

January 3, 2024

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 further 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.

In response to the original two comment letters filed on this proposal, Nasdaq submitted a [comment letter](#) on November 2, 2023. In that letter, Nasdaq claimed that the “IEX and Themis Letters also falter in arguing that the Commission should disapprove CMO because it remains prone to information leakage.” Nasdaq explained why they are not worried about the CMO order leaking information:

“When the CMO **fails to execute** in the scenario IEX presents, the information to be gleaned would not be as specific or useful as IEX contends. That is, **the execution would not reveal** the details of the incoming order, including its size, its time-in-force, or whether the order is still available after the trade. In any event, any information to be gleaned from this scenario would be knowable to all market participants at the time it is published on the SIP and the other market data feeds; the CMO user would have no information advantage over the rest of the market in this regard.”

We are a bit confused by this explanation from Nasdaq. First, Nasdaq says “when the CMO fails to execute” but then they go on to say that “the execution would not reveal the details of the incoming order”. **Is Nasdaq referring to a CMO execution or the lack of a CMO execution?** We agree that the details of an execution would be published on the SIP and other market data feeds but it’s the details of the **non-execution**, that are only available to the client who entered the CMO order, that concern us.

In a [comment letter](#) dated November 17, 2023, the FIA-PTG also expressed their concern about CMO information leakage:

“FIA PTG remains troubled by the non-public information provided to the CMO order sender when the CMO order is “removed.” Regardless of whether the CMO order is canceled as would have been the case with the earlier Nasdaq Proposal, or removed as is the case with this PHLX Proposal, **the originator of the CMO order will still have access to information about the contra side order that no other participant will have.** Specifically, the originator of the CMO order knows that the contra side order is larger than the CMO order because trades occurred that would have executed against the resting CMO order had the size of the contra side order been equal to or smaller than the resting CMO order’s size. Accordingly, as we stated in our Nasdaq Letter, 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.”

We’re glad that Nasdaq took the time to respond to our information leakage concerns but we are not satisfied with their answer. We believe that Nasdaq needs to provide further information that explains why the proposed CMO order type does not leak information.

Respectfully,

Joseph Saluzzi

Partner, Themis Trading LLC