

market Plan to Address Extraordinary Market Volatility. The proposed rule change was published for comment in the **Federal Register** on August 29, 2019.<sup>3</sup> On October 10, 2019, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act<sup>5</sup> provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is October 13, 2019.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change, as modified by Amendment No. 1. Accordingly, pursuant to Section 19(b)(2) of the Act,<sup>6</sup> the Commission designates October 18, 2019, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-CBOE-2019-049), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>3</sup> See Securities Exchange Act Release No. 86744 (August 23, 2019), 84 FR 45565.

<sup>4</sup> In Amendment No. 1, the Exchange revised the proposed rule text to reflect rule numbering and organizational changes enacted by separate proposed rule changes that became effective while the instant proposal was pending before the Commission.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> *Id.*

<sup>7</sup> 17 CFR 200.30-3(a)(31).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87276; File No. SR-NASDAQ-2019-084]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend The Nasdaq Options Market LLC (“NOM”) Pricing Schedule at Options 7, Section 2

October 10, 2019.

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 September 27, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“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 Nasdaq Options Market LLC (“NOM”) Pricing Schedule at Options 7, Section 2, titled “Nasdaq Options Market—Fees and Rebates.”

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaq.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in 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.

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

<sup>2</sup> 17 CFR 240.19b-4.

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

##### 1. Purpose

The Exchange proposes to amend NOM’s Pricing Schedule at Options 7, Section 2, titled “Nasdaq Options Market—Fees and Rebates.” Specifically, the Exchange proposes to amend the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options.

##### Description of Proposed NOM Market Maker Pricing

The purpose of the proposed rule change is to incentivize Market Makers to add liquidity on the Exchange. Today, NOM offers Market Maker Rebates to Add Liquidity in Penny Pilot Options. There are currently 6 tiers of Rebates to Add Liquidity.<sup>3</sup> This proposal seeks to amend Tier 5 of the NOM Market Maker Rebates to Add Liquidity in Penny Pilot Options, which currently pays a \$0.40 per contract rebate to a Participant that adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.30% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options.

The Exchange proposes to increase the Tier 5 Market Maker Rebate to Add Liquidity in Penny Pilot Options from \$0.40 to \$0.44 per contract. Further, the Exchange proposes to amend the first requirements to obtain a Tier 5 Market Maker Rebate to Add Liquidity. The Exchange proposes to amend the current rule text to require a Participant to add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month. This amendment increases the amount of total industry customer equity and ETF options ADV contracts per day in a month from 0.30% to 0.40%. In addition to the aforementioned requirement, Tier 5 additionally currently requires, as a second requirement, that a Participant qualify for the Tier 6<sup>4</sup> Customer and/or

<sup>3</sup> See NOM Pricing Schedule at Options 7, Section 2(1).

<sup>4</sup> Tier 6 of the Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options requires that, “Participant adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% or more of total industry customer equity and ETF option

Professional Rebate to Add Liquidity in Penny Pilot Options. The Exchange proposes to remove this requirement to qualify for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options and instead require, as the second part of the overall Tier 5 requirements, that a Participant transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (“CV”)<sup>5</sup> which adds liquidity in the same month on The Nasdaq Stock Market.<sup>6</sup> This particular requirement is intended to incentivize Participants to transact a greater volume on The Nasdaq Stock Market in order to qualify for the Tier 5 rebate on NOM. As proposed, the Tier 5 Market Maker Rebate to Add Liquidity in Penny Pilot Options requirement would provide.

Participant adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month and transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (“CV”) which adds liquidity in the same month on The Nasdaq Stock Market.

Both the requirement to add 0.40% of total industry customer equity and ETF option ADV contracts per day in a month and the requirement to transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (“CV”), as specified, are necessary to achieve the proposed increased rebate of \$0.44 per contract. This proposal would provide

ADV contracts per day in a month, or Participant adds: (1) Customer and/or Professional liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 0.20% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS (defined below).”

<sup>5</sup> 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. For purposes of calculating Consolidated Volume and the extent of an equity member’s trading activity, expressed as a percentage of or ratio to Consolidated Volume, 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.

<sup>6</sup> In calculating total volume, the Exchange would add the Participant’s total volume transacted on The Nasdaq Stock Market in a given month across its Nasdaq Market Center MPIDs which adds liquidity, and will divide this number by the total industry Consolidated Volume.

participants with additional opportunities to earn an increased Tier 5 NOM Market Maker rebate, and will encourage Participants to send order flow to both the options and equity markets to receive the rebate. This proposal is designed as a means to improve market quality by providing Participants with an incentive to increase their provision of liquidity on the Exchange’s equity and options markets.

