used to attract order flow. MIAX believes, however, that evidence not then before the court clearly demonstrates that availability of data attracts order flow. Due to competition among platforms, MIAX intends to improve its platform data offerings on a continuing basis, and to respond promptly to customers' data needs.

The intensity of competition for proprietary information is significant and MIAX believes that this proposal itself clearly evidences such competition. MIAX is offering ToM in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new Member Applicants and customers. MIAX competitors continue to create new market data products and innovative pricing in this space. MIAX expects to see firms challenge its pricing on the basis of MIAX's explicit fees being higher than the zero-priced fees from other competitors such as BATS. In all cases, MIAX expects firms to make decisions on how much and what types of data to consume on the basis of the total cost of interacting with MIAX or other exchanges. Of course, the explicit data fees are only one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this proprietary information is highly competitive and continually evolves as products develop and change.

The Exchange notes that the ToM market data and fees will compete with similar products offered by other markets such as NASDAQ OMX PHLX, LLC (''PHLX'') and the International Stock Exchange LLC (''ISE''). For example, PHLX and ISE offer market data products that are similar to ToM: data feeds that show the top of the market entitled Top of PHLX Options (''TOPO'') and the ISE TOP Quote Feed.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] 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.* Please include File Number SR–MIAX–2013–14 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–MIAX–2013–14. 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 Web site (*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 Web site 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; 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–MIAX–2013–14 and should be submitted on or before May 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–08488 Filed 4–10–13; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69335; File No. SR–NYSEArca–2013–34]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Implement a One-Year Pilot Program for Issuers of Certain Exchange-Traded Products (''ETPs'') Listed on the Exchange

April 5, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 21, 2013, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On April 5, 2013, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaces and supersedes the proposed rule change in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

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

The Exchange proposes to implement a one-year pilot program for issuers of certain exchange-traded products (''ETPs'') listed on the Exchange. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

This Amendment No. 1 to SR–NYSEArca–2013–34 replaces and supercedes SR–NYSEArca–2013–34 in its entirety.[4]

The Exchange proposes to create a one-year pilot program for issuers of certain ETPs listed on the Exchange. The pilot program would be called the NYSE Arca ETP Incentive Program (''Incentive Program''). As described in more detail below, the Incentive Program is designed to enhance the market quality for ETPs by incentivizing Market Makers [5] to take Lead Market Maker (''LMM'') assignments in certain lower volume ETPs by offering an alternative fee structure for such LMMs that would be funded from the Exchange's general revenues. The costs of the Incentive Program would be offset by charging participating issuers non-refundable Optional Incentive Fees, which would be credited to the Exchange's general revenues. Participation would be entirely voluntary on the part of both LMMs and issuers. The Exchange proposes to add new NYSE Arca Equities Rule 8.800 to set forth the requirements for the Incentive Program, including performance standards specific to LMMs participating in the Incentive Program.

Background

Under the current Fee Schedule for listings, an issuer of an ETP is required to pay a Listing Fee that ranges from $5,000 to $45,000.[6] An ETP issuer also pays a graduated Annual Fee based on the number of shares of the ETP that are outstanding. The Annual Fee ranges from $5,000 to $55,000.

A qualified Market Maker may request an assignment as an LMM for an ETP, and the request is subject to approval by the Exchange.[7] For some ETPs, no Market Maker requests an assignment as an LMM, and the ETP therefore trades without an LMM assigned to it. The Exchange operates under the price-time priority model for all market participants, so there is no distinct transactional benefit to being assigned as an LMM. However, LMMs must meet certain obligations and requirements and therefore incur greater risks than other market participants on the Exchange.

An LMM is currently subject to the obligations for Market Makers that are set forth in NYSE Arca Equities Rule 7.23 and the minimum performance standards that are referenced in NYSE Arca Equities Rule 7.24. Under NYSE Arca Equities Rule 7.24, the minimum performance standards include (i) Percent of time at the National Best Bid (the ''NBB'') or National Best Offer (the ''NBO'') (collectively, the ''NBBO''), (ii) percent of executions better than the NBBO, (iii) average displayed size, (iv) average quoted spread, and (v) in the event that the security is a derivative security, the ability to transact in underlying markets. An LMM's minimum performance standards are described in an official NYSE Arca policy, titled *NYSE Arca LMM Requirements,* which may be amended from time to time. The minimum performance standards are measured daily and reviewed as a monthly average. The Exchange believes that they are stringent and help foster liquidity provision and stability in the market.[8]

The risks for LMMs that exceed those of other market participants include risks associated with managing position inventory as well as risks associated with maintaining quotes. Inventory risks may be higher for certain ETPs with low volume and low shares outstanding because there are fewer opportunities to turn over positions in such ETPs and there is an accumulation of costs from carrying those positions as well as positions in the underlying securities used for hedging.[9] LMMs are currently required to continuously quote on both sides of the market; therefore, they must be willing to buy as well as sell by posting displayed and firm quotes on the Exchange. When there is a low volume of shares outstanding, there is often less supply for securities lending purposes. In order to meet settlement requirements, LMMs acting in ETPs with low shares outstanding are often required to maintain long ETP positions. Quoting risks exist due to the complexity of pricing ETPs and the potential for human and/or technological errors. ETPs are open-ended and derivatively priced securities that typically track returns of underlying assets. LMMs' quotes can diverge from the underlying assets' values, and in such cases, the LMMs are more likely to buy (sell) at prices that are above (below) theoretical fair values. Because LMMs are currently required to continuously quote on both sides of the market and maintain certain minimum performance standards, they are more likely to face these types of risks because other market participants have more freedom to withdraw quotes upon experiencing difficulties or unusual market conditions.

To incentivize firms to take on the LMM designation and foster liquidity provision and stability in the market, the Exchange currently provides LMMs with an opportunity to receive incrementally higher transaction credits and incur incrementally lower transaction fees (''LMM Rates'') compared to standard liquidity maker-taker rates (''Standard Rates'').[10] LMM

[4] SR–NYSEArca–2013–34 replaced and superceded SR–NYSEArca–2012–37, which was withdrawn by the Exchange. *See* Securities Exchange Act Release Nos. 66966 (May 11, 2012), 77 FR 29419 (May 17, 2012) and 68616 (Jan. 10, 2013), 78 FR 3482 (Jan. 16, 2013) (SR–NYSEArca–2012–37). Attached hereto is Exhibit 4, which reflects the changes made to Exhibit 5.

[5] A Market Maker is an Equity Trading Permit Holder (''ETP Holder'') that acts as a Market Maker pursuant to NYSE Arca Equities Rule 7. *See* NYSE Arca Equities Rule 1.1(v). An ETP Holder is a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing that has been issued an Equity Trading Permit. *See* NYSE Arca Equities Rule 1.1(n).

