

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93987; File No. SR-NASDAQ-2022-001)

January 18, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NOM Pricing Schedule at Options 7, Section 2

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 3, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (the “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 Nasdaq Options Market (“NOM”) Pricing Schedule at Options 7, Section 2.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 NOM's Pricing Schedule at Options 7, Section 2 to: (1) increase the Fee to Remove Liquidity in Penny Symbols for Customers⁴ and Professionals,⁵ and (2) amend the qualifications for the Tier 3 NOM Market Maker⁶ Rebate to Add Liquidity in Penny Symbols to allow an alternative way to qualify for the rebate. Each change is further discussed below.

Customer and Professional Fee to Remove Liquidity

Today, the Exchange charges Customers and Professionals a \$0.48 per contract Fee to Remove Liquidity in Penny Symbols. The Exchange proposes to increase this fee to \$0.49 per contract for Customers and Professionals.

⁴ The term "Customer" or ("C") applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(a)(47)).

⁵ The term "Professional" or ("P") means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Options 1, Section 1(a)(47). All Professional orders shall be appropriately marked by Participants.

⁶ The term "NOM Market Maker" or ("M") is a Participant that has registered as a Market Maker on NOM pursuant to Options 2, Section 1, and must also remain in good standing pursuant to Options 2, Section 9. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

NOM Market Maker Rebate to Add Liquidity

Today, the Exchange offers tiered NOM Market Maker Rebates to Add Liquidity in Penny Symbols that are \$0.20 (Tier 1), \$0.25 (Tier 2), \$0.30 (Tier 3),⁷ \$0.32 (Tier 4),⁸ \$0.44 (Tier 5), and \$0.48 (Tier 6). These rebates are paid per the highest tier achieved below.

Monthly Volume

- Tier 1** Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of up to 0.10% of total industry customer equity and ETF option average daily volume (“ADV”) contracts per day in a month
- Tier 2** Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.10% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month
- Tier 3** Participant: (a) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.20% to 0.60% of total industry customer equity and ETF option ADV contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.07% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.70% or more of Consolidated Volume (“CV”) which adds liquidity in the same month on The Nasdaq Stock Market, (3) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.10% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (4) executes greater than 0.01% of CV via Market-on- Close/Limit-on-Close (“MOC/LOC”) volume within The Nasdaq Stock Market Closing Cross in the same month
- Tier 4** Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.60% of total industry customer equity and ETF option ADV contracts per day in a month
- Tier 5** Participant adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month and transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (“CV”) which adds liquidity in the same month on The Nasdaq Stock Market

⁷ This rebate is \$0.40 per contract in the following symbols: AAPL, SPY, QQQ, IWM, and VXX. See Options 7, Section 2(1), note 4.

⁸ Id.

Tier 6

Participant: (a)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.95% of total industry customer equity and ETF option ADV contracts per day in a month, (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 30,000 or more contracts per day in a month must be removing liquidity, and (3) adds Firm, Broker-Dealer and Non-NOM Market Maker liquidity in Non-Penny Symbols of 10,000 or more contracts per day in a month; or (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 1.50% of total industry customer equity and ETF option ADV contracts per day in a month, and (2) executes Total Volume of 250,000 or more contracts per day in a month, of which 15,000 or more contracts per day in a month must be removing liquidity

As set forth above, the Exchange currently offers two different paths in (a) and (b) for Participants to achieve the Tier 3 Market Maker rebate. The Exchange now proposes to amend the Tier 3 qualifications in (b) as follows:

Participant... (b)(1) adds NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols above 0.07% to 0.20% of total industry customer equity and ETF option ADV contracts per day in a month, (2) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent (i) 0.70% or more of Consolidated Volume (“CV”) which adds liquidity in the same month on The Nasdaq Stock Market or (ii) 70 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market, (3) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.10% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (4) executes greater than 0.01% of CV via Market-on- Close/Limit-on-Close (“MOC/LOC”) volume within The Nasdaq Stock Market Closing Cross in the same month

The proposal adds an alternative route to achieve the equity component in (b)(2), namely by introducing an alternative volume-based requirement in new (b)(2)(ii) that requires Market Makers to transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 70 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market.⁹ The options component in (b)(1) and the other equity components in (b)(3) and

⁹ All NOM Participants are required to be members of The Nasdaq Stock Market pursuant to General 3 (Membership and Access).

