

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 29

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

File No. \* SR 2022 - \* 070

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"/>	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 schedule of credits

**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 \* Katie Last Name \* Hopkins

Title \* Associate General Counsel

E-mail \* katie.hopkins@nasdaq.com

Telephone \* (301) 232-4067 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 12/01/2022 (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: 2022.12.01 13:29:42 -05'00'

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 \***

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SR-NASDAQ-2022-070 19b-4.doc

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-2022-070 Exhibit 1.doc

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

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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**

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SR-NASDAQ-2022-070 Exhibit 5.doc

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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s schedule of credits 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:

Katie Hopkins  
Associate General Counsel  
Nasdaq, Inc.  
301-232-4067

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

<sup>2</sup> 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 credits, at Equity 7, Section 118(a). Specifically, with respect to its schedule of supplemental credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity, the Exchange proposes to (1) add a restriction to and reduce an existing supplemental credit, (2) delete an existing supplemental credit of \$0.0001 currently labeled as "M-ELO Supplemental Credit B," and (3) make conforming changes to its schedule of credits.

Reduction of Existing Growth Credit and Proposed Restriction

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

114(e).<sup>3</sup> The Exchange provides this current \$0.0001 supplemental credit to incentivize members to increase their liquidity providing activity on the Exchange. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. Accordingly, the Exchange proposes to reduce the credit from \$0.0001 to \$0.00005 and to exclude firms already benefitting from Tier 2 QMM Program credits from receiving this modified supplemental growth credit of \$0.00005.

#### Deletion of M-ELO Supplemental Credit B

Currently, the Exchange provides a credit of \$0.0001 per share executed to a member which, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent of its ADV of M-ELO Orders and/or midpoint orders (that execute against M-ELO Orders) in all securities by an ADV of 2 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least 4 million shares ADV through midpoint orders provided and M-ELO Orders during the month and increases the extent of its ADV of midpoint orders provided and M-ELO Orders in all securities by 150% or more during the month relative to the month of June 2021. The Exchange proposes to delete this credit. The Exchange provides this credit to incentivize members to grow or add M-ELO or midpoint liquidity. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where

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<sup>3</sup> The credit may continue to be combined with the QMM Program Tier 1 credit set forth in Equity 7, Section 114(e).

it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. As M-ELO volume has grown over time, the current M-ELO Supplemental Credit C, which is more aligned with current volumes, will continue to provide members an incentive to grow or add M-ELO or midpoint liquidity during the month. Accordingly, the Exchange proposes to streamline the M-ELO Supplemental Credits and eliminate current M-ELO Supplemental Credit B.

#### Conforming Changes

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

#### b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>5</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and

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

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

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

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the 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>6</sup>

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

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<sup>6</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)).

broader forms that are most important to investors and listed companies.”<sup>7</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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

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

It is also reasonable, equitable, and not unfairly discriminatory for the Exchange to eliminate the current M-ELO Supplemental Credit B for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the

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



Exchange and make related conforming changes. Elimination of current M-ELO Supplemental Credit B and related conforming changes will streamline and recalibrate the M-ELO Supplemental Credits to account for changes in member behavior over time. As M-ELO volume has grown over time, the proposed M-ELO Supplemental Credit B (i.e., the current M-ELO Supplemental Credit C), which is more aligned with current volumes, will continue to provide members an incentive to grow or add M-ELO or midpoint liquidity during the month. To the extent that the Exchange succeeds in increasing the addition of midpoint or M-ELO liquidity or executions on the Exchange, all participants will benefit from the increase in market quality.

The Exchange notes that the credits affected by this proposal are voluntary. Moreover, nothing about the Exchange's volume-based tiered pricing model, as set forth in Equity 7, is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it enhances price discovery and improves the overall quality of the equity markets.

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

#### 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.

##### Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage.

As noted above, the Exchange intends for its proposed changes to its credits to reallocate its limited resources more efficiently and optimally, to recalibrate the credit schedule to reflect changing market behavior, and to align the credit schedule with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

##### Intermarket Competition

The Exchange believes that the proposed changes to its schedule of credits as described above will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the

Exchange must continually adjust its credits and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited.

