

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>33</sup> and Rule 19b-4(f)(2)<sup>34</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

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

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAX-2021-50 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-MIAX-2021-50. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2021-50, and should be submitted on or before November 22, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

[FR Doc. 2021-23671 Filed 10-29-21; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93428; File No. SR-NASDAQ-2021-040]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Establish the "Extended Trading Close" and a New "Extended Trading Close" Order Type

October 26, 2021.

#### I. Introduction

On July 12, 2021, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to add Equity 4, Rule ("Rule") 4755 and amend Rules 4702 and 4703 to establish the "Extended Trading Close," as well as the "ETC Eligible LOC" and "Extended Trading Close" order types. The proposed rule change was published for comment in the **Federal Register** on July 28, 2021.<sup>3</sup> On

<sup>35</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 92466 (July 22, 2021), 86 FR 40667. The comment letters received on the proposed rule change are available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2021-040/srnasdaq2021040.htm>.

September 9, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On October 25, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.<sup>6</sup> The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

#### II. Description of the Proposal

The Exchange proposes to adopt the Extended Trading Close ("ETC"), which would be a process during which eligible orders in Nasdaq-listed securities<sup>8</sup> may match and execute at the Nasdaq official closing price ("NOCP"), as determined by the Nasdaq closing cross or the LULD closing cross (together, the "Closing Cross"), for a five-minute period immediately following the Closing Cross.<sup>9</sup> According to the Exchange, the ETC would be complementary to the Closing Cross and is not intended or expected to be a substitute for the Closing Cross,<sup>10</sup> and it would allow participants an additional

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 92905, 86 FR 51390 (September 15, 2021). The Commission designated October 26, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> In Amendment No. 1, the Exchange modified the scenarios in which executions in the Extended Trading Close would be suspended, and made other conforming and clarifying changes throughout the proposed rule change. Amendment No. 1 is available on the Commission's website at: <https://www.sec.gov/comments/sr-nasdaq-2021-040/srnasdaq2021040.htm>.

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> The Exchange states that it is appropriate to limit participation in the ETC to orders in Nasdaq-listed securities, given the Exchange's role as the primary listing market and its commitment in investing in and enhancing the Closing Cross (as defined herein) for Nasdaq-listed securities. See Amendment No. 1 at 20. The Exchange also states that the vast majority of participants looking to trade at the closing price participate in the primary listing market's closing auction and do not route orders to non-primary listing market destinations. See *id.*

<sup>9</sup> See proposed Rule 4755(a)(5).

<sup>10</sup> See Amendment No. 1 at 18. The Exchange states that it does not expect the ETC to have an impact on participation in the Closing Cross, and that a number of off-exchange venues already offer their participants the ability to receive the NOCP after the Closing Cross. See *id.*

<sup>33</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>34</sup> 17 CFR 240.19b-4(f)(2).

opportunity to access liquidity in Nasdaq-listed securities at the NOCP for a limited period of time after the Closing Cross concludes.<sup>11</sup>

As proposed, only “ETC Orders” and “ETC Eligible LOC Orders” (together, “ETC Eligible Orders”) would be eligible to participate in the ETC.<sup>12</sup> An ETC Order would be a new order type for Nasdaq-listed securities that may be executed only during the ETC and only at the NOCP as determined by the Closing Cross.<sup>13</sup> An ETC Order may be entered, cancelled, or modified between the time when the ETC commences and ends.<sup>14</sup> If an ETC Order is not fully executed at the conclusion of the ETC, then any unexecuted portion of the order would be cancelled.<sup>15</sup> An ETC Eligible LOC Order would be a LOC order for a Nasdaq-listed security entered through RASH or FIX<sup>16</sup> that did not fully execute during the Closing

