

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-81097; File No. SR-NASDAQ-2016-161)

July 7, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt a New Extended Life Priority Order Attribute under Rule 4703, and to Make Related Changes to Rules 4702, 4752, 4753, 4754, and 4757

I. Introduction

On November 17, 2016, the NASDAQ Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt a new extended life priority order (“ELO”) attribute for designated retail orders under Nasdaq Rule (“Rule(s)”) 4703, and to make related changes to Rules 4702, 4752, 4753, 4754, and 4757. The proposed rule change was published for comment in the Federal Register on December 5, 2016.<sup>3</sup> On January 17, 2017, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> The Commission initially received seven

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 79428 (November 30, 2016), 81 FR 87628 (“Notice”).

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 79810, 82 FR 8244 (January 24, 2017). The Commission designated March 5, 2017 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

comment letters on the proposed rule change.<sup>6</sup> On February 17, 2017, the Exchange filed Amendment No. 1 to the proposed rule change<sup>7</sup> and submitted a comment response letter.<sup>8</sup> The Commission subsequently received two additional comment letters on the proposed rule change.<sup>9</sup> On March 3, 2017, the Commission instituted proceedings under Section 19(b)(2)(B) of the

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<sup>6</sup> See Letters to Brent J. Fields, Secretary, Commission, from: Joseph Saluzzi and Sal Arnuk, Partners, Themis Trading LLC, dated December 19, 2016 (“Themis Letter I”); Eric Swanson, EVP, General Counsel, and Secretary, Bats Global Markets, Inc., dated December 22, 2016 (“BATS Letter”); Adam Nunes, Head of Business Development, Hudson River Trading LLC, dated December 22, 2016 (“Hudson River Trading Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group, dated December 23, 2016 (“FIA PTG Letter I”); Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel Securities, dated December 27, 2016 (“Citadel Letter I”); Andrew Stevens, General Counsel, IMC Financial Markets, dated December 28, 2016 (“IMC Letter”); and Venu Palaparathi, SVP, Compliance, Regulatory & Government Affairs, Virtu Financial LLC, dated February 9, 2017 (“Virtu Letter”).

<sup>7</sup> In Amendment No. 1, the Exchange: (i) specified that the ELO attribute would be available during “System Hours” as defined in Rule 4701(g); (ii) clarified that any subsequent proposal to broaden the availability of the ELO attribute would be set forth in a distinct rule filing; (iii) provided additional details regarding the calculation of the 99% ELO eligibility requirement; (iv) proposed to assess members’ compliance with ELO eligibility requirements on a monthly basis instead of a quarterly basis as initially proposed; (v) stated that, concurrently with the initial launch of the ELO attribute, it will implement new surveillances to identify any potential misuse of the ELO attribute; (vi) provided additional discussions regarding the availability of the ELO identifier on the Exchange’s TotalView ITCH market data feed; (vii) provided additional details as to how the ELO attribute would operate with other order attributes and cross-specific order types; (viii) provided information regarding the Exchange’s implementation of the ELO attribute; and (ix) provided additional justifications for proposing the ELO attribute. Amendment No. 1 has been placed in the public comment file for SR-NASDAQ-2016-161 at <https://www.sec.gov/comments/sr-nasdaq-2016-161/nasdaq2016161-1589828-132168.pdf>.

<sup>8</sup> See Letter to Brent J. Fields, Secretary, Commission, from T. Sean Bennett, Associate Vice President and Principal Associate General Counsel, Nasdaq, dated February 17, 2017 (“Nasdaq Response Letter I”).

<sup>9</sup> See Letters to Brent J. Fields, Secretary, Commission, from: John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, dated March 2, 2017 (“IEX Letter”); and Joseph Saluzzi and Sal Arnuk, Partners, Themis Trading LLC, dated March 3, 2017 (“Themis Letter II”).

Act<sup>10</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.<sup>11</sup> The Commission received two additional comment letters on the proposed rule change in response to the Order Instituting Proceedings.<sup>12</sup> On April 24, 2017, the Exchange submitted a second comment response letter.<sup>13</sup> On May 31, 2017, the Exchange extended the time period for Commission action to August 2, 2017. This order approves the proposed rule change, as modified by Amendment No. 1.

