

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85373; File No. SR-NASDAQ-2019-015)

March 20, 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)(3)

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 March 12, 2019, 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)(3) to adopt a \$0.00005 per share executed credit provided to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities listed on exchanges other than Nasdaq and NYSE (“Tape B Securities”) that provide liquidity, as described further below.

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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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)(3) to adopt a \$0.00005 per share executed credit provided to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape B Securities that provide liquidity. The proposed credit would be provided to a member in addition to any other credit it qualifies for under Section 118(a)(3), including the \$0.0001 per share executed credit for displayed quotes/orders in Tape B securities provided in addition to other credits under Section 118(a)(3).³ To qualify for the proposed credit, a member must have shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent at least 1.75% of Consolidated Volume⁴ during the month, including

³ The Exchange provides the credit to members with shares of liquidity provided in Tape B securities during the month representing at least 0.10% of Consolidated Volume during the month through one or more of its Nasdaq Market Center MPIDs. Thus, a member that qualifies for the proposed credit would also qualify for the existing \$0.0001 per share executed credit, resulting in a combined credit of \$0.00015 per share executed provided in addition to other credits under Section 118(a)(3).

⁴ Consolidated Volume is the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes shall be

shares of liquidity provided with respect to Tape B securities that represent at least 0.60% of Consolidated Volume.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ 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 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.”⁷

Likewise, in NetCoalition v. Securities and Exchange Commission⁸ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness

excluded from both total Consolidated Volume and the member’s trading activity. See Equity 7, Section 118(a).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁸ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

of market data fees against a challenge claiming that Congress mandated a cost-based approach.⁹ 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.”¹⁰

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’”¹¹

The Exchange believes that the proposed credit is reasonable because it is similar to an existing credit provided by the Exchange. As described above, the Exchange currently provides a \$0.0001 per share executed credit for displayed quotes/orders in Tape B securities, which is provided in addition to other credits under Section 118(a)(3). The proposed credit will likewise be provided in addition to any other credits that a member may qualify for including the \$0.0001 per share executed credit. The Exchange has set the level of Consolidated Volume in Tape B securities required to qualify for the credit higher than the current \$0.0001 per share executed credit’s criteria and added an additional 1.75% or greater Consolidated Volume requirement to reflect the significant credits a member would receive if it qualified for the proposed credit. In this regard, a member that qualifies for the proposed \$0.00005 per share executed credit would

⁹ See NetCoalition, at 534 - 535.

¹⁰ Id. at 537.

¹¹ 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)).

also qualify for the existing \$0.0001 per share executed credit for displayed quotes/orders in Tape B securities. Consequently, a member would receive a combined credit of \$0.00015 per share executed provided in addition to other credits under Section 118(a)(3) if it qualified for the proposed new credit. Consequently, the Exchange believes that the proposed qualification criteria are commensurate with level of credit received.

The Exchange believes that the proposed credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The proposed qualification criteria of the proposed credit is [sic] set at a sufficiently high level to reflect the significant credits a member would receive if it qualified. Any member may elect to provide the levels of market activity required by the proposed credit's qualification criteria in order to receive the credit. If the member determines that the level of Consolidated Volume is too high, it has other opportunities to receive credits that require less Consolidated Volume, including the \$0.0001 per share executed credit currently provided under Section 118(a)(3). The Exchange also believes that it is an equitable allocation and is not unfairly discriminatory to limit the credit to only quotes/orders in Tape B securities because the Exchange has observed lower overall volume on the Exchange in Tape B securities in comparison to Tapes A and C securities, and is thus providing incentive to members to provide displayed liquidity in Tape B securities. The Exchange has limited funds with which to apply in the form of incentives, and thus must deploy those limited funds to incentives that it believes will be the most effective and improve market quality in areas that the Exchange determines are in need of improvement. For these reasons, the Exchange believes that the proposed credit is an equitable allocation and is not unfairly discriminatory.

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 proposed changes to the credits available to member firms for execution of securities in Tape B securities does not impose a 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. The proposed change provides another opportunity for members to receive a credit based on their market-improving behavior. As noted above, the proposed credit would be provided in addition to other credits under the rule for which the member qualifies. Thus, any member may elect to provide the levels of market activity required by the credit's qualification criteria in order to receive the credit. Moreover, other market venues are free to adopt the same or similar credits and incentives as a competitive response to this proposed change. As a consequence, the Exchange does not believe that the proposed credit burdens competition among market participants or market venues. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange

will lose market share as a result and, conversely, if the proposal is successful at attracting greater volume to the Exchange other market venues are free to make similar changes as a competitive response. 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.¹²

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

¹² 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-015 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-2019-015. 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-2019-015 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Eduardo A. Aleman
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).