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February 21, 2023

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission 100 F. Street N.E.
Washington, D.C. 20549-1090

RE: Release No. 34-96601; File No. SR-NASDAQ-2022-077 - “Contra Midpoint Only” and “Contra Midpoint Only with Post-Only” Order Types

Dear Ms. Countryman:

Themis Trading appreciates the opportunity to comment on the above referenced rule change in which Nasdaq proposes to establish new “Contra Midpoint Only” (CMO) and “Contra Midpoint Only with Post-Only” (CMO+PO) order types.

For your background, Themis Trading is an institutional agency brokerage, providing investment managers of all sizes with the best possible execution on their equity trade orders. We represent long-term investors who form the backbone of our capital markets system by investing in the growth of public companies and the US economy.

The Nasdaq proposal states that "CMO and CMO+PO are the latest variations on the M-ELO/M-ELO+CB theme." Considering that M-ELO orders were originally designed for “like-minded investors” to interact only with each other, we were hopeful that the CMO and CMO+PO would be orders that were designed to help long-term investors find liquidity.

However, after reading the proposal, it appears that the new Nasdaq order types have been intentionally designed NOT to trade and to potentially leak order information. Specifically, Nasdaq has created an order that will be automatically cancelled if it's about to trade against a more aggressively priced order. While other exchanges have order types which are designed to mitigate adverse selection, the CMO and CMO+PO are very different. For example, the IEX Exchange has developed the Crumbling Quote Indicator (CQI) which is a mathematical formula based on price updates from exchanges which helps to identify when the current price is likely to change. Rather than use pricing information from other exchanges, Nasdaq will be relying solely on proprietary order flow information to make a decision when to cancel a CMO or CMO+PO order.

According to Nasdaq, here is the logic behind the CMO orders:

> *"A CMO is a non-displayed Order Type with the Midpoint Pegging Attribute that will be priced and ranked in time order at the Midpoint. A user may cancel a CMO at any time. The System will cancel a CMO Order automatically if a CMO is resting at the Midpoint on the Exchange Book, an incoming Order is priced through the price of the CMO, the CMO would otherwise trade against the incoming Order, and one or more of the following conditions apply, which the Exchange observes are indicative of a pending price shift in favor of the CMO user:*
>
> *· The incoming Order is Displayed and its size is greater than that of the resting CMO;*
> *· The incoming Order is not Displayed, it is priced at the far side of the NBBO, and its size is greater than that of the resting CMO; or*
> *· The incoming Order is assigned the ISO attribute."*

We read this as the CMO and CMO+PO orders will be cancelled if a contra side order is received that is priced more aggressively. We have a number of questions about this proposal:

- **Why is an exchange allowed to use confidential, proprietary order flow data to cancel orders that otherwise would have traded?** According to Nasdaq, "the Exchange observes that the incoming Order will likely cause the NBBO to shift, such that cancellation of the CMO will be preferable to allowing the CMO to execute at a Midpoint price that may be stale." What gives Nasdaq the right to use client order information to interfere with the price discovery mechanism?
- **Who is asking for an order type like this?** We doubt most institutional clients that seek liquidity are the ones who are asking for an order that would be cancelled instead of traded. More likely, we would guess that Nasdaq received a request from one of their larger, high-speed clients to add this order type.

Nasdaq is also proposing to add a Post Only feature to the CMO orders. According to the proposal:

> *"CMO+PO will possess all of the characteristics and attributes of a CMO, as well as those of a Midpoint Peg Post-Only Order. Like a Midpoint Peg Post-Only Order, a CMO+PO is a non-displayed Order that is priced at the Midpoint and executes upon entry only in circumstances where **economically beneficial to the party** entering the Order.*

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> *Unlike a Midpoint Peg Post-Only Order, RASH may be used to enter a CMO+PO with a Time in Force of IOC (as well as OUCH, which can be used for such purposes with respect to a MPPO), and in such cases the* ***Order will be canceled*** *after determining whether it can be executed."*

We have long been concerned about Post Only orders because these order types have been designed to leak information. Basically, if a contra-side order already exists on an exchange book, the post only order upon entry would either be cancelled or moved up/down a tick to avoid an execution and being charged an access fee. The owner of the post-only order does not get a trade but gains valuable information about contra-side liquidity. Access fees and rebates should not be something that interrupts the trading process.

We believe that the CMO and CMO+PO order types should not be approved since they will hinder the price discovery process and leak valuable order information.

Sincerely,

Joseph Saluzzi

Partner, Themis Trading LLC