

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87708; File No. SR-NASDAQ-2019-094)

December 10, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at 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 November 27, 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: (i) adjust the criteria for members to qualify for a credit; and (ii) to adjust the categories of credits which the Exchange will provide to members that enter Orders with Midpoint Pegging that receive price improvement with respect to the national best bid and best offer ("NBBO"), as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 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 Exchange proposes to amend the schedule of credits it provides to members, pursuant to Equity 7, Section 118(a), in two respects.

First, the Exchange proposes to amend its schedule of credits by adjusting a volume threshold to qualify for one of the credits it provides to its members. For Orders in securities in each of Tapes A, B, and C, the Exchange presently provides a \$0.00305 per share executed credit 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 1.25% of Consolidated Volume³ during the month. The Exchange proposes to raise the qualifying volume threshold for this credit from 1.25% to 1.50% of Consolidated Volume. The Exchange intends for this amendment to incentivize members to increase the extent of their liquidity adding activity to qualify for and to continue to qualify for this credit.

³ As used in Equity 7, Section 118(a), the term “Consolidated Volume” means 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.

Second, the Exchange proposes to amend its credits for Non-Displayed Orders⁴ in securities in each Tape (other than Supplemental orders) that provide liquidity to the Exchange. Under the existing schedules for these credits, a member that enters a Midpoint Order⁵ that adds liquidity to the Exchange may be entitled to receive one of several tiers of rebates and supplemental rebates, which vary to the extent that the member also engages in specified volumes, amounts, and types of corresponding activities.⁶ The Exchange also provides rebates for between \$0.0010 and \$0.0005 per share executed for other types of Non-Displayed Orders entered by members that achieve certain specified volume thresholds. Finally, the Exchange provides no credits to, but also imposes no charges upon, members that enter other Non-Displayed Orders if they do not achieve the specified volume or activity thresholds.

The Exchange proposes to amend the schedule of credits (and supplemental credits) that apply to Midpoint Orders that add liquidity to the Exchange and, in particular, buy (sell) Orders with Midpoint Pegging that receive execution prices that are lower (higher) than the midpoint of the NBBO. Under the proposal, members entering Orders with Midpoint Pegging that execute at prices which are less aggressive than the midpoint of the NBBO will be entitled to receive credits

⁴ As set forth in Rule 4702(b), a “Non-Displayed Order” is an Order Type that is not displayed to other participants, but nevertheless remains available for potential execution against incoming Orders until executed in full or cancelled.

⁵ Pursuant to Rule 4703, an “Order with Midpoint Pegging” is a Non-Displayed Order that is pegged with reference to the midpoint between the Inside Bid and the Inside Offer (the “Midpoint”).

⁶ The Exchange provides a baseline rebate of \$0.0010 per share executed for Midpoint Orders. It provides higher rebates, varying from \$0.0013 per share executed to \$0.0025 per share executed, for Midpoint Orders where members provide specified threshold volumes of Midpoint Orders during a month, add certain threshold numbers of shares, or increases its orders provided and executed by specified amounts. Additionally, the Exchange provides a supplemental rebate of between \$0.0001 and \$0.0002 per share executed for Midpoint Orders where members execute specified average daily volumes of shares through Midpoint Extended Life Orders. See Equity 7, Section 118(a).

applicable to “other non-displayed orders” – to the extent such members achieve certain volume thresholds during a month – or no credits if they do not achieve these thresholds (in which case the executions will, however, continue to be free of charge). The Exchange believes that it is reasonable to offer the credit schedule applicable to Non-Displayed Orders to members that enter Orders with Midpoint Pegging which execute at prices less aggressive than the midpoint of the NBBO because such Orders behave the same way as do Non-Displayed Orders. Moreover, members that enter Orders with Midpoint Pegging which execute at prices less aggressive than the midpoint of the NBBO already benefit from the fact that their orders receive price improvements, such that these members do not require additional inducements to enter their Orders on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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 proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposal is Reasonable

The Exchange’s proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[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’”⁹

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

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the

⁹ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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

Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

In particular, the Exchange proposes to raise the volume threshold to qualify for its \$0.00305 per share executed credit as a means of encouraging members to increase their extent of their liquidity adding activity to qualify for or to continue to qualify for this credit. To the extent that this proposal results in an increase in liquidity adding activity on the Exchange, this will improve the quality of the Nasdaq market and increase its attractiveness to existing and prospective participants.