[6] The Exchange has one Schedule of Fees and Charges for Exchange Services that is for listings (''Listing Fee Schedule'') and another that is for trade-related charges (''Trading Fee Schedule''). To differentiate them, the Exchange proposes to change the name of the former to ''SCHEDULE OF FEES AND CHARGES FOR EXCHANGE LISTING SERVICES.'' ETPs are generally classified as either Derivative Securities Products or Structured Products for purposes of the Listing Fee Schedule. *See* Listing Fee Schedule, *available at http://www.nyse.com/pdfs/NYSEArca_Listing_Fees.pdf.*

[7] *See* NYSE Arca Equities Rule 7.22(d).

[8] References in this rule filing to an LMM's minimum performance standards outside of the Incentive Program mean those set forth in *NYSE Arca LMM Requirements.* The proposed standards for LMMs in the Incentive Program are referred to as the ''proposed Incentive Program LMM performance standards.''

[9] Costs of carrying ETP inventories include the expense ratio, which includes the management fee, financing costs or the cost of capital, and the opportunity cost of allocating capital. At times, it may also include stock loan costs for maintaining a hedge in hard-to-borrow securities.

[10] The Exchange generally employs a maker-taker transactional fee structure, whereby an ETP Holder that removes liquidity is charged a fee (''Take Rate''), and an ETP Holder that provides liquidity receives a credit (''Make Rate''). The Take Rate for LMMs is currently $0.0025 per share. The Make

Rates are intended to balance the increased risks and requirements assumed by LMMs. Accordingly, the value of acting as an LMM can be measured by the incremental difference in the transaction credits or fees under the LMM Rates as compared to the Standard Rates. However, the absolute incremental difference depends on the LMM's trading volume. Trading volume for different ETPs can vary significantly and result in a corresponding variance in LMM trading volume. The benefit of acting as an LMM can therefore vary significantly depending upon the ETP to which the LMM is assigned. There are fewer financial benefits for LMM assignments in ETPs with lower CADVs than ETPs with higher CADVs. The table below provides hypothetical examples based on assumptions that NYSE Arca market share equals 22%, LMM participation rate equals 20%, LMM make ratio equals 80%, and LMM take ratio equals 20%: [11]

Symbol	CADV	Annual transaction credit/fee (LMM rates)	Annual transaction credit/fee (standard rates)	Annual incremental difference
ABC	25,000,000	$637,560	$332,640	$304,920
DEF	5,100,000	130,062	67,859	62,204
GHI	2,500,000	74,844	33,264	41,580
JKL	1,100,000	32,931	14,636	18,295
MNO	750,000	25,780	9,979	15,800
PQR	500,000	17,186	6,653	10,534
STU	100,000	3,437	1,331	2,107
VWX	10,000	344	133	211
YZ	1,000	34	13	21

The Exchange believes that the assignment of an LMM, which is held to higher standards as compared to Market Makers and other market participants, is a critical component of the promotion of a consistent, fair and orderly market in ETPs on the Exchange. However, market participants may be forgoing LMM assignments in ETPs—instead choosing to trade ETPs as Market Makers or ETP Holders with lower or no obligations or minimum performance standards—because the incentives to serve as an LMM in low-volume ETPs are insufficient to outweigh the obligations, minimum performance standards, and other risks described above. To illustrate how this change has transpired, the following table highlights the increasing proportion of new NYSE Arca ETPs that are listed without an LMM present:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
New NYSE Arca ETP Listings	11	34	49	133	223	195	124	196	297	147
Listed with LMM	11	34	49	133	218	190	121	175	271	135
Listed without LMM	0	0	0	0	5	5	3	21	26	12

The Exchange is concerned that this trend will continue or worsen if there is no mechanism to appropriately remunerate capable Market Makers to take on the obligations and accountability that are part and parcel of the LMM assignment. The Exchange also is concerned that this would not be limited to future listings and that existing listings could also be subject to LMM withdrawals. Indeed, since January 2008, nearly 100% of all LMM withdrawal requests for ETPs already listed and trading were made for securities that exhibited low CADV in the period prior to the withdrawal requests being made. This behavior further signals a connection between low CADV and low interest levels from firms seeking to act as LMMs. Likewise, it supports the assertion that there is less value relative to the risks of acting as the LMM for certain ETPs.

The Exchange believes that there is ample evidence, along with logical inference, to support the assertion that the presence of an obligated and accountable liquidity provider leads to superior market quality and thus benefits long-term investors. When there is an LMM assigned to a security listed on NYSE Arca, long-term investors trading on the Exchange in the secondary market likely experience enhanced market quality compared to similar securities for which there are no LMMs assigned. For instance, in the fourth quarter of 2012, there were 609 ETPs listed on NYSE Arca that traded less than 10,000 shares CADV. Of those ETPs, 567 had LMMs while 42 did not. The average spread for the ETPs with LMMs was 0.79% and the average quote size was 3,014 shares. The average spread for the ETPs without LMMs was 11.52% and the average quote size was 1,655 shares. During the same time period, there were 410 ETPs listed on NYSE Arca that traded between 10,000 shares and 100,000 shares CADV. Of those ETPs, 396 had LMMs while 14 did not. The average spread for the ETPs with LMMs was 0.23% and the average quote size was 6,643 shares. The average spread for ETPs without LMMs was 0.36% and the average quote size was 2,613 shares. Exhibits 1 and 2 illustrate that these observations were consistent over longer time periods and that there has been a greater variance in market quality for ETPs without LMMs.[12]

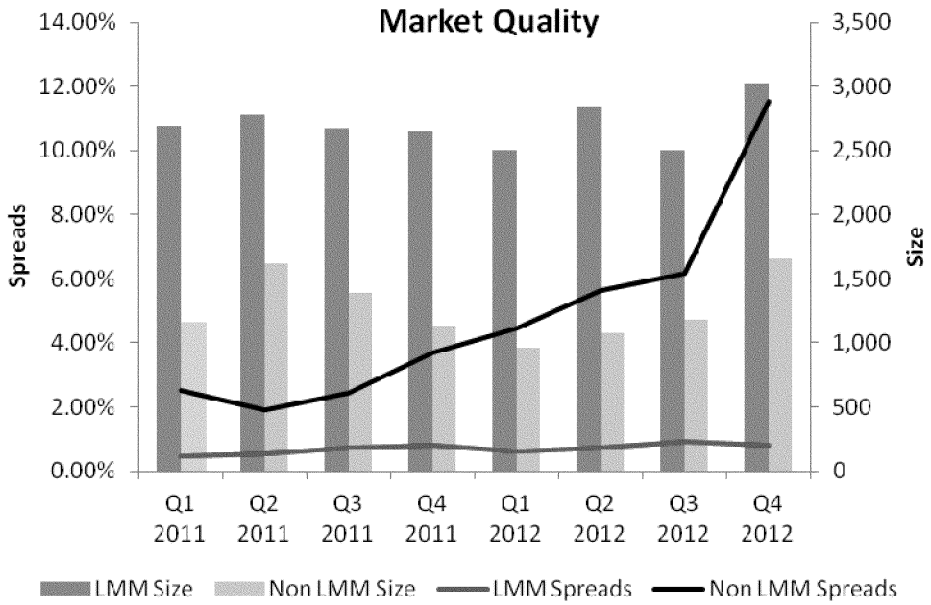
Rate for LMMs is currently generally between $0.0035 and $0.0045 per share depending on consolidated average daily volume (''CADV''). *See* Trading Fee Schedule, *available at https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_arca_marketplace_fees__4_4__13_copy.pdf.*

