

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 28

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2022 - * 032

Amendment No. (req. for Amendments *)

Filing by The Nasdaq Stock Market LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010
Section 806(e)(1) *

Section 806(e)(2) *

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) *

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

A proposal to amend the Exchanges transaction fees at Equity 7 Section 118a.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Brett Last Name * Kitt

Title * AVP Principal Associate General Counsel

E-mail * Brett.Kitt@nasdaq.com

Telephone * (301) 978-8132 Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, The Nasdaq Stock Market LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 04/12/2022


(Title *)

By John Zecca

EVP and Chief Legal Officer

(Name *)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2022.04.12 13:42:05 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information *

Add Remove View

SR-NASDAQ-2022-032 19b-4.docx

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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SR-NASDAQ-2022-032 Exhibit 1.docx

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

SR-NASDAQ-2022-032 Exhibit 5.docx

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s transaction fees at Equity 7, Section 118(a), as described further below.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Brett Kitt
AVP, Principal Associate General Counsel
Nasdaq, Inc.
(301) 978-8132

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

The purpose of the proposed rule change is to amend the Exchange’s schedule of fees, at Equity 7, Section 118(a), to incent members to grow the extent to which they participate in Nasdaq’s routing strategy for Designated Retail Orders (“RFTY”).

RFTY is an order routing option designed to enhance execution quality and benefit retail investors by providing price improvement opportunities to Designated Retail Orders (“DROs”).³ As set forth in Equity 7, Section 118(a), for securities in each Tape, the Exchange presently charges a \$0.0030 per share executed fee to a member for shares executed above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center. For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, the Exchange excludes RFTY orders that execute at taker-maker venues.

³ See Securities Exchange Act Release No. 34-75987 (September 25, 2015), 80 FR 59210 (October 1, 2015) (SR-NASDAQ-2015-112). A DRO 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 rule, 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. An order from a “natural person” can include orders on behalf of accounts that are held in a corporate legal form -- such as an Individual Retirement Account, Corporation, or a Limited Liability Company – that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. Members must submit a signed written attestation, in a form prescribed by Nasdaq, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as “Designated Retail Orders” comply with these requirements.

The Exchange charges no fee per share executed to a member for shares executed up to 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS.

In adopting the existing fee structure for RFTY, the Exchange intended to provide incentives for members to adopt RFTY while also allowing the Exchange to mitigate the costs it incurs when RFTY routes large volumes of orders to venues that charge access fees.⁴ Although the Exchange continues to believe that the RFTY fee structure is appropriate, it also recognizes that the specter of incurring fees inhibits new or existing light users of RFTY from increasing their use of this strategy, even as the Exchange works to augment the value that RFTY offers. The Exchange now proposes to amend the RFTY fee structure to provide a new incentive for new or existing light RFTY users to grow the extent of their use of RFTY during the month.⁵ The Exchange intends for this new incentive to be temporary,⁶ and hopes that even after it no longer applies, participants that benefited from it will continue to make significant use of RFTY,

⁴ See Securities Exchange Act Release No. 34-90164 (October 13, 2020), 85 FR 66379 (October 19, 2020) (SR-NASDAQ-2020-067).

⁵ The proposed amendment is applicable both to existing RFTY users as well as to new users that exceed 4 million shares executed using RFTY during regular market hours during a month. Since new users would, by definition, lack March 2022 baseline RFTY volume against which to measure subsequent growth, such new users would meet the growth requirement through whatever volume of RFTY shares they execute during regular market hours during the first month of use.

⁶ The Exchange has yet to propose a date for sunseting this incentive; it will do so in a future rule filing.

notwithstanding the associated fees, in recognition of the value it provides to them and their customers.

Specifically, the Exchange proposes to amend Equity 7, Section 118(a) to state that the Exchange will charge no fee per share executed during regular market hours to a member that executes orders using RFTY, when the member exceeds the 4 million share executed threshold for RFTY orders described above, if the member also grows the volume of its shares executed using RFTY during regular market hours during the month by at least 100 percent relative to a baseline month of March 2022.⁷ Again, the Exchange intends for this amendment to reward RFTY users that grow substantially the extent of their use of the RFTY strategy during regular market hours.⁸

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

⁷ The proposal also corrects typographical errors in the Rule whereby the Exchange, in several instances, mistakenly refers to RFTY as “RTFY.” The Exchange anticipates submitting another rule filing in the near future to make the same corrections to other instances in typographical error in the Rulebook.