Cross, and would participate in the ETC if the NOCP, as determined by the Closing Cross, is at or within its limit price.<sup>17</sup> A participant may choose to disable a LOC order from participating in the ETC, in which case the system would cancel any shares of the LOC order that remain unexecuted after the Closing Cross.<sup>18</sup> In addition, if a participant enters a time-in-force that continues after the time of the Closing Cross to a LOC order (*i.e.*, closing cross/extended hours order), then such order would bypass the ETC.<sup>19</sup> Any unexecuted portion of an ETC Eligible LOC Order may be cancelled or modified by the participant at any time during the ETC, and any unexecuted portion of an ETC Eligible LOC Order at the conclusion of the ETC would be cancelled.<sup>20</sup>

As proposed, the ETC would commence upon the conclusion of the Closing Cross and end at 4:05 p.m. (or 1:05 p.m. on a day when the Exchange closes early).<sup>21</sup> The system would match and execute ETC Eligible Orders continuously throughout the ETC, in time priority order based on the time the system received each order into the ETC,<sup>22</sup> and at the NOCP as determined

by the Closing Cross.<sup>23</sup> If fewer than all shares of ETC Eligible Orders are executed by the conclusion of the ETC, then the system would cancel any unexecuted portions of such orders.<sup>24</sup>

Also as proposed, beginning at 4:00:05 p.m. (or 1:00:05 p.m. on a day when the Exchange closes early), the Exchange would disseminate by electronic means an ETC order imbalance indicator every 5 seconds until the ETC concludes.<sup>25</sup> The ETC order imbalance indicator would disseminate the following information: (a) Symbol; (b) the number of shares of ETC Eligible Orders that have been matched and executed at the NOCP during the ETC, as of the time of dissemination of the ETC order imbalance indicator; (c) the size of any ETC imbalance<sup>26</sup> (exclusive of orders with minimum quantity instructions<sup>27</sup>); and (d) the buy or sell direction of any ETC imbalance.<sup>28</sup>

Moreover, as proposed, the Exchange system would suspend execution of ETC Eligible Orders in a security whenever it detects: (i) An order in that same security resting on the Nasdaq continuous book in after-hours trading<sup>29</sup> with a bid (offer) price that is higher than (lower than) the NOCP for that security, as determined by the Closing Cross;<sup>30</sup> or (ii) the after-hours trading last sale price, or the best after-hours trading bid (offer) price, of the

necessarily enter the ETC with the same relative priority that they had prior to the ETC. *See id.* Moreover, due to the time required for the system to process ETC Eligible LOC Orders for participation in the ETC, it is possible that an ETC Eligible LOC Order would enter the ETC with a lower time priority than an ETC Order entered after the Closing Cross concludes. *See id.*

<sup>23</sup> *See* proposed Rule 4755(b)(2). All ETC Eligible Orders executed in the ETC would be trade reported anonymously and disseminated via the consolidated tape. *See* proposed Rule 4755(b)(5).

<sup>24</sup> *See* proposed Rule 4755(b)(4).

<sup>25</sup> *See* proposed Rule 4755(b)(1).

<sup>26</sup> ETC imbalance would mean the number of shares of buy or sell ETC Eligible Orders that have not been matched during the ETC. *See* proposed Rule 4755(a)(4).

<sup>27</sup> The Exchange states that it proposes to exclude ETC Eligible Orders with minimum quantity instructions from the calculation of the size of the ETC imbalance because the size of such orders may be misleading to participants, given that such orders would rest on the book and would not execute if the minimum quantity instruction was not satisfied. *See* Amendment No. 1 at 18–19.

<sup>28</sup> *See* proposed Rule 4755(a)(8).

<sup>29</sup> *See* proposed Rule 4755(a)(1) (defining “after hours trading” to mean trading in a Nasdaq-listed security that commences immediately following the conclusion of the Closing Cross, during post-market hours, as that term is defined in Equity 1, Section 1(a)(9)).

<sup>30</sup> According to the Exchange, this limitation would prevent the Exchange from trading through orders on its own continuous book in after-hours trading that do not participate in the ETC. *See* Amendment No. 1 at 6.

