

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92433; File No. SR-NASDAQ-2021-058)

July 16, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Credits 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 July 8, 2021, 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 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

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 purpose of the proposed rule change is to amend the Exchange's schedule of credits, at Equity 7, Section 118(a). Specifically, the Exchange proposes to make the following changes with respect to its schedule of credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity: (1) add a new credit of \$0.0028 per share executed; (2) amend the criteria for an existing credit of \$0.0029 per share executed; and (3) eliminate an existing credit of \$0.0029 per share executed. The Exchange also proposes to add two new non-cumulative supplemental credits to members for displayed quotes/orders (other than Supplemental Orders) that provide liquidity, of \$0.0001 and \$0.00015 per share executed, respectively.

New Credit for MELO Activity and Adding Liquidity to the Exchange

The Exchange proposes to add a new credit for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity of \$0.0028 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 0.375% or more of Consolidated Volume³

³ Equity 7, Section 118(a) defines "Consolidated Volume" to mean 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.

during the month; (ii) that executes an average daily volume (“ADV”) of at least 500,000 shares of Midpoint Extended Life Orders (“M-ELOs”)⁴during the month; and (iii) that increases the extent of its ADV of MELO orders in all securities by 100% or more during the month relative to the month of June 2021.

The purpose of this new credit is to provide a new means to incent members to provide a substantial amount of liquidity to the Exchange generally as well as to increase the extent to which they engage in MELO activity on the Exchange and grow the extent of such activity over time. An increase in MELO activity and overall liquidity stands to improve the quality of the market generally, and of MELO, in particular, to the benefit of all market participants.

Amended Displayed Credit

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 0.50% 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) with at least a 15% ratio of volume that sets the NBBO provided through one or more of its Nasdaq Market Center MPIDs to all displayed volume that provides liquidity through one or more of its Nasdaq Market Center MPIDs. The Exchange first proposes to amend this credit by raising the threshold percentage of Consolidated Volume needed to qualify for the credit from 0.50% to 0.60%. This proposed amendment will encourage those participants that already

⁴ Pursuant to Equity 4, Rule 4702(b)(14), a "Midpoint Extended Life Order" is an Order Type with a Non-Display Order Attribute that is priced at the midpoint between the NBBO and that will not be eligible to execute until a minimum period of 10 milliseconds has passed after acceptance of the Order by the System.

qualify for the credit to increase the extent to which they add liquidity to the Exchange in order to continue to qualify for it. 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 appropriately challenging for participants to attain in light of changes to their levels of activity on the Exchange.

Second, the Exchange proposes to eliminate the criterion that a member must have at least a 15% ratio of volume that sets the NBBO to all displayed volume that provides liquidity to the Exchange, and to replace it with the requirement that a member add 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 eliminate the existing criterion 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 proposed replacement criterion will be more readily attainable for members and will also improve market quality by incenting members to add substantial volumes of non-displayed liquidity to the Exchange.

Elimination of MARS Credit

The Exchange proposes to eliminate an existing \$0.0029 per share executed credit that it provides 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 0.30% of Consolidated Volume

during the month and (ii) which qualifies for the NOM Market Access and Routing subsidy or “MARS” program.⁵

This credit has not been effective in accomplishing its intended purpose, which is to incent members to increase their liquidity adding activity on both Nasdaq and NOM. The Exchange has observed that historically, few members have received this credit, and it has served to neither meaningfully increase activity on the Exchange or NOM nor improve the quality of those markets. The Exchange therefore proposes to eliminate it. The Exchange notes that even after it eliminates this credit, it will continue to offer a similarly structured credit of \$0.0030 per share executed for members that meet specified volume requirements and qualify for the Tier 4 of the MARS program.

New Supplemental Credits for MELOs and Midpoint Orders that Execute Against MELOs

The Exchange proposes to offer two new supplemental credits to a member that either (i) grows its ADV of MELO and midpoint orders (that execute against MELO orders) during a month by a threshold amount relative to a baseline month or (ii) that provides a threshold ADV through midpoint orders provided and MELO Orders and also grows its ADV in midpoint orders provided and MELO Orders by a threshold amount relative to a baseline month. These credits will be in addition to other credits otherwise available to members for adding displayed liquidity to the Exchange (other than Supplemental Orders), but a member’s activity will qualify it to

⁵ Under the MARS program, NOM pays a subsidy to NOM Participants that provide certain order routing functionalities to other NOM Participants and/or that use such functionalities themselves. The specified MARS Payment is paid on all executed Eligible Contracts that add liquidity, which are routed to NOM through a participating NOM Participant's System and meet the requisite Eligible Contracts ADV. See Securities Exchange Act Release No. 79251 (November 7, 2016), 81 FR 79536 (November 14, 2016) (SR-NASDAQ-2016-149).

receive only one of the two new supplemental credits at a time, meaning that they are not cumulative.

