

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97290; File No. SR-BX-2023-008)

April 12, 2023

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees and Credits at Equity 7, Section 118

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 April 3, 2023, Nasdaq BX, Inc. (“BX” 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 (i) adjust or eliminate several of the Exchange’s transaction credits, at Equity 7, Section 118(a); and (ii) eliminate several of the Exchange’s transaction fees, 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/bx/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

¹ 15 U.S.C. 78s(b)(1).

² 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 Exchange operates on the “taker-maker” model, whereby it generally pays credits to members that take liquidity and charges fees to members that provide liquidity. Currently, the Exchange has a schedule, at Equity 7, Section 118(a), which consists of several different credits that it provides for orders in securities priced at \$1 or more per share that access liquidity on the Exchange and several different charges that it assesses for orders in such securities that add liquidity on the Exchange. The purpose of the proposed rule change is to amend this schedule of fees and credits, at Equity 7, Section 118(a) to: (i) adjust or eliminate several of the Exchange’s transaction credits; and (ii) eliminate several of the Exchange’s transaction fees.

Revision to and Elimination of Transaction Credits

The Exchange proposes to eliminate two of the Exchange’s transaction credits and adjust three of the Exchange’s transaction credits.

Currently, the Exchange provides \$0.0015, \$0.0015, and \$0.0014 per share executed credits for securities in Tape A, Tape B, and Tape C, respectively, to a member accessing liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a non-displayed price): (i) whose combined liquidity removing and adding activities equal or exceed 0.075% of total Consolidated Volume during a month; and (ii) that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month. The Exchange proposes to eliminate this credit because it has not been successful in accomplishing its objectives. That is, it has not induced members to

materially grow liquidity removing and adding activity on the Exchange. The Exchange also seeks to simplify its schedule of credits. The Exchange has limited resources to allocate to incentive programs and it must, from time to time, reallocate resources to maximize their net impact on the Exchange, market quality, and participants.

Currently, the Exchange provides a \$0.0018 per share executed credit for securities in Tape B to a member accessing liquidity that (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a non-displayed price): (i) accesses at least 60% more liquidity in Tape B securities, as a percentage of total Consolidated Volume during a month, than it did during April 2021; (ii) accesses liquidity in Tape B securities equal to or exceeding 0.035% of total Consolidated Volume during a month; and (iii) adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month. The Exchange proposes to eliminate this credit because the baseline month for the growth element of the credit – April 2021 – is no longer a relevant benchmark. As such, this credit no longer provides a growth incentive that is aligned with the Exchange’s needs. Again, the Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange’s overall mix of objectives.

Presently, the Exchange provides a \$0.0015 per share executed credit for securities in Tape C to a member accessing liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a non-displayed price): (i) whose combined liquidity removing and adding activities equal or exceed 0.10% of total Consolidated Volume during a month; (ii) that accesses liquidity equal to or exceeding 0.05% of total Consolidated Volume during a month; and (iii) that adds liquidity equal to or exceeding an

average daily volume of 50,000 shares in a month. The Exchange proposes to increase the amount of this credit for securities in Tape C to \$0.0016 per share executed.

Currently, the Exchange provides a \$0.0009 per share executed credit for securities in Tape C to a member accessing liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a non-displayed price): (i) whose combined liquidity removing and adding activities equal or exceed 0.05% of total Consolidated Volume during a month; and (ii) that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month. The Exchange proposes to increase the amount of this credit for securities in Tape C to \$0.0010 per share executed.

Finally, the Exchange currently provides a \$0.0004 per share executed credit for securities in Tape C to a member accessing liquidity (excluding orders with Midpoint pegging and excluding orders that receive price improvement and execute against an order with a non-displayed price) that adds liquidity equal to or exceeding an average daily volume of 50,000 shares in a month. The Exchange proposes to increase the amount of this credit for securities in Tape C to \$0.0005 per share executed.

The Exchange proposes to increase the three credits described above for securities in Tape C to make these credit amounts consistent with the credits offered for securities in Tapes A and B. These adjustments will align existing incentives for members to add liquidity or executions on the Exchange.

