

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100739; File No. SR-NASDAQ-2024-044)

August 15, 2024

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 August 1, 2024, 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 credits for non-displayed midpoint orders (other than Supplemental Orders) that provide liquidity, the Exchange proposes to (i) add a new credit in Tapes A, B, and C, (ii) cap the maximum credit per share executed that a member organization can receive when certain requirements are met within Section 118(a)(1), and (iii) reorder the schedule of credits.

The Exchange proposes to provide a new credit of \$0.0028 for midpoint orders (excluding buy (sell) orders with Midpoint pegging that receive an execution price that is lower (higher) than the midpoint of the NBBO) if the member provides midpoint liquidity that represents at least 0.30% or more of Consolidated Volume during the month. This change will apply to Tapes A, B, and C. The purpose of the new credit is to incentivize liquidity adding activity and provide incentive to members that provide non-displayed liquidity to the Exchange to do so through midpoint orders. The Exchange believes that if such incentive is effective, then any ensuing increase in liquidity to the Exchange will improve market quality, to the benefit of all participants.

The Exchange currently provides a supplemental credit for midpoint orders (excluding buy (sell) orders with Midpoint pegging that receive an execution price that is lower (higher) than the midpoint of the NBBO), in addition to the other credits provided for non-displayed orders that provide liquidity, if the member executes a requisite ADV of shares through M-ELO,

as follows: (a) \$0.0001 per share executed for midpoint orders (excluding buy (sell) orders with Midpoint pegging that receive an execution price that is lower (higher) than the midpoint of the NBBO) if the member executes an ADV of at least 2.5 million up to, but not including 4 million shares through M-ELO; or (b) \$0.0002 per share executed for midpoint orders (excluding buy (sell) orders with Midpoint pegging that receive an execution price that is lower (higher) than the midpoint of the NBBO) if the member executes an ADV of 4 million or more shares through M-ELO. The Exchange proposes that a member receiving this supplemental credit may receive combined credits (regular and supplemental) of up to a maximum of \$0.0028 per share executed.

The Exchange notes that it proposes to cap combined regular and supplemental credits at \$0.0028 per share executed to manage the costs to the Exchange of providing these incentives. The Exchange has only limited resources available to it for incentive programs, and it must ensure that it allocates such resources appropriately to optimize their intended impacts.

Lastly, for clarifying purposes, the Exchange proposes to reorder the schedule of credits for non-displayed orders (other than Supplemental Orders) that provide liquidity by moving the aforementioned supplemental credit further down in the rebate schedule to immediately precede the other supplemental credits offered.

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

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposals are Reasonable

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 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 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

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)).

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005)

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 credit of \$0.0028 for midpoint orders (excluding buy (sell) orders with Midpoint pegging that receive an execution price that is lower (higher) than the midpoint of the NBBO) if the member provides midpoint liquidity that represents at least 0.30% or more of Consolidated Volume during the month for Tapes A, B, and C. This proposal is reasonable because it will incentivize liquidity adding activity and provide incentive to members that provide non-displayed liquidity to the Exchange to do so through midpoint orders. The Exchange believes that if such incentive is effective, then any ensuing increase in liquidity to the Exchange will improve market quality, to the benefit of all participants.

The Exchange believes that it is reasonable to cap the amount of combined regular and supplemental credits it proposes to offer members who add liquidity through midpoint orders to \$0.0028 per share executed. This cap will allow the Exchange to manage its costs of providing

(“Regulation NMS Adopting Release”).

these incentives. The Exchange has only limited resources available to it for incentive programs, and it must ensure that it allocates such resources appropriately to optimize their intended impacts.

The Exchange also believes that it is reasonable to reorder the schedule of credits for non-displayed orders (other than Supplemental Orders) that provide liquidity to increase clarity in the Rules, consistent with the public interest and protection of investors.

The Proposals are Equitable Allocations of Credits

The Exchange believes that it is equitable to establish a new transaction credit and otherwise increase the amount of credit a member may receive for providing non-displayed liquidity through midpoint orders. To the extent that the Exchange succeeds in increasing the levels of liquidity and activity on the Exchange, the Exchange will experience improvements in its market quality, which stands to benefit all market participants. The Exchange also believes that the proposed clarifying changes (i.e., reordering the schedule of credits) and the proposal to cap rebates at \$0.0028 for members receiving certain supplemental credits is equitable because the changes and the cap will be applied uniformly to all members.

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

The Exchange believes that its proposals to adopt a new credit for providing non-displayed liquidity through midpoint orders, impose a cap on the amount of combined regular and supplemental credits it proposes to offer members receiving certain supplemental credits, and make clarifying changes, as described above, are not unfairly discriminatory because the changes are not intended to advantage any particular member and will be applied uniformly to all members. Moreover, the 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 adding activity in midpoint orders 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 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 proposals will place any category of Exchange participant at a competitive disadvantage.

As noted above, the Exchange's proposals to add a new transaction credit, impose a cap on the maximum rebate offered to members receiving certain supplemental credits, and make clarifying changes are intended to have market-improving effects, to the benefit of all members. Any member may elect to achieve the level of liquidity in midpoint orders required to qualify for

the new credit. The other proposed changes also apply equally and will be applied uniformly to all members.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the Exchange's fee schedule 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 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 credit and own 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 new and amended credits are reflective of this competition because, as a threshold issue, 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, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to credit and

fee changes. This is an addition to free flow of order flow to and among off-exchange venues which comprises more than 40% of industry volume in recent months.

The Exchange's proposal to add a new transaction credit is pro-competitive in that the Exchange intends for the credit to increase liquidity addition activity in midpoint orders on the Exchange, thereby rendering the Exchange more attractive and vibrant to 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.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.

⁷ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NASDAQ-2024-044 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-2024-044. 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-2024-044 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).