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January 2, 2024

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

Re: File No. SR-PHLX-2023-40; Release No. 34-98280

Dear Ms. Countryman:

Investors Exchange LLC ("IEX") is writing again to comment on the referenced filing (the "Filing")[1] by Nasdaq PHLX LLC ("Nasdaq") to introduce a new order type labeled "Contra Midpoint Only" ("CMO").[2] These additional comments address statements by Nasdaq in its response to previous comments on the Filing from IEX and other commenters.[3] For the reasons explained below, IEX believes Nasdaq has failed to answer the concerns that have been raised and the Filing should be disapproved.

Comparison to Other Order Types and Order Functionality

Nasdaq seeks to compare CMO to certain existing order types and functionality in order to suggest it is not materially different from those examples. None of those comparisons make the point Nasdaq seeks to make and do not justify the approval of CMO.

First, Nasdaq cites to the use of minimum quantity orders. Minimum quantity instructions are used in connection with various order types to allow users to avoid multiple executions of small-sized orders, both for convenience and to defend against the use of "pinging" orders that are seeking to discover hidden interest in size. This is very different from the use of an entirely different order type designed to avoid trading with orders in size larger than the resting order.

Next, Nasdaq compares the use of IEX's D-Limit and D-Peg order types. Each of these allow repricing of individual orders in discrete moments based on the use of IEX's Signal, which is designed to predict pending price moves adverse to the resting order. Neither these order types, nor any other order types offered by IEX, provide for the ability of users to selectively avoid trading with incoming orders based on their larger size or how they are priced. Instead, those order types react based on publicly available market data, in accordance with a disclosed formula. By comparison, CMO orders would be selectively removed from the order book in reaction to entry of an incoming order, the presence of which is unknown to anyone but Nasdaq, the market participant entering the order, and in many cases as described below, the CMO user.

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[1] See Securities Exchange Act Release No. 98280, 88 FR 62129 (September 8, 2023).
[2] See Letter from John Ramsay, Chief Market Policy Officer, IEX, to Vanessa Countryman, Secretary, SEC, dated September 28, 2023. Unless otherwise defined, capitalized terms used in this letter have the meanings ascribed to them in our earlier letter.
[3] See Letter from Brett Kitt, Associate Vice President, Nasdaq, to Vanessa Countryman, Secretary, SEC, dated November 2, 2023 ("Nasdaq Response"), and other comments avail. at https://www.sec.gov/comments/sr-nasdaq-2022-077/srnasdaq2022077-20158139-326230.pdf. The Commission subsequently instituted proceedings to determine whether to disapprove the Filing. See Securities Exchange Act Release No. 99083, 88 FR 85964 (December 11, 2023).

Nasdaq also compares CMO to the use of Managed Midpoint Peg Post-Only Orders, which can be removed from the book when necessary to avoid the order book being crossed or when there is no valid order to which they can be "pegged", and then resubmitted when there is a valid non-crossed NBBO. Again, CMO is entirely different. The functionality Nasdaq describes is used to take action where necessary to avoid violating regulatory requirements, or in the absence of a valid reference price. CMO would be "removed" and replaced to selectively avoid trading with individual orders containing specific price and size characteristics.

Nasdaq also references the use of other managed peg orders. This comparison is also inapposite. In these other cases, prices are adjusted on an ongoing basis in response to market price changes. CMO is used to selectively remove an order in response to a specific type of incoming order. Action is not triggered based on market price changes but the arrival of specific orders that could otherwise receive an execution.

Nasdaq also makes comparisons to its M-ELO order type and imbalance-only ("IO") auction orders. Neither one is apt. Nasdaq holds M-ELO orders on the book for a minimum period of time before they become executable to enable execution with other orders that also remain on the book for the same minimum period. M-ELO orders are not removed from the book in response to the arrival of other orders. The use of IOs is unique to the auction mechanism, whereby the exchange adjusts the price in response to specific order instructions and has no relevance to selective avoidance of orders on the exchange's continuous order book.

Finally, Nasdaq points to a previous NYSE Arca, Inc. ("Arca") order type dubbed "PL Select". As explained by Arca in its original filing, PL Select was a non-displayed order type designed so that it would not interact with orders designated as immediate or cancel orders or intermarket sweep orders, or orders with a size larger than the size of the PL Select Order. Arca stated that a primary purpose for PL Select was to allow users to avoid interacting with professional traders using "pinging" strategies that seek to discover hidden interest at the midpoint of the NBBO. The order type was meant to attract more trading interest that is intended to be displayed. In furtherance of this purpose, the order type "would be available to execute against any incoming interest that has the potential to become displayed or passive liquidity at [Arca]".[4]

Just a few months after the order type was adopted, Arca amended it to remove the condition that PL Select Orders would not execute against orders that were larger than the size of the PL Select orders. In making that change, Arca noted that it could have the result of precluding interaction with some orders that would otherwise become displayed. It also noted that "some institutional investors have raised concerns that by not executing against larger-sized interest, PL Select Orders may be bypassing legitimate interest entered on behalf of institutional investors." In making the change, Arca recognized that "the goal is not to bypass executions with a legitimate trading interest…"[5] The Commission approved that change based on Arca's

[4] See Securities Exchange Act Release No. 67101, 77 FR 34115, 34115-16 (June 8, 2012).
[5] Securities Exchange Act Release No. 68385 (December 12, 2012), at 3-4, avail. at https://www.sec.gov/files/rules/sro/nysearca/2012/34-68385.pdf.

stated explanations that the change would help to encourage incoming displayed orders and would ensure PL Select orders would not bypass executions with a legitimate trading interest.[6]

In contrast, with CMO, Nasdaq is seeking to preclude interacting with select orders based on their price and size, including orders that can be displayed and provide additional liquidity. The intention is not to protect against "pinging" orders, but instead larger size orders that are less likely to represent proprietary orders from professional traders. Further, as Nasdaq notes, the order type was amended in response to criticism that it would cause selective avoidance of legitimate trading interest from institutional investors.

If anything, the history of the PL Select Order type argues against, not for, approval of CMO. IEX's previous statement that there is no other order type that discriminates against incoming orders in the way proposed by Nasdaq is correct.

Information Leakage

In our prior comment letter, IEX noted that CMO would leak information about incoming orders to users because users will be able to discern the existence of large-size orders by observing executions of those orders with other trading interest. Nasdaq responds that the information "would not be as specific or useful as IEX contends" because trade executions will not reveal the actual size or time-in-force of incoming orders, or whether they are still available to trade. It also notes that trade execution information will be disclosed on data feeds that all participants can see.

This response does not address information leakage concerns. By observing executions, CMO users can know that an order entered the book that was larger than their own order and that was priced through the midpoint or at the far side of the NBBO, and that the order was not fully executed. Only they could deduce that information from execution reports. No other participants could do so because no other participants could know about the CMO order and that it was bypassed. The fact that CMO users can not glean perfect or complete information about bypassed orders makes no difference. Without question, the scope of information that could be obtained would be highly valuable and could be used to the detriment of investors seeking to access exchange liquidity.

In summary, CMO represents a new form of segmentation that will complicate markets and provide no benefit other than to participants that have the means to make use of the information

[6] Securities Exchange Act Release 68725 (January 24, 2013), avail. at https://www.sec.gov/files/rules/sro/nysearca/2013/34-68725.pdf. Arca eliminated the PL Select order type in 2014. See Securities Exchange Act Release No. 72942, 79 FR 52784 (September 4, 2014).

about other participants' trading interest the order type would give them. We continue to believe it should be rejected.

Sincerely,

John Ramsay
Chief Market Policy Officer, IEX