

December 19, 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. 34-79428; File No. SR-NASDAQ-2016-161- Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt a New Extended Life Priority Order Attribute under Rule 4703, and to Make Related Changes to Rules 4702, 4752, 4753, 4754, and 4757

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 Extended Life Priority Order Attribute. For the reasons set forth below, Themis Trading objects to the proposal and urges the commission to not approve this order type attribute. We have two main objections to this proposal:

1 - Information Leakage

The Nasdaq proposal essentially will reward queue position to certain orders that **will not cancel or revise for at least one second**. If an extended life order remains untouched for at least 1 second, then that order will have queue priority over non-ELO orders. Here is how Nasdaq describes the Extended Life Priority Order Attribute (ELO):

"Nasdaq is proposing to offer a new **Order Attribute that will allow certain Displayed Orders** to have priority ahead of other resting Displayed Orders on the Nasdaq Book at the same price. To receive this priority, an Order must be designated with the Order Attribute "Extended Life Priority" ("ELO") to indicate that the Order will not be altered or canceled by the member before the minimum resting time has elapsed."

We highlighted the above line because it is the key to understanding why we believe Nasdaq's proposal is flawed and why it will actually harm the investors that Nasdaq claims would benefit from the proposal. Only displayed "Designated Retail Orders" will be allowed to use the ELO attribute (although Nasdaq does state in the filing state that they are planning to extend the attribute to institutional investors at a future time).

The Nasdaq proposal details how they will be identifying these orders in their data feed:

"To implement the retail phase of the Extended Life Priority Attribute, Nasdaq is developing a unique identifier that will be appended to each Order entered by the member. Orders with the Extended Life Priority Attribute may be individually designated with the new identifier or entered through an Order port that has been set to designate, by default, all Orders with the new identifier. Orders marked with the new identifier -- whether on an order-by-order basis or via a designated port -- will be disseminated via Nasdaq's TotalView ITCH data feed.¹⁸ Thus, market participants will be able to identify Designated Retail Orders that have the Extended Life Priority Attribute."

In return for giving retail orders queue position, Nasdaq will require that these orders be marked as extended life orders. This identifier will be disseminated to customers who purchase a proprietary data feed from Nasdaq. In other words, ELO orders will easily be identified by high frequency traders since they are the ones who most commonly purchase the data feeds. Why does this matter? Because HFT's like to know as much as possible about queue position. Knowing which orders in the queue that will not be cancelled or revised for at least one second and knowing that these are retail orders are extremely valuable pieces of information for a high frequency trader. This is the type of information that makes an exchange proprietary data feed extremely valuable.

Nasdaq claims it is "improving the quality of the market by rewarding participants for longer life order flow". But have they really just created another way to leak information about the identity of their clients? If approved, retail clients might unknowingly be giving up information about themselves to some of the most sophisticated traders in the market.

2 – One second Minimum Resting Time

Another issue that needs to be clarified is **how the one second minimum resting time is calculated**. Nasdaq will be asking their members who use the ELO attribute "to attest that at least 99% of the Designated Retail Orders submitted with Extended Life Priority exist on the Nasdaq Book unaltered for at least one second." In other words, Nasdaq is asking their members to use the honor system and not cancel or alter an order within one second of entry. Nasdaq, however, doesn't seem to trust their members and will conduct **quarterly** audits to make sure that members are complying with the 99% threshold. If a member is found to violate the rules, it will not be eligible to use ELO orders for the next quarter. After the one quarter penalty, they will be allowed to use the ELO orders again. If they violate the rules again, then they will receive a two quarter penalty. If they violate the rules for a third time, then they will be permanently barred from using ELO orders.



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Rather than using such an onerous attestation process and relying on the honor system, it seems to us that Nasdaq should have been able to simply code a one second minimum duration into the ELO order attribute. In order to maintain the integrity of their one second requirement, Nasdaq should have automated this process and not relied on a members self-attestation.

We believe that Nasdaq should eliminate the unique identifier attached to ELO orders and should automate the one-second minimum order life. We think that if Nasdaq were to address these two issues and fix the problems that we have highlighted, then the ELO order would actually be an improvement to our current market structure that we could support.

Sincerely,

Joseph Saluzzi and Sal Arnuk

Partners, Themis Trading LLC