

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85861; File No. SR-NASDAQ-2019-036)

May 15, 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)

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 May 1, 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) to: (1) adopt two new credit tiers available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes³ that provide liquidity; (2) adopt a new credit tier for midpoint orders (other than Supplemental Orders) that provide liquidity; (3) amend the qualification criteria required to receive a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity; and (4)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Tape C securities are those that are listed on the Exchange, Tape A securities are those that are listed on NYSE, and Tape B securities are those that are listed on exchanges other than Nasdaq or NYSE. Under Nasdaq’s rules, Section 118(a)(1) concerns fees for execution and routing of Tape C securities, Section 118(a)(2) concerns fees for execution and routing of Tape A securities, and Section 118(a)(3) concerns fees for execution and routing of Tape B securities.

lower a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity.

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

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: (1) adopt two new credit tiers available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes⁴ that provide liquidity; (2) adopt a new credit tier for midpoint orders (other than Supplemental Orders) that provide liquidity; (3) amend the qualification criteria required to receive a credit available to members for displayed quotes/orders (other than Supplemental

⁴ Tape C securities are those that are listed on the Exchange, Tape A securities are those that are listed on NYSE, and Tape B securities are those that are listed on exchanges other than Nasdaq or NYSE. Under Nasdaq's rules, Section 118(a)(1) concerns fees for execution and routing of Tape C securities, Section 118(a)(2) concerns fees for execution and routing of Tape A securities, and Section 118(a)(3) concerns fees for execution and routing of Tape B securities.

Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity; and (4) lower a credit available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in securities of all three Tapes that provide liquidity.

First New Credit

The Exchange is proposing to adopt a new \$0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3) for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity provided to a member: (i) with shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.60% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.225% of Consolidated Volume during the month.

Second New Credit

The Exchange is proposing to adopt a new \$0.0029 per share executed credit tier under Sections 118(a)(1), (2) and (3) for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity provided to a member: (i) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.30% of Consolidated Volume during the month and (ii) member qualifies for the MARS program on The Nasdaq Options Market (“NOM”) during the month. The Market Access and Routing Subsidy or “MARS” program is an NOM incentive program designed to increase market quality by providing

payments to Participants in return for market-improving behavior.⁵ Nasdaq currently provides a \$0.0030 per share executed credit under Sections 118(a)(1), (2) and (3) to members: (i) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.50% of Consolidated Volume during the month and (ii) member qualifies for Tier 4⁶ of the MARS program on The Nasdaq Options Market during the month.

Third New Credit

The Exchange is proposing to adopt a new \$0.0013 per share executed credit tier under Section 118(a)(1) for midpoint orders in Tape C securities that provide liquidity and adopt a new \$0.0019 per share executed credit tier under Sections 118(a)(2) and (3) for midpoint orders in Tape A and B securities, respectively, that provide liquidity. The new credits would be provided to a member that (i) executes a combined volume of 1 million or more shares in midpoint orders provided and Midpoint Extended Life Orders executed during the month through one or more of its Nasdaq Market Center MPIDs and (ii) has a 10% or greater increase in midpoint orders provided and Midpoint Extended Life Orders executed through one or more of its Nasdaq

⁵ See Options 7, Section 6. To qualify for MARS, the Participant's routing system ("System") would be required to: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System would also need to cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the national best bid or offer ("NBBO"), regardless of size or time or (b) orders that establish a new NBBO on NOM's Order Book, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remains solely responsible for implementing and operating its System. Id.

⁶ There are five MARS payment tiers, each with increasing Average Daily Volume requirements and payments. Id.

Market Center MPIDs during the month over the month of April 2019. A Midpoint Extended Life Order is an Order Type with a Non-Display Order Attribute that is priced at the midpoint between the NBBO and that will not be eligible to execute until a minimum period of one half of a second has passed after acceptance of the Order by the System.⁷

Amended Credit Tier Criteria

The Exchange is proposing to amend the qualification criteria required to receive a \$0.0027 per share executed credit under Sections 118(a)(1), (2) and (3) provided to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity. Currently, the credit is provided to a member (i) with shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.65% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.10% of Consolidated Volume during the month. The Exchange is proposing to decrease the level of Consolidated Volume under (i) of the tier from more than 0.65% to more than 0.50% and increase the level of Consolidated Volume under (ii) of the tier from more than 0.10% to more than 0.175%.