<sup>11</sup> *See id.* at 4. The Exchange states that, for participants with limit-on-close (“LOC”) orders that do not execute in full in the Closing Cross, the ETC would give these LOC orders another opportunity to execute at the NOCP before the after-market trading price moves far away from it. *See id.* at 15. The Exchange also states that, with the ETC, participants would have an opportunity to access liquidity at the NOCP even if they did not participate in the Closing Cross. *See id.* According to the Exchange, by increasing opportunities for participants to execute their orders at the NOCP, it would allow them to execute sizable orders without market impact as a complement to the Closing Cross and as an alternative to after-hours trading. *See id.*

<sup>12</sup> ETC Orders and ETC Eligible LOC Orders may only execute against other ETC Orders and ETC Eligible LOC Orders. *See* proposed Rules 4702(b)(17)(A) and 4702(b)(12)(A).

<sup>13</sup> *See* proposed Rule 4702(b)(17)(A). An ETC Order may be assigned a minimum quantity order attribute, and the minimum quantity condition may be satisfied only by execution against one or more orders, each of which must have a size that satisfies the minimum quantity condition. *See* proposed Rule 4702(b)(17)(B). *See also* Amendment No. 1 at 13–14 n.18. If no orders in the ETC satisfy a minimum quantity condition for an ETC Order, then the ETC Order with a minimum quantity condition would rest on the Nasdaq book in time priority unless and until there is an order that can satisfy the minimum quantity condition to allow for execution of the ETC Order; if no such order is present in the ETC at its conclusion, then the ETC Order would cancel. *See* proposed Rule 4702(b)(17)(B). Moreover, an ETC Order may be referred to as having a time-in-force of “ETC.” *See* proposed Rule 4703(a)(8).

<sup>14</sup> The system would reject an ETC Order that is submitted prior to the commencement of the ETC. *See* proposed Rule 4702(b)(17)(A). In addition, the system would not accept an ETC Order entered on any day when insufficient interest exists in the system to conduct a Closing Cross for that security, or when the Exchange invokes contingency procedures due to a disruption that prevents the execution of the Closing Cross. *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> The Exchange states that it typically assumes a more active role in managing the order flow submitted by users of the RASH and FIX protocols, and in contrast, users of the OUCH and FLITE protocols generally assume a more active role in managing their order flow. *See* Amendment No. 1 at 15–16.

<sup>17</sup> *See* proposed Rule 4702(b)(12)(A). The Exchange also proposes to amend Rule 4702(b)(12) to describe the participation of LOC orders in the LULD closing cross.

<sup>18</sup> *See id.* Post-only orders, midpoint peg post-only orders, supplemental orders, and market maker peg orders may not operate as ETC Eligible LOC Orders, and ETC Eligible LOC Orders would be rejected if they are assigned a pegging attribute. *See* Amendment No. 1 at 9 n.14.

<sup>19</sup> *See* proposed Rule 4702(b)(12)(B).

<sup>20</sup> *See* proposed Rule 4702(b)(12)(A).

<sup>21</sup> As proposed, the ETC would not occur for a security on any day when insufficient interest exists in the Exchange system to conduct the Closing Cross for that security or when the Exchange invokes contingency procedures due to a disruption that prevents the execution of the Closing Cross. *See* proposed Rule 4755(b). Moreover, the Exchange would cancel executions in a security that occur in the ETC if the Exchange nullifies the Closing Cross in that security pursuant to the rules governing clearly erroneous transactions. *See id.* The Exchange also states that if short sale orders in securities subject to Regulation SHO are permitted to execute in the Closing Cross pursuant to Rule 201 of Regulation SHO, then the system would also permit short sale executions in such securities to occur in the ETC; whereas the system would reject short sale orders in securities if short sale orders in such securities were not permitted to execute in the Closing Cross. *See* Amendment No. 1 at 8 n.11. Moreover, the restrictions of Rule 201 of Regulation SHO will apply to the ETC to the extent that the current national best bid is being calculated, collected, and disseminated for securities. *See id.*

