

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96467; File No. SR-NASDAQ-2022-070)

December 8, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of 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 December 1, 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 schedule of 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, with respect to its schedule of supplemental credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity, the Exchange proposes to (1) add a restriction to and reduce an existing supplemental credit, (2) delete an existing supplemental credit of \$0.0001 currently labeled as “M-ELO Supplemental Credit B,” and (3) make conforming changes to its schedule of credits.

Reduction of Existing Growth Credit and Proposed Restriction

Currently, the Exchange provides a supplemental credit of \$0.0001 per share to a member that, through one or more of its Nasdaq Market Center MPIDs, (i) increases its shares of liquidity provided in all securities by at least 30% as a percentage of Consolidated Volume during the month relative to the month of October or November 2021 and (ii) has shares of liquidity provided of least 15 million average daily volume (“ADV”) during the month. The Exchange proposes to reduce this credit from \$0.0001 per share to \$0.00005 per share. Currently, this credit is in addition to other credits otherwise available to members for adding displayed liquidity to the Exchange (other than Supplemental Orders or Designated Retail Orders). The Exchange proposes to add a restriction to this existing credit whereby the credit cannot be combined with the Qualified Market Maker (“QMM”) Program Tier 2 credit set forth in Equity 7, Section 114(e).³ The Exchange provides this current \$0.0001 supplemental credit to

³ The credit may continue to be combined with the QMM Program Tier 1 credit set forth in

incentivize members to increase their liquidity providing activity on the Exchange. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. Accordingly, the Exchange proposes to reduce the credit from \$0.0001 to \$0.00005 and to exclude firms already benefitting from Tier 2 QMM Program credits from receiving this modified supplemental growth credit of \$0.00005.

Deletion of M-ELO Supplemental Credit B

Currently, the Exchange provides a credit of \$0.0001 per share executed to a member which, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent of its ADV of M-ELO Orders and/or midpoint orders (that execute against M-ELO 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 M-ELO Orders during the month and increases the extent of its ADV of midpoint orders provided and M-ELO Orders in all securities by 150% or more during the month relative to the month of June 2021. The Exchange proposes to delete this credit. The Exchange provides this credit to incentivize members to grow or add M-ELO or midpoint liquidity. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. As M-ELO volume has grown over time, the current M-ELO Supplemental Credit C, which is more aligned with current volumes, will continue to provide

Equity 7, Section 114(e).

members an incentive to grow or add M-ELO or midpoint liquidity during the month.

Accordingly, the Exchange proposes to streamline the M-ELO Supplemental Credits and eliminate current M-ELO Supplemental Credit B.

Conforming Changes

The Exchange also proposes to rename current M-ELO Supplemental Credit C as M-ELO Supplemental Credit B given the proposed deletion of current M-ELO Supplemental Credit B. In addition, the Exchange proposes to clarify that M-ELO Supplemental Credit A may not be combined with proposed M-ELO Supplemental Credit B (current M-ELO Supplemental Credit C), rather than with both M-ELO Supplemental Credits B and C, given the removal of current M-ELO Supplemental Credit B. Similarly, the Exchange proposes to clarify that proposed M-ELO Supplemental Credit B (current M-ELO Supplemental Credit C) may not be combined with M-ELO Supplemental Credit A, rather than with both M-ELO Supplemental Credits A and B, given the removal of current M-ELO Supplemental Credit B.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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 changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

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’”⁶

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.”⁷

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

⁶ 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)).

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

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 it is reasonable, equitable, and not unfairly discriminatory for the Exchange to add a restriction to an existing credit for displayed orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the Exchange and reduce the amount of the credit from \$0.0001 to \$0.00005, as described above. These changes would better align the growth incentives with the Exchange's needs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

It is also reasonable, equitable, and not unfairly discriminatory for the Exchange to eliminate the current M-ELO Supplemental Credit B for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the Exchange and make related conforming changes. Elimination of current M-ELO Supplemental Credit B and related conforming changes will streamline and recalibrate the M-ELO Supplemental Credits to account for changes in member behavior over time. As M-ELO volume has grown over time, the proposed M-ELO Supplemental Credit B (i.e., the current M-ELO Supplemental Credit C), which is more aligned with current volumes, will continue to provide members an incentive to grow or add M-ELO or midpoint liquidity during the month. To the extent that the Exchange

succeeds in increasing the addition of midpoint or M-ELO liquidity or executions on the Exchange, all participants will benefit from the increase in market quality.

The Exchange notes that the credits affected by this proposal are voluntary. Moreover, nothing about the Exchange's volume-based tiered pricing model, as set forth in Equity 7, 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.

Those participants that are dissatisfied with the amendments to the Exchange's schedule of credits are free to shift their order flow to competing venues that provide more generous incentives 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.

As noted above, the Exchange intends for its proposed changes to its credits to reallocate its limited resources more efficiently and optimally, to recalibrate the credit schedule to reflect

changing market behavior, and to align the credit schedule with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals 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 fee and credit changes.

Intermarket Competition

The Exchange believes that the proposed changes to its schedule of credits as described above will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock. 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 credits 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 credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited.

The proposed changes to the Exchange's credits are reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by

volume only has 17-18% 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 in recent months.

In sum, 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.⁸

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,

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2022-070 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-2022-070. 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-2022-070 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.⁹

Sherry R. Haywood,
Assistant Secretary.

⁹ 17 CFR 200.30-3(a)(12).