

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91307; File No. SR-NASDAQ-2021-011)

March 12, 2021

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 1, 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 transaction 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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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).

Presently, in Equity 7, Section 118(a), the Exchange offers several credits that are based, in part, upon members’ activities in securities priced at or more than \$1 relative to total “Consolidated Volume.”<sup>3</sup>

The Exchange proposes to amend two of the credits it offers to members in displayed quotes or orders in securities in all three Tapes (other than Supplemental Orders or Designated Retail Orders) that add liquidity to the Exchange.

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<sup>3</sup> Pursuant to Equity 7, Section 114(h), the term "Consolidated Volume" shares the meaning of that term set forth in Equity 7, Section 118(a). Equity 7, Section 118(a) defines “Consolidated Volume” to mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member's trading activity. Unlike Section 118(a), however, Section 114(h) states that, for purposes of calculating a member’s qualifications for Tiers 1 and 2 of the QMM Program credits set forth in Equity 4, Section 114(e), the Exchange will calculate a member’s volume and total Consolidated Volume twice. First, the Exchange will calculate a member’s volume and total Consolidated Volume inclusive of volume that consists of executions in securities priced less than \$1. Second, the Exchange will calculate a member’s volume and total Consolidated Volume exclusive of volume that consists of executions in securities priced less than \$1, while also applying distinct qualifying volume thresholds to each Tier. The Exchange will then assess which of these two calculations would qualify the member for the most advantageous credits for the month and then it will apply those credits to the member.

First, the Exchange proposes to amend a credit it presently offers of \$0.00295 per share executed to a member that, through one or more of its Nasdaq Market Center MPIDs (i) adds shares of liquidity during the month representing at least 0.50% of Consolidated Volume during the month; (ii) adds at least 0.35% of Consolidated Volume during the month in securities in Tape C; and (iii) adds at least 0.15% of Consolidated Volume during the month in Designated Retail Orders<sup>4</sup> for securities in any Tape. The Exchange proposes to increase the threshold percentage of Consolidated Volume necessary to qualify for this credit from 0.50% to 0.80%. The Exchange proposes to raise this threshold to incentivize members to increase the extent of their liquidity adding activity to continue to qualify for the \$0.00295 per share executed credit. If members increase their liquidity adding activity on the Exchange to continue to qualify for this credit, then the quality of the market will improve, to the benefit of all participants.

Second, the Exchange proposes to amend a credit it presently offers of \$0.0030 per share executed to a member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 1.00% of Consolidated Volume during the month and shares of non-displayed liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.25% of Consolidated Volume. The Exchange proposes to decrease the threshold percentage of Consolidated Volume necessary to qualify for this credit from 1.00% to 0.95%. The Exchange proposes to lower this threshold to render it easier for members to qualify for the \$0.0030 per share executed credit.

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<sup>4</sup> Pursuant to Equity 7, Section 118, a “Designated Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 and that originates from a natural person and is submitted to Nasdaq by a member that designates it pursuant to this section, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

The Exchange believes that more members may seek to attain this credit to the extent that it is more accessible to them. If more members increase their liquidity adding activity on the Exchange to attain this credit, then the quality of the market will improve, to the benefit of all participants.

In addition to the above, the Exchange proposes to establish a new credit for non-displayed orders (other than supplemental orders). Specifically, the Exchange proposes to provide a new credit for other non-displayed orders if a member, during the month: (i) provides 0.30% or more of Consolidated Volume through non-displayed orders (other than midpoint orders); and (ii) increases providing liquidity through non-displayed orders (including midpoint orders) by 10% or more relative to the member's February 2021 average daily volume provided through non-displayed orders (including midpoint orders). The amount of this credit will be \$0.00125 per share executed for securities in Tapes A and B and \$0.00075 per share executed for securities in Tape C.

The Exchange intends for this new credit to reward members that provide significant volumes of non-displayed liquidity on the Exchange and to encourage such members to further grow the extent to which they provide non-displayed liquidity to the Exchange. The Exchange believes that any ensuing increase in non-displayed liquidity on the Exchange will improve the quality of the Nasdaq market. In particular, the Exchange intends to encourage members to increase the extent to which they provide non-displayed liquidity in securities in Tapes A and B, as the Exchange believes that an increase in such liquidity is most needed and likely to be most beneficial to market quality.