<sup>22</sup> ETC Eligible LOC Orders would receive new timestamps upon entry into the ETC and prioritized amongst each other and ETC Orders based on the time the system received each order into the ETC. *See* Amendment No. 1 at 9. Specifically, the system would submit ETC Eligible LOC Orders for participation in the ETC, and would assign them new timestamps, in random order. *See id.* at 9 n.15. Therefore, ETC Eligible LOC Orders may not

security other than on the Nasdaq continuous book is either more than 0.5% or \$0.01 higher than (lower than) the NOCP for that security as determined by the Closing Cross, whichever is greater.<sup>31</sup> The system would resume execution of ETC Eligible Orders in a security in scenario (i) if and when the system determines, during the ETC, that the Nasdaq continuous book in after-hours trading is clear of resting orders in that security with a bid (offer) price that is higher than (lower than) the NOCP for that security, as determined by the Closing Cross.<sup>32</sup> The system would resume execution of ETC Eligible Orders in a security in scenario (ii) if and when the after-hours trading last sale price or the best after-hours trading bid (offer) price of the underlying security (other than on the Nasdaq continuous book) returns to within the greater of the 0.5% or \$0.01 thresholds during the ETC.<sup>33</sup> If execution of ETC Eligible Orders remains suspended as of the conclusion of the ETC, then the system would cancel any remaining unexecuted ETC Eligible Orders in that security.<sup>34</sup>

The Exchange represents that it will surveil the ETC for any unfair or manipulative trading practices.<sup>35</sup>

### III. Summary of Comments and the Exchange's Response

The Commission received a comment letter opposing the proposal.<sup>36</sup> This commenter states that the Exchange has not effectively identified the purpose, use case, or client demand for the ETC,<sup>37</sup> and expresses the concern that the ETC would diminish the quality of the Closing Cross process, encourage harmful arbitrage behavior, and negatively impact aspects of the continuous market.<sup>38</sup>

<sup>31</sup> See proposed Rule 4755(b)(3). According to the Exchange, this limitation would help to mitigate the risk that orders in Nasdaq-listed securities that participate in the ETC would execute at a price that is no longer reflective of the value of the security on trading venues other than Nasdaq. See Amendment No. 1 at 7.

<sup>32</sup> See proposed Rule 4755(b)(3).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See Amendment No. 1 at 19. As proposed, the Exchange intends to introduce the ETC and begin accepting ETC Orders during the Fourth Quarter of 2021. See *id.* at 14. The Exchange states that, at least 30 days prior to launching the ETC and beginning to accept ETC Orders, it would publish a Nasdaq Trader Alert announcing the launch date. See *id.*

<sup>36</sup> See letter from Mehmet Kinak, Global Head of Systematic Trading & Market Structure and Jonathan Siegel, Senior Legal Counsel—Legislative & Regulatory Affairs, T. Rowe Price, to Vanessa Countryman, Secretary, Commission, dated August 18, 2021.

<sup>37</sup> See *id.* at 1.

<sup>38</sup> See *id.* This commenter also provides alternative recommendations for the closing auction. See *id.* at 3.

Specifically, this commenter does not believe that the ETC would enhance the Closing Cross process, or improve price discovery or liquidity in the Closing Cross.<sup>39</sup> Rather, this commenter believes that the ETC could detract from the Closing Cross because some market participants would withhold their interest from the Closing Cross and refrain from submitting orders until they know the NOCP.<sup>40</sup> This, according to the commenter, would detract from the robustness and quality of the closing price.<sup>41</sup>

