

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98731; File No. SR-BX-2023-024)

October 12, 2023

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Transaction Fees at Equity 7, Section 118(e)

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 September 29, 2023, Nasdaq BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“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(e), as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2023.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the 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(e), which consists of several different credits and fees for Retail Orders³ and Retail Price Improvement Orders⁴ under Rule 4780 (Retail Price Improvement Program).

The purpose of the proposed rule change is to amend the Exchange’s schedule of fees at Equity 7, Section 118(e). Specifically, the Exchange proposes to amend the qualifying criteria for two existing fees for RPI Orders and update a related sunset date for one of the aforementioned fees.

Currently, the Exchange charges a \$0.0018 per share executed fee for RPI Orders entered by a member that provides liquidity through RPI Orders equal to or exceeding an average daily

³ Retail Orders shall mean an order type with a Non-Display Order Attribute submitted to the Exchange by a Retail Member Organization (as defined in Rule 4780). A Retail Order must be an agency Order, or riskless principal Order that satisfies the criteria of FINRA Rule 5320.03. The Retail Order must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology. See Rule 4702(b)(6).

⁴ Retail Price Improving (“RPI”) Orders shall mean an Order Type with a Non- Display Order Attribute that is held on the Exchange Book in order to provide liquidity at a price at least \$0.001 better than the NBBO through a special execution process described in Rule 4780. A Retail Price Improving Order may be entered in price increments of \$0.001. RPI Orders collectively may be referred to as “RPI Interest.” See Rule 4702(b)(5).

volume of 2,500,000 shares. The Exchange proposes to amend the qualifying criteria for the \$0.0018 fee. Under the proposed change, a member could qualify for the \$0.0018 per share executed fee for RPI Orders if the member provides liquidity through RPI Orders equal to or exceeding 0.02% of total Consolidated Volume during a month (rather than an average daily volume of 2,500,000 shares, as the current Rule provides).

The Exchange believes that by modifying the qualifying criteria for the \$0.0018 per share executed fee to require that a member provides liquidity through RPI Orders equal to or exceeding 0.02% of total Consolidated Volume during a month rather than an average daily volume of 2,500,000 shares in order to qualify, the criteria would be more representative of the overall volume trading in the market. In a fluctuating volume environment, the change to the qualifying criteria would ease the burden to qualify for the fee. The Exchange hopes that modifying the qualifying criteria for the \$0.0018 fee as described above will encourage members to increase liquidity providing activity in RPI Orders on the Exchange. If the proposal is effective in achieving this purpose, then the quality of the Exchange's market will improve, particularly with respect to RPI and Retail Orders to the benefit of all participants, especially those who submit RPI and Retail Orders.

Currently, the Exchange charges a \$0.0020 per share executed fee for RPI Orders entered by a member that (i) quotes RPI Orders in at least 1,200 symbols on average per day; (ii) provides liquidity through RPI Orders equal to or exceeding an average daily volume of 1,000,000 shares; and (iii) increases its average daily volume of liquidity provided in RPI Orders at least 10% relative to the month of March 2023. This fee is applicable through September 30, 2023. The Exchange proposes to amend the qualifying criteria for the \$0.0020 fee. First, the Exchange proposes to revise the criteria to require that a member provides liquidity through RPI

Orders equal to or exceeding 0.01% of total Consolidated Volume during a month instead of the current criteria that a member provides liquidity through RPI Orders equal to or exceeding an average daily volume of 1,000,000 shares. Second, the Exchange proposes to revise the criteria that a customer increases its average daily volume of liquidity provided in RPI Orders at least 10% relative to the month of March 2023 by modifying the reference month from March 2023 to April 2023. Additionally, the Exchange proposes to offer the fee through October 31, 2023. Specifically, the Exchange proposes to charge a \$0.0020 per share executed fee for RPI Orders entered by a member that (i) quotes RPI Orders in at least 1,200 symbols on average per day; (ii) provides liquidity through RPI Orders equal to or exceeding 0.01% of total Consolidated Volume during a month (rather than an average daily volume of 1,000,000 shares); and (iii) increases its average daily volume of liquidity provided in RPI Orders at least 10% relative to the month of April 2023 (rather than March 2023). The proposed rule change provides that such fee is applicable through October 31, 2023.

The Exchange believes that by modifying the qualifying criteria for the \$0.0020 per share executed fee to require that a member provides liquidity through RPI Orders equal to or exceeding 0.01% of total Consolidated Volume during a month rather than an average daily volume of 1,000,000 shares in order to qualify, the criteria would be more representative of the overall volume trading in the market. In a fluctuating volume environment, the change to the qualifying criteria would ease the burden to qualify for the fee. Additionally, the Exchange hopes that the proposed revision to the qualifying criteria to a more recent reference month, together with the change to require RPI Orders equal to or exceeding 0.01% of total Consolidated Volume, will encourage members to increase liquidity providing activity in RPI Orders on the Exchange relative to April 2023. If the proposal is effective in achieving this

purpose, then the quality of the Exchange's market will improve, particularly with respect to RPI and Retail Orders to the benefit of all participants, especially those who submit RPI and Retail Orders.

