

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85039; File No. SR-NASDAQ-2018-111)

February 1, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 7, Section 118(a) of the Rules

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on December 26, 2018, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the 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 proposes to amend the Exchange’s transaction fees at Equity 7, Section 118(a) to: (i) assess fees for the Midpoint Extended Life Order; and (ii) offer new supplemental credits in all three tapes for non-displayed orders that add liquidity, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 2, 2019.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.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 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 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 purpose of the proposed rule change is to amend the Exchange's transaction fees at Equity 7, Section 118(a) to: (i) assess fees for the Midpoint Extended Life Order; and (ii) establish two new supplemental credits in all three tapes for non-displayed midpoint orders that provide liquidity, as described further below.³

First Change

The Exchange is proposing to assess a \$0.0004 per share executed fee for executions of Midpoint Extended Life Orders in securities priced at \$1 or more. Currently, the Exchange does not assess a fee for executions of Midpoint Extended Life Orders. The proposed fee covers Orders in securities of any of the three tapes. The Exchange believes that the market in Midpoint Extended Life Orders has matured to the point that it can support the proposed \$0.0004 per share executed fee.

Second Change

³ The Exchange initially filed the proposed pricing changes on December 21, 2018 (SR-NASDAQ-2018-110). On December 26, 2018, the Exchange withdrew that filing and submitted this filing.

The Exchange is proposing to offer two new supplemental credits in all three tapes for non-displayed midpoint orders that provide liquidity if a member executes a requisite average daily volume of shares through Midpoint Extended Life Orders. These are supplemental credits because they will apply in addition to the credits otherwise available to members that add non-displayed liquidity to the Exchange. Specifically, the Exchange proposes to offer a member a \$0.0001 supplemental credit per share executed for midpoint orders if the member executes an average daily volume of at least 2.5 million up to, but not including, 4 million shares through Midpoint Extended Life Orders. Alternatively, the Exchange proposes to offer a member a \$0.0002 supplemental credit per share executed for midpoint orders if the member executes an average daily volume of 4 million or more shares through Midpoint Extended Life Orders. The purposes of the new credits are to provide members with a greater incentive to utilize Midpoint Extended Life Orders as well as to increase their provision of non-displayed midpoint liquidity on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.⁸ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”⁹

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁰

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ See NetCoalition, at 534 - 535.

⁹ Id. at 537.

¹⁰ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

First Change

The proposed \$0.0004 per share executed fee is reasonable because the Exchange has considered the nature of the market in Midpoint Extended Life Orders, the need to assess a fee to help cover the costs of supporting trading on Nasdaq, and the Exchange's desire to continue to promote use of Midpoint Extended Life Orders on the Exchange. Taking these factors into consideration, the Exchange has determined that \$0.0004 per share executed is appropriate. The Exchange currently assess a fee of \$0.0007 per share executed for certain TFTY Orders.¹¹ The Exchange also assesses \$0.0007 per share executed for QCST and QDRK orders, except for QCST orders that execute on Nasdaq BX for which there is no charge or credit.¹² Thus, the lower fee is similar to existing fees for Orders that utilize the Exchange and may promote use of Midpoint Extended Life Orders and consequently the quality of the market in Midpoint Extended Life Orders. The Exchange also notes that a competitor exchange assesses a fee of \$0.0009 per share executed for both adding and removing all non-displayed liquidity in securities priced \$1 or more.¹³

As discussed extensively in its proposal,¹⁴ the Exchange believes that the Midpoint Extended Life Order is consistent with the Act because it is emblematic of a core function of a national securities exchange, namely matching buyers and sellers of securities on a transparent and well-regulated market, and helping these buyers and sellers come together to receive the best execution possible. The Exchange achieves this by permitting Midpoint Extended Life Orders to execute solely against other Midpoint Extended Life Orders at the midpoint of the NBBO in

¹¹ See Rule 7018(a)(1)-(3) [sic].

¹² Id.

¹³ See Investors Exchange Fee Schedule, available at: <https://iextrading.com/trading/fees/>.

¹⁴ See Securities Exchange Act Release No. 81311 (August 3, 2017), 82 FR 37248 (August 9, 2017) (SR-NASDAQ-2017-074).

return for providing market-improving behavior in the form of a longer-lived midpoint order. Thus, the Exchange believes that it is important for participants using Midpoint Extended Life Orders to have a deep and liquid market. Applying a lower fee than the \$0.0030 per share executed that the Exchange assesses for removing resting midpoint liquidity should provide incentive to market participants to use Midpoint Extended Life Orders while also allowing the Exchange to recoup some of the costs it incurs in offering the Order.

The Exchange believes that the proposed fees are an equitable allocation and are not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members. Moreover, members not interested in using Midpoint Extended Life Orders will continue to have the ability to enter midpoint Orders in the Nasdaq System, which have both fees and credits associated with their execution.¹⁵ The proposed \$0.0004 per share executed fee is lower than most other fees assessed for executions, which is reflective of the beneficial nature of the type of Order. Any member may take advantage of the lower fee by using the Order Type.

Last, the Exchange is not assessing a charge for executions in Midpoint Extended Life Orders in securities priced below \$1 because there are very few executions in such Orders relative to transactions in Midpoint Extended Life Orders in securities priced at \$1 or greater. Allowing such transactions at no cost will help promote a deeper market in Midpoint Extended Life Orders in securities priced below \$1. Thus, the Exchange believes that the no cost tier in Midpoint Extended Life Orders in securities priced below \$1 remains an equitable allocation and is not unfairly discriminatory.

¹⁵ Based on whether the member is removing or adding liquidity. See Equity 7, Section 118(a).

Second Change

The Exchange believes that it is reasonable to offer new supplemental credits to a member for non-displayed midpoint orders that add liquidity to the Exchange if the member executes a requisite average daily volume of shares through Midpoint Extended Life Orders. If effective, the Exchange believes that the new supplemental credits will improve market quality on the Exchange, including for Midpoint Extended Life Orders. The Exchange believes that the new credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposal to assess a modest fee of \$0.0004 per share executed will not place any burden on competition, but rather will help ensure continued growth in the use of Midpoint Extended Life Orders by making such Orders attractive to members that seek to execute at the midpoint with like-minded members, while also allowing the Exchange to recoup

some of the costs associated with offering the Order Type. To the extent the proposal is not successful in promoting liquidity in Midpoint Extended Life Orders, it would have no meaningful impact on competition as few transactions in Midpoint Extended Life Orders would occur.

Likewise, the Exchange believes that the new proposed supplemental credits will not place any burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. Moreover, the addition of the proposed credits may encourage other market venues to provide similar credits to improve their market quality. In that sense, the Exchange believes that the new credits may promote competition.

In sum, if the proposal to assess the new fee tiers for executions of Midpoint Extended Life Orders and to provide new supplemental credits for members that execute Midpoint Extended Life Orders are unattractive to market participants, it is likely that the Exchange will not gain any market share and may lose market share. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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

No written comments were either solicited or 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.¹⁶

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2018-111 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-NASDAQ-2018-111. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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-NASDAQ-2018-111 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Eduardo A. Aleman
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).