## II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange has proposed to offer a new ELO attribute, which would allow certain displayed retail orders to receive higher priority on the Nasdaq book than other orders at the same price (“Extended Life Priority”), and to make conforming changes to its rules. As discussed in more detail below, the Exchange has proposed to amend Rule 4703 to set forth the ELO attribute in new subparagraph (m), add an attachment B to its designated retail order attestation form that sets forth an attestation that would be required of members in connection with utilizing the ELO attribute, and make related changes to Rules 4702(b), 4752, 4753, 4754, and 4757.

### A. Proposed Rule 4703(m) and Attestation

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<sup>10</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>11</sup> See Securities Exchange Act Release No. 80149, 82 FR 13168 (March 9, 2017) (“Order Instituting Proceedings”).

<sup>12</sup> See Letter to Brent J. Fields, Secretary, Commission, from Joanna Mallers, Secretary, FIA Principal Traders Group, dated March 30, 2017 (“FIA PTG Letter II”); Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from Stephen John Berger, Managing Director, Government & Regulatory Policy, Citadel Securities, dated March 30, 2017 (“Citadel Letter II”).

<sup>13</sup> See Letter to Brent J. Fields, Secretary, Commission, from T. Sean Bennett, Associate Vice President and Principal Associate General Counsel, Nasdaq, dated April 24, 2017 (“Nasdaq Response Letter II”).

Proposed Rule 4703(m) states that ELO is an order attribute that allows an order to receive priority in the Nasdaq book above other orders resting on the Nasdaq book at the same price that are not designated with the ELO attribute.<sup>14</sup> As proposed, the ELO attribute would be available only for displayed orders that qualify as Designated Retail Orders,<sup>15</sup> and would be available during System Hours.<sup>16</sup> A Designated Retail Order with the ELO attribute that is not marketable upon entry would be ranked on the Nasdaq book ahead of other displayed orders at the same price level that do not have the ELO attribute, but behind any other ELO orders at the same price level that the Exchange received previously.<sup>17</sup>

As proposed, at least 99% of the Designated Retail Orders with the ELO attribute entered by the member must exist unaltered on the Nasdaq book for a minimum of one second for an Exchange member to be eligible to use the ELO attribute.<sup>18</sup> Exchange members would be

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<sup>14</sup> See also proposed changes to Rule 4757(a)(1)(B).

<sup>15</sup> See proposed Rule 4703(m). A “Designated Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 and that originates from a natural person and is submitted to Nasdaq by a member that designates it pursuant to Rule 7018, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Rule 7018. If a Designated Retail Order with a non-display attribute is also entered with the ELO attribute, the ELO attribute would be ignored and the order would be ranked on the Nasdaq book as a non-displayed order without Extended Life Priority. See proposed Rule 4703(m). The Exchange has stated that it may propose to extend the availability of the ELO functionality to all orders that meet the requirements of the ELO attribute at a later time. See Notice, 81 FR at 87630; see also Amendment No. 1. According to the Exchange, any such proposal would be made through a separate filing of a proposed rule change with the Commission, and would likely require significant changes to the operation of the ELO attribute to account for the different participants eligible to use the attribute. See Amendment No. 1.

<sup>16</sup> See Amendment No. 1. See also Rule 4701(g) (defining “System Hours” to mean the period of time beginning at 4:00 a.m. ET and ending at 8:00 p.m. ET (or such earlier time as may be designated by Nasdaq on a day when Nasdaq closes early)).

<sup>17</sup> See proposed Rule 4703(m); see also Notice, 81 FR at 87631.

<sup>18</sup> See proposed Rule 4703(m). The Exchange has stated that it will monitor the effectiveness of the one-second minimum resting time and the 99% threshold, and will

required to submit a signed written attestation that they will comply with these eligibility requirements.<sup>19</sup>

For purposes of determining compliance with the 99% threshold, the Exchange would measure the number of orders with the ELO attribute that rested for one second or longer and divide that value by the number of orders that the member marked with the ELO attribute.<sup>20</sup> Moreover, the one second time frame would begin at the time the ELO order is entered into the Nasdaq book and would conclude once the order is removed from the Nasdaq book or modified by the participant or the Nasdaq system.<sup>21</sup> As proposed, any change to an order that would currently result in the order losing priority (*i.e.*, a change in the order's time stamp) would, if applied to an ELO order, be considered an alteration of the ELO order and stop the clock in terms of determining whether the order rested on the book unaltered for at least one second.<sup>22</sup> In this vein, the Exchange stated that any type of update to an order that creates a new time stamp for priority purposes would count as a modification of the order and noted, by way of example,

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propose to adjust these requirements, as needed, in a separate proposed rule change with the Commission. See Amendment No. 1.