[11] Market share is the percentage of CADV traded on NYSE Arca. Participation rate is the percentage of NYSE Arca volume traded by the LMM. Make ratio is the percentage of LMM volume that provides liquidity. Take ratio is the percentage of LMM volume that takes liquidity. The formula for calculating the transaction credit is as follows: (LMM make volume * Make Rate) + (LMM take volume * Take Rate). LMM make volume equals CADV * Arca market share * LMM participation rate * LMM make ratio. LMM take volume equals CADV * Arca market share * LMM participation rate * LMM take ratio.

[12] All open-ended ETPs trading over 100,000 CADV have LMMs except SPY, which has

Continued

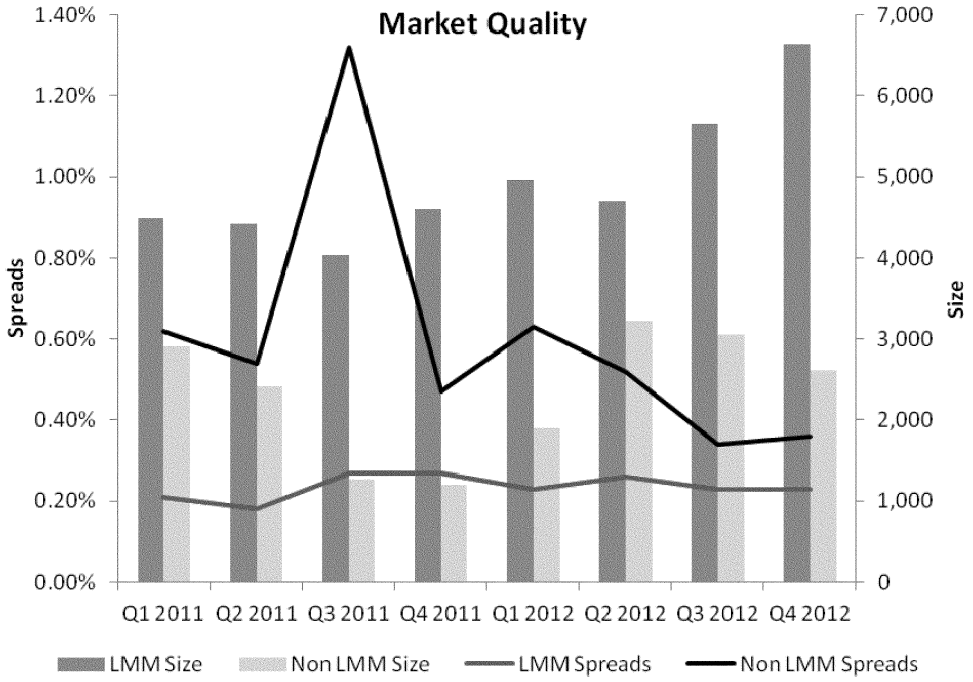
For ETPs <10,000 Shares CADV:



significant liquidity without the need for an LMM,

and UBS E–TRACS Alerian MLP Infrastructure ETN (symbol: MLPI).

For ETPs between 10,000 and 100,000 Shares CADV:



Proposed Incentive Program

To address these issues, the Exchange proposes to establish the Incentive Program as a one-year pilot to enhance the market quality for ETPs by incentivizing Market Makers to take LMM assignments in certain lower volume ETPs by offering an alternative fee structure for such LMMs funded from the Exchange's general revenues. Incentive Program costs would be offset by charging participating issuers non-refundable Optional Incentive Fees, which would be credited to the Exchange's general revenues. Participation would be entirely voluntary on the part of both LMMs and issuers. The Exchange proposes to add new NYSE Arca Equities Rule 8.800, which would set forth Incentive Program requirements, including performance standards specific to LMMs participating in the Incentive Program, as described in more detail below.

Proposed Rule

Proposed NYSE Arca Equities Rule 8.800(a) would describe the ETPs that would be eligible to participate in the Incentive Program. An ETP would be eligible to participate in the Incentive Program if:

(1) It is listed on the Exchange as of the commencement of the pilot period or becomes listed during the pilot period;

(2) the listing is under NYSE Arca Equities Rules 5.2(j)(3) (Investment Company Units), 5.2(j)(5) (Equity Gold Shares), 8.100 (Portfolio Depositary Receipts), 8.200 (Trust Issued Receipts), 8.201 (Commodity-Based Trust Shares), 8.202 (Currency Trust Shares), 8.203 (Commodity Index Trust Shares), 8.204 (Commodity Futures Trust Shares), 8.300 (Partnership Units), 8.600 (Managed Fund Shares), or 8.700 (Managed Trust Securities);

(3) with respect to an ETP that listed on the Exchange before the commencement of the Incentive Program, the ETP has a CADV of one million shares or less for at least the preceding three months and the issuer of such ETP has not suspended the issuance or redemption of new shares; [13] and

(4) it is compliant with continuing listing standards, if the ETP was added to the Incentive Program after listing on the Exchange.

Proposed NYSE Arca Equities Rule 8.800(b) would describe the issuer application and LMM assignment process. Specifically, under proposed NYSE Arca Equities Rule 8.800(b)(1), an issuer that wished to have an ETP participate in the Incentive Program and pay the Exchange an Optional Incentive Fee would be required to submit a written application in a form prescribed by the Exchange for each ETP. The issuer could apply to have its ETP participate at the time of listing or thereafter at the beginning of each quarter during the pilot period. An issuer could not have more than five ETPs that were listed on the Exchange prior to the pilot period participate in the Incentive Program.[14] However, there would not be a limitation on the number of an issuer's ETPs listed during the pilot period that could participate.

Proposed NYSE Arca Equities Rule 8.800(b)(2) would set forth eligibility requirements for issuers. Specifically, in order for its ETP to be eligible to participate in the Incentive Program, an issuer must be current in all payments due to the Exchange.

Proposed NYSE Arca Equities Rule 8.800(b)(3) would provide that the Exchange would communicate the ETP(s) proposed for inclusion in the Incentive Program on a written solicitation that would be sent to all qualified LMMs [15] along with the

[13] The Exchange maintains a list of ETPs that have suspended the issuance of new shares, which is available at *https://etp.nyx.com/en/trading-information/us/funds-closed-creation.*

[14] In light of this limitation, the Exchange does not believe that there would be any improper incentive for an LMM to pressure an issuer to place currently listed ETPs in the Incentive Program.