Likewise, the Exchange believes that it is reasonable to treat Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO the same as “other Non-Displayed Orders,” because Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO behave the same way that Non-Displayed Orders behave. Furthermore, these Orders receive price improvements and incur no execution fees, which benefit members. Therefore, members that enter these Orders already have incentives to submit them to the Exchange and do not require added incentives in the form of credits to do so.

The Exchange notes that those participants that are dissatisfied with the proposed amended credits are free to shift their order flow to competing venues.

The Proposal is an Equitable Allocation of Charges

The Exchange believes its proposal will allocate its charges fairly among its market participants. It is equitable for the Exchange to raise the qualification requirement for the \$0.00305 per share executed credit as a means of incentivizing increased liquidity providing activity on the Exchange. An increase in liquidity providing activity on the Exchange will improve the quality of the Nasdaq market and increase its attractiveness to existing and prospective participants.

It is also equitable to treat Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO the same as “other Non-Displayed Orders,” because Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO behave the same way that Non-Displayed Orders behave. Furthermore, these Orders receive price improvements and incur no execution fees, which benefit members. Therefore, members that enter these Orders already have incentives to submit them to the Exchange and do not require added incentives in the form of credits to do so.

The Proposed Amended Credits are not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today’s economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity

that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

Although the Exchange's proposal to raise the qualifying criteria for its \$0.00305 per share executed credit will require members to add more liquidity than is currently required to qualify for this credit, any resulting increase in liquidity to the market will improve market-wide quality and price discovery, to the benefit all market participants. And although under the proposal, Exchange members entering Orders with Midpoint Pegging that execute at prices less aggressive than the midpoint of the NBBO will receive the schedule of credits applicable to Non-Displayed Orders going forward, this is not unfairly discriminatory because these Orders behave in the same manner as do Non-Displayed Orders, and it is fair to treat such Orders the same. Moreover, members that enter these Orders with Midpoint Pegging will continue to receive the benefits of price improvements and no execution charges associated with their Orders. Finally, the Exchange will be able to apply the savings from changes to its credit schedule to incentivize market improving behavior in other areas, again, to the ultimate benefit of all market participants. Finally, the Exchange notes that any participant that does not find the amended credits to be sufficiently attractive is free to shift its order flow to a competing venue.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage. All members of the Exchange will benefit from any increase in market activity that the proposal to amend the \$0.00305 per share executed credit effectuates. Members that enter Orders with Midpoint Pegging that execute at prices less

aggressive than the midpoint of the NBBO will also continue to receive benefits in the form of free executions and price improvements on their Orders.

Moreover, members are free to trade on other venues to the extent they believe that the credits provided are too low or the qualification criteria are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that the tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

Intermarket Competition

The Exchange believes that its proposed modification to its schedule of credits will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other 12 live exchanges and from off-exchange venues, which include 32 alternative trading systems. 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 credits 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 credit changes in this market may impose any burden on competition is extremely limited.

The proposed amended credits are reflective of this competition because, even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprised more than 37% of industry volume for the month of July 2019.

The Exchange's proposal to raise the qualification requirement for its \$0.00305 per share executed credit is procompetitive in that it is intended to increase liquidity on the Exchange and thereby render the Exchange a more attractive and vibrant venue to market participants.

Similarly, the proposed amendments to the Exchange's schedule of credits applicable to Non-Displayed Orders (other than Supplemental Orders) is not a burden on competition because the Exchange has limited resources to apply as credits and such resources must be applied in a manner that the Exchange believes will best improve market quality thereon. The Exchange believes that providing credits to members that are already receiving price improvement is not the most efficient allocation of such limited resources, since such Orders already receive the benefits of price improvement and free execution, and thus do not need to be incentivized. Instead, this proposal will allow the Exchange to apply its limited resources to other areas wherein it can promote market-improving behavior by its participants. In doing so, the proposed changes again have the potential to make the Exchange a more attractive trading venue, and consequently may promote competition among markets.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe

that the proposed change 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.¹¹

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-2019-094 on the subject line.

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2019-094. 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-2019-094 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.¹²

J. Matthew DeLesDernier
Assistant Secretary

¹² 17 CFR 200.30-3(a)(12).