## 2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,<sup>5</sup> in general, and further the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</sup> 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 its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>7</sup>

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<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>7</sup> 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)).

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.”<sup>8</sup>

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.

The Exchange believes that it is reasonable to modify the qualification criteria for two of its transaction credits, at Equity 7, Section 118(a) because they will each encourage the addition of liquidity to the Exchange, first by making it easier for additional members to qualify for the \$0.0030 credit, and second by challenging members that currently qualify for the \$0.00295 per

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<sup>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

share executed credit to add additional liquidity to the Exchange to continue to qualify for it. If more members seek to qualify for a credit by adding liquidity to the Exchange, and if members increase their extent of their liquidity adding activity on the Exchange to continue to qualify for a credit, then the quality of the market will improve, and the Exchange will become more attractive to existing and prospective participants.

The Exchange also believes that its proposal is reasonable to establish a new add non-displayed credit with a growth component tied to the addition of non-displayed liquidity. The proposal will encourage members to increase the extent to which they provide non-displayed liquidity to the Exchange, and it will reward members that do so in significant volumes. The Exchange believes that any ensuing increase in non-displayed liquidity on the Exchange – and in particular, non-displayed liquidity in securities in Tapes A and B – will improve the quality of the Nasdaq market, and it will cause the Exchange to become more attractive to existing and prospective participants. The Exchange notes that it selected February 2021 as the baseline for the growth requirements because it is the month immediately preceding the establishment of the new tier.

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 Credits

The Exchange believes its proposals will allocate its charges and credits fairly among its market participants.

The Exchange believes that is an equitable allocation to increase the eligibility requirements for the \$0.00295 per share executed credit, and to lower the eligibility requirements

for the \$0.0030 per share executed credit, because both proposals will encourage members to add additional liquidity to the Exchange. To the extent that the Exchange succeeds in increasing liquidity on the Exchange, then the Exchange will experience improvements in its market quality, which again stands to benefit all market participants.

Additionally, the Exchange believes that it is equitable to establish a new add credit tier that is tied to the growth of non-displayed liquidity. The addition of this new proposed credit tier will encourage members to increase the extent to which they add non-displayed liquidity to the Exchange, and it will reward members that do so in significant volumes. The Exchange believes that any increase in non-displayed liquidity on the Exchange that follows from the introduction of this new credit – and in particular, non-displayed liquidity in securities in Tapes A and B – will improve the quality of the Nasdaq market, and it will cause the Exchange to become more attractive to existing and prospective 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 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 incentivizes customer activity



that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The Exchange believes that its proposals to amend the qualifying Consolidated Volume criteria for two of its transaction credits are not unfairly discriminatory because these credits are available to all members. Moreover, these 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 on the Exchange.

Likewise, the Exchange believes that its new proposed add credit with a growth component is not unfairly discriminatory because it is aimed at encouraging the growth of non-displayed liquidity on the Exchange, which if successful, stands to improve the quality of the Nasdaq market, to the benefit of all market participants. The Exchange notes that its proposal to offer higher credits to members with orders in non-displayed securities in Tapes A and B than to those in Tape C is fair because the Exchange observes that its market has a greater need for, and its market quality would benefit most from, growth in non-displayed liquidity in securities in Tapes A and B. The Exchange has limited resources with which to apply to incentives, and it must allocate those limited resources in a manner that prioritizes areas of greatest need and potential effect.

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 proposal will place any category of Exchange participant at a competitive disadvantage.

As noted above, the proposed changes to the qualifying criteria for two of its transaction credits are intended to have market-improving effects, to the benefit of all members. Any member may elect to achieve the levels of liquidity required in order to qualify for the credits or fees.

Likewise, the proposed addition of a rebate tied to a member's activity in non-displayed liquidity will encourage growth in that activity, to the benefit of overall market quality. Any member may elect to engage in the levels of non-displayed liquidity adding activity that are required to qualify for this new credit.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposed amended qualification criteria for these fees and credits 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. 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 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 amended credits are 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 50% of industry volume.

The Exchange's proposals are pro-competitive in that the Exchange intends for them to increase liquidity 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.<sup>9</sup>

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-011 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-2021-011. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

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<sup>9</sup> 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-2021-011 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.<sup>10</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).