<sup>19</sup> See proposed Rule 4703(m). The Exchange has proposed to amend its designated retail order attestation form to add an attachment B in order to require members to attest to compliance with the eligibility requirements for the ELO attribute, and to attest to their understanding of the penalties in cases of non-compliance. See proposed changes to the designated retail order attestation form, included as Exhibit 3 to Amendment No. 1. As proposed, the designated retail order attestation form also would inform members that they can designate certain order entry ports as "Retail Extended Life Order Ports" or tag each order as a "Retail Extended Life Order." See id.

<sup>20</sup> See Amendment No. 1.

<sup>21</sup> See id. For an ELO order that Nasdaq routes upon receipt, the one second time frame would begin if and when the order returns to Nasdaq and is posted on the Nasdaq book. See id.

<sup>22</sup> See id.

that each time an ELO order is updated due to pegging,<sup>23</sup> re-pricing, or reserve replenishment, the one-second timer would restart.<sup>24</sup> The Exchange also stated that full cancellations would stop the timer.<sup>25</sup> In addition, a sub-second full or partial execution of an ELO order resting on the Nasdaq book would not count as an order modification for purposes of determining compliance with the ELO eligibility requirements.<sup>26</sup> Accordingly, a sub-second partial execution of an ELO order would not reset the time from which the one second time frame is measured for the remainder of the order.<sup>27</sup> Likewise, a member's reduction of the size of a resting ELO order prior to one second elapsing also would not count as an alteration for purposes of determining compliance with the ELO eligibility requirements.<sup>28</sup>

As noted above, only displayed Designated Retail Orders would be eligible for the ELO attribute, and if a Designated Retail Order with a non-display attribute also is entered with the ELO attribute, the order would be added to the Nasdaq book as a non-displayed order without Extended Life Priority.<sup>29</sup> By way of example, the Exchange noted that an order with minimum quantity or midpoint pegging attributes would not be able to receive Extended Life Priority because an order with either of those attributes must be non-displayed.<sup>30</sup> The Exchange also

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<sup>23</sup> The Exchange illustrated through an example that each time an ELO order with a primary or market pegging attribute has its price updated, it would be considered a new order for purposes of determining its resting time. See id. According to the Exchange, each price update would be considered a separate order for determining compliance with the ELO eligibility requirements. See id.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See proposed Rule 4703(m); see also Amendment No. 1.

<sup>27</sup> See Amendment No. 1.

<sup>28</sup> See id.

<sup>29</sup> See proposed Rule 4703(m); see also supra note 15.

<sup>30</sup> See Amendment No. 1.

noted that a reserve order has a displayed portion and non-displayed portion, and the displayed portion of a reserve order with the ELO attribute would be eligible to receive Extended Life Priority while the non-displayed portion of the order would not.<sup>31</sup> If the displayed portion of such an order receives a full execution, the displayed quantity would be replenished from the non-displayed reserve quantity, the newly-replenished displayed size would receive a new time stamp and Extended Life Priority based on that time stamp, and a new timer would start for purposes of determining compliance with the one second requirement.<sup>32</sup>

As proposed, an order designated with the ELO attribute would only have Extended Life Priority if it is ranked at its displayed price. Specifically, proposed Rule 4703(m) would provide that an ELO order that is adjusted by the Exchange system upon entry to be displayed on the Nasdaq book at one price but ranked on the book at a different, non-displayed price would be ranked without the ELO attribute at the non-displayed price. If the Nasdaq system subsequently adjusts such an order to be displayed and ranked on the Nasdaq book at the same price, the order would be assigned Extended Life Priority and ranked on the book in time priority among other orders with Extended Life Priority at that price.<sup>33</sup>

Additionally, proposed Rule 4703(m) would provide that, for purposes of the Nasdaq opening, closing, and halt crosses, all ELO orders on the Nasdaq book upon initiation of a cross may participate in such a cross and retain priority among orders posted on the Nasdaq book that also participate in the cross. Upon initiation of a cross, all ELO orders on the Nasdaq book that are eligible to participate in a cross would be processed in accordance with Rule 4752 (Opening

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<sup>31</sup> See id.