The Exchange also proposes to add a new note to Options 7, Section 2 of the Pricing Schedule which provides that NOM Participants that qualify for the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options and add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, will receive a \$0.46 per contract rebate to add liquidity in Penny Pilot Options as Market Maker in lieu of the Tier 5 rebate. The Exchange notes that in comparison to proposed Tier 5 qualifications, which require 0.40% of total industry customer equity and ETF option ADV contracts per day in a month and pays a proposed \$0.44 per contract rebate, this incentive would pay an increased rebate of \$0.46 per contract for 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, in lieu of the Tier 5 rebate. The Exchange believes that this incentive will attract additional liquidity to NOM to the benefit of all market participants who may interact with that order flow.

#### Applicability to and Impact on Participants<sup>7</sup>

The Exchange believes that increasing the NOM Market Maker Tier 5 Rebate to Add Liquidity in Penny Pilot Options from \$0.40 to \$0.44 per contract as well as requiring a greater amount of total industry customer equity and ETF options ADV contracts per day in a month (from 0.30% to 0.40%) and also replacing the current criteria to qualify for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options with the

<sup>7</sup> On May 21, 2019, the SEC Division of Trading and Markets (the “Division”) issued fee filing guidance titled “Staff Guidance on SRO Rule Filings Relating to Fees” (“Guidance”). Within the Guidance, the Division noted, among other things, that the purpose discussion should address “how the fee may apply differently (e.g., additional cost vs. additional discount) to different types of market participants (e.g., market makers, institutional brokers, retail brokers, vendors, etc.) and different sizes of market participants.” See Guidance (available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>).

requirement to transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume (“CV”) which adds liquidity in the same month on The Nasdaq Stock Market will attract greater volume to both NOM and The Nasdaq Stock Market. Any NOM Market Maker may obtain the Tier 5 rebate provided the qualifications are met. The Exchange notes that Market Makers have certain obligations<sup>8</sup> on NOM, unlike other market participants. Market Maker are a source of liquidity. The proposed amendments are generally designed to attract additional order flow to the Exchange by incentivizing NOM Market Makers. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by market makers. An increase in the activity of these market participants in turn facilitates tighter spreads.

Furthermore, the additional incentive to receive an even greater Tier 5 rebate of \$0.46 per contract to add liquidity in Penny Pilot Options as Market Maker, provided the NOM Participant qualified for the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options and added NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, will further incentivize NOM Market Makers to add liquidity to NOM. These incentives are intended to benefit all NOM market participants who will be able to interact with additional liquidity which this incentive attracts to the Exchange.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>10</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

<sup>8</sup> Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. See Chapter VII, Section 5.

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

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. Moreover, the Exchange believes that its proposal complies with Commission guidance on SRO fee filings that the Commission Staff issued on May 21, 2019.<sup>11</sup>

#### The Proposal Is Reasonable

The Exchange's proposed amendments to Options 7, Section 2 relating to the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options 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>12</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar options functionality, with varying pricing schedules. 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.<sup>13</sup>

Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors. The Exchange believes that its proposed rebate is a reasonable attempt to achieve this end as this rebate represents competitive pricing as compared to other options markets. Market participants have a number of choices in deciding where to direct their options orders. Options exchanges offer different markets offering incentives and rebates to market participants to lower transaction fees. With this proposal, the Exchange is attempting to attract additional order flow to both NOM and The Nasdaq Stock Market. The Exchange may be unsuccessful in its initial attempt to attract order flow with the proposed rebate.

#### NOM Market Maker Rebates

With respect to the proposed Tier 5 NOM Market Maker rebate amendment, the Exchange believes that increasing the Tier 5 Market Maker Rebate to Add Liquidity in Penny Pilot Options from \$0.40 to \$0.44 per contract while also amending the qualifications for the Tier 5 rebate is reasonable. The Exchange believes that increasing the volume requirement for NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options, from above 0.30% to above 0.40% of total industry customer equity and ETF options ADV contracts per day in a month, will attract additional liquidity to NOM. Further, the proposal to amend the second part of the Tier 5 rebate requirement by eliminating the requirement that a Participant qualify for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options<sup>14</sup> and instead require a Participant transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market, will also attract liquidity to NOM and also The Nasdaq Stock Market. Specifically, the new second requirement for the Tier 5 rebate is intended to incentivize Participants to transact greater volume on The Nasdaq Stock Market in order to qualify for the Tier 5 rebate on NOM. Because the Exchange requires a Participant to comply with both the first

requirement,<sup>15</sup> to add NOM Market Maker liquidity, and the second requirement,<sup>16</sup> to transact in securities and add liquidity on The Nasdaq Stock Market, in order to qualify for the proposed increased \$0.44 per contract Tier 5 rebate, the Exchange believes that Market Makers will be incentivized to direct additional order flow to NOM and The Nasdaq Stock Market and, in turn, market participants will benefit from the opportunity to interact with such order flow.