Decreased Credit

The Exchange is proposing to decrease a credit under Sections 118(a)(1), (2) and (3) available to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape C, A and B securities, respectively, that provide liquidity. Currently, the Exchange provides a \$0.0028 per share executed credit to a member with shares of liquidity provided in the Opening and Closing Crosses, excluding Market-on-Close, Limit-on-Close (other

⁷ See Rule 4702(b)(14).

than an Limit-on-Close Order entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET), Market-on-Open, Limit-on-Open, Good-till-Cancelled, and Immediate-or-Cancel orders, through one or more of its Nasdaq Market Center MPIDs that represent more than 0.01% of Consolidated Volume during the month. The Exchange is proposing to reduce the credit available from \$0.0028 per share executed to \$0.0027 per share executed.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹ 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.”¹⁰

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and (5).

¹⁰ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Likewise, in NetCoalition v. Securities and Exchange Commission¹¹ (“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.¹² 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.”¹³

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’”¹⁴

As a general principle, the Exchange chooses to offer credits to members in return for market improving behavior. Equity 7, Section 118(a) sets forth the various credits available to members, which require a member to significantly contribute to market quality by providing certain levels of Consolidated Volume through one or more of its Nasdaq Market Center MPIDs, volume on NOM, as well as other market-improving activity. The three new credit tiers are reflective of the Exchange’s efforts to improve market quality in all three Tapes by providing members with differing levels of incentive in return for market-improving activity. The proposed increase to the qualification requirements of the amended credit tier is similarly

¹¹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹² See NetCoalition, at 534 - 535.

¹³ Id. at 537.

¹⁴ 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)).

reflective of the Exchange's desire to provide incentives to improve market quality, while also balancing the need to keep the incentives provided in-line with the market-improving activity required. From time to time, the Exchange must evaluate the effectiveness of its fee and credit tiers in relation to the criteria required to qualify for them, and to make adjustments to them when appropriate. In this case, the Exchange has determined that the credit tier qualification criteria may be increased without a material impact on the number of members that would qualify for the credit. Similarly, the decrease in the credit available is reflective of the Exchange's determination that the level of credit available may be decreased without a significant impact to the number of members that qualify for the credit.

First New Credit

The Exchange believes that the proposed \$0.0028 per share executed credit is reasonable because it is similar to existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. As described above, the Exchange currently provides a \$0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3).¹⁵ The Exchange also has a \$0.0027 per share executed credit tier, which requires a member to have (i) shares of liquidity accessed in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.65% of Consolidated Volume during the month, and (ii) with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.10% of Consolidated Volume during the month. Thus, the amount of the proposed credit is the same as other credits

¹⁵ To qualify for the credit, a member must have shares of liquidity provided in the Opening and Closing Crosses, excluding Market-on-Close, Limit-on-Close (other than an Limit-on-Close Order entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET), Market-on-Open, Limit-on-Open, Good-til-Cancelled, and Immediate-or-Cancel orders, through one or more of its Nasdaq Market Center MPIDs that represent more than 0.01% of Consolidated Volume during the month. See Equity 7, Section 118(a)(1), (2) and (3).

currently available to members, and there are other similar credit opportunities available to members with different qualification criteria should a member choose not to qualify for the proposed credit.

The Exchange believes that the proposed \$0.0028 per share executed credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The qualification criteria of the proposed credit is set at a sufficiently high level to reflect the significant credit 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, which have different qualification criteria, as described above.

Second New Credit

The Exchange believes that the proposed \$0.0029 per share executed credit is reasonable because it is similar to existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. For example, the Exchange currently provides a \$0.0029 per share executed credit tier under Sections 118(a)(1), (2) and (3) provided to a member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.60% of Consolidated Volume during the month. As described above, the Exchange also has a \$0.0028 per share executed credit tier under Sections 118(a)(1), (2) and (3) with different qualification criteria.¹⁶ Thus, the amount of the proposed credit is the same as other credits currently available to members, and there are other similar credit opportunities available to

¹⁶ Id.

members with different qualification criteria should a member choose not to qualify for the proposed credit.