<sup>32</sup> See id.

<sup>33</sup> See proposed Rule 4703(m).

Process), Rule 4753 (Nasdaq Halt Cross), or Rule 4754 (Nasdaq Closing Cross), as applicable.<sup>34</sup> ELO orders that are held by the Nasdaq system for participation in the opening or closing cross would not have Extended Life Priority in the cross,<sup>35</sup> but would be assigned Extended Life Priority if the order joins the Nasdaq book upon completion of the cross.<sup>36</sup> Any orders with Extended Life Priority that are not executed in a cross would be ranked on the Nasdaq book with Extended Life Priority.<sup>37</sup>

The Exchange stated that it would carefully monitor members' use of the ELO attribute on a monthly basis and would not rely solely on a member's attestation with regard to ELO usage.<sup>38</sup> The Exchange also stated that it would determine whether a member was in compliance with the ELO eligibility requirements for a given month within five business days of the end of that month.<sup>39</sup> A member that does not meet the ELO eligibility requirements for any given month would be ineligible to receive Extended Life Priority for its orders in the month immediately following the month in which it did not comply.<sup>40</sup> Following the end of the

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<sup>34</sup> See id.

<sup>35</sup> According to the Exchange, cross-specific orders marked with the ELO attribute would be eligible to participate in the Nasdaq opening, halt, and closing crosses, but they would be ranked for purposes of a cross execution without the ELO attribute. See Notice, 81 FR at 87631. By contrast, orders with the ELO attribute that are ranked on the Nasdaq book (i.e., orders that are in the continuous market) would retain Extended Life Priority for purposes of a cross execution. See id. See also Amendment No. 1.

<sup>36</sup> See proposed Rule 4703(m).

<sup>37</sup> See id.

<sup>38</sup> See Amendment No. 1.

<sup>39</sup> See id.

<sup>40</sup> See id.; see also proposed new attachment B to the Exchange's designated retail order attestation form at Exhibit 3 to Amendment No. 1. The Exchange has stated that its system would prevent a member that is not eligible to participate in the program from entering orders that are flagged with Extended Life Priority (including such designation on the port level). See Notice, 81 FR at 87630 n.17.



ineligible month, a member would once again be able to enter ELO orders if it completes a new attestation.<sup>41</sup> If a member fails to meet the ELO eligibility requirements for a second time, its orders would not be eligible for Extended Life Priority for the two months immediately following the month in which it did not meet the eligibility requirements for the second time.<sup>42</sup> If a member fails to meet the ELO eligibility requirements for a third time, it would no longer be eligible to receive Extended Life Priority for its orders.<sup>43</sup> In addition, concurrently with the launch of the ELO attribute, the Exchange would implement new surveillances to identify any potential misuse of the ELO attribute.<sup>44</sup> Moreover, any attempted manipulation or misrepresentation of the nature of an ELO order (e.g., representing a non-retail order to be a Designated Retail Order) would be a violation of Nasdaq's rules.<sup>45</sup>

The Exchange has proposed to designate orders with the ELO attribute with a new, unique identifier.<sup>46</sup> Specifically, orders with the ELO attribute may be individually designated with the new identifier, or may be entered through an order port that has been set to designate, by

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<sup>41</sup> See Amendment No. 1; see also proposed new attachment B to the Exchange's designated retail order attestation form at Exhibit 3 to Amendment No. 1.

<sup>42</sup> Following the end of the ineligible months, a member would once again be able to enter ELO orders if it completes a new attestation. See Amendment No. 1; see also proposed new attachment B to the Exchange's designated retail order attestation Form at Exhibit 3 to Amendment No. 1.

<sup>43</sup> See Amendment No. 1; see also proposed new attachment B to the Exchange's designated retail order attestation form at Exhibit 3 to Amendment No. 1.

<sup>44</sup> See Amendment No. 1.

