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May 10, 2022

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street NW
Washington, DC 20006-1506

Re: Complex Products and Options (Regulatory Notice 22-08)

Dear Ms. Mitchell:

Nasdaq, Inc. (“Nasdaq”) appreciates the opportunity to comment on FINRA’s March 8, 2022, Regulatory Notice 22-08 entitled Complex Products and Options (the “Notice”). Nasdaq has an expansive global footprint in the exchange-traded product (“ETP”) ecosystem, which includes ETP listings, public price discovery, quality trade execution and trade reporting platforms, ETP options and indexing services. Consequently, we feel that it is important to contribute our unique perspective to any efforts to improve the ETP regulatory landscape. As Nasdaq previously discussed in a comment letter¹ on the Securities and Exchange Commission’s (“SEC” or “Commission”) Exchange-Traded Funds Rule Proposal,² we support efforts to augment investor protections and education, as well as to enhance the sensible regulation of ETPs. We welcome FINRA’s efforts in this regard through the Notice soliciting comments on effective practices and rule enhancements related to complex products.

Nasdaq generally believes that complex products have an important and beneficial role to

¹ See Letter from John Zecca, Executive Vice President, Chief Legal & Regulatory Officer, Nasdaq Inc., on Commission’s Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers’ Transactions in Certain Leveraged/Inverse Investment Vehicles Rule Proposal (May 14, 2020), available at <https://www.sec.gov/comments/s7-24-15/s72415-7195910-216858.pdf>.

² See Securities Exchange Act Release No. 33-10515; IC-33140 (June 28, 2018), 83 FR 37332 (July 31, 2018) (File No. S7–15–18).

play in the markets. Certain complex products are effective and appropriate for some investors, for example by allowing sophisticated investors to engage in portfolio hedging and by allowing them to contribute to the price discovery process. They also provide a direct method for investors to obtain exposure to diverse asset classes. Thus, it is important that the outcome of FINRA's efforts not result in disincentivizing new and novel products, which are critical to investors.

Nasdaq also believes it must serve as an advocate for retail investors and encourages the ETP community to step forward to aid investors, particularly retail investors, and that we believe is best accomplished through robust disclosure coupled with enhanced retail investor education. U.S. securities laws are predicated on a disclosure-based regime and Nasdaq continues to believe that disclosure should be at the core of effective regulation. A critical component of such disclosure is for the issuer to very clearly identify and explain whether an investment product is intended for retail and/or sophisticated investors. Further, the issuer of the product should highlight any risks that may apply to retail investors. In that regard, Nasdaq is the only exchange to require listed products to make additional disclosure about the effect of compounding if the product's objective is to obtain leveraged or inverse returns measured on a daily basis.³

As the Notice states, on October 21, 2021, SEC Chair Gary Gensler directed his staff to review the potential risks of complex ETPs and to consider rulemaking proposals to address those risks.⁴ Chair Gensler stated that certain ETPs "can pose risks even to sophisticated investors, and can potentially create system-wide risks by operating in unanticipated ways when markets experience volatility or stress conditions"⁵ underscoring the even greater risks posed for retail investors. Yet, neither FINRA's notice nor Chair Gensler's statement provide a clear definition as to what constitutes a "complex product." Rather, FINRA has taken the position that since new products and strategies are continually being launched it made more sense to describe the characteristics that would make a product "complex" rather than to create a single static definition.⁶

Nasdaq believes that the ongoing evolution of complex products and related technology makes the definition of what constitutes a complex product an issue of paramount importance. We are concerned with the scope of the Notice because it seems to categorize as "complex" all but the most vanilla investment vehicles, as FINRA has in the past for certain investment products (e.g., target date funds, commodities funds, and nontraditional index funds). This, in turn, may lead to inadvertently and unnecessarily restricting retail investors from accessing beneficial investment products that could be used to diversify their portfolios and/or to mitigate

³ See Listing Rules 5705(b)(1)(B)(iv) and 5710; see also Securities Exchange Act Release No. 85362 (March 19, 2019), 84 FR 11148 (March 25, 2019) (SEC Approval Order).