[15] The written solicitation would be included in the Green Sheet, which is the common term for an email communication sent by NYSE Arca staff members to all qualified LMMs prior to an LMM selection. The Green Sheet includes, among other things, the name, symbol and description of the

Continued

Optional Incentive Fee the issuer would pay the Exchange for each ETP. The issuer would determine the amount of the Optional Incentive Fee for each ETP within a permitted range that would be set forth in the Exchange's Listing Fee Schedule. In this regard, the Exchange proposes to amend its Listing Fee Schedule to provide that the Optional Incentive Fee under NYSE Arca Rule 8.800 may initially range from $10,000 to $40,000, as determined by the issuer of an ETP.[16] The Optional Incentive Fee would be paid by the issuer to the Exchange in quarterly installments for each participating ETP at the beginning of each quarter and prorated if the issuer commenced participation for an ETP in the Incentive Program after the beginning of a quarter. If the LMM did not meet its proposed Incentive Program LMM performance standards for an ETP in any given month in such quarter, the issuer would not receive any refund or credit from the Exchange following the end of the quarter.[17] If the ETP had a sponsor, the sponsor could pay the Optional Incentive Fee to the Exchange.[18]

Proposed NYSE Arca Equities Rule 8.800(b)(4) would provide that after the Exchange provided the written solicitation to LMMs, no individual associated with an LMM could contact such issuer or the Exchange staff about that ETP until the assignment of the LMM is made, except as otherwise permitted in the rules.

Proposed NYSE Arca Equities Rule 8.800(b)(5) would describe the assignment of an LMM if more than one qualified LMM proposed to serve as such for a particular ETP.[19] If more than one qualified LMM proposed to serve as such for a particular ETP, Exchange staff would select the LMM. Each LMM could provide material to the Exchange staff, which could include a corporate overview of the LMM and the trading experience of its personnel. Exchange staff would meet with representatives of each LMM if requested by the LMM. No more than three representatives of each LMM could participate in the meeting, each of whom must be employees of the LMM, and one of whom must be the individual trader of the LMM who is proposed to trade the ETP. If the LMM were unavailable to appear in person, a telephone interview with that LMM would be acceptable. Meetings would normally be held at the Exchange, unless the Exchange agreed that they may be held elsewhere. The issuer of the ETP could choose to submit a letter to the Exchange staff indicating its preference and supporting justification for a particular LMM, and the Exchange staff could consider such letter in performing its duty to select an LMM, but such letter would not be determinative of the particular LMM selected by the Exchange. Within two business days after the final LMM interview, the Exchange staff, in its sole discretion, would select an LMM and notify the LMM and the issuer.[20]

Proposed NYSE Arca Equities Rules 8.800(b)(6) and (7) would describe required public notices relating to the Incentive Program. Under proposed NYSE Arca Equities Rule 8.800(b)(6), the Exchange would provide notification on a dedicated page on its Web site regarding (i) The ETPs participating in the Incentive Program, (ii) the date a particular ETP began participating in the Incentive Program, (iii) the date a particular ETP ceased participating in the Incentive Program, (iv) the LMM assigned to each ETP participating in the Incentive Program, and (v) the amount of the Optional Incentive Fee for each ETP. This page would also include a fair and balanced description of the Incentive Program, including (i) A description of the Incentive Program's operation as a pilot, including the effective date thereof, (ii) the potential benefits that may be realized by an ETP's participation in the Incentive Program, (iii) the potential risks that may be attendant with an ETP's participation in the Incentive Program, (iv) the potential impact resulting from an ETP's entry into and exit from the Incentive Program, and (v) how interested parties can request additional information regarding the Incentive Program and/or the ETPs participating therein.

Under proposed NYSE Arca Equities Rule 8.800(b)(7), an issuer of an ETP that is approved to participate in the Incentive Program would be required to issue a press release to the public when an ETP commences or ceases participation in the Incentive Program. The press release would be in a form and manner prescribed by the Exchange, and if practicable, would be issued at least two days before the ETP commences or ceases participation in the Incentive Program.[21] For example, there could be instances in which it would not be known two days in advance that an ETP would be ceasing participation in the Incentive Program, in which case the Exchange would request that the issuer distribute the press release as soon as possible under the particular circumstances. The issuer also would be required to dedicate space on its Web site, or, if it does not have a Web site, on the Web site of the adviser or sponsor of the ETP, that (i) included any such press releases and (ii) provided a hyperlink to the dedicated page on the Exchange's Web site that describes the Incentive Program.[22]

Proposed NYSE Arca Equities Rule 8.800(c) would describe the proposed Incentive Program LMM performance standards that would apply to an LMM for each Incentive Program security it is assigned.[23] Under proposed NYSE Arca Equities Rule 8.800(c)(1), an LMM in the Incentive Program would remain obligated to satisfy the general requirements of NYSE Arca Rule 7.23.

Under proposed NYSE Arca Equities Rule 8.800(c)(2), an LMM would be subject to a ''market wide'' requirement. Specifically, an LMM would be required to maintain quotes or orders at the NBBO or better (the ''Inside'') during the month during Core Trading Hours in accordance with certain maximum width and minimum depth thresholds, which would be provided in

ETP(s) as well as the name of the issuer and a link to the ETP prospectus. A qualified LMM must complete the application for a specific ETP or group of ETPs.

[16] Optional Incentive Fees would be credited to the Exchange's general revenues. The issuer would still be required to pay applicable Listing Fees and Annual Fees.

[17] However, as described below, if an issuer did not pay its quarterly installments to the Exchange on time and the ETP continued to be listed, the Exchange would continue to credit the LMM as long as the LMM met its performance standards.

[18] The term ''sponsor'' means the registered investment adviser that provides investment management services to an ETP or any of such investment adviser's parents or subsidiaries.

[19] As is the case with all securities traded on the Exchange, only one LMM would be assigned per ETP participating in the Incentive Program. The Exchange's market structure has long included a single LMM structure and the Exchange does not propose to change this for the Incentive Program. Indeed, the Exchange believes that its proposed payment (the range of which was established after significant analysis) might not be sufficient if it had to be divided among multiple Market Makers.

[20] Proposed NYSE Arca Equities Rule 8.800(b)(5) is modeled in part on New York Stock Exchange (''NYSE'') Rule 103B(III)(B)(1), which governs Designated Market Maker unit assignments for equities listed on the NYSE.

[21] The issuer's press release would be required to include language describing, for example, that while the impact of participation in or exit from the Incentive Program, which is optional, cannot be fully understood until objective observations can be made in the context of the Incentive Program, potential impacts on the market quality of the issuer's ETP may result, including with respect to the average spread and average quoted size for the ETP.