This commenter also believes that the ETC would allow sophisticated participants to engage in arbitrage by quickly identifying price differences between the Closing Cross price and the prevailing after-hours market price before other participants.<sup>42</sup> According to the commenter, these sophisticated participants could use ETC-only order types and ETC imbalance information to opportunistically submit orders to engage with other participants' ETC activity at a previously determined fixed price using the ETC and unwind risk in the after-market at prices that more accurately reflect the current value of the security.<sup>43</sup>

Finally, this commenter states that the availability of information going into the closing auction becomes the principal driver of price discovery in the continuous market in the last five to ten minutes of trading.<sup>44</sup> According to the commenter, if participants do not submit their true interest in hopes they could trade in greater size utilizing the ETC, the breadth and quality of market information could be affected and result in more uncertainty and volatility in continuous trading behavior leading into the close.<sup>45</sup>

<sup>39</sup> See *id.* at 1. This commenter also distinguishes the ETC from off-exchange trading venues' mechanisms that allow their participants to receive the NOCP, and states that these other mechanisms are pre-arranged matched trades or guaranteed close trades that (unlike the ETC) are received prior to the Closing Cross and the determination of the closing price. See *id.* at 2. This commenter also states that when a trade is sent to an off-exchange mechanism after the Closing Cross, it is generally a trade that is executed by a broker in a principal capacity, and these transactions tend to be "clean-up" trades for orders that did not complete in the auction or trades to facilitate other specific needs of a client. See *id.* The commenter believes that these existing clean-up and facilitation mechanisms generally work well and does not believe there is a void that the Exchange needs to fill in this regard. See *id.*

<sup>40</sup> See *id.* at 1–2.

<sup>41</sup> See *id.* at 2. This commenter also expresses the concern that Commission approval of the ETC might encourage others to offer similar functions that would likely further detract from participation and price discovery in the closing auction. See *id.*

<sup>42</sup> See *id.* at 3.

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

In its response letter, the Exchange disagrees with the commenter's concerns that the ETC would threaten the integrity of the Closing Cross.<sup>46</sup> The Exchange reiterates that the ETC would compete with other venues that already offer mechanisms that enable their customers to execute orders at the Closing Cross price after the Closing Cross concludes.<sup>47</sup> The Exchange also does not believe that the ETC would siphon orders away from the Closing Cross.<sup>48</sup> According to the Exchange, the Closing Cross is robust, efficient, and affords its participants reasonable assurance that their orders will execute, and the published indicative price and order imbalance information prior to the commencement of the Closing Cross enable its participants to mitigate their risks of participating in the Closing Cross.<sup>49</sup> The Exchange believes that the ETC should not significantly alter the behavior of participants for which execution assurance is important,<sup>50</sup> and that the ETC could bolster participants' willingness to participate in the Closing Cross because the ETC would provide an added opportunity for their LOC orders to execute at the Closing Cross price.<sup>51</sup> The Exchange further states that it expects participants to use the ETC as a "clean-up" mechanism for executing orders that are not executed in the Closing Cross or to facilitate other specific client needs.<sup>52</sup>

<sup>46</sup> See letter from Brett M. Kitt, Associate Vice President & Principal Associate General Counsel, Nasdaq, to Vanessa Countryman, Secretary, Commission, dated September 9, 2021.

<sup>47</sup> See *id.* at 1–2. While the Exchange would support a Commission review of "echo prints" of the Closing Cross price and their effects on market efficiency, the Exchange believes that, unless or until the Commission so acts, there is no reasonable basis to allow off-exchange venues to offer echo prints, while denying the Exchange the ability to do the same. See *id.* at 3.

<sup>48</sup> See *id.* at 2. The Exchange states that, to the extent that it assesses that the ETC has become too large relative to the Closing Cross, or that members are indeed utilizing the ETC as a regular substitute for the Closing Cross, then it will propose such actions as are necessary to mitigate any threat to the Closing Cross or its price discovery function. See *id.* at 3.

<sup>49</sup> See *id.* at 2.