The Exchange acknowledges that the proposed new criteria would require additional volume to achieve the first requirement<sup>17</sup> of the Tier 5 rebate and different volume to achieve the second requirement<sup>18</sup> of the Tier 5 rebate to qualify for the increased proposed \$0.44 per contract Tier 5 rebate, as compared to the current Tier 5 rebate qualifications.<sup>19</sup> The Exchange's proposal offers to pay a higher Tier 5 rebate (\$0.44 per contract as compared to the current \$0.40 per contract) to NOM Market Makers who qualify for the rebate with the new requirements. The Exchange believes that it is reasonable to create an additional opportunity for Participants to earn the Tier 5 rebate by incentivizing Participants to transact greater volume on The Nasdaq Stock Market in order to qualify for the Tier 5 rebate on NOM. The Exchange notes that this proposal is designed as a means to improve market quality by providing Participants with an incentive to increase their provision of liquidity on the Exchange's equity and options markets. This proposal will encourage Participants to send order flow to both the options and equity markets to receive the Tier 5 rebate. The Exchange believes that replacing the second requirement of the Tier 5 rebate, which currently requires Participants to achieve the Tier 6 Customer and Professional Rebate to Add Liquidity in

<sup>15</sup> The first requirement to qualify for the Tier 5 rebate requires a Participant to add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.40% of total industry customer equity and ETF options ADV contracts per day in a month.

<sup>16</sup> The second requirement to qualify for the Tier 5 rebate requires a Participant to transact in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.40% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market.

<sup>17</sup> See note 15 above.

<sup>18</sup> See note 16 above.

<sup>19</sup> Today, the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options requires a Participant to add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.30% of total industry customer equity and ETF option ADV contracts per day in a month and qualifies for the Tier 6 Customer and/or Professional Rebate to Add Liquidity in Penny Pilot Options.

<sup>11</sup> See Guidance, *supra* note 7. Although the Exchange believes that this filing complies with the Guidance, the Exchange does not concede that the standards set forth in the Guidance are consistent with the Exchange Act and reserves its right to challenge those standards through administrative and judicial review, as appropriate.

<sup>12</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)).

<sup>13</sup> The Exchange perceives no regulatory, structural, or cost impediments to market participants shifting order flow away from it as a result of this rule change.

<sup>14</sup> See note 4 above.

Penny Pilot Options, with the proposed requirement to add liquidity to The Nasdaq Stock Market will permit a greater number of market participants to qualify for the Tier 5 rebate. Today, NOM Market Makers also transact an equities business on The Nasdaq Stock Market. The proposed qualifications for the Tier 5 rebate will incentivize those Participants that are engaged in an equities business to add a greater amount of liquidity both on NOM and The Nasdaq Stock Market. Furthermore, the concept of linking an incentive on NOM to activity on The Nasdaq Stock Market exists today. The Exchange currently offers rebates on NOM that relate to activity on The Nasdaq Stock Market.<sup>20</sup> Similarly, The Nasdaq Stock Market offers credits that are based on activity on NOM.<sup>21</sup> As such, the Exchange believes that the volume requirement to transact in all securities through one or more of the Participant's Nasdaq Market Center MPIDs that represent 0.40% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market is reasonable because the Exchange already offers rebates based on similar volume requirements.<sup>22</sup>

Further, the Exchange proposes to add a new note to Options 7, Section 2 of the Pricing Schedule which provides that NOM Participants that qualify for the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options, as proposed herein, and add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, will receive an increased Tier 5 rebate of

\$0.46 per contract rebate (in lieu of the \$0.44 per contract Tier 5 rebate) to add liquidity in Penny Pilot Options as Market Maker in lieu of the Tier 5 rebate. The Exchange notes that in comparison to the proposed Tier 5 qualifications, which require Participant to add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.40% of total industry customer equity and ETF option ADV contracts per day in a month, and pays a proposed \$0.44 per contract rebate, this additional incentive would pay an increased rebate of \$0.46 per contract to add liquidity in Penny Pilot Options as Market Maker, provided the Participants adds liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month. The Exchange believes that this incentive will attract additional liquidity to NOM.