The first supplemental credit, of \$0.0001 per share executed, will be available to a member that, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent to which its ADV of MELO Orders and/or midpoint orders (that executes against MELO Orders) in all securities by an ADV of 1 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least 3 million shares ADV through midpoint orders provided and MELO Orders during the month and increases the extent of its ADV of midpoint orders provided and MELO Orders in all securities by 100% or more during the month relative to the month of June 2021. A second, higher supplemental credit of \$0.00015 per share executed, will be available to a member that, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent to which its ADV of MELO Orders and/or midpoint orders (that executes against MELO Orders) in all securities by an ADV of 2 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least 4 million shares ADV through midpoint orders provided and MELO Orders during the month and increases the extent of its ADV of midpoint orders provided and MELO Orders in all securities by 150% or more during the month relative to the month of June 2021.

The purpose of these new credits is to provide extra incentives to members to be actively involved in MELO on the Exchange, as well as to grow substantially the extent to which they submit MELO orders to the Exchange and provide midpoint orders that execute against MELO orders relative to a recent benchmark month. The Exchange believes that if such incentives are

effective, then any ensuing increase in MELO activity on the Exchange will once again improve market quality, to the benefit of all participants.

2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,⁶ in general, and further the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁷ in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposals are also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposals are Reasonable

The Exchange's proposals 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 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

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

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.

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. Within the foregoing context, the proposals represent reasonable attempts by the Exchange to increase its liquidity and market share relative to its competitors.

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”).

The Exchange believes that it is reasonable to establish a new \$0.0028 per share executed transaction credit, at Equity 7, Section 118(a), for members that provide liquidity of at least 0.375% of Consolidated Volume, execute an ADV of at least 500,000 shares of MELO Orders during the month and increase the extent of their ADV of MELO Orders in all securities by 100% or more during the month relative to the month of June 2021. The new credit will encourage substantial activity on the Exchange as well as substantial activity and growth in MELO Orders. Any increased activity and growth will improve the quality of the market for MELOs as well as overall market quality, to the benefit of both MELO and other market participants.

The Exchange also believes that it is reasonable to amend its existing credit of \$0.0029 per share executed, which applies to members that add liquidity representing 0.50% or more of Consolidated Volume during the month, including shares of liquidity in Tape B Securities of 0.10% or more of Consolidated Volume, and which achieve at least a 15% ratio of volume that sets the NBBO to all displayed liquidity provided. The proposed amendments will increase the threshold percentage of Consolidated Volume required to qualify for the credit from 0.50% to 0.60% and replace the NBBO-setting ratio criteria with a minimum non-displayed volume add requirement (exclusive of midpoint orders) of 0.175% of Consolidated Volume. The proposed increase in the Consolidated Volume threshold will encourage members that currently qualify for the credit to further increase the extent of their liquidity adding activity on the Exchange to continue to do so. 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 appropriately challenging for participants to attain in light of changes to their levels of activity on the Exchange. Meanwhile, the elimination of the NBBO-setting ratio requirement is reasonable 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 replace this criterion with a requirement that a member add at least 0.175% of Consolidated Volume during the month in non-displayed orders (excluding midpoint orders) is reasonable because the proposed replacement criterion will be more readily attainable for members and will also improve market quality by incenting members to add substantial volumes of non-displayed liquidity to the Exchange.

It is also reasonable for the Exchange to eliminate its existing \$0.0029 per share executed credit that it provides to a member that adds liquidity representing more than 0.30% of Consolidated Volume during the month and which qualifies for the MARS program. This credit has not been effective in accomplishing its intended purpose, which is to incent members to increase their liquidity adding activity on both Nasdaq and NOM. The Exchange has observed that historically, few members have received this credit, and it has served to neither meaningfully increase activity on the Exchange or NOM nor improve the quality of those markets.

