

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95458; File No. SR-NASDAQ-2022-045)

August 9, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Equity 7, Section 114(f)

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 28, 2022, 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 Pricing Schedule at Equity 7, Section 114(f) ("Pricing Schedule").

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 Pricing Schedule at Equity 7, Section 114(f) applicable to the Designated Liquidity Provider (“DLP”)³ Program. The Exchange proposes to amend certain of the market quality metrics (“MQMs”) for rebates applicable to DLPs in Nasdaq-listed securities.

The Exchange proposes to amend Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5). Specifically, the Exchange is adding a fifth MQM that concerns auction quality requirements (“Auction Quality Requirements”). In order for a DLP to qualify for a DLP Standard Rebate, it will need to meet 4 of 5 of the Standard MQMs in the assigned exchange-traded product (“ETP”) as measured by Nasdaq to qualify for the Standard Rebate (rather than the current 4 of 4 of the Standard MQMs). In order for a DLP to qualify for an Enhanced Rebate, a DLP will need to meet all 5 Enhanced MQMs in the assigned ETP as measured by Nasdaq to qualify for the Enhanced Rebate. The current MQMs are measured on average in the assigned ETP during

³ Equity 7, Section 114(f)(2) defines a “Designated Liquidity Provider” or “DLP” as a registered Nasdaq market maker for a Qualified Security that has committed to maintain minimum performance standards. A DLP shall be selected by Nasdaq based on factors including, but not limited to, experience with making markets in exchange-traded products, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws. Nasdaq may limit the number of DLPs in a security, or modify a previously established limit, upon prior written notice to members.

regular market hours, however, the Auction Quality Requirements will be measured each auction against the metrics set forth below.

The Auction Quality Requirement for the Standard Rebate requires that the auction price must be within 350 basis points (opening) and 100 basis points (closing) of the first reference price within 30 seconds prior to the market open (opening) and within 120 seconds prior to the market close (closing). The Auction Quality Requirement for the Enhanced Rebate requires that the auction price must be within 150 basis points (opening) and 50 basis points (closing) of the first reference price within 30 seconds prior to the market open (opening) and within 120 seconds prior to the market close (closing). The Exchange believes that the Auction Quality Requirement thresholds for the Standard Rebate outlined above are very achievable for DLPs, while the Auction Quality Requirement thresholds for the Enhanced Rebate outlined above are within reach for most DLPs.

The Exchange also proposes to amend Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to secondary DLPs (“Secondary DLPs”). Specifically, the current MQM says that the Secondary DLP qualifies for Secondary DLP Rebates in ETPs if it meets any 2 of the 4 Enhanced MQMs. This will be revised to say that it must meet 2 of the Enhanced MQMs, excluding the Auction Quality Requirements metric. In essence, this means this MQM will remain unchanged.

Description of the Changes

This proposal amends Equity 7, Section 114(f)(4) for certain of the MQMs tied to the rebates applicable for DLPs in Nasdaq-listed securities. The Exchange believes that these changes will encourage DLPs to monitor orders leading up to the auctions and participate in the auctions for Nasdaq-listed securities. As previously discussed, the revision to the monthly

performance criteria related to Secondary DLPs in Equity 7, Section 114(f)(4) is being made simply to maintain the status quo of the MQMs for Secondary DLPs.

Nasdaq is proposing these changes to encourage DLPs to maintain better market quality leading up to and at the time of the opening and closing auctions for Nasdaq-listed securities, as well as to remain competitive with NYSE Arca, Inc. (“Arca”) and Cboe BZX Exchange, Inc. (“Cboe”),⁴ which have both recently added auction quality standards for their DLP equivalents as well.

2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,⁵ in general, and further the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ 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 its facilities and do not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange also notes that its ETP listing business operates in a highly-competitive market in which market participants, which include both DLPs and ETP issuers, can readily transfer their listings or opt not to participate, respectively, if they deem fee levels, liquidity incentive programs, or any other factor at a particular venue to be insufficient or excessive. The proposed rule change reflects a competitive pricing structure designed to incentivize issuers to list new products and transfer existing products to the Exchange and market participants to enroll and participate as DLPs on the

⁴ See Securities and Exchange Act Release No. 92053 (May 27, 2021), 86 FR 29868 (June 3, 2021) (SR-NYSEArca-2021-43); and Securities and Exchange Act Release No. 93616 (Nov. 19, 2021), 86 FR 67524 (Nov. 26, 2021) (SR- CboeBZX-2021-073) [sic].

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b) (5).

Exchange, which the Exchange believes will enhance market quality in qualified ETPs listed on the Exchange.