[22] These disclosure requirements would be in addition to, and would not supersede, the prospectus disclosure requirements under the Securities Act of 1933 or the Investment Company Act of 1940.

[23] The Exchange would specify in proposed Commentary .01 to Rule 8.800 that only displayed quotes and orders would be considered for purposes of the LMM performance standards of proposed Rule 8.800(c).

Commentary .01 to Rule 8.800.[24] However, this requirement would not apply to an LMM if the thresholds provided in Commentary .01 were otherwise met by quotes or orders of other market participants on the Exchange or across all other markets trading the security.

Under proposed NYSE Arca Equities Rule 8.800(c)(3), an LMM would also be subject to an NYSE Arca-specific requirement, which could be satisfied in one of two ways. First, an LMM could choose to satisfy the ''Time-at-the-Inside Requirement'' under proposed NYSE Arca Equities Rule 8.800(c)(3)(A), pursuant to which an LMM would be required to maintain quotes or orders on NYSE Arca at the NBBO or better at least 15% of the time when quotes may be entered during Core Trading Hours each trading day, as averaged over the course of a month.[25] Alternatively, an LMM could choose to satisfy the ''Size-Setting NBBO Requirement'' under proposed NYSE Arca Equities Rule 8.800(c)(3)(B), pursuant to which an LMM would be required to maintain ''Size-Setting'' quotes or orders on NYSE Arca, as compared to trading interest on other markets, at the NBBO or better at least 25% of the time when quotes may be entered during Core Trading Hours each trading day, as averaged over the course of a month.[26] However, this requirement would not apply to an LMM if this threshold is otherwise met by quotes or orders of other market participants on NYSE Arca.

Finally, under proposed NYSE Arca Equities Rule 8.800(c)(4), for at least 90% of the time when quotes may be entered during Core Trading Hours each trading day, as averaged over the course of a month, an LMM would be required to maintain (A) at least 2,500 shares of attributable, displayed posted buy liquidity on the Exchange that is priced no more than 2% away from the NBB for the particular ETP; and (B) at least 2,500 shares of attributable, displayed posted offer liquidity on the Exchange that is priced no more than 2% away from the NBO for the particular ETP.

Proposed NYSE Arca Equities Rule 8.800(d) would describe the payment to an LMM by the Exchange (''LMM Payment''). Under this provision, the Exchange would credit an LMM for the LMM Payment, which would be determined by the Exchange and set forth in the Trading Fee Schedule. An LMM participating in the Incentive Program would not be entitled to an LMM Payment unless and until it meets or exceeds the proposed Incentive Program LMM performance standards for an assigned ETP, as determined by the Exchange. In this regard, the Exchange proposes to amend its Trading Fee Schedule to provide that at the end of each quarter the Exchange would credit an LMM an ''LMM Payment'' for each month during such quarter that the LMM meets or exceeds its proposed Incentive Program LMM performance standards for an assigned ETP. If an LMM does not meet or exceed its proposed Incentive Program LMM performance standards for an assigned ETP for a particular month, or the ETP is withdrawn from the Incentive Program pursuant to paragraph (e) of NYSE Arca Equities Rule 8.800, then the LMM Payment would be zero for such month. The amount of the LMM Payment for a particular month would not exceed ⅓ of the quarterly Optional Incentive Fee, less an Exchange administration fee of 5%, and such LMM would be subject to Standard Rates during that quarter instead of LMM Rates. As is the case with all liquidity-adding credits currently payable to NYSE Arca ETP Holders, LMM Payments would be paid by the Exchange from its general revenues. The Trading Fee Schedule would also reflect that if an issuer did not pay its quarterly installments to the Exchange on time and the ETP continued to be listed, the Exchange would continue to credit the LMM if the LMM met its proposed Incentive Program LMM performance standards.

Proposed NYSE Arca Equities Rule 8.800(e) would describe the circumstances for withdrawal from the Incentive Program. First, if an ETP no longer met continuing listing standards, suspended the creation and/or redemption of shares, or liquidated, it would be automatically withdrawn from the Incentive Program as of the ETP suspension date.

Second, NYSE Arca, in its discretion, could allow an issuer to withdraw an ETP from the Incentive Program before the end of the pilot period if the assigned LMM was unable to meet its proposed Incentive Program LMM performance standards for any two of the three months of a quarter or for five months during the pilot period and no other qualified ETP Holder was able to take over the assignment.

Third, an LMM also could withdraw from all of its ETP assignments in the Incentive Program. Alternatively, NYSE Arca, in its discretion, could allow an LMM to withdraw from a particular ETP before the end of the pilot period if the Exchange determined that there were extraneous circumstances that prevented the LMM from meeting its proposed Incentive Program LMM performance standards for such ETP that did not affect its other ETP assignments in the Incentive Program. In either such event, the LMM's ETP(s) would be reallocated as described below.

Fourth, if an ETP maintained a CADV of one million shares or more for three consecutive months, it would be automatically withdrawn from the Incentive Program within one month thereafter. If after such automatic withdrawal the ETP failed to maintain a CADV of one million shares or more for three consecutive months, the issuer of the ETP could reapply for the Incentive Program one month thereafter. The Exchange believes that setting a one-million-share threshold would focus Incentive Program resources on particularly low volume ETPs and provide an objective measurement for evaluating the effectiveness of the Incentive Program.

Fifth, if the issuer was not current in all payments due to the Exchange for two consecutive quarters, its ETP would be automatically terminated from the Incentive Program.

Finally, proposed NYSE Arca Equities Rule 8.800(f) would describe the LMM reallocation process. If the LMM for a particular ETP did not meet or exceed its proposed Incentive Program LMM performance standards for any two of the three months of a quarter or for five months during the pilot period, or chose to withdraw from the Incentive Program, and at least one other qualified Market Maker had agreed to become the assigned LMM under the Incentive Program, then the ETP would be reallocated. If more than one qualified LMM proposed to serve as such, another

[24] The Exchange would specify in proposed Commentary .01 to Rule 8.800 that (i) the spread thresholds would be calculated as the time-weighted average throughout the trading day and then averaged, by day, across the month and (ii) the depth thresholds would be calculated as the average of (a) the average time-weighted bid depth and (b) the average time-weighted ask depth.

[25] The Exchange would specify in proposed Commentary .01 to Rule 8.800 that the Time-at-the-Inside Requirement would be calculated as the average of (a) the percentage of time the LMM has a bid on NYSE Arca at the NBB and (b) the percentage of time the LMM has an offer on NYSE Arca at the NBO.

