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March 2, 2017

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

Re: Proposed Nasdaq Extended Life Priority Order Type (Release No. 34-79428; File No. SR-NASDAQ-2016-161)

Dear Mr. Fields:

Investors Exchange LLC ("IEX") is pleased to comment on the proposal ("Proposal") by Nasdaq Stock Market LLC ("Nasdaq") to adopt a new order type it calls Extended Life Priority Order Attribute ("ELO").[1] IEX favors exchange innovations that offer all investors a chance to obtain better executions. However, IEX believes that the Proposal as constructed raises significant concerns about the potential for information leakage and creates a poorly-constructed compliance mechanism that could be subject to gaming.

In brief, ELO would allow orders designated as retail to gain priority on Nasdaq's order book in return for committing to remain on the book unaltered for a full second. All ELO orders would be required to be identified as having that designation on a Nasdaq proprietary data feed. As amended, Nasdaq would conduct a monthly review to determine whether at least 99% of all ELO orders sent by a particular member met the eligibility requirements. Failure to comply would result in a member being precluded from using ELO for a one month penalty period, and failing to comply over three separate review periods would result in a permanent bar.

Our first concern is that, by requiring the identification of ELO orders on Nasdaq's proprietary feed, firms using predatory trading strategies will be able to better identify institutional investor orders on the Nasdaq order book, to the detriment of those investors. Nasdaq has responded to information leakage concerns by stating that the nature of retail order flow is such that concerns about information leakage are not present for those orders.[2] We think this misses the point. Consumers of its proprietary data feeds already have information that can be used to identify which orders are submitted by electronic trading firms, and the mandatory ELO marker could now be used to identify retail orders. Orders that do *not* fall into either of those categories could

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[1] *See* Securities Exchange Act Release No. 79428 (November 30, 2016), 81 FR 87628 (December 5, 2016).

[2] Letter to Brent J. Fields, Secretary, SEC, from T. Sean Bennett, Associate Vice President and Principal Associate General Counsel, dated February 17, 2017 ("Nasdaq Response"), at 6-7.

more easily be identified as orders of institutional investors (many of which represent millions of retail investors) by firms using predatory strategies.

This same type of concern has arisen before with the use of a similar order type by a Nasdaq exchange. In 2011, Nasdaq PHLX introduced a "minimum life" order type, open to all participants, with a minimum resting period of 100 milliseconds.[3] During the comment process, the concern was expressed that if all such orders were identified, predatory traders could use this information to model price behavior. In response, Nasdaq clarified that the orders would be identified only for purposes of order entry and would *not* be distinguished from other orders in its market data.[4] Nasdaq should explain why this question, asked and answered in 2011, is not equally valid now.

Nasdaq also makes reference in its rule filing to the "Long Life" order type offered by the Toronto Stock Exchange ("TSX"). But Nasdaq fails to mention that TSX determined not to identify that order type in its market data "in order to minimize the potential for information leakage."[5] Nasdaq should explain how the use of the TSX order type supports the ELO proposal, given TSX's decision not to identify the order type because of concerns about information leakage.

Our second concern is with the complicated "three strikes" compliance mechanism Nasdaq is proposing. As others have noted, this method could give rise to various types of gaming behavior.[6] For example, because Nasdaq would allow up to 1% of ELO orders submitted by a member to be canceled in less than one second, there is the potential that a participant could submit a large number of orders with a limit price far outside the national best bid and offer in order to meet the 99% condition, and then selectively determine whether to cancel in under one second better-priced orders without violating the conditions of the ELO designation. Nasdaq says that it is developing new means of surveillance to detect potential misuse of ELO but has not offered any specifics.

Further, on the face of the Proposal, it would appear that all violations of the conditions would be treated equally in terms of penalty. Thus, if a firm sent a very large number of non-compliant orders during a particular month, the firm would be barred from using ELO for the following

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[3] See Securities Exchange Act Release No. 65926 (December 9, 2011), 76 FR 78507 (December 15, 2011).
[4] Id.
[5] *See* TSX Inc. – Notice of Proposed Amendments and Request for Comments – Long Life Orders (May 21, 2015), at 5, avail. at http://www.osc.gov.on.ca/en/Marketplaces_xxr-tsx_20150521_amd-rfc-long-life-orders.htm.
[6] *See,* e.g,, letter to Brent J. Fields, Secretary, SEC, from Venu Palaparthi, SVP, Compliance, Regulatory & Government Affairs, Virtu Financial, dated February 9, 2017.

month only, but that response would not address the problem that other participants trading with the noncompliant orders during that period were doing so under false assumptions.[7]

Accordingly, we believe that the Commission should not approve the Proposal unless Nasdaq eliminates the requirement that ELO orders must be identified to other participants through its proprietary data feed. Further, we think that Nasdaq should better explain and justify how the proposed compliance mechanism, together with other measures, would address potential misuse of the ELO order type.

Sincerely,

John Ramsay
Chief Market Policy Officer

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[7] In response to comment, Nasdaq amended the Proposal to provide for a monthly, rather than quarterly, review and penalty periods, while still allowing a firm to use ELO after a finding of noncompliance. Nasdaq Response, at 4. While that change may identify misuse of the order type earlier, it does not address the substance of our concerns.