SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94076; File No. SR-NASDAQ-2022-006)

January 27, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Enable Exchange Members to Enter Midpoint Extended Life Orders and M-ELO Plus Continuous Book Orders with an Immediate-or-Cancel Time-in-Force Instruction

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1], and Rule 19b-4 thereunder,[2] notice is hereby given that on January 19, 2022, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to enable Exchange members to enter Midpoint Extended Life Orders ("M-ELOs") and M-ELO Plus Continuous Book ("M-ELO+CB") Orders with an immediate-or-cancel ("IOC") Time-in-Force ("TIF") instruction. [3]

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Citations herein to the Nasdaq Rule 4000 Series shall refer to Equity 4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4702(b)(14) and (by implication) 4702(b)(15) to enable Exchange members to enter M-ELO and M-ELO+CB Orders with an IOC time-in-force instruction.

On March 7, 2018, the Commission issued an order approving the Exchange's proposal to adopt the M-ELO as a new Order Type.[4] A M-ELO is a non-displayed order that is available to all members but interacts only with other M-ELOs and M-ELO+CBs. It is priced at the midpoint between the National Best Bid and Offer ("NBBO") and it does not become eligible for execution until at least 10 milliseconds elapse after its entry (the "Holding Period").[5] Once the

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4 See Securities Exchange Act Release No. 34-82825 (Mar. 7, 2018), 83 FR 10937 (Mar. 13, 2018) (order approving SR-NASDAQ-2017-074).

5 In 2020, the Commission issued an order approving the Exchange's proposal to shorten the Holding Period for M-ELO and M-ELO+CB Orders from one half second to 10 milliseconds. See Securities Exchange Act Release No. 34-88743 (April 24, 2020), 85 FR 24068 (April 30, 2020) (order approving SR-NASDAQ-2020-011). If a member modifies a MELO or M-ELO+CB during the Holding Period, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will cause the Holding Period to reset.

Holding Period elapses, a M-ELO becomes eligible for execution against other M-ELOs and M-ELO+CBs on a time-priority basis.[6]

A M-ELO+CB is an Order Type that has all the characteristics and attributes of a M-ELO Order, except that a M-ELO+CB that satisfies the Holding Period is eligible to execute (at the midpoint of the NBBO) against other eligible M-ELO+CBs, eligible M-ELOs, and also eligible non-displayed Orders with Midpoint Pegging and Midpoint Peg Post-Only Orders ("Midpoint Orders") resting on the Exchange's Continuous Book.[7]

Presently, neither M-ELO nor M-ELO+CB Orders may be entered with a TIF of IOC. An Order with a TIF of IOC is one that is designated to deactivate immediately after determining whether the Order is marketable.[8] In the Exchange's proposal to establish the M-ELO Order Type, the Exchange explained that it decided to exclude IOCs from M-ELOs since it deemed the IOC TIF, by its nature, to be "inconsistent with the Holding Period requirement of the proposal."[9] That is, the Exchange designed M-ELO to provide a space where investors with

6 If a member modifies a M-ELO or M-ELO+CB after the Holding Period elapses, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will trigger a new Holding Period for the order.

7 A M-ELO+CB is eligible to execute against a Midpoint Order if: (i) the Midpoint Order has the Midpoint Trade Now Attribute enabled; (ii) no other order is resting on the Continuous Book that has a more aggressive price than the current midpoint of the NBBO; (iii) the Midpoint Order has rested on the Exchange's Continuous Book for a minimum of 10 milliseconds after the NBBO midpoint falls within the limit set by the participant; and (iv) the Midpoint Order satisfies any minimum quantity requirement of the M-ELO+CB. A buy (sell) M-ELO+CB is ranked in time order at the midpoint among other buy (sell) M-ELO+CBs, buy (sell) Midpoint Extended Life Orders, and buy (sell) Midpoint Orders, as of the time when such Orders become eligible to execute. See Rule 4702(a)(15); see also Securities Exchange Act Release No. 34-86938 (September 11, 2019), 84 FR 48978 (September 17, 2019) (order approving SR-NASDAQ-2019-048).

