, with a delay (not to exceed 60 days) to limit opportunities for other market participants to engage in predatory trading practices that might harm fund shareholders.

Nasdaq Rule 5735 requires Active ETFs to disclose publicly their full portfolio positions at least once daily. According to the Exchange, the purpose of this requirement is to provide Active ETF market makers with the portfolio information needed to hedge the intraday market risk they assume as they take inventory positions in connection with their market making activities. Nasdaq states that, in conventional ETF trading, a condition to maintaining a tight relationship between market trading prices and contemporaneous underlying portfolio values is that market makers have sufficient information regarding portfolio positions to enable them to earn reliable arbitrage profits by entering into long (or short) positions in ETF shares and offsetting short (or long) positions in the underlying holdings (or a suitable proxy).

Nasdaq states that, in ETMF trading, by contrast, a market maker assumes no intraday market risk in connection with its inventory positions because all ETMF Share transaction prices are based on the next-determined NAV. According to the Exchange, whether an ETMF's underlying value goes up or down over the course of a trading day would not affect how much profit a market maker earns by selling (or buying) ETMF Shares in the market at a net premium

¹⁴ The Exchange also proposes to make certain other minor technical changes to these rules unrelated to ETMFs. Specifically, the Exchange proposes to amend Rule 4120(a)(9), (b)(4)(A), and (b)(4)(E) to include appropriate references to various derivative securities defined in Rule 5711, and to make certain other typographical corrections and clarifications.

(discount) to NAV, and then purchasing (redeeming) an offsetting number of ETMF Shares at the end of the day in transactions with the ETMF. The Exchange states that no intraday market risk means no requirement for intraday hedging, and therefore no associated requirement for portfolio disclosure to maintain a tight relationship between ETMF Share trading prices and NAV.

According to the Exchange, the arbitrage that connects ETMF trading prices to NAV is effected at the end of each trading day when a market maker or other arbitrageur purchases (or redeems) Creation Units of ETMF Shares through an Authorized Participant to offset the net amount of ETMF Shares it has sold (bought) over the course of the trading day, and buys (sells) the quantity of Composition File instruments corresponding to the number of Creation Units purchased (redeemed). The Exchange states that an ETMF market maker that purchases (or redeems) a Creation Unit at the end of a trading day to offset its net intraday sales (purchases) of a Creation Unit quantity of ETMF Shares would earn arbitrage profits to the extent that it either sells (buys) Shares at an aggregate premium (discount) to NAV or buys (sells) a Creation Unit-equivalent quantity of Composition File instruments at an aggregate discount (premium) to their end-of-day values, and the net amount of ETMF premium (discount) plus Composition File instruments discount (premium) exceeds the transaction fee that applies to a purchase (redemption) of a Creation Unit of ETMF Shares.¹⁵

The Exchange states that, different from ETFs trading in conventional intraday markets, ETMFs offer market makers an arbitrage profit opportunity that does not depend on either

¹⁵ The arbitrage mechanism is simplified for cash creations and redemptions. An ETMF market maker that purchases (or redeems) a Creation Unit in cash to offset its net intraday sales (purchases) of a Creation Unit quantity of ETMF Shares would earn arbitrage profits to the extent that it sells (buys) ETMF Shares in the secondary market at an aggregate premium (discount) to NAV that exceeds the transaction fee that applies to a cash creation (redemption) of a Creation Unit of ETMF Shares.

corresponding intraday adjustments in fund share and underlying portfolio positions or the use of a hedge portfolio to manage intraday market risk. According to the Exchange, a “perfect arbitrage” in an ETMF requires only that market makers holding short (or long) positions in ETMF Shares accumulated intraday transact with the ETMF to purchase (redeem) a corresponding number of Creation Units of ETMF Shares, buy (sell) the equivalent quantities of Composition File instruments at market-closing or better prices, and offload any remaining sub-Creation Unit ETMF Share inventory through secondary market transactions by the market close.¹⁶

According to the Exchange, because the arbitrage mechanism that underlies ETMF trading is simpler, more reliable and exposes market makers to less risk than ETF arbitrage, market makers should require less profit inducement to establish and maintain markets in ETMF Shares than in similarly constituted ETFs, thereby enabling ETMFs to routinely trade at smaller premiums/discounts and narrower bid-ask spreads. Further, because the arbitrage mechanism that underlies efficient trading of ETMFs does not involve portfolio positions that are not included in the Composition File, the need for full portfolio transparency to achieve tight markets in ETMF Shares is eliminated.

Exchange Listing

Nasdaq intends to enter into a license agreement to allow for the listing and trading of

¹⁶ According to the Exchange, market makers are expected generally to seek to minimize their exposure to price risk in ETMF Shares by holding little or no overnight inventory. Establishing Creation Unit sizes for ETMFs that are somewhat smaller (i.e., in a range of 5,000 to 50,000 Shares) than is customary for ETFs should support efficient arbitrage between an ETMF’s trading prices and NAV by facilitating tighter market maker inventory management. To the extent that market makers hold small positions in ETMF Shares overnight, they are expected to aggregate such holdings with other risk positions and transact at or near the market close to buy or sell offsetting positions in appropriate, broad-based hedging instruments. Such hedging of overnight inventory risk on a macro basis does not require disclosure of non-Composition File portfolio positions.