<sup>45</sup> See *id.* According to Nasdaq, like the current surveillances it conducts, the new surveillances would identify potential violative conduct that would be investigated by Nasdaq and FINRA, and if the conduct is found to be violative, the offending member would be subject to disciplinary action. See *id.* (citing the Nasdaq Rule 9000 Series). See also *infra* notes 96-98 and accompanying text.

<sup>46</sup> See Notice, 81 FR at 87630-31; see also proposed new attachment B to the Exchange's designated retail order attestation form at Exhibit 3 to Amendment No. 1.

default, all orders with the new identifier.<sup>47</sup> Orders marked with the new identifier—whether on an order-by-order basis or via a designated port—would be disseminated via Nasdaq’s TotalView ITCH data feed.<sup>48</sup>

B. Additional Conforming Rule Changes

In connection with the proposed addition of Rule 4703(m), the Exchange has proposed to make conforming changes to Rules 4702(b)(1)(C), (b)(2)(C), and (b)(4)(C) to indicate that the ELO attribute may be assigned to price to comply, price to display, and post-only orders, respectively. In addition, the Exchange has proposed to amend Rules 4752 (Opening Process), 4753 (Nasdaq Halt Cross), and 4754 (Nasdaq Closing Cross) to incorporate ELO orders into the cross execution priority hierarchies set forth in each of those rules.

C. Implementation

The Exchange has stated that it plans to implement the ELO functionality for Designated Retail Orders in a measured manner.<sup>49</sup> Specifically, the Exchange anticipates a rollout of the ELO functionality, beginning with a small set of symbols and gradually expanding further, and that it will publish the symbols that are eligible for the ELO attribute on its website.<sup>50</sup> According to the Exchange, the exact implementation date would be reliant on several factors, such as the

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<sup>47</sup> See Notice, 81 FR at 87630-31; see also proposed new attachment B to the Exchange’s designated retail order attestation form at Exhibit 3 to Amendment No. 1.

<sup>48</sup> See Notice, 81 FR at 87630-31. The Exchange is not proposing to disseminate the ELO identifier via the SIP data feeds. See Amendment No. 1.

<sup>49</sup> See Amendment No. 1.

<sup>50</sup> See id. The Exchange noted that, in symbols that are not eligible for the ELO functionality, it would accept orders submitted with the ELO attribute as non-ELO orders. See id.

results of extensive testing and industry events and initiatives.<sup>51</sup> The Exchange currently plans to implement the initial set of symbols for ELO in the third quarter of 2017.<sup>52</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>53</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>54</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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, and that the rules are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and Section 6(b)(8) of the Act,<sup>55</sup> which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the Exchange's proposed ELO functionality should benefit retail investors by providing enhanced order book priority to retail order flow that is not

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<sup>51</sup> See id.

<sup>52</sup> See id. The Exchange stated that it would notify market participants via an Equity Trader Alert once a specific date for the initial rollout is determined. See id.

<sup>53</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>54</sup> 15 U.S.C. 78f(b)(5).

<sup>55</sup> 15 U.S.C. 78f(b)(8).

marketable upon entry. Such enhanced order book priority could result in additional or more immediate execution opportunities on the Exchange for resting retail orders that otherwise would be farther down in the order book queue, and thereby enhance execution opportunities for retail investors.

As noted above, the Commission received eleven comment letters on the proposed rule change,<sup>56</sup> and two response letters from the Exchange.<sup>57</sup> One of the commenters expressed support for the proposal, but encouraged additional safeguards to minimize the opportunity for potential gaming of the ELO eligibility requirements.<sup>58</sup> Other commenters expressed concerns that focused on the availability of the ELO attribute only to retail orders; the eligibility requirements for the ELO attribute, including the attestation requirement and the Exchange's methods for monitoring compliance and imposing discipline for non-compliance; the identification of ELO orders in Nasdaq's market data feed; and the potential conflict between the proposed ELO eligibility requirements and other activities of the member.

Four commenters expressed concern that the Exchange's proposal would be unfairly discriminatory by providing the ELO functionality only to retail orders.<sup>59</sup> One commenter

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<sup>56</sup> See supra notes 6, 9, and 12. The IMC Letter broadly supported the comments articulated in FIA PTG Letter I.

<sup>57</sup> See supra notes 8 and 13.

