THEMIS TRADING LLC
10 Town Square, Suite 100
Chatham, NJ 07928
(973) 665-9600 Phone
(973) 665-9888 Fax
www.ThemisTrading.com
Member FINRA/SIPC

September 29, 2023

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

RE: Release No. 34-98280; File No. SR-PHLX-2023-40 - "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 PHLX 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 PHLX proposal is essentially the same proposal that Nasdaq proposed[1] on January 5, 2023 and subsequently withdrew[2] on March 24, 2023. The original Nasdaq proposal had received three comment letters[3] which all expressed concerns about information leakage. In our original comment letter on the Nasdaq CMO proposal, we wrote:

"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

[1] https://www.sec.gov/files/rules/sro/nasdaq/2023/34-96601.pdf

[2] https://www.sec.gov/files/rules/sro/nasdaq/2023/34-97194.pdf

[3] https://www.sec.gov/comments/sr-nasdaq-2022-077/srnasdaq2022077.htm

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."

We also had this question about the data that Nasdaq would be accessing to determine if a CMO order is eligible to trade:

"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?"

Nasdaq PHLX Contra-Midpoint Only

Apparently, Nasdaq must have had second thoughts and withdrew their proposal. However, six months later the proposal has resurfaced under the Nasdaq PHLX exchange.

We read through this new Nasdaq PHLX proposal and noticed only two differences from the original proposal:

- the term "cancellation" was changed to "removal" when referring to what would happen to a CMO order when a more aggressive contra-side order was entered.
- Nasdaq would now resubmit a removed order automatically rather than have the user submit a new one manually.

Here is how Nasdaq PHLX explains the wording change from "cancellation" to "removal":

> *"The Exchange will* ***remove*** *a CMO resting on the Order Book upon entry of certain types of incoming Orders that are likely to result in unfavorable executions, including because the incoming Orders are likely to indicate price movements that would be more favorable to the resting CMO user than the prevailing price."*
>
> *"In certain instances below,* ***the Exchange uses the term "removal" rather than the term "cancellation"*** *to describe how the System would behave when handling a CMO. When the Exchange removes a CMO from its Order Book,* ***it would not send a***

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> ***cancellation message*** *when doing so, thus limiting the potential for information leakage."*

We think Nasdaq may have changed the way they cancel CMO orders to address the concerns of information leakage as described in this FIA-PTG comment letter which was filed on the original CMO proposal:

> "FIA PTG is concerned by the information leakage provided to the CMO order sender when the CMO order is canceled. The cancel message is presumably only sent to the originator of the CMO order. The CMO order sender necessarily gains information that may not be available to any other market participant. The CMO order sender could discern that the opposing, unexecuted order exists and profit from that information without the need to trade with it.

However, we don't understand how the "remove" process addresses the concerns of information leakage. The originator of the CMO order is still going to need to be notified that their order was removed and therefore information leakage will still exist. Is Nasdaq planning on not sending a cancel message? If so, this is a major change in order handling.

We believe that Nasdaq needs to provide a more detailed explanation of how they plan on removing CMO orders without leaking information.

Respectfully,

Joseph Saluzzi

Partner, Themis Trading LLC