⁸ The Exchange proposes to apply this incentive to members with shares executed using RFTY during regular market hours, and to members that grow shares executed using RFTY during regular market hours, because the Exchange believes that the full functionality and value of RFTY will be most apparent to members during regular market hours, when market makers and liquidity providers are available to execute orders. The Exchange wishes to target use and growth of RFTY during that time period.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposal is Reasonable

The Exchange's proposal 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

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”¹¹

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.”¹²

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. The Exchange is also subject to intense competition for retail order flow with off-exchange competitors, including wholesale market makers.

The Exchange believes its proposed amendment to the RFTY fee schedule is a reasonable attempt to incent new and existing RFTY users to grow the extent of their

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

usage substantially. Under the proposed rule change, RFTY users that grow their volumes of RFTY shares executed during regular market hours during the month by at least 100 percent relative to March 2022 will not incur fees for executing their orders using RFTY during regular market hours that exceed 4 million shares that month.¹³ The Exchange notes that it employs similar growth programs in other contexts for similar purposes.¹⁴

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

The Proposal is an Equitable Allocation of Fees and is not Unfairly

Discriminatory

The Exchange believes its proposal will allocate its charges fairly among its market participants and is not unfairly discriminatory.

¹³ As noted above, the Exchange believes it is reasonable to apply this incentive to members with shares executed using RFTY during regular market hours, and to members that grow shares executed using RFTY during regular market hours, because the Exchange believes that the full functionality and value of RFTY will be most apparent to members during regular market hours, when market makers and liquidity providers are available to execute orders. The Exchange wishes to target use and growth of RFTY during that time period.

¹⁴ See, e.g., Equity 4, Section 114(j) (Nasdaq Growth program), Equity 7, Section 118(a) (providing a credit to members that, among other things, increase the extent of their average daily volumes of Midpoint Extended Life Orders by 100% or more during the month relative to June 2021).

The Exchange believes that it is an equitable allocation and not unfairly discriminatory to continue to charge a transaction fee to certain participants that execute more than 4 million shares using RFTY during regular market hours during the month, while charging no fees to other participants that execute similar volumes using RFTY, because in the latter case, the Exchange's decision to charge no fees during regular market hours is a reward to participants that double the extent of the share volume they execute using RFTY during regular market hours during the month, relative to a baseline month of March 2022.¹⁵ As noted above, the Exchange expects this incentive to be a temporary measure to boost usage in RFTY and to compete for retail order flow. As also discussed earlier, the Exchange employs similar growth programs in other contexts for similar purposes.

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

4. 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.

¹⁵ As noted above, the proposed incentive program is available both to new and existing RFTY users, although in practice, the Exchange expects that only existing users will qualify for it.

Intramarket Competition

The Exchange does not believe that its proposal will inappropriately burden any category of market participant. Although under the proposal, the Exchange will charge a transaction fee to certain participants that execute more than 4 million shares using RFTY during regular market hours during the month, and charge no fees to other participants that execute similar volumes using RFTY, the Exchange believes this is appropriate because in the latter case, the Exchange's decision to charge no fees is a reward to participants that double the extent of the share volume they execute using RFTY during regular market hours during the month, relative a baseline month of March 2022. As noted above, the Exchange expects this incentive to be a temporary measure to boost usage in RFTY and to compete for retail order flow. As also discussed earlier, the Exchange employs similar growth programs in other contexts for similar purposes.

Those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

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 proposal is reflective of this competition.

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.

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.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,¹⁶ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-NASDAQ-2022-032)

April __, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees 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 April 12, 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 transaction fees at Equity 7, Section 118, 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 fees, at Equity 7, Section 118(a), to incent members to grow the extent to which they participate in Nasdaq’s routing strategy for Designated Retail Orders (“RFTY”).

RFTY is an order routing option designed to enhance execution quality and benefit retail investors by providing price improvement opportunities to Designated Retail Orders (“DROs”).³ As set forth in Equity 7, Section 118(a), for securities in each

³ See Securities Exchange Act Release No. 34-75987 (September 25, 2015), 80 FR 59210 (October 1, 2015) (SR-NASDAQ-2015-112). A DRO 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 rule, 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. An order from a “natural person” can include orders on behalf of accounts that are held in a corporate legal form -- such as an Individual Retirement Account, Corporation, or a Limited Liability Company – that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. Members must submit a signed written attestation, in a form prescribed by Nasdaq, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as “Designated Retail Orders” comply with these requirements.

Tape, the Exchange presently charges a \$0.0030 per share executed fee to a member for shares executed above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center. For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, the Exchange excludes RFTY orders that execute at taker-maker venues.

