

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-96091; File No. SR-NASDAQ-2022-053)

October 17, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Credits at Equity 7, Section 118(a)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 3, 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 schedule of credits, at Equity 7, Section 118(a), as described further below. 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 proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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 schedule of credits, at Equity 7, Section 118(a). Specifically, with respect to its schedule of credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity, the Exchange proposes to amend the criteria for an existing credit of \$0.0029 per share executed.

The Exchange proposes to amend its existing credit of \$0.0029 per share executed 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 0.60% of Consolidated Volume during the month, including shares of liquidity provided with respect to securities that are listed on exchanges other than Nasdaq or NYSE that represent more than 0.10% of Consolidated Volume, and (ii) that adds at least 0.175% of Consolidated Volume during the month in non-displayed orders (excluding midpoint orders) for securities in any tape during the month. The Exchange proposes to amend this credit by lowering the threshold percentage of Consolidated Volume added during the month in non-displayed orders (excluding midpoint orders) for securities in any tape during the month. Specifically, the Exchange proposes lowering this threshold percentage from 0.175% to 0.15%.

The Exchange proposes to amend the existing criteria because it proved too difficult for members to meet in combination with the other criterion set forth in the credit, and has hindered the credit in achieving its intended effect. The Exchange has limited resources at its disposal to

devote to incentives and it periodically reassesses the allocation of those resources when they prove to be ineffective. The lower threshold proposed will be more readily attainable for members and will continue to incent members to add substantial volumes of non-displayed liquidity to the Exchange. From time to time, the Exchange believes it is reasonable to recalibrate the criteria for credits such as this one to ensure that the credits remain relevant to current levels of liquidity providing activity on the Exchange.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>3</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>4</sup> 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 change to its schedule of credits is 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 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

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<sup>3</sup> 15 U.S.C. 78f(b).

<sup>4</sup> 15 U.S.C. 78f(b)(4) and (5).

possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>5</sup>

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.”<sup>6</sup>

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 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.

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<sup>5</sup> 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)).

<sup>6</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange believes that it is reasonable to require a member to (i) provide 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, including shares of liquidity provided with respect to securities that are listed on exchanges other than Nasdaq or NYSE that represent more than 0.10% of Consolidated Volume, and (ii) add at least 0.15% (instead of 0.175%) of Consolidated Volume during the month in non-displayed orders (excluding midpoint orders) for securities in any tape during the month in order to qualify for the existing \$0.0029 per share executed credit. The Exchange believes that it is reasonable to lower the threshold percentage of Consolidated Volume in non-displayed orders (excluding midpoint orders) for securities in any tape in order to qualify for the credit to ensure that this credit remains relevant to current levels of liquidity providing activity on the Exchange.

The Exchange believes it is reasonable to establish a lower threshold because it proved too difficult for members to meet in combination with the other criterion set forth in the credit, and has hindered the credit in achieving its intended effect. The Exchange has limited resources at its disposal to devote to incentives and it periodically reassesses the allocation of those resources when they prove to be ineffective. The proposal to lower the requirement that a member add at least 0.175% of Consolidated Volume to 0.15% of Consolidated Volume (during the month in non-displayed orders (excluding midpoint orders)) is reasonable because the proposed amendment will be more readily attainable for members and will still incentivize members to add substantial volumes of non-displayed liquidity to the Exchange.

The Exchange believes its proposal will allocate its charges and credits fairly among its market participants. The Exchange also believes it is equitable to recalibrate or revise existing criteria for its credits to ensure that the credits remain appropriate for participants to attain.

The Exchange believes that its 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 enhances price discovery and improves the overall quality of the equity markets.

The Exchange believes that its proposal to decrease the non-displayed volume threshold percentage to qualify for an existing \$0.0029 transaction credit is not unfairly discriminatory because the credit is available to all members. The Exchange also believes it is not unfairly discriminatory to recalibrate or revise existing criteria for its credits to ensure that the credits are effective and readily attainable.

Any Participant that is dissatisfied with the proposal is free to shift their order flow to competing venues that provide more generous pricing or less stringent qualifying criteria.

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. Any member may elect to achieve the levels of liquidity required in order to qualify for the credit. The Exchange notes that its members are free to trade on other venues to the extent they believe that the Exchange's credits 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.

#### Intermarket Competition

The Exchange believes that the proposed change to its schedule of credits to amend the criteria to qualify for an existing \$0.0029 transaction credit as noted above 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 live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock. 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.

The proposed change to the qualifying criteria for an existing credit is reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17-18% 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 comprises more than 40% of industry volume in recent months.

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 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) of the Act<sup>7</sup> and paragraph (f) of Rule 19b-4<sup>8</sup> thereunder.

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.

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<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f).



#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2022-053 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-2022-053. 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-2022-053 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.<sup>9</sup>

J. Matthew DeLesDernier

Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).