<sup>50</sup> The Exchange also states that, for those participants that seek to execute large volumes of shares at the Closing Cross price, exclusive participation in the ETC is unlikely to meet their needs, as ETC-only orders will execute only to the extent that there exists matching share volume in the ETC that is sufficient to do so. See *id.* According to the Exchange, because it would disseminate ETC imbalance information only after the ETC commences, participants in the ETC would have less assurance about the outcome of their participation than when they participate in the Closing Cross, or in the Closing Cross and ETC together. See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* The Exchange also states that market forces should determine whether the market for this

In addition, the Exchange does not share the commenter's concerns regarding arbitrage, and states that any risk that ETC participants would face harm from arbitrageurs is likely to be considerably less than the risks that market participants presently face when they trade after-hours.<sup>53</sup> The Exchange also states that because it would suspend ETC executions if significant deviations emerge between the Closing Cross price and the after-hours market price of a security, this should limit the instances in which egregious arbitrage occurs.<sup>54</sup> Finally, the Exchange reiterates that participation in the ETC is voluntary, and therefore any participant that is concerned about arbitrageurs is free to not participate in the ETC or cancel its orders in the ETC.<sup>55</sup>

#### IV. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2021–040, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>56</sup> to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, 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 modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>57</sup> the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange has proposed to adopt the ETC, which would be a five-minute process immediately following the Closing Cross during which ETC Eligible Orders could match and execute against other ETC Eligible Orders continuously at the NOCP.<sup>58</sup> As

proposed, the Exchange would disseminate an ETC order imbalance indicator during the ETC, which would include certain information regarding ETC Eligible Orders. As described above, the Commission has received a commenter letter that expresses concerns regarding the potential impact of the ETC on the Closing Cross and on continuous trading, and the potential for the ETC to encourage arbitrage behavior. The Commission has also received a response letter from the Exchange. Moreover, on October 25, 2021, the Exchange submitted an amendment to the proposed rule change.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Sections 6(b)(5)<sup>59</sup> and 6(b)(8)<sup>60</sup> of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested

that is higher than (lower than) the NOCP for that security; or (ii) the after-hours trading last sale price, or the best after-hours trading bid (offer) price, of the security (other than on the Nasdaq continuous book) is more than 0.5% or \$0.01 higher than (lower than) the NOCP for that security, whichever is greater. The Exchange would resume execution of ETC Eligible Orders in a security in scenario (i) if and when the system determines, during the ETC, that the Nasdaq continuous book in after-hours trading is clear of resting orders in that security with a bid (offer) price that is higher than (lower than) the NOCP. The Exchange would resume execution of ETC Eligible Orders in a security in scenario (ii) if and when the after-hours trading last sale price or the best after-hours trading bid (offer) price of the security (other than on the Nasdaq continuous book) returns to within the greater of the 0.5% or \$0.01 thresholds during the ETC.

<sup>59</sup> 15 U.S.C. 78f(b)(5).

<sup>60</sup> 15 U.S.C. 78f(b)(8).

persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5), 6(b)(8), or any other provision of the Act, or rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,<sup>61</sup> any request for an opportunity to make an oral presentation.<sup>62</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by November 22, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 6, 2021. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR–NASDAQ–2021–040 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 No. SR–NASDAQ–2021–040. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

<sup>61</sup> 17 CFR 240.19b–4.

<sup>62</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants to 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 Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

service is already saturated and whether there is new room for competition. See *id.*

<sup>53</sup> See *id.* at 3.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>57</sup> *Id.*

<sup>58</sup> However, as described above, the Exchange would suspend execution of ETC Eligible Orders in a security whenever it detects: (i) An order in that same security resting on the Nasdaq continuous book in after-hours trading with a bid (offer) price

public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NASDAQ-2021-040 and should be submitted by November 22, 2021. Rebuttal comments should be submitted by December 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>63</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93424; File No. SR-MIAX-2021-49]

### Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt an Incentive Program for Market Makers in SPIKES® Options

October 26, 2021.