Finally, the Exchange believes it is reasonable to establish two new supplemental credits available to a member that either (i) grows its ADV of MELO and midpoint orders (that execute against MELO orders) during a month by a threshold amount relative to a baseline month or (ii) that executes during a month a threshold ADV through midpoint orders provided and MELO orders and also grows its ADV in midpoint orders provided and MELO Orders by a threshold amount relative to a baseline month. These new supplemental credits will be non-cumulative, meaning that only one of them is attainable at once. These proposals are reasonable because they will provide extra incentives to members to engage in substantial amounts of MELO-related

activity on the Exchange during a month, as well as to grow substantially the extent to which they do so relative to a recent benchmark month. The Exchange believes that if such incentives are effective, then any ensuing increase in MELO Orders and executions on the Exchange will improve the quality of the MELO market, and the market overall, to the benefit of MELO and all market participants.

The Exchange notes that those market participants that are dissatisfied with the proposals are free to shift their order flow to competing venues that offer more generous pricing or less stringent qualifying criteria.

The Proposals are Equitable Allocations of Credits

The Exchange believes that it is an equitable allocation to establish new transaction credits and otherwise modify the eligibility requirements for its transaction credits because the proposals will encourage members to increase the extent to which they add liquidity to the Exchange. To the extent that the Exchange succeeds in increasing the levels of liquidity and activity on the Exchange, including in segments for which there is an observed need or demand, such as non-displayed, MELO, and Tape B securities, then the Exchange will experience improvements in its market quality, which stands to benefit all market participants. The Exchange also believes it is equitable to recalibrate or revise existing criteria for its credits to ensure that the credits remain appropriately challenging for participants to attain in light of changes to their levels of activity on the Exchange.

It is also equitable to eliminate a MARS-related credit that has not been utilized historically and which has not fulfilled its intended purpose. The Exchange has limited resources to devote to incentive programs and periodically reallocates those resources to programs that are more likely to be utilized and effective.

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

The Proposals are not Unfairly Discriminatory

The Exchange believes that its proposals are 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 believes that its proposals to adopt new credits or otherwise amend the qualifying criteria for its transaction credits are not unfairly discriminatory because these credits are available to all members. Moreover, these proposals stand to improve the overall market quality of the Exchange, to the benefit of all market participants, by incentivizing members to increase the extent of their liquidity provision or activity on the Exchange, including in segments for which there is an observed need or demand, such as non-displayed, MELO, and Tape B securities. The Exchange also believes it is not unfairly discriminatory to recalibrate or revise existing criteria for its credits to ensure that the credits remain appropriately challenging for participants to attain in light of changes to their levels of activity on the Exchange.

Meanwhile, it is not unfairly discriminatory to eliminate a MARS-related credit that has not been utilized historically and which has not fulfilled its intended purpose. The Exchange has limited resources to devote to incentive programs and periodically reallocates those resources to programs that are more likely to be utilized and effective. The Exchange notes that it will continue to offer another similarly-structured credit to members that qualify for Tier 4 of the MARS program.

Any participant that is dissatisfied with the proposals 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 changes 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.

As noted above, Nasdaq's proposals to add and amend transaction credits are intended to have market-improving effects, to the benefit of all members. Any member may elect to achieve the levels of liquidity or activity required in order to qualify for the new or amended credits.

Likewise, the Exchange's proposal will not duly burden competition to eliminate its \$.0029 per share executed MARS credit as members have not utilized the credit historically, such that its elimination will have limited or no impact. The Exchange has limited resources to devote to incentive programs and periodically reallocates those resources to programs that are more likely to be utilized and effective. The Exchange notes that it will continue to offer another similarly-structured credit to members that qualify for Tier 4 of the MARS program.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposed qualification criteria for or amounts of these 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 credit changes. The Exchange notes that its pricing tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

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 credit 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 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 in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit changes in this market may impose any burden on competition is extremely limited.

The proposed new and amended credits are reflective of this competition because, 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 credit changes.

This is in addition to free flow of order flow to and among off-exchange venues which comprises upwards of 44% of industry volume.

The Exchange's proposals to add new and amend its transaction credits are pro-competitive in that the Exchange intends for the changes to increase liquidity addition and activity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to market participants.

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.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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2021-058 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-2021-058. 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-2021-058 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.¹¹

J. Matthew DeLesDernier
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).