The Exchange's proposal to increase the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options from \$0.40 to \$0.44 per contract while also amending the qualifications for the Tier 5 rebate is equitable and not unfairly discriminatory. All eligible Participants that qualify for the Tier 5 rebate will uniformly receive the rebate. The Exchange believes that the proposed volume requirements to qualify for the Tier 5 rebate are proportionate to the amount of the increased Tier 5 rebate of \$0.44 per contract and equitably reflect the purpose of the rebate, which is to incentivize Participants to transact greater volume on both the Exchange's equity and options markets. In addition, the Exchange believes that it is equitable and not unfairly discriminatory to offer this rebate to NOM Participants that transact as NOM Market Makers and also transact on The Nasdaq Stock Market. Any NOM Participant may trade on The Nasdaq Stock Market because they are approved members.<sup>23</sup> Furthermore, unlike other market participants, NOM Market Makers add value through continuous quoting and the commitment of capital.<sup>24</sup> Because NOM Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering these rebates to only NOM Market Makers is

equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging NOM Market Makers to add greater liquidity on the Exchange benefits all market participants in the quality of order interaction.

The Exchange's proposal to offer Participants that qualify for the Tier 5 rebate and add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, a rebate of \$0.46 per contract to add liquidity in Penny Pilot Options as Market Maker is reasonable. This additional incentive will further incentivize NOM Market Makers to add liquidity to NOM and The Nasdaq Stock Market to achieve the greater rebate. The incentive is intended to benefit all NOM market participants who will be able to interact with additional liquidity which this incentive attracts to the Exchange.

The Exchange's proposal to offer Participants that qualify for the Tier 5 rebate and add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month, a rebate of \$0.46 per contract to add liquidity in Penny Pilot Options as Market Maker is equitable and not unfairly discriminatory. As noted above, NOM Market Makers add value through continuous quoting and the commitment of capital.<sup>25</sup> Because NOM Market Makers have these obligations to the market and regulatory requirements that normally do not apply to other market participants, the Exchange believes that offering these rebates to only NOM Market Makers is equitable and not unfairly discriminatory in light of their obligations. Finally, encouraging NOM Market Makers to add greater liquidity benefits all market participants, on both NOM and The Nasdaq Stock Market, in the quality of order interaction.

#### *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. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads.

<sup>20</sup> For example, the Tier 3 NOM Market Maker Rebate to Add Liquidity requires: Participant: (a) Adds NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.20% to 0.60% of total industry customer equity and ETF option ADV contracts per day in a month: Or (b)(1) transacts in all securities through one or more of its Nasdaq Market Center MPIDs that represent 0.70% or more of Consolidated Volume ("CV") which adds liquidity in the same month on The Nasdaq Stock Market, (2) transacts in Tape B securities through one or more of its Nasdaq Market Center MPIDs that represent 0.18% or more of CV which adds liquidity in the same month on The Nasdaq Stock Market, and (3) executes greater than 0.01% of CV via Market-on-Close/Limit-on-Close ("MOC/LOC") volume within The Nasdaq Stock Market Closing Cross in the same month. See Options 7, Section 2(1).

<sup>21</sup> For example, Nasdaq offers a credit of \$0.0029 per share if the member adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry ADV in the customer clearing range for Equity and ETF option contracts per day in a month on NOM. See Equity 7, Section 118(a)(1).

<sup>22</sup> *Id.*

<sup>23</sup> Although a NOM Participant may incur additional labor and/or costs to establish connectivity to The Nasdaq Stock Market, there are no additional membership fees for NOM Participants that want to transact on The Nasdaq Stock Market.

<sup>24</sup> See note 8 above.

<sup>25</sup> See note 8 above.

### Inter-Market Competition

The proposed amendments to the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options do not impose an undue burden on inter-market competition. The pricing changes proposed above are generally designed to attract additional order flow to the Exchange, which strengthens the Exchange's competitive position.

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

NOM is a relatively small market so its ability to burden intermarket competition is limited. 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.

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

### Intra-Market Competition

The proposed amendments to the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options do not impose an undue burden on intra-market competition. Increasing the Tier 5 NOM Market Maker Rebate to Add Liquidity in Penny Pilot Options and also requiring participants to add more volume on NOM and add liquidity on The Nasdaq Stock Market will attract liquidity to the Exchange. The additional rebate incentive that is being offered to Participants that qualify for the Tier 5 rebate and also add NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot

Options of above 0.50% of total industry customer equity and ETF option ADV contracts per day in a month will further incentivize Market Makers to direct order flow to the Exchange. Greater liquidity benefits all market participants by providing more trading opportunities and attracting greater participation by Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads. Overall, the Exchange believes that the tiered NOM Market Maker Rebates to Add Liquidity in Penny Pilot Options along with the proposed Tier 5 increased rebate incentive will continue to reflect the progressively increasing rebate requirements offered to NOM Market Maker to incentivize them to earn the highest possible rebates by bringing the most order flow to the Exchange.

### 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>26</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-084 on the subject line.

<sup>26</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

### 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-2019-084. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-084 and should be submitted on or before November 7, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736

<sup>27</sup> 17 CFR 200.30-3(a)(12).