ETMF Shares on the Exchange.¹⁷ According to the Exchange, ETMF Shares listed on the Exchange may trade pursuant to UTP on other national securities exchanges that have obtained appropriate licenses, adopted applicable exchange rules and developed systems to support NAV-Based Trading. Nasdaq states that fees collected by the Exchange in connection with the listing and trading of ETMF Shares would comply with the statutory requirements set forth in the Act.

Trading Rules

Nasdaq would deem ETMF Shares to be equity securities, thus rendering trading in ETMF Shares to be subject to Nasdaq's existing rules governing the trading of equity securities.

III. Comment Letters

The Commission received four comment letters on the proposed rule change. All of the commenters supported the proposal. The commenters stated their views that ETMFs could offer investment managers and investors a tax-efficient alternative to today's mutual funds.¹⁸ In addition to the benefits of tax-efficiency, some commenters stated their belief that ETMFs would offer lower cost benefits to investors as a result of lower expenses,¹⁹ and one commenter stated its belief that a benefit would be transparency of ETMF transaction costs.²⁰ The same commenter also stated its view that the non-disclosed nature of the ETMF portfolio would serve as a barrier to front-running of portfolio trades of actively managed funds and that the proposed

¹⁷ The Exchange states that aspects of ETMFs and NAV-Based Trading are protected intellectual property subject to issued and pending U.S. patents held by Navigate Fund Solutions LLC ("Navigate"), a wholly owned subsidiary of Eaton Vance Corp. Nasdaq would enter into a license agreement with Navigate to allow for NAV-Based Trading on the Exchange of ETMFs that have themselves entered into license agreements with Navigate.

¹⁸ See MMI Letter; Tull Letter; Strategic Insight Letter; and ConvergeEx Letter at 1, supra note 4.

¹⁹ See Tull Letter; Strategic Insight Letter; and ConvergeEx Letter at 1, supra note 4.

²⁰ See Tull Letter, supra note 4.

ETMFs would promote renewed competition in the fund marketplace by encouraging investment managers concerned about maintaining the confidentiality of their portfolio trading to offer their leading strategies in a better performing product structure.²¹

In addition, several commenters stated their belief about the potential positive impact the proposed ETMF product may have on arbitrage and pricing. Specifically, one commenter stated its view that NAV-Based Trading for ETMFs would permit market makers to offer differential arbitrage pricing to investors based on the closing NAV of the ETMF, which should expand market maker opportunities as the arbitrage moves towards order management control and away from sophisticated arbitrage pricing models using real-time pricing that makes it difficult for an investor to calculate personal market entry and exit costs.²² Another commenter stated its view that, because ETMFs could promote competition in the fund marketplace, such competition might enable ETMFs to trade close to the underlying fund value on a consistent basis.²³ Lastly, one commenter stated its view that the promise of ETMFs can be realized if a “common Chassis” is adopted by multiple fund managers, who would then simultaneously educate the marketplace about the benefits of ETMFs.²⁴ The same commenter also believes that the adoption curve of ETMFs might parallel the acceleration in the use of mutual funds triggered by the introduction in the early 1990s of the Schwab’s Mutual Fund OneSource® supermarket, when numerous fund managers articulated the benefit of a common administrative platform.²⁵ The commenter concluded with its view that ETMFs have the potential to significantly improve returns to investors in actively-managed funds, and to encourage additional investment and savings by

²¹ See id.

²² See id.

²³ See ConvergeEx Letter at 2, supra note 4.

²⁴ See Strategic Insight Letter, supra note 4.

²⁵ See id.

millions of American over the coming decades.²⁶

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2014-020 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

As discussed above, the Exchange proposes to adopt new Nasdaq Rule 5745, which would govern the listing and trading of ETMF Shares. In addition, ETMF Shares would trade on Nasdaq using a new trading protocol called “NAV-Based Trading.” In NAV-Based Trading, all bids, offers, and execution prices would be expressed as a premium/discount (which may be zero) to the ETMF’s next-determined NAV. Trade executions using NAV-Based Trading would be binding at the time orders are matched on Nasdaq’s facilities, with the transaction prices contingent upon the determination of the ETMF’s NAV at the end of the business day. The Commission believes that the proposal, which seeks to permit the listing and trading of ETMFs on the Exchange, raises important trading issues that warrant further public comment and Commission consideration. The proposed rule change would permit the listing and trading of ETMFs based on a novel and unique trading protocol, NAV-Based Trading, and the Commission believes that proceedings are appropriate to consider, among other matters, the ability of brokers,

²⁶ See id.

²⁷ 15 U.S.C. 78s(b)(2)(B).

dealers, investors, and other market participants to fully understand NAV-Based Trading, as well as the public availability of information, including the differing representations of intraday bids, offers and execution prices for ETMFs, for investors and other market participants.

Pursuant to Section 19(b)(2)(B) of the Act,²⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," and "to protect investors and the public interest."²⁹

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁰

²⁸ Id.

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding - either oral or notice and opportunity for written comments - is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2014-020 on the subject line.

Paper comments:

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

All submissions should refer to File Numbers SR-NASDAQ-2014-020. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.

and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2014-020 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Kevin M. O'Neill
Deputy Secretary

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³¹ 17 CFR 200.30-3(a)(57).