[26] The Exchange would specify in proposed Commentary .01 to Rule 8.800 that the Size-Setting NBBO Requirement would be calculated throughout the trading day and then averaged, by day, across the month. Quotes and orders of all market participants across all markets trading the security would be considered when calculating the Size-Setting NBBO Requirement. A quote or order would be considered ''Size-Setting'' if it is at the NBB or NBO. If multiple quotes or orders exist at the same price, the quote or order with the largest size would be considered ''Size-Setting.'' If multiple quotes or orders exist at the same price and the same size, the quote or order with the earliest entry time would be considered ''Size-Setting.''

LMM would be selected in accordance with the written solicitation and assignment processes described above. The reallocation process would be completed no sooner than the end of the current quarter and no later than the end of the following quarter.

Implementation of Incentive Program

The Incentive Program would be offered to issuers from the date of implementation, which would occur no later than 90 days after Securities and Exchange Commission (''Commission'') approval of this filing, until one calendar year after implementation. As described above, each issuer could select ETPs to participate in the Incentive Program. During the pilot period, the Exchange would assess the Incentive Program and could expand the criteria for ETPs that are eligible to participate, for example, to permit issuers to include more than five ETPs that were listed on the Exchange before the pilot period commenced. At the end of the pilot period, the Exchange would determine whether to continue or discontinue the Incentive Program or make it permanent and submit a rule filing as necessary. If the Exchange determined to change the terms of the Incentive Program while it was ongoing, it would submit a rule filing to the Commission.

During the Incentive Program, the Exchange would provide the Commission with certain market quality reports each month, which would also be posted on the Exchange's Web site. Such reports would include the Exchange's analysis regarding the Incentive Program and whether it is achieving its goals, as well as market quality data such as, for all ETPs listed as of the date of implementation of the Incentive Program and listed during the pilot period (for comparative purposes), volume (CADV and NYSE Arca ADV), NBBO bid/ask spread differentials, LMM participation rates, NYSE Arca market share, LMM time spent at the inside, LMM time spent within $0.03 of the inside, percent of time NYSE Arca had the best price with the best size, LMM quoted spread, LMM quoted depth, and Rule 605 statistics (one-month delay) as agreed upon by the Exchange and the Commission staff. In connection with this proposal, the Exchange would provide other data and information related to the Incentive Program as may be periodically requested by the Commission. In addition, and as described further below, issuers could utilize ArcaVision to analyze and replicate data on their own.[27]

Benefits of the Incentive Program

The proposed LMM Payment is designed to encourage additional Market Makers to pursue LMM assignments and thereby support the provision of consistent liquidity in lower-volume ETPs listed on the Exchange. The Exchange believes that providing a quarterly LMM Payment would create a more equitable system of incentives for LMMs. The Exchange would administer all aspects of the LMM Payments, which, as noted above, would be paid by the Exchange to LMMs out of the Exchange's general revenues.

The Exchange believes that the Incentive Program would increase the supply of Market Makers seeking to take on LMM assignments, ultimately leading to improved market quality for long-term investors in ETPs, which would lead to multiple benefits. It would help to ensure that a diversified pool of qualified LMM candidates exists in the present and future. It would also help to discover a competitive balance to set the fair Optional Incentive Fees within the proposed range of $10,000 to $40,000 per ETP annually, based on the risk/reward of receiving specific LMM assignments. Issuers would be able to monitor the performance of LMMs as well as registered Market Makers and other participants that opted into the ''ArcaVision Market Maker Summary'' reporting mechanism. Thus, issuers would be able to compare and contrast the performance of various Market Makers to ensure that they were optimizing benefits vis-a-vis cost.

Consistency with FINRA Rule 5250

The Exchange believes that the Incentive Program is designed to mitigate risks and concerns that Financial Industry Regulatory Authority (''FINRA'') Rule 5250 addresses. FINRA Rule 5250 prohibits a FINRA member or a person associated with a FINRA member from accepting any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith.

FINRA Rule 5250 is designed to preserve the integrity of the marketplace by ensuring that quotations accurately reflect a broker-dealer's interest in buying or selling a security and that the decision by a firm to make a market in a given security and the question of price should not be influenced by payments to members from issuers or promoters.[28] The Exchange believes that the Incentive Program is carefully tailored to promote the beneficial purpose of improved market quality, while at the same time being designed to mitigate the public policy risks and concerns that FINRA Rule 5250 addresses and to not adversely affect market integrity.

First, the derivative and open-ended nature of many of the ETPs eligible to participate in the Incentive Program would allow for transparent intrinsic intraday pricing. As such, the Exchange does not believe that such products would lend themselves to the type of market manipulation that FINRA Rule 5250 was designed to prevent. The transparent nature of many ETPs' portfolio composition as well as their accessibility and the elasticity of shares outstanding contribute to an arbitrage process that will lead to executions of orders of many ETPs priced at or near net asset values (''NAVs''). The typical unit size is 50,000 shares to 100,000 shares and each share represents fractional ownership of the portfolio, allowing low minimum investments to access the exposure of a large notional portfolio. ETP supply (i.e., shares outstanding) can be increased or decreased through the creation and redemption process. Clearing firms that are authorized participants will have the opportunity to deliver, or take delivery of, unit-sized amounts of the underlying securities. Proprietary traders engaging in arbitrage are able to calculate an estimated intraday NAV. Such traders understand what the intrinsic per-share price is, hedge themselves using the underlying securities or correlated equivalents, and manage their positions by either creating or redeeming units. If and when the quote is priced beyond

[27] NYSE Arca provides ArcaVision free of charge to the public via the Web site www.ArcaVision.com. ArcaVision offers a significant amount of trading data and market quality statistics for every Regulation NMS equity security traded in the United States, including all ETPs. Publicly available reports within ArcaVision, which include relevant comparative data, are the Symbol Summary, Symbol Analytics, Volume Comparison and Quotation Comparison reports, among others. In addition, users can create the reports on a per-symbol basis over a flexible time frame. They can also take advantage of predefined, accurate and up-to-date symbol sets based on type of ETP or issuer. Users can also create their own symbol lists. ArcaVision also allows an ETP issuer to see additional information specific to its LMM and other Market Makers in each ETP via the ''ArcaVision Market Maker Summary'' reporting mechanism.

[28] *See* Securities Exchange Act Release No. 60066 (June 8, 2009), 74 FR 28308 (June 15, 2009) (SR–FINRA–2009–36). *See also* Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (SR–NASD–97–29) (order approving NASD Rule 2460, predecessor to FINRA Rule 5250).

the intrinsic value of an ETP, an arbitrage opportunity can arise, and market participants will arbitrage such spread until price equilibrium is restored.

