

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93407; File No. SR-NASDAQ-2021-081)

October 22, 2021

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Schedule of Transaction Credits and Charges 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 October 13, 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 schedule of transaction credits and charges, 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 transaction credits and charges, at Equity 7, Section 118(a).

Each month, the Exchange determines the applicability to a member of the various credits and charges set forth in this schedule based, in part, on the nature and extent of a member's activities on the Exchange during the month. Credits generally apply to members that add liquidity to the Exchange during the month, with credit amounts varying based upon the extent or nature of such liquidity adding activity, or other criteria, while transaction charges that are discounted from the standard rate apply to members that remove liquidity from the Exchange during the month, with the amounts of the discounts varying based upon the extent or nature of such liquidity removal activity, or other criteria.

Among the order types that comprise a member's activity on the Exchange during a month are Midpoint Extended Life Orders ("M-ELOs").³ Generally, the M-ELO order type (including its Holding Period) is designed to create additional trading opportunities on the Exchange for investors with longer investment time horizons. M-ELO Order will only execute against other M-ELO orders, as well as certain other qualified midpoint orders on the continuous book.

³ 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.

Currently, the Exchange charges a member that executes a M-ELO Order a flat fee of \$0.0004 per share executed (for securities priced at \$1 or more), but does not provide a credit for liquidity provided or charge a fee for liquidity removed.⁴ The design of the tiers of the Section 118 “Nasdaq Market Center Order Execution and Routing” mandates that member’s trading activity that is not treated as “liquidity provided,” necessarily becomes activity classified as “liquidity removed.” Accordingly, before the proposed change became effective, all M-ELO trading activity was classified as removing liquidity.

Nasdaq now proposes to count all M-ELO Orders that a member executes on Nasdaq during the month as liquidity-adding activity on Nasdaq for the purposes of calculating the extent of a member’s trading activity during the month on Nasdaq and determining the charges and credits applicable to such member’s activity.⁵ A M-ELO Order must rest on the book for at least 10 milliseconds, and therefore Nasdaq believes this approach is appropriate because M-ELO is an order type that focuses on the execution quality experience. Nasdaq believes that these qualities allow a M-ELO Order to have a lesser market price impact thus contributing to the market quality by providing passive liquidity.

The purpose of counting all M-ELO Orders that a member executes on Nasdaq during the month as liquidity-adding activity on Nasdaq for the purposes of calculating the extent of a member’s trading activity during the month is to provide extra incentives to members to be actively involved in M-ELO on the Exchange. The Exchange believes that if such incentives are

⁴ Although the proposed rule change will classify all M-ELO trading activity as “liquidity provided,” a member that executes a M-ELO Order will continue to be assessed a fee of \$0.0004 per share executed.

⁵ Where a fee in a particular tier is determined based on shares of non-displayed liquidity (without specifying the treatment of M-ELO Orders) provided in all securities that represent more than a certain threshold of Consolidated Volume, executed M-ELO Orders will not be counted towards such non-displayed liquidity.

effective, then any ensuing increase in M-ELO activity on the Exchange will 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 count all M-ELO Orders that a member executes on Nasdaq during the month as liquidity-adding activity on Nasdaq for the purposes of calculating the extent of a member's trading activity during the month on Nasdaq and determining the charges and credits applicable to such member's activity.

The proposal is reasonable because it will provide extra incentives to members to engage in substantial amounts of MELO-related activity on the Exchange during a month. Nasdaq believes that the qualities of a M-ELO Order cause it to have a lesser market price impact thus contributing to the market quality by providing passive liquidity. The Exchange believes that if such incentives are effective, then any ensuing increase in M-ELO Orders will improve the quality of the M-ELO market, and the market overall, to the benefit of M-ELO 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 Fees and Credits

The Exchange believes that it is an equitable allocation to modify the eligibility requirements for its transaction credits and fees because the proposal will encourage members to increase the extent to which they add M-ELO liquidity to the Exchange. Nasdaq believes that the qualities of a M-ELO Order cause it to have a lesser market price impact thus contributing to the market quality by providing passive liquidity. To the extent that the Exchange succeeds in increasing the levels of M-ELO liquidity on the Exchange, then the Exchange will experience improvements in its market quality, which stands to benefit all market participants.

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 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 believes that its proposal to amend the qualifying criteria for its transaction fees and credits is not unfairly discriminatory because these credits and fees are available to all members. Nasdaq believes that the qualities of a M-ELO Order cause it to have a lesser market price impact thus contributing to the market quality by providing passive liquidity. Moreover, the proposal stands 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 M-ELO liquidity provision or activity on the Exchange.

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 because the change represents a reasonable effort to enhance the ability of longer-term trading interest to participate effectively on an exchange, without discriminating unfairly against other market participants or inappropriately or unnecessarily burdening competition. Nasdaq believes that the qualities of a M-ELO Order cause it to have a lesser market price impact thus contributing to the market quality by providing passive liquidity. In addition, the proposal is applicable to all members on equal terms.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposed treatment of M-ELO Orders is not desirable. 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. 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 fee or 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 fees and 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 fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee and credit changes in this market may impose any burden on competition is extremely limited.

The proposal is 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 fee and 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 proposal is pro-competitive in that the Exchange intends for the change to increase M-ELO liquidity addition 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.

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-2021-081 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-2021-081. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2021-081 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).