⁴ See SEC Chair Gary Gensler, Statement on Complex Exchange-Traded Products (Oct. 4, 2021) ("Gensler Statement on Complex ETPs").

⁵ Id.

⁶ See Regulatory Notice 12-03 (Complex Products, Heightened Supervision of Complex Products) (Jan. 2012).

risk. FINRA should provide a clear definition as to which “complex” products any new rules would apply and should apply any such rules only where necessary.

Nasdaq also believes that it is important that those gatekeepers best positioned to make the determination around investor sophistication should do so, and do so carefully. Specifically, FINRA should build upon its current framework of existing obligations under FINRA Rule 2111 (Suitability)⁷ and FINRA Rule 2090 (Know Your Customer).⁸

Many investors can benefit from access to varied ETP structures that represent numerous investment strategies, including complex products. Therefore, it is vital that FINRA considers the potential for unintended consequences that might arise by requiring investors to demonstrate competency (via a test or otherwise) prior to investing, rather than focusing on the advisor who can determine on behalf of the client whether the investment product is appropriate, suitable, and in the best interests of the client. This could unintentionally result in the reduction or elimination of retail investor access to useful investment products due to overly broad restrictions based on the level of the investor’s financial sophistication. FINRA must first carefully consider the value these investment products may afford investors and balance this against any perceived investor protection benefit. Nasdaq opposes the removal of important investment vehicles for knowledgeable retail investors who may rely on these products in their brokerage accounts (*e.g.*, for hedging) and whose disqualification may unintentionally cause them financial harm.

Finally, Nasdaq also strongly supports greater efforts in financial literacy targeting retail investors and recognizes such education as being vital to the health and continued growth of the ETP industry. The ETP community needs to coalesce around this issue and work in concert to develop not just *more* content, but *more effective* content and *more effective* ways to educate retail investors on the intricacies of financial products. We believe that all participants in the ETP landscape want retail investors to better understand what risks they are undertaking when buying and trading ETPs, but we need to develop improved methods to properly equip them in this regard. It is only through informing and empowering retail investors to make more educated investment decisions that we ensure the health and growth of the ETP industry.

As the number and complexity of ETPs continues to grow and evolve, Nasdaq looks forward to continuing to work closely with both FINRA and the ETP community in developing targeted and more effective retail investor education and in strengthening suitable investor protections. Taken together, disclosure and education will serve to benefit both investors and the ETP industry alike by ensuring retail investors are better protected and educated as to exactly

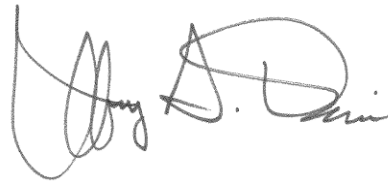
⁷ See FINRA Rule 2111, which requires a member to have a reasonable basis to believe that a recommended transaction or investment strategy involving a security is suitable for the customer. The rule also includes three main suitability obligations for firms and associated persons (reasonable-basis, customer-specific, and quantitative suitability obligations).

⁸ See FINRA Rule 2090, which requires firms to use “reasonable diligence” in the opening and maintenance all accounts and to know the critical facts concerning every customer.

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what it is they are purchasing before committing to investing in a particular investment product. Nasdaq is a passionate advocate for a healthy and vibrant ETP industry and believes that it is crucial that the ETP community understand that maintaining retail investor confidence is critically important to preserving the long-term health and vitality of the ETP marketplace.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey S. Davis". The signature is fluid and cursive, with the first name "Jeffrey" written in a larger, more prominent script than the last name "Davis".

Jeffrey S. Davis
Senior Vice President, Senior Deputy General Counsel
Nasdaq, Inc.