

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85546; File No. SR-NASDAQ-2019-023)

April 8, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at Equity 7, Section 118(a)

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 March 28, 2019, 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 transaction fees at Equity 7, Section 118(a), as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on April 1, 2019.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaq.cchwallstreet.com/>, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The purpose of the proposed rule change is to amend the Exchange's transaction fees at Equity 7, Section 118(a)(1), (2), and (3) to adjust the qualifying terms for an existing credit it offers to members with orders that provide liquidity to the Exchange in all three Tapes.

The Exchange operates on the "maker-taker" model, whereby it pays credits to members that provide liquidity and charges fees to members that access liquidity. Currently, the Exchange offers several different credits for orders that display quotes/orders in securities (other than Supplemental Orders or Designated Retail Orders) in Tapes A, B, and C that provide liquidity to the Exchange. Among these credits, the Exchange offers a \$0.0027 per share executed credit to a member (i) with shares of liquidity provided in all securities during the month representing more than 0.10% of Consolidated Volume³ during the month, through one or more of its Nasdaq

³ Pursuant to Equity 7, Section 118(a), the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member's trading activity.

Market Center MPIDs, and (ii) adds Customer,⁴ Professional,⁵ Firm,⁶ Non-NOM Market Maker⁷ and/or Broker-Dealer⁸ liquidity in Non-Penny Pilot Options of 0.40% or more of total industry average daily volume (“ADV”) in the customer clearing range for Equity and ETF option contracts per day in a month on The Nasdaq Options Market (“NOM”). The Exchange proposes to recalibrate the credit by eliminating the requirement that a member must add liquidity “in Non-Penny Pilot Options” on NOM to qualify for it.

When the Exchange first added this particular credit program in 2016,⁹ it limited the availability of the credit to members that add liquidity on NOM in Non-Penny Pilot Options because the Exchange wanted to specifically encourage liquidity-adding behavior on NOM in less liquid option classes in order to help improve the markets for those options classes. The Exchange still wishes to encourage such market-improving behavior for Non-Penny Pilot

⁴ The term “Customer” 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 defined in Chapter I, Section 1 of the NOM rules.

⁵ A “Professional” is defined in Chapter I, Section 1 of the NOM rules as “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).”

⁶ The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

⁷ The term “Non-NOM Market Maker” or (“O”) is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

⁸ The term “Broker-Dealer” or (“B”) applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

⁹ See Securities Exchange Act Release No. 34-78354 (July 19, 2016), 81 FR 48487 (July 25, 2016) (SR-NASDAQ-2016-102).

Options, but it seeks to revise the credit so that it also encourages members to add liquidity in other options classes on NOM, including Penny Pilot Options.

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 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.”¹²

Likewise, in NetCoalition v. Securities and Exchange Commission¹³ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹³ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.¹⁴ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁵

Further, “[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’”¹⁶ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposal is reasonable to eliminate the credit-qualifying requirement that a member must add liquidity on NOM specifically in Non-Penny Pilot Options [sic]. Under Rule 7018(a), the various credits the Exchange provides for members that add liquidity require members to contribute significantly to market quality by providing certain levels of Consolidated Volume through one or more of its [sic] Nasdaq Market Center MPIDs, and by also contributing volume on NOM. Although the Exchange originally designed this particular credit to encourage members to add liquidity on NOM only in Non-Penny Pilot Options, the Exchange believes that it is reasonable to revise the credit so that it more broadly encourages

¹⁴ See NetCoalition, at 534 - 535.

¹⁵ Id. at 537.

¹⁶ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

members to add liquidity on NOM in all options classes. Indeed, the proposed change will help to improve the market on NOM for all, rather than a subset of, options classes.

The Exchange believes that the proposed change [sic] is equitably allocated among members, and is not designed to permit unfair discrimination. By eliminating the requirement that a member must add liquidity only in Non-Penny Pilot Options, the Exchange will potentially expand the availability of the credit to additional members, including those that provide liquidity on NOM primarily or exclusively in Penny Pilot Options. Moreover, all similarly situated members are equally capable of qualifying for the credit if they choose to meet the revised requirements. The Exchange notes that the proposed change applies to securities of all Tapes.

The Exchange believes that the proposed revised requirements for qualifying for the credit are proportionate to the amount of the credit and that the revised requirements equitably reflect the purpose of the credit, which is to incentivize members to transact greater volume on Nasdaq and NOM.

Finally, the Exchange notes that the proposed volume threshold is consistent with other volume-based credits that the Exchange offers in Equity 7, Section 118(a)(1), (2), and (3) to members for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. Nasdaq currently offers a variety of credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that add liquidity, some of which are linked to activity on NOM and some of which relate to activity on Nasdaq only, which range from \$0.0025 per share executed to \$0.00305 per share executed, and which apply progressively more stringent requirements in return for higher per share executed credits.

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

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 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.

In this instance, the proposed changes do not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The proposal to eliminate from the credit the requirement that members provide liquidity on NOM in Non-Penny Pilot Options is designed to promote competition by improving overall market quality on NOM. The Exchange also notes that its proposed change reflects the Exchange's need to balance the incentives that it provides in return for the market improving behavior it seeks to incentivize. The Exchange has limited funds to apply toward incentives, and therefore must adjust its credit tier qualification criteria to ensure that it applies its limited funds in the most efficient manner.

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 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.¹⁷

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-2019-023 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.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2019-023. 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-2019-023 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.¹⁸

Jill M. Peterson
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).