

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98128; File No. SR-NASDAQ-2023-028)

August 14, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend 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 August 1, 2023, 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 credits at Equity 7, Section 118(a) to establish a new credit tier, 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 schedule of credits it provides to members, pursuant to Equity 7, Section 118(a), by establishing a new credit tier.

Specifically, the Exchange proposes to provide a new credit for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) of \$0.0030 per share executed to a member with: (i) shares of liquidity provided in all securities that represent 0.70% or more (in securities priced at or greater than \$1) of Consolidated Volume (in securities priced at or greater than \$1); (ii) shares of liquidity provided with respect to securities that are listed on exchanges other than Nasdaq or NYSE that represent 0.15% or more of Consolidated Volume; and (iii) shares of non-displayed liquidity (other than midpoint orders) provided in all securities that represent 0.10% or more of Consolidated Volume. The new credit of \$0.0030 per share executed would apply to displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) in Tape A, Tape B, and Tape C. Members would not be permitted to combine the new \$0.0030 per share executed with QMM credits set forth in Equity 7, Section 114(e).

The purpose of this credit is to provide members with a new incentive to add significant amounts of liquidity to the Exchange and, in particular, to add significant volumes of liquidity in securities in Tape B and in non-displayed liquidity (other than midpoint orders) in all Tapes. An increase in liquidity adding activity on the Exchange would help to improve the quality of the market for all participants.

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 change to its schedule of credits is 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 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

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(4) and (5).

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)).

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.

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 that it is reasonable to establish a new \$0.0030 per share executed credit as a means of incentivizing members to provide meaningful amounts of liquidity to the Exchange, particularly in securities in Tape B as well as non-displayed orders (other than midpoint orders) in securities in any Tape. To the extent that the Exchange succeeds in increasing liquidity adding activity on the Exchange, including in securities in Tape B and non-

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

displayed order flow (other than midpoint orders), then the Exchange would experience improvements in its market quality, which would benefit all market participants.

The Exchange also believes that it is equitable to establish a new \$0.0030 per share executed credit. Again, this proposed credit stands to improve the market quality of the Exchange, to the benefit of all participants, by incentivizing members to provide meaningful amounts of liquidity to the Exchange, particularly in securities in Tape B as well as in non-displayed orders (other than midpoint orders) in securities in any Tape. The Exchange also believes that it is equitable to target the credit, in part, to liquidity adding activity in securities in Tape B, and non-displayed orders (other than midpoint orders) in any Tape, because the Exchange believes that the market for such securities and orders would benefit from additional liquidity. The Exchange notes that it has limited funds to apply in the form of incentives, and thus must deploy those limited funds to incentives that it believes will be the most effective at improving market quality in areas that the Exchange determines are in need of improvement.

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 enhances price discovery and improves the overall quality of the equity markets.

The Exchange believes that its proposed \$0.0030 per share executed credit is not unfairly discriminatory because the credit is available to all members. Moreover, the proposed credit stands to improve the overall market quality of the Exchange, to the benefit of all participants, by incentivizing members to provide meaningful amounts of liquidity to the Exchange, including in securities in Tape B as well as in non-displayed orders (other than midpoint orders) in securities in any Tape. It is not unfairly discriminatory to target the credit, in part, to liquidity adding activity in securities in Tape B and non-displayed orders (other than midpoint orders) in all Tapes, because the Exchange believes that the market for such securities and orders would benefit from additional liquidity. The Exchange notes that it has limited funds to apply in the form of incentives, and thus must deploy those limited funds to incentives that it believes will be the most effective at improving market quality in areas that the Exchange determines are in need of improvement.

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. To the contrary, the proposed change will provide an opportunity for members to receive a new credit based on their market-improving behavior. Any member may elect to provide the levels of market activity required in order to receive the new credit.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the Exchange's schedule of credits is 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 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 and credit changes in this market may impose any burden on competition is extremely limited.

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 more than 40% of industry volume.

The Exchange's proposal is pro-competitive in that the Exchange intends for the proposal to increase liquidity on the Exchange and thereby render the Exchange a more attractive and vibrant venue to market participants.

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)(ii) of the Act.⁷

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)(ii).

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-NASDAQ-2023-028 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-2023-028. 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-NASDAQ-2023-028 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.⁸

Sherry R. Haywood,

Assistant Secretary.

⁸ 17 CFR 200.30-3(a)(12).