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November 8, 2016

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, DC. 20549

Re: Securities Exchange Act Release No. 78908 (Sept. 22, 2016); 81 F.R. 66702 (Sept. 28, 2016) (SR-NASDAQ-2016-111)

Mr. Fields:

The Nasdaq Stock Market LLC ("Nasdaq") is responding to comments submitted by Themis Trading LLC ("Themis") regarding the above-captioned proposed rule change ("Proposal").[1] The Proposal would, in relevant part, modify the processing of Post Only Orders under a narrow set of conditions to ensure that the market operates as efficiently as possible to benefit all market participants – liquidity providers, market makers, long term institutional investors, broker dealers, and retail investors.

For the most part, Themis directs its comments not at the current Proposal but at a proposal the U.S. Securities and Exchange Commission ("Commission") approved over seven years ago that first established Post Only Orders on Nasdaq.[2] Themis notes that prior to 2009 the Commission had approved proposals by the New York Stock Exchange and the BATS Exchange that established order types with characteristics similar to the Nasdaq Post Only Order. The Commission has subsequently approved Post Only Orders for other exchanges, which Themis does not cite.[3] None of those seasoned approvals is under review here.

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1 *See* Letter dated October 10, 2016, from Joseph Saluzzi and Sal Arnuk, Partners, Themis Trading LLC. to Brent J. Fields, Secretary, US Securities and Exchange Commission, available at: https://www.sec.gov/comments/sr-nasdaq-2016-111/nasdaq2016111-2.pdf.

2 *See* Securities Exchange Act Release No. 59392 (Feb. 11. 2009) (SR-NASDAQ-2009-006), available at: https://www.sec.gov/rules/sro/nasdaq/2009/34-59392.pdf

3 *See, e.g.,* CHX Rule 2(b)(1)(D) (post only order type).

The Proposal actually under review is much more modest. Nasdaq proposed to modify the processing of Post Only Orders only when they interact with non-displayed orders and only when they would lock or cross such non-displayed orders already resting on the Nasdaq book. Today, when those limited circumstances exist, Nasdaq would slide the price of the Post Only Order to avoid locking[4] the resting non-displayed order; in the future, Nasdaq would not slide the price of a Post Only Order to avoid locking or crossing a non-displayed order. As stated in the Proposal, Nasdaq believes that this modification is consistent with the Exchange Act because it reduces information leakage and improves execution quality. Additionally, where a displayed Post-Only order is permitted to lock a resting non-displayed order, both orders retain their price priority whereas an order that is price-slid does not.

Beyond advocating the repeal of the long-approved Post Only order type, it is unclear exactly what relief Themis seeks that the Commission can grant. However, Nasdaq believes that Themis' comments are consistent with the Proposal because it addresses what Themis perceives to be a flaw in the processing of Post Only Orders. Themis states in its comment letter that it has long opposed and continues to oppose Post Only Orders because "they allowed the initiator to gain valuable knowledge about hidden order flow since these orders would have their price slide from their original limit price." In other words, Themis advocates against price sliding under exactly the same circumstances in which Nasdaq proposes to avoid price sliding.

Nasdaq will also respond to the specific questions posed by Themis, to the extent they relate to the actual proposed rule change rather than the earlier approval of Post Only orders.

Question 1. Will allowing bids and offers at the same price without a trade help or enhance Price Discovery? *Will the public market for stocks (bids/offers/and trades) be more or less likely to reflect equilibrium supply and demand, and true asset value*, at any point in time if bids and offers can exist at the same price and time and not trade?

Answer 1: As set forth in the original submission, Nasdaq's proposal will enhance price discovery. Posting Post Only orders at their limit price and refraining from re-pricing will result in tighter bid-ask spreads relative to Nasdaq's current re-pricing practice. Tighter spreads are the ultimate reflection of enhanced price discovery.

Question 2: Retail and institutional investors take for granted that at any point in time, the public market of bids/offers/trades reflect the true price of an asset. Will allowing such non-clearing-price behavior – locking behavior – make mockery of this important assumption? What is the value of a stock if bids and offers can lock and not trade? Is the value of the stock 50 cents? 51 cents? 74 cents? 23 dollars?

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4 When a Post Only order crosses a resting Non-Display order by at least $0.01, it will execute against the resting order.

Answer 2: As stated in the original submission, many economists believe that a locked market is the truest reflection of the price of an asset. Nasdaq believes that allowing buyers and sellers to reflect their true demand and supply prices, as opposed to re-pricing to an artificial price, enhances retail and institutional investors' experience on Nasdaq. Nasdaq also believes that retail and institutional investors will benefit greatly by the reduction of information leakage that will result from the Proposal. In addition, it is worth noting that the Proposal does not permit a locked market as defined by Rule 610 of Regulation NMS under the Exchange Act. Rule 610 defines a locked market as the display of bids and offers at the same price; whereas Nasdaq's Proposal involves only the *display* of a bid or offer but not both. In actuality, the Proposal simply mimics the same behavior that occurs thousands of times each day on off-exchange trading venues that account for a substantial percentage of consolidated trading. Finally, Nasdaq notes, as it did in the original submission, that NYSE ARCA has adopted this same behavior.

Question 3: If the SEC allows such behavior, is it promoting markets with better price discovery – or worse price discovery?

Answer 3: Nasdaq reiterates Answer 1 above.

Question 4: If the SEC allows this behavior, is it a litmus test for the removal of the ban against locked and crossed markets?

Answer 4: No, this proposal will not lead to a removal of the ban on locked and crossed markets; in fact, the Proposal will not impact the instances of locked markets at all for the reasons discussed in the answer to question 2

Question 5: Is NASDAQ's solution (allowing locked hidden markets) one that will serve investors? Will the proposed rule maintain fair and orderly efficient markets; facilitate capital formation; and protect and serve investors? Who will benefit from the proposed rule filing?

Answer 5: As stated in the original submission and above, Nasdaq believes that the Proposal is consistent with the Exchange Act, meaning that it is consistent with maintaining fair and orderly markets, efficient capital formation, and the protection of investors. Nasdaq believes that the Proposal will lead to tighter spreads, better execution prices, and lower information leakage for investors that currently quote and trade on Nasdaq. Additionally, by enhancing the market in these ways, Nasdaq anticipates that current members will quote and trade more actively and that new members will commence quoting and trading, both of which will further enhance the quality of the Nasdaq market. In essence, Nasdaq believes the Proposal could spark a virtuous cycle of liquidity and executions that promote the full range of policy objectives of the Exchange Act.

Nasdaq applauds Themis' commitment to the notice-and-comment process, believing that such comments generally enhance the Commission's review of impactful proposals. Nasdaq also appreciates Themis' view that price sliding Post Only Orders to avoid locking and crossing the market is sub-optimal. Nonetheless, Nasdaq respectfully submits that Themis' recommendation to disapprove the Proposal is a misdirected attempt to reverse the seven-year history of Post Only Orders.

Respectfully submitted,

Jeffrey S. Davis