8 Rule 4703(a)(1).

9 See Securities Exchange Act Release No. 34-81311 (August 3, 2017), 82 FR 37248 (August 9, 2017) (SR-NASDAQ-2017-074).

longer time horizons, including institutional investors, can interact exclusively with each other – by virtue of a mutually-applicable Holding Period – without fear that aggressive order types could trade with M-ELOs or M-ELO+CBs to the detriment of such M-ELOs and M-ELO+CBs immediately upon entry and without waiting 10 milliseconds before doing so, such as immediately before a change in the NBBO for a particular security (i.e., risk of adverse selection). Nevertheless, institutional investors – which again are the primary beneficiaries and users of M-ELO and M-ELO+CB – have approached the Exchange recently to request the ability to enter IOC instructions for their M-ELO and M-ELO+CB Orders as a means of assisting them in sourcing liquidity on the Exchange's M-ELO/M-ELO+CB Book so that they can minimize the opportunity costs of utilizing M-ELO and M-ELO+CB Orders and thus render use of M-ELO and M-ELO+CB more efficient and productive for participants.

That is, the functionality would provide users with an indication as to whether eligible contra-side liquidity would be available to their M-ELO or M-ELO+CB Orders and allow these users to streamline their decision-making process of whether to send additional M-ELO or M-ELO+CB Orders to the Exchange or to seek liquidity elsewhere.[10] It would also enable participants whose M-ELO or M-ELO+CB Orders do not satisfy the conditions for a Holding Period to commence upon Order entry to have those Orders cancel immediately rather than be held by the System until such time as the conditions are met, which would allow these participants to assess whether they wish to submit new M-ELO or M-ELO+CB Orders that would satisfy the conditions to commence a Holding Period upon entry.

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10 The Exchange understands that some participants representing institutional investor orders have developed methods that mimic the functions of IOC.

To avoid introducing the risks of adverse selection associated with enabling IOC in these contexts (discussed above), brokers representing institutional investors requested that when they enter M-ELO and M-ELO+CB Orders (which are eligible to commence a Holding Period upon entry) with an IOC instruction, the IOC instruction should activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry. In other words, only after the 10 millisecond Holding Period elapses would the System check to see if a M-ELO or M-ELO+CB Order with an IOC TIF is able to execute immediately against contra-side resting liquidity; if so, the Order will execute as it would currently, but if not, the System will automatically cancel the Order rather than keep it on the Book. If the Order at the time of entry is unable to begin the Holding Period (because, for example, it is entered with a limit price that is not at or better than the midpoint of the NBBO, if there is no NBB or NBO at the time of entry, or the NBBO is crossed at the time of entry), then the Order will be automatically cancelled immediately.

The Exchange agrees with the participants that requested this IOC functionality that when modified in this manner, its use with M-ELO and M-ELO+CB would serve a beneficial purpose that is not inconsistent with the Exchange's intentions and designs for these Order Types. That is, it would permit IOC users to check the M-ELO or M-ELO+CB Book for contra-side liquidity, but not in an aggressive or riskless fashion.[11] Users of the IOC functionality in this context would still need to endure the Holding Period before utilizing it, and then execute against contra-side interest if it is available upon expiration of that Holding Period. While the proposal would provide for immediate cancellation of M-ELO and M-ELO+CB Orders that do not meet the

[11] Nasdaq reiterates that by design, spread-crossing orders do not interact with MELO or M-ELO+CB Orders.

conditions for a Holding Period to commence upon entry, the cancellation of these M-ELOs and M-ELO+CBs would only indicate that such Orders are not eligible to enter the Holding Period (i.e., the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and would not indicate whether there are available contra-side M-ELOs or M-ELO+CBs at the time of entry on Nasdaq. The Exchange also notes that, in other contexts, the use of IOCs is routine and recognized as a prudent way to seek liquidity in a fragmented market, and its use in this context, as modified, should not be controversial.