The Exchange charges no fee per share executed to a member for shares executed up to 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS.

In adopting the existing fee structure for RFTY, the Exchange intended to provide incentives for members to adopt RFTY while also allowing the Exchange to mitigate the costs it incurs when RFTY routes large volumes of orders to venues that charge access fees.⁴ Although the Exchange continues to believe that the RFTY fee structure is appropriate, it also recognizes that the specter of incurring fees inhibits new or existing light users of RFTY from increasing their use of this strategy, even as the Exchange works to augment the value that RFTY offers. The Exchange now proposes to amend the RFTY fee structure to provide a new incentive for new or existing light RFTY users to grow the extent of their use of RFTY during the month.⁵ The Exchange intends for

⁴ See Securities Exchange Act Release No. 34-90164 (October 13, 2020), 85 FR 66379 (October 19, 2020) (SR-NASDAQ-2020-067).

⁵ The proposed amendment is applicable both to existing RFTY users as well as to new users that exceed 4 million shares executed using RFTY during regular market hours during a month. Since new users would, by definition, lack March 2022 baseline RFTY volume against which to measure subsequent growth, such

this new incentive to be temporary,⁶ and hopes that even after it no longer applies, participants that benefited from it will continue to make significant use of RFTY, notwithstanding the associated fees, in recognition of the value it provides to them and their customers.

Specifically, the Exchange proposes to amend Equity 7, Section 118(a) to state that the Exchange will charge no fee per share executed during regular market hours to a member that executes orders using RFTY, when the member exceeds the 4 million share executed threshold for RFTY orders described above, if the member also grows the volume of its shares executed using RFTY during regular market hours during the month by at least 100 percent relative to a baseline month of March 2022.⁷ Again, the Exchange intends for this amendment to reward RFTY users that grow substantially the extent of their use of the RFTY strategy during regular market hours.⁸

new users would meet the growth requirement through whatever volume of RFTY shares they execute during regular market hours during the first month of use.

⁶ The Exchange has yet to propose a date for sunseting this incentive; it will do so in a future rule filing.

⁷ The proposal also corrects typographical errors in the Rule whereby the Exchange, in several instances, mistakenly refers to RFTY as “RTFY.” The Exchange anticipates submitting another rule filing in the near future to make the same corrections to other instances in typographical error in the Rulebook.

⁸ The Exchange proposes to apply this incentive to members with shares executed using RFTY during regular market hours, and to members that grow shares executed using RFTY during regular market hours, because the Exchange believes that the full functionality and value of RFTY will be most apparent to members during regular market hours, when market makers and liquidity providers are available to execute orders. The Exchange wishes to target use and growth of RFTY during that time period.

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

The Proposal is Reasonable

The Exchange's proposal 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-

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

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’”¹¹

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.”¹²

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. The Exchange is also subject to intense competition for retail order flow with off-exchange competitors, including wholesale market makers.

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange believes its proposed amendment to the RFTY fee schedule is a reasonable attempt to incent new and existing RFTY users to grow the extent of their usage substantially. Under the proposed rule change, RFTY users that grow their volumes of RFTY shares executed during regular market hours during the month by at least 100 percent relative to March 2022 will not incur fees for executing their orders using RFTY during regular market hours that exceed 4 million shares that month.¹³ The Exchange notes that it employs similar growth programs in other contexts for similar purposes.¹⁴

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

¹³ As noted above, the Exchange believes it is reasonable to apply this incentive to members with shares executed using RFTY during regular market hours, and to members that grow shares executed using RFTY during regular market hours, because the Exchange believes that the full functionality and value of RFTY will be most apparent to members during regular market hours, when market makers and liquidity providers are available to execute orders. The Exchange wishes to target use and growth of RFTY during that time period.

¹⁴ See, e.g., Equity 4, Section 114(j) (Nasdaq Growth program), Equity 7, Section 118(a) (providing a credit to members that, among other things, increase the extent of their average daily volumes of Midpoint Extended Life Orders by 100% or more during the month relative to June 2021).

The Proposal is an Equitable Allocation of Fees and is not Unfairly Discriminatory

The Exchange believes its proposal will allocate its charges fairly among its market participants and is not unfairly discriminatory.

