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November 7, 2016

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission 100 F. Street N.E.
Washington, D.C. 20549-1090

RE: Release No. 34-79163; File No. SR-NASDAQ-2016-141 – Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend Rule 4702 to Adopt a New Retail Post-Only Order

Dear Mr. Fields:

Themis Trading appreciates the opportunity to comment on the above referenced proposed rule changes in which the Nasdaq Stock Market proposes to adopt a new Retail Post-Only Order. For the reasons set forth below, Themis Trading objects to the proposal and urges the commission to not approve this order type.

After admitting last month that post-only orders have been inefficient and detrimental to investors, we would have expected NASDAQ to begin cleaning up their order types and start eliminating orders that have been harmful to the market. But rather than eliminating post-only orders, Nasdaq is proposing a new Retail Post-Only Order type**.** This order type is even more baffling and unnecessary than the post-only order.

Basically, the retail post only order is an order designed for retail brokers to avoid access fees. Currently, if a retail broker receives a **non-marketable order**, they will often send that order to an exchange to be posted and would receive a liquidity rebate if that order trades (marketable orders are usually sold to internalizing market makers). However, if that non-marketable order becomes marketable while it is being routed to an exchange, it is possible that the order might remove liquidity and the broker would incur an access fee. This fee ($0.003/share) would result in a reduction of a retail broker's profit margin. For example, the retail broker would incur a $1.50 fee for a 500 share order that takes liquidity from an exchange. Obviously, for some retail brokers who charge $0 for trades, this is not economically viable.

According to Nasdaq, retail brokers will now be able to send these non-marketable orders to Nasdaq with the Retail Post Only order type. This means that if they became marketable

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while they were on the way to the exchange, then the order would not remove liquidity and instead the order would be cancelled. We believe that the Nasdaq Retail Post-only order could be preventing a retail client from receiving the execution they deserve because their broker wants to avoid paying an access fee.

Nasdaq has already created a routing scheme last year called RTFY which attempts to circumvent exchange access fees. The RTFY order routing option sends non-marketable orders which have become marketable to internalizing brokers first rather than accessing an exchange quote. This way the retail broker is guaranteed never to pay an access fee for non-marketable orders and they can continue to reap profits from payment for order flow even at $0 commission. We wrote an SEC comment letter against RTFY last year, but the SEC still approved it.

With the retail post-only order proposal, Nasdaq now seems to have found a new way for retail brokers to avoid access fees. Here is how Nasdaq described why they are proposing the retail post only order:

> *"Currently, if a firm does not want a retail customer order to remove liquidity from the Exchange upon entry, the firm can select the RTFY routing option, which routes the order to destinations in the System routing table instead of immediately removing liquidity from the Exchange order book. Some firms, however, prefer to use their own routing infrastructure in seeking execution of a customer order rather than allowing that order to remove liquidity from the Exchange upon entry or instructing the Exchange to make a routing determination. In cancelling the order for any reason instead of adjusting its price, the Retail Post-Only Order will therefore provide firms with an alternative for handing [sic] retail customer orders."*

We believe that the retail post-only order type violates a broker's best execution responsibility, as it cancels an order *which would have received a fill had it been sent without a post-only order type.* This order type is another example of how access fees and payment for order flow have distorted price discovery and sacrificed best execution.

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In a March 2014 speech to the Consumer Federation of America, SEC Chair Mary Jo White stated:

"At the Securities and Exchange Commission, we have a three-part mission -- to protect investors, to ensure fair and efficient markets and to facilitate capital formation. Each part of our mission circles back to the first – to protect investors – because if our markets are not fair and safe, they will not attract investors to provide the capital companies are seeking."

We believe that if the Commission approves this order type, then they will be going against one of their missions – to protect investors. We hope that the Commission stands by their mission statement and issues a rejection of this conflicted order type.

Sincerely,

Joseph Saluzzi and Sal Arnuk

Partners, Themis Trading LLC