Accordingly, the Exchange now proposes to amend Rule 4702(b)(14) (and implicitly, Rule 4702(b)(15)), because it would incorporate amendments to Rule 4702(b)(14)) to permit members to enter M-ELO and M-ELO+CB Orders with a TIF instruction of IOC, with the caveat that, when used for these Order Types, the IOC instruction will activate upon the expiration of the Holding Period, unless the Order is unable to begin the Holding Period upon entry, in which case it will cancel immediately.

As part of the surveillance the Exchange currently performs, M-ELOs and M-ELO+CBs with IOC would be subject to real-time surveillance to determine if they are being abused by market participants. In addition, as is the case for ordinary M-ELOs and M-ELO+CBs, the Exchange will monitor the use of M-ELOs and M-ELO+CBs with IOC with the intent to apply additional measures, as necessary, to ensure their usage is appropriately tied to the intent of the Order Types. The Exchange is committed to determining whether there is opportunity or prevalence of behavior that is inconsistent with normal risk management behavior, such as excessive cancellations. Manipulative abuse is subject to potential disciplinary action under the Exchange's Rules, and other behavior that is not necessarily manipulative but nonetheless frustrates the purposes of the M-ELO or M-ELO+CB Order Types may be subject to penalties or other participant requirements to discourage such behavior, should it occur.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The proposal will assist market participants in sourcing liquidity on the Exchange's M-ELO/M-ELO+CB Book so that they can minimize the opportunity costs associated with utilizing M-ELO and M-ELO+CB Orders and thus render use of M-ELO and M-ELO+CB more efficient and productive. At the same time, the proposal avoids exposing M-ELO and M-ELO+CB orders to the risks of adverse selection associated with aggressive IOC by proposing that, when used in the contexts of M-ELO and M-ELO+CB Orders, the IOC instruction will activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry, as orders with a TIF of IOC do in other contexts. The exception to this is if the M-ELO or M-ELO+CB Order with an IOC instruction is unable to begin the Holding Period upon entry, as will occur if the Market is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint. In such cases, the Order will be cancelled immediately upon entry. Doing so is consistent with the spirit of the IOC instruction, in that the market participant is indicating a desire for their

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[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

Order to persist for the minimum period possible, while a M-ELO or M-ELO+CB Order that is ineligible to begin the Holding Period upon entry could potentially persist in a held state until it is cancelled by the System at the end of Market Hours. Crucially, the immediate cancel of an Order that is ineligible to begin the Holding Period upon entry does not provide information to the participant about the underlying state of the M-ELO/M-ELO+CB Book.[14] When used in this context, IOC will not be useful to participants engaging in strategies that are time sensitive. Thus, this proposal will not frustrate the underlying design of M-ELO and M-ELO+CB Orders, which again is to provide investors, including institutional investors, with longer time horizons to safely interact with each other without interacting with aggressive or time sensitive orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposal will enhance the utility and efficiency of the M-ELO and M-ELO+CB Order Types, which in turn will render the Exchange a more attractive venue for market participants that stand to benefit from these Order Types. The proposed IOC instruction will not burden intra-market competition as it will be available for use by all market participants.

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14 The existence of resting interest on the M-ELO/M-ELO+CB Book is not a prerequisite for the Order to enter the Holding Period. Therefore, the cancellation of these M-ELOs and M-ELO+CBs only indicate that such Orders are not eligible to enter the Holding Period (i.e., the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and does not indicate whether there are available contra-side M-ELOs or M-ELO+CBs at the time of entry on Nasdaq. Consequently, the IOC instruction cannot be exploited to check the Book for liquidity in a riskless fashion (e.g., by cancelling before the Holding Period expires).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-006 on the subject line.

Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2022-006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2022-006 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

J. Matthew DeLesDernier
Assistant Secretary

[15] 17 CFR 200.30-3(a)(12).