The Exchange believes that the proposed \$0.0029 per share executed credit is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The qualification criteria of the proposed credit is set at a sufficiently high level to reflect the significant credit 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, or if it does not participate on NOM, it has other opportunities to receive similar credits, which require less Consolidated Volume as described above.

Third New Credit

The Exchange believes that the proposed \$0.0013 and \$0.0019 per share executed credits are reasonable because they are similar to existing credits available on the Exchange for midpoint orders that provide liquidity. The Exchange currently provides a midpoint order credit of \$0.0017 per share executed under Section 118(a)(1) and \$0.0020 per share executed Sections 118(a)(2) and (3). To be eligible for these existing midpoint order credits, a member must provide an average daily volume of 3 million or more shares through midpoint orders during the month. The proposed new midpoint order credits are lower than the current credits described above because of the lower qualification criteria of the proposed credits.

The Exchange believes that the proposed \$0.0013 and \$0.0019 per share executed credits are an equitable allocation and are not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The proposed criteria for the new midpoint credits requires members to execute a combined minimum volume of 1 million shares

comprising of midpoint orders provided and Midpoint Extended Life Orders executed, and to demonstrate an increase of 10% or more in midpoint orders provided and Midpoint Extended Life Orders executed through one or more of its Nasdaq Market Center MPIDs during the month over the month of April 2019. Thus, members are provided incentive to increase the overall level of midpoint orders and Midpoint Extended Life Orders transacted over its trading in April 2019, in turn improving liquidity in midpoint orders and Midpoint Extended Life Orders. The Exchange chose April 2019 because it is reflective of a member's most recent trading in midpoint orders and Midpoint Extended Life Orders, thereby setting a baseline for a member's midpoint order and Midpoint Extended Life Order trading prior to the credit's effectiveness. The Exchange believes that the qualification criteria of the proposed credit tiers is 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 shares of midpoint orders and Midpoint Extended Life Orders is too high, it has other opportunities to receive credits for midpoint orders, including the \$0.0010 per share executed credit for all other midpoint orders under Section 118(a)(1) and the \$0.0014 per share executed credit for all other midpoint orders under Sections 118(a)(2) and (3).

Amended Credit Tier Criteria

The Exchange believes that the amount of the proposed amended credit tier is reasonable because the amount of the credit is remaining unchanged. The proposed changes to the qualification criteria are reasonable because the Exchange believes that an increase in the criteria should not decrease the number of members that will qualify for the credit. As described above,

the Exchange must evaluate the effectiveness of its fee and credit tiers in relation to the criteria required to qualify for them, and to make adjustments to them when appropriate.

The Exchange believes that the proposed amended credit qualification criteria is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit criteria to all members and provide the credit to all members that meet the qualification criteria, unless that member qualifies for a larger credit. The proposed qualification criteria of the credit is 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, which require less Consolidated Volume.

Decreased Credit

The Exchange believes that the proposed amended credit is reasonable because the amount of the credit given is the same as existing credits available on the Exchange for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. For example, the Exchange provides a \$0.0027 per share executed credit tier under Sections 118(a)(1), (2) and (3) available to a member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.30% of Consolidated Volume during the month during the month.

The Exchange believes that the proposed amended 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 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, which require less Consolidated Volume.

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 Exchange is adopting new credit opportunities for members. Thus, the proposed change provides another opportunity for members to receive a credit based on their market-improving behavior and is reflective of the highly competitive market in which the Exchange operates. The new credit tiers may attract greater order flow to the Exchange, which would benefit all market participants on Nasdaq. The proposed amended criteria for an existing credit and proposed reduced credit are reflective of the need to periodically calibrate the criteria required to receive credits. The Exchange has limited resources with which to apply to credits. Given the competitive environment among exchanges and other trading venues, the Exchange

must ensure that it is requiring the most beneficial market activity for a credit that is permitted in the competitive landscape for order flow. In this regard, the Exchange notes that other market venues are free to adopt the same or similar credits and incentives as a competitive response to this proposed change. Moreover, 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.¹⁷

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.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2019-036 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-2019-036. 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-2019-036 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.¹⁸

Eduardo A. Aleman
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).