Second, the Incentive Program would have numerous structural safeguards that were designed to prevent any adverse effect on market integrity. First, the Incentive Program would be administered by the staff of the Exchange, which is a self-regulatory organization,[29] and which would be interposed between LMMs and issuers. Second, both LMMs and issuers would be required to apply to participate in the program and to meet certain standards. The Exchange would collect the Optional Incentive Fees from issuers and credit them to the Exchange's general revenues. An LMM would be eligible to receive an LMM Payment, again from the Exchange's general revenues, only after it met the proposed Incentive Program LMM performance standards set and monitored by the Exchange. Third, the Incentive Program is rules based and subject to significant public disclosure. Application to, continuation in, and withdrawal from the Incentive Program would be governed by published Exchange rules and policies, and there would be extensive public notice regarding the Incentive Program and payments thereunder on both the Exchange's and the issuers' Web sites.

In light of the pricing mechanisms of ETPs and the structural safeguards of the Incentive Program, the Exchange believes that the payments under the Incentive Program are designed to mitigate the risks and concerns that FINRA Rule 5250 addresses. In this regard, the Exchange understands, based upon discussions with FINRA, that FINRA will file an immediately effective rule change with the Commission indicating that participation by LMMs and issuers in the Incentive Program would not violate Rule 5250.

Consistency With Regulation M

Rule 102 of Regulation M prohibits an issuer from directly or indirectly attempting ''to induce any person to bid for or purchase, a covered security during the applicable restricted period'' unless an exemption is available.[30] For the reasons discussed below, the Exchange believes that exemptive relief from Rule 102 should be granted for the Incentive Program.

First, the Exchange notes that the Commission and its staff have previously granted relief from Rule 102 to a number of ETPs (''Existing Relief'') in order to permit the ordinary operation of such ETPs.[31] In granting the Existing Relief, the Commission has relied in part on the exclusion from the provisions of Rule 102 provided by paragraph (d)(4) of Rule 102 for securities issued by an open-end management investment company or unit investment trust. In granting the Existing Relief from Rule 102 to other types of ETPs, for which the (d)(4) exception is not available, the staff has relied on (i) representations that the fund in question would continuously redeem ETP shares in basket-size aggregations at their NAV and that there should be little disparity between the market price of an ETP share and the NAV per share and (ii) a finding that ''[t]he creation, redemption, and secondary market transactions in [shares] do not appear to result in the abuses that * * * Rules 101 and 102 of Regulation M * * * were designed to prevent.''[32] The crux of the Commission's findings in granting the Existing Relief rests on the premise that the prices of ETP shares closely track their per-share NAVs. Given that the Incentive Program neither alters the derivative pricing nature of ETPs nor impacts the arbitrage opportunities inherent therein, the conclusion on which the Existing Relief is based remains unaffected by the Incentive Program. In this regard, most ETPs that would be eligible to participate in the Incentive Program would have previously been granted relief from Rule 102. Moreover, and as noted above, an ETP that suspended the creation and/or redemption of shares, or liquidated, would be automatically withdrawn from the Incentive Program as of the ETP suspension date.

Second, the Incentive Program requires, among other things, that an LMM make two-sided quotes and not just bids. It is not intended to raise ETP prices but rather to improve market quality. In light of the derivative nature of ETPs described above, the Exchange does not expect that LMMs would quote outside of the normal quoting ranges for these products as a result of the LMM Payment, but rather would quote within their normal ranges as determined by market factors. Indeed, the Incentive Program would not create any incentive for an LMM to quote outside such ranges.

Finally, the staff of the Exchange, which is a self-regulatory organization, would be interposed between the issuer and the LMM, administering a rules-based program with numerous structural safeguards described in the previous section. Specifically, both LMMs and issuers would be required to apply to participate in the program and to meet certain standards. The Exchange would collect the Optional Incentive Fees from issuers and credit them to the Exchange's general revenues. An LMM would be eligible to receive an LMM Payment, again from the Exchange's general revenues, only after it met the proposed Incentive Program LMM performance standards set and monitored by the Exchange. Application to, continuation in, and withdrawal from the Incentive Program would be governed by published Exchange rules and policies, and there would be extensive public notice regarding the Incentive Program and payments thereunder on both the Exchange's and the issuers' Web sites. Given these structural safeguards, the Exchange believes that payments under the Incentive Program are appropriate for exemptive relief from Rule 102.

In summary, the Exchange believes that exemptive relief from Rule 102 should be granted for the Incentive Program because, for example, (1) The Incentive Program would not create any incentive for an LMM to quote outside of the normal quoting ranges for the ETPs included therein; (2) the Incentive Program has numerous structural safeguards, such as the application process for issuers and LMMs, the interpositioning of the Exchange between issuers and LMMs, and significant public disclosure surrounding the Incentive Program, which in general is designed to help inform investors about the potential impact of the Incentive Program; and (3) the Incentive Program does not alter the basis on which Existing Relief is based and, furthermore, most ETPs that would be eligible to participate in the Incentive Program would have previously been granted relief from Rule 102.[33]

[29] FINRA surveils trading on the Exchange, including ETP trading, pursuant to a Regulatory Services Agreement (''RSA''). The Exchange is responsible for FINRA's performance under this RSA.

[30] Rule 102 provides that ''[i]n connection with a distribution of securities effected by or on behalf of an issuer or selling security holder, it shall be unlawful for such person, or any affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period'' unless an exception is available. *See* 17 CFR 242.102.

[31] *See, e.g.,* Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP (Oct. 24, 2006) (regarding class relief for exchange traded index funds).

[32] *See* Rydex Specialized Products LLC, SEC No-Action Letter (June 21, 2006).

[33] The Exchange notes that the Commission granted a limited exemption from Rule 102 of

Continued

Surveillance

The Exchange believes that its surveillance procedures would be adequate to properly monitor the trading of Incentive Program ETPs on the Exchange during all trading sessions and to detect and deter violations of Exchange rules and applicable federal securities laws. Trading of the ETPs through the Exchange would be subject to FINRA's surveillance procedures for derivative products including ETFs.[34] The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members or affiliates of the ISG;[35] and from issuers and public and non-public data sources such as, for example, Bloomberg.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[36] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[37] in particular. The proposed rule change is consistent with Section 6(b)(5) of the Act in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the Incentive Program would enhance quote competition, improve liquidity, support the quality of price discovery, promote market transparency, and increase competition for listings and trade executions while reducing spreads and transaction costs. The Exchange further believes that enhancing liquidity in Incentive Program ETPs with all of the structural safeguards described above would help raise investors' confidence in the fairness of the market generally and their transactions in particular. As such, the Incentive Program would foster cooperation and coordination with persons engaged in facilitating securities transactions, enhance the mechanism of a free and open market, and promote fair and orderly markets in ETPs on the Exchange.

The Exchange further believes that designating ETPs as the products eligible for inclusion in the Incentive Program is reasonable because it would incentivize Market Makers to undertake LMM assignments in ETPs with lower trading volume. As described earlier in the filing, there is ample data demonstrating that there are generally fewer financial benefits for such ETPs as compared to ETPs with higher CADVs and that market quality has been affected.