<sup>58</sup> See Virtu Letter. Another commenter also stated its strong support for exchange innovation and providing additional choices for retail orders, but expressed concern that the Exchange did not propose strong enough penalties or controls to deter abuse on a real-time basis. See BATS Letter at 1.

<sup>59</sup> See FIA PTG Letter I at 3-4; Hudson River Trading Letter at 2; Citadel Letter I at 4; Citadel Letter II at 1 and 4; IMC Letter. Three commenters also expressed general concerns with respect to the potential expansion of the ELO functionality beyond retail orders, or noted that their concerns regarding the enhanced priority provided to retail orders under the proposal could be exacerbated in connection with any such expansion. See BATS Letter at 1; Citadel Letter I at 6; FIA PTG Letter I at 6. In response to these concerns, the Exchange noted that any future expansion of the ELO functionality beyond

argued that the proposal would unfairly burden competition because it would allow the Exchange to compete for order flow by creating an order attribute that inappropriately favors certain market participants at the expense of others.<sup>60</sup> Two commenters argued that the proposal is unnecessary, stating that there is insufficient evidence that retail investors are experiencing difficulty in obtaining fills for resting orders and therefore would benefit from the proposed functionality.<sup>61</sup>

Four commenters also expressed concern that the proposal would increase equity market structure complexity, create uncertainty regarding the priority of resting orders, and negatively impact market liquidity and price discovery.<sup>62</sup> According to these commenters, the increased uncertainty among liquidity providers would result in wider spreads, which would adversely impact long-term investors, including institutional and retail investors.<sup>63</sup> One of these commenters suggested that the proposal would negatively impact market makers' hedging strategies in ETFs and their underlying securities, and the associated risk and cost would be borne by institutional and retail investors.<sup>64</sup> Another commenter argued that ELO orders should not receive priority over other orders that have already been resting for at least one second, and that doing so would discourage other market participants from displaying liquidity.<sup>65</sup>

In response, the Exchange stated its belief that the growth in internalization and the speed of execution has required differentiation of retail orders, which are typically entered by long-

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retail orders would be subject to a separate rule filing with the Commission. See Nasdaq Response Letter I at 7. See also Amendment No. 1.

<sup>60</sup> See Citadel Letter I at 4.

<sup>61</sup> See FIA PTG Letter I at 2-3; Citadel Letter I at 1-2; Citadel Letter II at 4-5.

<sup>62</sup> See Citadel Letter I at 3-7; Citadel Letter II at 4-5; FIA PTG Letter I at 1-3 and 5-6; FIA PTG Letter II at 1-2; Hudson River Letter at 2-3; IMC Letter.

<sup>63</sup> See Citadel Letter I at 3-4; Citadel Letter II at 4; FIA PTG Letter I at 5.

<sup>64</sup> See Citadel Letter I at 3.

<sup>65</sup> See Hudson River Trading Letter at 2-3.

term investors, from those of other market participants.<sup>66</sup> The Exchange noted that the proposal is an effort to promote displayed orders with longer time horizons to enhance the market so that it works better for a wider array of market participants.<sup>67</sup> According to the Exchange, unlike professional market makers and automated liquidity providers, who commonly invest in low-latency technology to facilitate efficient order book placement, retail investors generally have a longer investment horizon, do not necessarily monitor market changes over very short time periods, and generally have not focused on efficient order queue placement of displayed orders.<sup>68</sup> As a result, the Exchange believes that its current price/display/time priority structure may limit retail investors from effectively participating on the Exchange, particularly in highly-liquid securities where the sequence of order arrival is important to participation in ensuing transactions on the Nasdaq order book.<sup>69</sup> The Exchange also noted that providing the proposed ELO functionality to retail investors would help improve execution quality and retail participation in on-exchange transactions, which should improve overall market quality on the Exchange.<sup>70</sup> According to the Exchange, an increase in participation from the retail segment of the market would increase the diversity of the marketplace and thereby improve general market function and price discovery.<sup>71</sup> Further, the Exchange stated that providing a mechanism by which retail

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<sup>66</sup> See Amendment No. 1.

<sup>67</sup> The Exchange also noted that the proposal would provide firms handling retail order flow with additional options to consider when determining the best way to represent and execute retail non-marketable limit orders. See Nasdaq Response Letter I at 3. In addition, the Exchange argued that the proposal would benefit publicly traded companies by promoting long-term investment in corporate securities. See id. at 2.