Elimination of Transaction Fees

In addition, the Exchange proposes to eliminate six of the Exchange's transaction fees.

Currently, the Exchange charges members providing liquidity \$0.0012 per share executed for securities in Tapes A, B, and C for displayed orders entered by a member that adds liquidity

equal to or exceeding 0.25% of total Consolidated Volume during a month. The Exchange charges members providing liquidity \$0.0014 per share executed for securities in Tapes A, B, and C for displayed orders entered by a member that adds liquidity equal to or exceeding 0.15% of total Consolidated Volume during a month. The Exchange charges members providing liquidity \$0.0017 per share executed for securities in Tapes A, B, and C for displayed orders entered by a member that adds liquidity equal to or exceeding 0.10% of total Consolidated Volume during a month. The Exchange proposes to eliminate these fees because they have not been successful in accomplishing their objectives. That is, they have not induced members to materially add liquidity on the Exchange. The Exchange also seeks to simplify its schedule of fees. The Exchange has limited resources to allocate to incentive programs and it must, from time to time, reallocate resources to maximize their net impact on the Exchange, market quality, and participants.

Presently, the Exchange charges members providing liquidity \$0.0017 per share executed for securities in Tapes A, B, and C for displayed orders entered by a member that: (i) adds liquidity equal to or exceeding an average daily volume of 9,500,000 shares in a month; and (ii) adds at least 15% more liquidity relative to the member's March 2021 average daily volume of liquidity provided. The Exchange charges members providing liquidity \$0.0020 per share executed for securities in Tapes A, B, and C for displayed orders that adds liquidity entered by a member that: (i) adds liquidity equal to or exceeding an average daily volume of 2,500,000 shares in a month; and (ii) adds at least 25% more liquidity relative to the member's March 2021 average daily volume of liquidity provided. The Exchange proposes to eliminate these fees because the baseline month for the growth element of the fees – March 2021 – is no longer a relevant benchmark. As such, this fee no longer provides a growth incentive that is aligned with

the Exchange's needs. As noted, the Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

Finally, the Exchange also currently charges members providing liquidity \$0.0024 per share executed for securities in Tapes A, B, and C for non-displayed orders (other than orders with Midpoint pegging) entered by a member that (i) adds and removes liquidity equal to or exceeding 0.15% total Consolidated Volume during a month; and (ii) achieves at least a 35% ratio of its displayed liquidity adding activity to its total liquidity adding activity during a month. The Exchange proposes to eliminate this fee because the fee has not been successful in accomplishing its objective and the Exchange seeks to streamline its fee schedule.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁴ 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 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 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

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(4) and (5).

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’”⁵

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.”⁶

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.

⁵ 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)).

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

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 it is reasonable, equitable, and not unfairly discriminatory to eliminate two of the Exchange's transaction credits, adjust three of the Exchange's transaction credits, and eliminate six of the Exchange's transaction fees. The Exchange seeks to simplify and streamline its schedule of credits and fees by: (i) eliminating credits and fees that have not been successful in inducing members to grow their liquidity adding or removing activity or that are no longer based on relevant benchmarks; and (ii) adjusting several credits to securities in Tape C to streamline such credits to those provided in Tapes A and B. The proposed changes are designed to better align with the Exchange's needs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

Those participants that are dissatisfied with the eliminations and adjustments to the Exchange's schedule of credits and fees are free to shift their order flow to competing venues that provide more generous incentives 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 proposals will place any category of Exchange participant at a competitive disadvantage.

The Exchange intends for its proposed changes to its credits and fees to reallocate its limited resources more efficiently and for optimized effect, to recalibrate them to reflect changing market behavior, and to align them with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals 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

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 credits and 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 credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited. The proposals are reflective of this competition.

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 comprises upwards of 50% of industry volume.

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) of the Act⁷ and paragraph (f) of Rule 19b-4⁸ 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.

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:

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f).

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-BX-2023-008 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-BX-2023-008. 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-BX-2023-008 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.⁹

Sherry R. Haywood

Assistant Secretary

⁹ 17 CFR 200.30-3(a)(12).