The Exchange believes that its implementation plan and the pilot period are reasonable in that they would permit the Commission, the Exchange, LMMs, and issuers to assess the impact of the Incentive Program before making it available to other securities. In particular, the Exchange believes that it is beneficial and not unfairly discriminatory to limit the ETPs participating so that the Exchange and issuers could measure the experience against nonparticipating ETPs and thereby conserve the commitment of resources to the Incentive Program. In particular, by setting an objective one-million-share CADV threshold, the Exchange and the Commission will have an opportunity to observe the impact, if any, on ETPs that exceed the threshold and ''graduate'' from the Incentive Program and compare them to other ETPs.

The Exchange believes that the proposed LMM minimum performance standards are reasonable, including aspects thereof that can be met by quotes or orders of other market participants on the Exchange or across all other markets trading the security, because such standards would contribute to reasonably ensuring that there is sufficient liquidity for the ETPs participating in the Incentive Program. In this regard, the role of the LMM is to reasonably ensure that sufficient liquidity exists for investors when such liquidity is not provided by other market participants, whether on the Exchange or across other markets trading the particular security, by submitting quotes and orders that contribute to the quality of the width and depth of liquidity for the ETP. Accordingly, when the quotes or orders of other market participants on the Exchange or across all other markets trading the security result in such sufficient liquidity, there is not a need for an LMM to quote according to the proposed LMM minimum performance standards, which are designed to reasonably ensure that such liquidity exists. However, when such liquidity is not otherwise present, the proposed LMM minimum performance standards would reasonably ensure that such liquidity exists and is available for investors.

With respect to the proposed fees, the Exchange believes that the proposed rule change is consistent with Sections 6(b)(4) and 6(b)(5) of the Act, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and that it is not unfairly discriminatory. The Exchange believes that the proposed Optional Incentive Fees for ETPs are reasonable, given the additional costs to the Exchange of providing the LMM Payments, which are paid by the Exchange out of the Exchange's general revenues. The Exchange also believes that the proposed fees are reasonable because they would be used by the Exchange to offset the cost that the Exchange incurs to provide listing services for ETPs. These costs include, but are not limited to, ETP rulemaking initiatives, listing administration processes, issuer services, consultative legal services provided to ETP issuers in support of new product development, and administration of the proposed quarterly LMM Payment. As such, the Exchange believes that it is reasonable for it to retain an administration fee to recover the costs of administering the Incentive Program.

The Exchange believes that the Optional Incentive Fee is reasonable, equitably allocated, and not unreasonably discriminatory because it is entirely voluntary on an issuer's part to join the Incentive Program. The amount of the fee would be determined and paid by the issuer within the $10,000 to $40,000 band per ETP and credited to the Exchange's general revenues. Only issuers that voluntarily join the Incentive Program would be required to pay the fees. The Exchange believes that this is fairer than requiring all issuers to pay higher fees to fund the Incentive Program.

The Exchange believes that the LMM Payment and standard transaction fees and credits are equitable and not unfairly discriminatory in that any Market Maker could seek to participate in the Incentive Program as an LMM. Moreover, an LMM participating in the Incentive Program would not be entitled to an LMM Payment unless and until it

Regulation M to The NASDAQ Stock Market LLC (''NASDAQ'') for a program similar to the Exchange's proposed Incentive Program. *See* Securities Exchange Act Release No. 69196 (March 20, 2013), 78 FR 18410 (March 26, 2013) (Order Granting a Limited Exemption From Rule 102 of Regulation M Concerning the NASDAQ Market Quality Program Pilot Pursuant to Regulation M Rule 102(e)) (the ''NASDAQ Exemption''). The NASDAQ Exemption includes certain conditions related to, among other things, notices to the public and disclosures with respect to NASDAQ's program. The Exchange notes that if the Commission were to provide exemptive relief from Rule 102 of Regulation M for the Incentive Program it may include similar conditions.

[34] *See supra* note 29.

[35] For a list of the current members and affiliate members of ISG, *see www.isgportal.com*.

[36] 15 U.S.C. 78f(b).

[37] 15 U.S.C. 78f(b)(4) and (5).

meets or exceeds the proposed Incentive Program LMM performance standards for an assigned ETP, as determined by the Exchange. The Exchange further believes that the range of credits, which would be paid from the Exchange's general revenues, is fair and equitable in light of the LMM's obligations and proposed Incentive Program LMM performance standards, which would be higher than the standards for LMMs not participating in the Incentive Program.

Finally, for the reasons stated above, the Exchange believes that the Incentive Program would be designed to mitigate risks and concerns that FINRA Rule 5250 addresses and that the Commission should provide exemptive relief from Rule 102 of Regulation M for the Incentive Program.[38]

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 that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the Incentive Program, which is entirely voluntary, would encourage competition among markets for issuers' listings and among Market Makers for LMM assignments. The Incentive Program is designed to improve the quality of market for lower-volume ETPs, thereby incentivizing them to list on the Exchange. The competition for listings among the exchanges is fierce. The Exchange notes that BATS Exchange, Inc. (''BATS'') has already implemented a program similar to the Exchange's proposed Incentive Program,[39] and NASDAQ has received approval to do so as well.[40]

In addition, the Exchange believes that the Incentive Program will properly promote competition among Market Makers to seek assignment as the LMM for eligible ETPs. As described in detail above, the Exchange believes that market quality is significantly enhanced for ETPs with an LMM as compared to ETPs without an LMM. The Exchange believes that market quality would be even further enhanced as a result of the proposed Incentive Program LMM performance standards that the Exchange would impose on LMMs in the Incentive Program. The Exchange anticipates that the increased activity of these LMMs would attract other market participants to the Exchange, and could thereby lead to increased liquidity on the Exchange in such ETPs. For these reasons, the Exchange does not believe that the proposed rule change would impose any unnecessary or inappropriate burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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. The Commission previously received comments on SR–NYSEArca–2012–37, which proposed rule change was withdrawn by the Exchange,[41] and all such comments are available on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*.

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*. Please include File Number SR–NYSEArca–2013–34 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–NYSEArca–2013–34. 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 Web site (*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 Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 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; 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–NYSEArca–2013–34 and should be submitted on or before May 2, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Kevin M. O'Neill,

Deputy Secretary.

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[38] *See supra* note 33.

[39] *See* Interpretation and Policy .02 of BATS Rule 11.8. *See also* Securities Exchange Act Release Nos. 66307 (February 2, 2012), 77 FR 6608 (February 8, 2012) (SR–BATS–2011–051) and 66427 (February 21, 2012), 77 FR 11608 (February 27, 2012) (SR–BATS–2012–011).

[40] *See* Securities Exchange Act Release No. 69195 (March 20, 2013), 78 FR 18393 (March 26, 2013) (SR–NASDAQ–2012–137).

[41] *See supra* note 4.

[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69321; File No. SR–NASDAQ–2013–062]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Penny Pilot and Non-Penny Pilot Options

April 5, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934