Pursuant to the provisions of 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 October 12, 2021, Miami International Securities Exchange LLC ("MIAX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the "Fee Schedule") to adopt an incentive program for Market Makers<sup>3</sup> in SPIKES® options.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings>, at MIAX'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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The Exchange proposes to amend the Fee Schedule to implement a SPIKES Options Market Maker Incentive Program (the "Incentive Program") for the period beginning October 1, 2021, and ending December 31, 2021.<sup>4</sup> The Incentive Program is designed to improve liquidity, volume, and quote width spreads in SPIKES options. Technical details regarding the Incentive Program were published in a Regulatory Circular on September 30, 2021.<sup>5</sup> The Exchange originally filed this proposal on September 30, 2021, (SR-MIAX-2021-45). On October 12, 2021, the Exchange withdrew SR-MIAX-2021-45 and refiled this proposal.

<sup>3</sup> The term "Market Makers" refers to "Lead Market Makers", "Primary Lead Market Makers" and "Registered Market Makers" collectively. See Exchange Rule 100.

<sup>4</sup> The Exchange notes that at the end of the period, the Program will expire unless the Exchange files another 19b-4 Filing to amend its fees.

<sup>5</sup> See MIAX Options Regulatory Circular 2021-56, SPIKES Options Market Maker Incentive Program (September 30, 2021) available at [https://www.miaxoptions.com/sites/default/files/circular-files/MIAX\\_Options\\_RC\\_2021\\_56.pdf](https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Options_RC_2021_56.pdf).

#### Background

On October 12, 2018, the Exchange received approval from the Commission to list and trade options on the SPIKES® Index, which measures expected 30-day volatility of the SPDR® S&P 500 ETF Trust (commonly known and referred to by its ticker symbol, "SPY").<sup>6</sup> The Exchange adopted its initial SPIKES transaction fees on February 15, 2019.<sup>7</sup> Options on the SPIKES Index began trading on the Exchange on February 19, 2019.

#### SPIKES Options Market Maker Incentive Program

The Exchange proposes to implement a SPIKES Options Market Maker Incentive Program for SPIKES options to incentivize Market Makers to improve liquidity, available volume, and the quote spread width of SPIKES options. To be eligible to participate in the Incentive Program, a Market Maker must meet certain minimum requirements related to quote spread width in certain in-the-money (ITM) and out-of-the-money (OTM) options as determined by the Exchange and communicated to Members via Regulatory Circular.<sup>8</sup> Market Makers must also satisfy a minimum time in the market in the front 2 expiry months of 70%, and have an average quote size of 25 contracts.

The Exchange proposes to establish two separate incentive compensation pools that will be used to compensate Market Makers that satisfy the criteria pursuant to the proposed Incentive Program.

##### Incentive 1 Pool

The first pool (Incentive 1) will be a total amount of \$40,000 per month, which will be allocated to Market Makers that meet the minimum requirements of the Incentive Program. Market Makers will be required to meet minimum spread width requirements in a select number of ITM and OTM SPIKES option contracts as determined by the Exchange and communicated to

<sup>6</sup> See Securities Exchange Act Release No. 84417 (October 12, 2018), 83 FR 52865 (October 18, 2018) (SR-MIAX-2018-14) (Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES® Index).

<sup>7</sup> See Securities Exchange Release No. 85283 (March 11, 2019), 84 FR 9567 (March 15, 2019) (SR-MIAX-2019-11). On September 30, 2020, the Exchange filed its proposal to, among other things, reorganize the Fee Schedule to adopt new Section 1(b), Proprietary Products Exchange Fees, and moved the fees and rebates for SPIKES options into new Section 1(b)(i). See Securities Exchange Act Release No. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR-MIAX-2020-32).

<sup>8</sup> *Supra* note 5.

<sup>63</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).

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

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