At this time, the Exchange proposes to amend the sunset date for the proposed fee of \$0.0020 per share executed. The fee will be available through October 31, 2023.⁵ By revising the reference month in the qualifying criteria and extending the sunset date, the Exchange intends to continue to encourage members to earn lower fees by increasing liquidity providing activity in RPI Orders on the Exchange. The Exchange will continue to evaluate the appropriate parameters going forward to encourage increasing liquidity providing activity in RPI Orders on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁷ 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

⁵ The proposed \$0.0020 per share executed fee would be available through October 31, 2023 but would not be available thereafter. For example, as of November 1, 2023, the Exchange would no longer offer the incentive as proposed.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

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’”⁸

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.”⁹

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.

⁸ 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)).

⁹ 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 and equitable to amend the qualifying criteria for the \$0.0018 per share executed fee for RPI Orders by requiring that a member provides liquidity through RPI Orders equal to or exceeding 0.02% of total Consolidated Volume during a month rather than requiring an average daily volume of 2,500,000 shares. Similarly, the Exchange believes it is reasonable and equitable to amend the qualifying criteria for the \$0.0020 per share executed fee for RPI Orders by requiring that a member provides liquidity through RPI Orders equal to or exceeding 0.01% of total Consolidated Volume rather than requiring an average daily volume of 1,000,000 shares. The Exchange's goal is to make the criteria more representative of the overall volume trading in the market and increase liquidity adding activity in RPI Orders on its platform. It is reasonable and equitable to address this need by modifying the qualification requirements as an incentive for members to increase their liquidity activity in RPI Orders on the Exchange. If the proposal is effective in achieving this purpose, then the quality of the Exchange's market will improve, particularly with respect to RPI and Retail Orders to the benefit of all participants, especially those who submit RPI and Retail Orders.

The Exchange also believes it is reasonable and equitable to amend the reference date in the qualifying criteria for the \$0.0020 per share executed fee for RPI Orders, to provide, in part, that in order to qualify for such fee, a member must increase its average daily volume of liquidity provided in RPI Orders at least 10% relative to the month of April 2023 (instead of March 2023). The Exchange's goal is to continue to encourage an increase in liquidity adding activity in RPI

Orders on its platform. It is reasonable and equitable to address this need by updating the requirement for a member to increase its average daily volume of liquidity provided in RPI Orders at least 10% relative to the month of April 2023, instead of March 2023, as an incentive for members to increase their liquidity activity in RPI Orders on the Exchange relative to a more current reference month. If the proposal is effective in achieving this purpose, then the quality of the Exchange's market will improve, particularly with respect to RPI and Retail Orders to the benefit of all participants, especially those who submit RPI and Retail Orders.

The Exchange's proposal to sunset the \$0.0020 fee at the end of October 2023 is also reasonable because the Exchange is updating the reference month in the qualifying criteria as discussed above and the Exchange believes that despite only offering this fee for a limited time, the incentive may continue to encourage members to earn lower fees by increasing liquidity providing activity in RPI Orders on the Exchange.

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.

The Exchange intends for its proposal to improve market quality for all members that submit RPI and Retail Orders on the Exchange and by extension attract more liquidity to the market, improving market wide quality and price discovery. Although net adders of liquidity for RPI Orders will benefit most from the proposal, this result is fair insofar as increased liquidity adding activity in RPI Orders will help to improve market quality and the attractiveness of the Exchange to all existing and prospective retail participants. The Exchange's proposal to sunset the \$0.0020 fee incentive at the end of October 2023 is equitable and not unfairly discriminatory because the fee will be available to all members during the month it is offered.

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. As described above, the proposal modifies the qualification requirements for the \$0.0018 per share executed fee and the \$0.0020 per share executed fee for RPI Orders and revises the sunset date for the \$0.0020 per share executed fee. Members may modify their businesses so that they can meet the required threshold and pay lower charges. As noted above, all members of the Exchange will benefit from any increase in market activity that the proposal effectuates. The Exchange's proposal to sunset the fee at the end of October does not impose an undue burden on competition because any member can qualify for the fee during the month it is offered. Moreover, members are free to trade on other

venues to the extent they believe that the fees assessed, and credits provided, 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 its proposed modifications to its schedule of fees 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 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 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 more than 40% of industry volume.

In sum, the Exchange intends for the proposed changes to its fees to increase member incentives to engage in the addition of liquidity on the Exchange. 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)(ii) of the Act.¹⁰

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.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-BX-2023-024 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-2023-024. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office

of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-BX-2023-024 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Sherry R. Haywood,

Assistant Secretary.

¹¹ 17 CFR 200.30-3(a)(12).