The Exchange believes that it is an equitable allocation and not unfairly discriminatory to continue to charge a transaction fee to certain participants that execute more than 4 million shares using RFTY during regular market hours during the month, while charging no fees to other participants that execute similar volumes using RFTY, because in the latter case, the Exchange's decision to charge no fees during regular market hours is a reward to participants that double the extent of the share volume they execute using RFTY during regular market hours during the month, relative to a baseline month of March 2022.¹⁵ As noted above, the Exchange expects this incentive to be a temporary measure to boost usage in RFTY and to compete for retail order flow. As also discussed earlier, the Exchange employs similar growth programs in other contexts for similar purposes.

The Exchange notes that those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

¹⁵ As noted above, the proposed incentive program is available both to new and existing RFTY users, although in practice, the Exchange expects that only existing users will qualify for it.

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 inappropriately burden any category of market participant. Although under the proposal, the Exchange will charge a transaction fee to certain participants that execute more than 4 million shares using RFTY during regular market hours during the month, and charge no fees to other participants that execute similar volumes using RFTY, the Exchange believes this is appropriate because in the latter case, the Exchange's decision to charge no fees is a reward to participants that double the extent of the share volume they execute using RFTY during regular market hours during the month, relative a baseline month of March 2022. As noted above, the Exchange expects this incentive to be a temporary measure to boost usage in RFTY and to compete for retail order flow. As also discussed earlier, the Exchange employs similar growth programs in other contexts for similar purposes.

Those participants that are dissatisfied with the proposed amendment to the RFTY fee schedule are free to shift their order flow to competing venues that offer more favorable terms for routing and executing retail orders. Such participants may also refrain from using RFTY or adjust their use of RFTY to avoid incurring execution fees.

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 proposal is reflective of this competition.

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.

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.¹⁶

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. Please include File Number SR-NASDAQ-2022-032 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.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2022-032. 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 Web site (<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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2022-032 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.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

The Nasdaq Stock Market Rules

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Equity Rules

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Equity 7 Pricing Schedule

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Section 118. Nasdaq Market Center Order Execution and Routing

(a) No change.

(1) Fees for Execution and Routing of Orders in Nasdaq-Listed Securities

Charge to member entering order that executes in the Nasdaq Market Center:	
...	
<u>Except as set forth immediately below, c[C]harge to member for shares executed above 4 million shares during the month for [RTFY]RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center. For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RTFY]RFTY orders that execute at taker-maker venues are excluded.</u>	\$0.0030 per share executed
Charge to member for shares executed <u>either: (i) up to 4 million shares during the month for [RTFY]RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS; or (ii) above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center during regular market hours, provided that the member grows its volume of</u>	\$0.0000 per share executed

<p><u>shares executed in RFTY during regular market hours during the month by at least 100 percent relative to March 2022.</u> For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RFTY]RFTY orders that execute at taker-maker venues are excluded.</p>	
<p>...</p>	

* * * * *

(2) Fees for Execution and Routing of Securities Listed on NYSE

<p>Charge to member entering order that executes in the Nasdaq Market Center:</p>	
<p>...</p>	
<p><u>Except as set forth immediately below, c[C]harge to member for shares executed above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center.</u> For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RFTY]RFTY orders that execute at taker-maker venues are excluded.</p>	<p>\$0.0030 per share executed</p>
<p>Charge to member for shares executed either: (i) up to 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS; or (ii) <u>above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center during regular market hours, provided that the member grows its volume of shares executed in RFTY during regular market hours during the month by at least 100 percent relative to March 2022.</u> For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RFTY]RFTY orders that execute at taker-maker venues are excluded.</p>	<p>\$0.0000 per share executed</p>
<p>...</p>	

* * * * *

(3) Fees for Execution and Routing of Orders in Securities Listed on Exchanges other than Nasdaq and NYSE ("Tape B Securities")

Charge to member entering order that executes in the Nasdaq Market Center:	
...	
Except as set forth immediately below, c[C]harge to member for shares executed above 4 million shares during the month for [RTFY]RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center. For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RTFY]RFTY orders that execute at taker-maker venues are excluded.	\$0.0030 per share executed
Charge to member for shares executed either: (i) up to 4 million shares during the month for [RTFY]RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS; or (ii) above 4 million shares during the month for RFTY orders that remove liquidity from the Nasdaq Market Center or that execute in a venue with a protected quotation under Regulation NMS other than the Nasdaq Market Center during regular market hours, provided that the member grows its volume of shares executed in RFTY during regular market hours during the month by at least 100 percent relative to March 2022. For purposes of calculating the 4 million share threshold described above and assessing the charge set forth herein, [RTFY]RFTY orders that execute at taker-maker venues are excluded.	\$0.0000 per share executed
...	

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