(b)(4) to qualify for the Tier 3 rebate will remain unchanged. The Exchange will also make a related change to renumber the existing volume requirement in (b)(2) as (b)(2)(i).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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 Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that 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’”¹²

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

¹² 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)).

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.”¹³

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. 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.

Customer and Professional Fee to Remove Liquidity

The Exchange believes that its proposal to increase the Fee to Remove Liquidity in Penny Symbols for Customers and Professionals from \$0.48 to \$0.49 per contract is reasonable. While this fee is increasing, Customers and Professionals will continue to be assessed the lowest Fee to Remove Liquidity in Penny Symbols compared to all other market participants.¹⁴ Accordingly,

¹³ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁴ The Exchange currently charges all other market participants (i.e., Broker-Dealers, Firms, Non-NOM Market Makers, and NOM Market Makers) a \$0.50 per contract Fee to Remove Liquidity in Penny Symbols.

the Exchange believes that the proposed fee will continue to attract Customer and Professional order flow to NOM to the benefit of all market participants.

The Exchange further believes that its proposal is equitable and not unfairly discriminatory because it will apply uniformly to all similarly situated Participants. With the proposed changes, Customers and Professionals will continue to be assessed a lower Fee to Remove Liquidity in Penny Symbols compared to all other market participants. The Exchange does not believe it is inequitable or unfairly discriminatory to assess a lower fee to Customers and Professionals, and not to other market participants. Customer order flow offers unique benefits to the market by providing more trading opportunities, which attracts specialists and market makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause a corresponding increase in order flow from other market participants. The Exchange believes that encouraging Professional order flow is similarly beneficial, as the lower fee may cause market participants to select NOM as a venue to send Professional order flow, which benefits all market participants by attracting valuable liquidity to the market and thereby enhancing the trading quality and efficiency for all.

NOM Market Maker Rebate to Add Liquidity

The Exchange believes that its proposal to amend the qualifications for the Tier 3 NOM Market Maker Rebate to Add Liquidity in Penny Symbols represents a reasonable attempt to incentivize market participants to increase the number and variety of orders sent to the Exchange for execution. Specifically, the Exchange proposes to introduce an alternative volume-based requirement in new subsection (b)(2)(ii) that requires Market Makers to transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 70 million shares or more ADV which adds liquidity in the same month on The Nasdaq Stock Market. By

introducing an alternative method to qualify for the Tier 3 rebate, the Exchange will create an additional opportunity for Market Makers to increase their liquidity adding activity on the Exchange's equity market. Taken together with existing options and equity components that comprise the Tier 3 rebate qualifications in (b), the Exchange believes that the amended qualifying criteria will continue to incentivize participation in greater volume from cross asset activity, which would improve the overall quality of the Exchange's marketplace to the benefit of all market participants, both on NOM and The Nasdaq Stock Market.

The Exchange also believes that the proposed changes to the qualifications for the Tier 3 Market Maker Rebate to Add Liquidity in Penny Symbols is equitable and not unfairly discriminatory because the Exchange will pay the Tier 3 rebate uniformly to any qualifying Market Makers. Market Makers add value through continuous quoting and the commitment of capital.¹⁵ Because Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering the rebate to only Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging Market Makers to add greater liquidity benefits all market participants, both on NOM and The Nasdaq Stock Market, in the quality of order interaction.

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 intra-market competition, the Exchange does not that its proposals will place any category of market participant at a competitive disadvantage. As discussed above, while the

¹⁵ See Options 2, Sections 4 and 5.

Exchange's proposals target certain order flow and activity on the Exchange (i.e., Customer, Professional, and Market Maker activity), the proposed changes are ultimately aimed at attracting greater order flow to the Exchange, which benefits all market participants by providing more trading opportunities.

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. 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 sum, if the changes proposed herein are 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 changes will impair the ability of Participants or competing exchanges 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-2022-001 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-2022-001. 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-2022-001, 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.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).