The proposed changes to the Exchange's credits are reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17-18% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprises more than 40% of industry volume in recent months.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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,<sup>8</sup> 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.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

5. Text of the proposed rule change.

**EXHIBIT 1**

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

December \_\_, 2022

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 1, 2022, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange’s schedule of credits at Equity 7, Section 118(a), as described further below. The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

<sup>2</sup> 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 credits, at Equity 7, Section 118(a). Specifically, with respect to its schedule of supplemental credits for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity, the Exchange proposes to (1) add a restriction to and reduce an existing supplemental credit, (2) delete an existing supplemental credit of \$0.0001 currently labeled as "M-ELO Supplemental Credit B," and (3) make conforming changes to its schedule of credits.

Reduction of Existing Growth Credit and Proposed Restriction

Currently, the Exchange provides a supplemental credit of \$0.0001 per share to a member that, through one or more of its Nasdaq Market Center MPIDs, (i) increases its shares of liquidity provided in all securities by at least 30% as a percentage of Consolidated Volume during the month relative to the month of October or November 2021 and (ii) has shares of liquidity provided of least 15 million average daily volume ("ADV") during the month. The Exchange proposes to reduce this credit from \$0.0001 per share to \$0.00005 per share. Currently, this credit is in addition to other credits

otherwise available to members for adding displayed liquidity to the Exchange (other than Supplemental Orders or Designated Retail Orders). The Exchange proposes to add a restriction to this existing credit whereby the credit cannot be combined with the Qualified Market Maker (“QMM”) Program Tier 2 credit set forth in Equity 7, Section 114(e).<sup>3</sup> The Exchange provides this current \$0.0001 supplemental credit to incentivize members to increase their liquidity providing activity on the Exchange. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. Accordingly, the Exchange proposes to reduce the credit from \$0.0001 to \$0.00005 and to exclude firms already benefitting from Tier 2 QMM Program credits from receiving this modified supplemental growth credit of \$0.00005.

#### Deletion of M-ELO Supplemental Credit B

Currently, the Exchange provides a credit of \$0.0001 per share executed to a member which, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent of its ADV of M-ELO Orders and/or midpoint orders (that execute against M-ELO Orders) in all securities by an ADV of 2 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least 4 million shares ADV through midpoint orders provided and M-ELO Orders during the month and increases the extent of its ADV of midpoint orders provided and M-ELO Orders in all securities by 150% or more during the month relative to the month of June

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<sup>3</sup> The credit may continue to be combined with the QMM Program Tier 1 credit set forth in Equity 7, Section 114(e).



2021. The Exchange proposes to delete this credit. The Exchange provides this credit to incentivize members to grow or add M-ELO or midpoint liquidity. However, the Exchange has limited resources available to it to offer its members market-improving incentives, and it allocates those limited resources to those segments of the market where it perceives the need to be greatest and/or where it determines that the incentive is likely to achieve its intended objective. As M-ELO volume has grown over time, the current M-ELO Supplemental Credit C, which is more aligned with current volumes, will continue to provide members an incentive to grow or add M-ELO or midpoint liquidity during the month. Accordingly, the Exchange proposes to streamline the M-ELO Supplemental Credits and eliminate current M-ELO Supplemental Credit B.

#### Conforming Changes

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

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>5</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the 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>6</sup>

The Commission and the courts have repeatedly expressed their preference for

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

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

<sup>6</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)).

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>7</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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes it is reasonable, equitable, and not unfairly discriminatory for the Exchange to add a restriction to an existing credit for displayed orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to the Exchange and reduce the amount of the credit from \$0.0001 to \$0.00005, as described above.

These changes would better align the growth incentives with the Exchange’s needs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for

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

the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

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

The Exchange notes that the credits affected by this proposal are voluntary. Moreover, nothing about the Exchange's volume-based tiered pricing model, as set forth in Equity 7, is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it enhances price discovery and improves the overall

quality of the equity markets.

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

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage.

As noted above, the Exchange intends for its proposed changes to its credits to reallocate its limited resources more efficiently and optimally, to recalibrate the credit schedule to reflect changing market behavior, and to align the credit schedule with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that these proposals are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

Intermarket Competition

The Exchange believes that the proposed changes to its schedule of credits as described above will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other live exchanges and from off-exchange venues, which include alternative

trading systems that trade national market system stock. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its credits and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited.

The proposed changes to the Exchange's credits are reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17-18% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprises more than 40% of industry volume in recent months.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or

competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>8</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

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2022-070 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2022-070. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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-2022-070 and should be submitted on or before [insert date 21 days from publication in the Federal Register].