Amend Equity 7, Section 114(f)(4) to Revise the Monthly Performance Criteria Related to Specific Rebates provided under Equity 7, Section 114(f)(5), and to Address Secondary DLPs

The Exchange believes that amending Equity 7, Section 114(f)(4) to revise the monthly performance criteria related to the specific rebates provided under Equity 7, Section 114(f)(5) by better aligning the behavior required to qualify for rebates with the nature of the rebates provided is reasonable because the Exchange must from time to time assess the effectiveness of the incentives it provides to market participants in return for the beneficial behavior required to receive the incentive.

The MQM will be changed from the current requirement to meet all 4 of 4 of the Standard MQMs to qualify for the Standard Rebate to needing to meet 4 of 5 of the Standard MQMs in the assigned ETP as measured by Nasdaq to qualify for the Standard Rebate. Additionally, the MQM will be changed from the current requirement to meet all 4 of 4 of the Enhanced MQMs to qualify for the Enhanced Rebate to needing to meet all 5 of 5 of the Enhanced MQMs in the assigned ETP as measured by Nasdaq to qualify for the Enhanced Rebate.

The Exchange believes that the Auction Quality Requirements for the Standard Rebate and the Enhanced Rebate, as discussed above, are an equitable allocation and are not unfairly discriminatory because the Exchange believes that the Auction Quality Requirement thresholds for the Standard Rebate are very achievable for DLPs, while the Auction Quality Requirement thresholds for the Enhanced Rebate are within reach for most DLPs.

The Exchange believes that the proposed revisions to the MQMs for Primary and Secondary DLPs are an equitable allocation and are not unfairly discriminatory because the

Exchange will apply the same criteria to all DLPs so that they can qualify for rebates that are available to all qualifying members and that reward meaningful quote quality and liquidity in ETPs. The Exchange also believes that the proposed revisions to the MQMs for Primary and Secondary DLPs are an equitable allocation and are not unfairly discriminatory among Exchange members because any member may become a market maker and take the steps necessary to also become a DLP, including meeting the proposed minimum criteria under Equity 7, Section 114(f)(4).⁷ The DLP Program is limited to Exchange market makers because of their unique role in the markets, including their obligation to provide liquidity in the securities in which they are registered. Thus, the DLP Program is a further extension of the market maker's role in providing liquidity in specific securities, to the benefit of all market participants.

The Exchange also believes these changes are an equitable allocation and are not unfairly discriminatory because the Exchange is proposing these changes to the DLP Program to encourage DLPs to maintain better market quality leading up to and at the time of the opening and closing auctions for Nasdaq-listed securities, as well as to remain competitive with Arca and Cboe,⁸ which have both recently added auction quality standards for their DLP equivalents as well.

The Exchange believes that its proposal to amend Equity 7, Section 114(f)(4) to address Secondary DLPs is reasonable because it simply maintains the status quo of the MQMs for Secondary DLPs.

The Exchange also believes that amending the DLP Program as proposed is an equitable allocation of rebates and is not unfairly discriminatory because it will allocate its rebates fairly

⁷ The Exchange will select DLPs based on the factors in Equity 7, Section 114(f)(2).

⁸ Supra note 4.

among its market participants (i.e., the Exchange will pay higher rebates to DLPs that meet higher MQMs and will pay DLPs higher fixed rebates for the ETPs with lower ADVs).

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. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem rebates (this includes the related MQMs) or 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 rebates (this includes the related MQMs) and 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 rebates (this includes the related MQMs) and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which rebate (this includes the related MQMs) and fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the Exchange is proposing to modify certain of the MQMs to qualify for the incentives provided to market makers for participation in the DLP program in an effort to improve the program by providing more targeted measurements to improve and increase market quality in all ETPs.

The Exchange uses incentives, such as the rebates of the DLP program, to incentivize market participants to improve the market. The Exchange must, from time to time, assess the effectiveness of incentives (and related MQMs) and adjust them when they are not as effective as

the Exchange believes they could be. Moreover, the Exchange is ultimately limited in the amount of rebates it may offer. The proposed amended MQMs are reflective of such an analysis.

The Exchange notes that participation in the DLP program is entirely voluntary and, to the extent that registered market makers determine that the MQMs and related rebates are not in line with the level of market-improving behavior the Exchange requires, a DLP may elect to deregister as such with no penalty.

The Exchange does not believe that the proposed changes place an unnecessary burden on competition and, in sum, if the changes proposed herein are unattractive to market makers, it is likely that the Exchange will lose participation in the DLP program as a result. Thus, the Exchange does not believe that the proposal represents a burden on competition among Exchange members, or that the proposal 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) of the Act⁹ and paragraph (f) of Rule 19b-4¹⁰ thereunder.

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,

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f).

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-2022-045 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-2022-045. 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-2022-045 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,
Deputy Secretary.

¹¹ 17 CFR 200.30-3(a)(12).