

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95300; File No. SR-NASDAQ-2022-040)

July 15, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Certain NOM Market Maker Non-Penny Discounts in Options 7, Section 2

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 July 1, 2022, 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 Pricing Schedule at Options 7, Section 2(1), which governs pricing for Nasdaq participants using The Nasdaq Options Market (“NOM”), Nasdaq’s facility for executing and routing standardized equity and index options.

The text of the proposed rule change is detailed below: proposed new language is underlined and proposed deletions are in brackets.[sic]

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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.

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

Pursuant to Options 7, Section 2(1), the Exchange currently assesses NOM Market Makers³ a \$0.35 per contract Fee to Add Liquidity in Non-Penny Symbols. This fee applies unless Participants meet the volume thresholds set forth in note 5. Note 5 currently stipulates that Participants that add NOM Market Maker liquidity in Non-Penny Symbols of 10,000 to 14,999 average daily volume ("ADV") contracts per day in a month will be assessed a \$0.00 per contract Non-Penny Options Fee for Adding Liquidity in that month. Participants that add NOM Market Maker liquidity in Non-Penny Symbols of 15,000 or more ADV contracts per day in a month will receive the Non-Penny Rebate to Add Liquidity (currently \$0.30 per contract) for that month instead of paying the Non-Penny Fee for Adding Liquidity. Accordingly, qualifying Participants are offered an opportunity to reduce the \$0.35 fee or earn a rebate if they meet the volume-based requirements under note 5.

³ 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.

The Exchange now proposes to replace the current ADV thresholds in note 5 with new thresholds that will be based on a percentage of total industry volume. Specifically, Participants will be eligible for free executions instead of paying the \$0.35 per contract fee if they add NOM Market Maker liquidity in Non-Penny Symbols of 0.05% to 0.07% of total industry customer equity and ETF option ADV contracts (“TCV”) per day in a month (currently 10,000 to 14,999 ADV contracts per day in a month). Further, Participants will receive the \$0.30 per contract rebate instead of paying the \$0.35 per contract fee if they add NOM Market Maker liquidity in Non-Penny Symbols of above 0.07% TCV (currently 15,000 or more ADV contracts) per day in a month. As proposed, note 5 will state:

The NOM Market Maker Fee for Adding Liquidity in Non-Penny Symbols will apply unless Participants meet the volume thresholds set forth in this note. Participants that add NOM Market Maker liquidity in Non-Penny Symbols of 0.05% to 0.07% of total industry customer equity and ETF option ADV contracts per day in a month will be assessed a \$0.00 per contract Non-Penny Options Fee for Adding Liquidity in that month. Participants that add NOM Market Maker liquidity in Non-Penny Symbols of above 0.07% of total industry customer equity and ETF option ADV contracts per day in a month will receive the Non-Penny Rebate to Add Liquidity for that month instead of paying the Non-Penny Fee for Adding Liquidity.

Only the volume requirements for the note 5 incentives will be amended with this proposal, not the related fees or rebates. The Exchange notes that the new volume requirements are more stringent than the current ADV volume requirements.⁴ The Exchange is proposing to effectively raise the volume requirements to align with increasing Participant activity on the Exchange over time. While the proposed tiered requirements are more stringent, the Exchange believes that the note 5 incentives will continue to encourage NOM Market Makers to add Non-Penny Symbol liquidity on NOM to the benefit of all market participants.

⁴ For example, 0.05% TCV is currently representative of approximately 16,150 contracts ADV and 0.07% TCV is currently representative of approximately 22,610 contracts ADV.

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 Exchange's proposed changes to 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’....”⁷

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

⁷ 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)).

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.”⁸

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.

The Exchange believes that its proposal to replace the current ADV thresholds in note 5 with the new TCV% thresholds described above is reasonable for the reasons that follow. The Exchange is proposing to base the note 5 incentives on a percentage of industry volume in recognition of the fact that the volume executed by a member may rise or fall with industry volume. A percentage of industry volume calculation allows the Exchange’s tiers to be calibrated to current market volumes rather than requiring the same amount of volume regardless of market conditions. While the amount of volume required by the proposed tiers in note 5 may change in any given month due to increases or decreases in industry volume, the Exchange believes that the proposed tier requirements are set at appropriate levels. While the proposed

⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

TCV% requirements are more stringent than the current ADV requirements, the Exchange is proposing to effectively raise the volume thresholds in note 5 to align with increased Participant activity over time.⁹ Furthermore, the Exchange believes that the more stringent volume requirements will encourage NOM Market Makers to add a greater amount of liquidity on NOM in order to receive the note 5 incentives. The Exchange believes that encouraging additional NOM Market Maker liquidity in this manner would increase overall liquidity and trading opportunities on NOM to the benefit of all market participants.

The Exchange believes that its proposal is equitable and not unfairly discriminatory. As described above, the proposed volume requirements will primarily impact NOM Market Makers that are eligible to receive the note 5 incentives for Non-Penny Symbols. The Exchange, however, anticipates minimal impact with the proposed changes as no NOM Market Maker would fall in or out of the new TCV% tiers as a result of this change. The Exchange further believes that the proposed changes to the volume requirements in note 5 is equitable and not unfairly discriminatory because the Exchange will apply the proposed requirements uniformly to all qualifying NOM Market Makers. The Exchange does not believe that it is unfairly discriminatory to offer the note 5 incentives to only NOM Market Makers because these market participants add value through continuous quoting and the commitment of capital.¹⁰ Because NOM 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 note 5 incentives to only NOM Market Makers is equitable and not unfairly discriminatory in light of

⁹ See supra note 4.

¹⁰ See Options 2, Sections 4 and 5.

their obligations. Finally, encouraging NOM Market Makers to add greater liquidity benefits all market participants 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 believe that its proposal will place any category of market participant at a competitive disadvantage. As discussed above, while the Exchange's proposal targets certain activity on NOM (i.e., NOM Market Makers adding liquidity in Non-Penny Symbols), 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.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-2022-040 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-2022-040. 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-2022-040 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).