For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

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

**THE NASDAQ STOCK MARKET LLC 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) The following charges shall apply to the use of the order execution and routing services of the Nasdaq Market Center by members for all securities priced at \$1 or more that it trades. 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 shall be excluded from both total Consolidated Volume and the member's trading activity. For the purposes of calculating the extent of a member's trading activity during the month on Nasdaq and determining the charges and credits applicable to such member's activity, all M-ELO Orders that a member executes on Nasdaq during the month will count as liquidity-adding activity on Nasdaq. Volume from ETC Eligible LOC Orders and ETC Orders shall not be utilized to determine eligibility for any pricing tiers set forth in Section 118(a) to the extent that such eligibility is based upon MOC or LOC volume.

As used in this section the following terms shall have the following meanings:

- “ADV” means Average Daily Volume;
- "Consolidated Volume" shall 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.
- 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. 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. Orders may be designated on an order by-order basis, or by designating all orders on a particular order entry port as Designated Retail Orders. If a member's total rebate for non-Designated Retail Orders (including any supplemental credits provided in Section 114 and Section 118, except the NBBO Program credit provided in Section 114(g)) is greater than its rebate for Designated Retail Orders (including supplemental credits provided in Section 114 and Section 118), then the member shall receive the higher rebate.

**(1) Fees for Execution and Routing of Orders**

\* \* \* \* \*

<b>Charge to enter orders that execute in the Nasdaq Market Center (per share executed):</b>			
	Tape A	Tape B	Tape C
* * * * *			
<b>Supplemental credit to member for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity (per share executed):</b>			
	Tape A	Tape B	Tape C
* * * * *			
member that, through one or more of its Nasdaq Market Center MPIDs, (i) increases its shares of liquidity provided in all securities by at least 30% as a percentage of Consolidated Volume relative to the month of October or November 2021 and (ii) has shares of liquidity provided of least 15 million ADV during the month:	\$0.000[1]05 (may not be combined with the QMM Tier 2 Program credits set forth in Section 114(e))	\$0.000[1]05 (may not be combined with the QMM Tier 2 Program credits set forth in Section 114(e))	\$0.000[1]05 (may not be combined with the QMM Tier 2 Program credits set forth in Section 114(e))

<p>M-ELO Supplemental Credit A</p> <p>member, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent of its ADV of M-ELO Orders and/or midpoint orders (that execute against M-ELO Orders) in all securities by an ADV of 1 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least 3 million shares ADV through midpoint orders provided and M-ELO Orders during the month and increases the extent of its ADV of midpoint orders provided and M-ELO Orders in all securities by 100% or more during the month relative to the month of June 2021:</p>	<p>\$0.00005 (may not be combined with M-ELO Supplemental Credit[s] B[ or C])</p>	<p>\$0.00005 (may not be combined with M-ELO Supplemental Credit[s] B[ or C])</p>	<p>\$0.00005 (may not be combined with M-ELO Supplemental Credit[s] B[ or C])</p>
<p>[M-ELO Supplemental Credit B</p> <p>member, through one or more of its Nasdaq Market Center MPIDs, either: (i) increases the extent of its ADV of M-</p>	<p>[\$0.0001 (may not be combined with M-ELO Supplemental Credits A or C)]</p>	<p>[\$0.0001 (may not be combined with M-ELO Supplemental Credits A or C)]</p>	<p>[\$0.0001 (may not be combined with M-ELO Supplemental Credits A or C)]</p>

<p>ELO Orders and/or midpoint orders (that execute against M-ELO Orders) in all securities by an ADV of 2 million shares or more during the month relative to the month of June 2021; or (ii) executes a combined volume of at least a 4 million shares ADV through midpoint orders provided and M-ELO Orders during the month and increases the extent of its ADV of midpoint orders provided and M-ELO Orders in all securities by 150% or more during the month relative to the month of June 2021:]</p>			
<p>M-ELO Supplemental Credit [C]B  member, through one or more of its Nasdaq Market Center MPIDs, executes a combined volume of at least a 5 million shares ADV through midpoint orders provided and M-ELO Orders during the month:</p>	<p>\$0.00015 (may not be combined with M-ELO Supplemental Credit[s] A[ or B])</p>	<p>\$0.00015 (may not be combined with M-ELO Supplemental Credit[s] A[ or B])</p>	<p>\$0.00015 (may not be combined with M-ELO Supplemental Credit[s] A[ or B])</p>

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