<sup>68</sup> See Amendment No. 1.

<sup>69</sup> See Notice, 81 FR at 87630; see also Amendment No. 1.

<sup>70</sup> See Nasdaq Response Letter I at 3 and 7; Nasdaq Response Letter II at 6-7.

<sup>71</sup> See Amendment No. 1. In particular, the Exchange stated its belief that markets and price discovery best function through the interactions of a diverse set of market

orders may have an increased chance of execution on the Exchange would promote competition among the Exchange, its exchange peers, and off-exchange trading venues.<sup>72</sup>

The Commission recognizes that market participants generally distinguish individual retail investors from professional traders, and that retail investors are presumed to be less informed than professional traders. Recognizing this distinction, the Commission believes that the Exchange's proposal to provide the ELO functionality only to Designated Retail Orders is consistent with the Act. In particular, the Commission believes that the Exchange's proposal represents a reasonable effort to enhance the ability of retail trading interest to participate effectively on an exchange without discriminating unfairly against other market participants or inappropriately or unnecessarily burdening competition.

The Commission also does not share the concern expressed by some commenters that the proposed ELO functionality would have a detrimental market impact, such as by causing wider spreads. The Commission believes that the proposal could lead to increased or more immediate execution opportunities on the Exchange for resting retail orders. Moreover, given that the ELO attribute would only be available for Designated Retail Orders that are displayed, to the extent that Exchange members send more retail interest to the Exchange due to the availability of the ELO functionality, this could translate into more displayed retail interest on the Exchange. If the ELO functionality contributes to greater displayed liquidity on the Exchange, this may benefit all market participants by improving the price discovery process. In addition, due to the greater likelihood that retail orders would have priority at the prevailing inside market as a result of the ELO functionality, the proposal may in fact encourage tighter spreads and price formation

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participants. See id. The Exchange also stated its belief that robust price discovery is best served when there are many different perspectives on what the price and timing of a transaction should be. See id.

<sup>72</sup> See Nasdaq Response Letter I at 7.

because non-retail liquidity providers may need to quote more aggressively than the prevailing market in order to gain priority.

With regard to the Exchange's proposed eligibility requirements for the ELO attribute, four commenters expressed concern that the Exchange's initial proposal to monitor for compliance with the ELO eligibility requirements on a quarterly basis would be insufficient to appropriately surveil for misuse of the functionality.<sup>73</sup> Two of these commenters advocated for stronger or more immediate penalties for failure to comply with the ELO eligibility requirements.<sup>74</sup> Specifically, one commenter noted that the Exchange should monitor for and penalize abuse on an intra-quarter basis, and that the proposal should impose stronger penalties to deter abuse.<sup>75</sup> The other commenter opined that the Exchange should conduct weekly reviews and that a participant should be prohibited from utilizing the ELO functionality after two weeks of non-compliance.<sup>76</sup> Moreover, two commenters suggested that the Exchange should automate the one second resting time for ELO orders.<sup>77</sup>

In addition, three commenters argued that, under the proposed attestation requirement, a participant could game the 99% threshold by improperly inflating its number of compliant ELO orders, such as by submitting a large number of non-marketable ELO Orders, while impermissibly benefiting from its non-compliant 1% of ELO Orders.<sup>78</sup> One of these commenters also stated that the Exchange has not provided sufficient clarity regarding how it would calculate whether at least 99% of a member's ELO orders have rested unaltered on the Nasdaq book for a

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<sup>73</sup> See BATS Letter at 1-2; Citadel Letter I at 4; Themis Letter I at 2-3; Virtu Letter at 2.

<sup>74</sup> See BATS Letter at 2; Virtu Letter at 2.

<sup>75</sup> See BATS Letter at 1-2.

<sup>76</sup> See Virtu Letter at 2.

<sup>77</sup> See FIA PTG Letter I at 5; Themis Letter I at 3.

<sup>78</sup> See FIA PTG Letter I at 4; Citadel Letter I at 6; IEX Letter at 2.



minimum of one second.<sup>79</sup> Further, two commenters expressed concern that the Exchange has not sufficiently limited the definition of “Designated Retail Order” for purposes of the proposed functionality to truly capture retail investors and to prevent misuse of the definition.<sup>80</sup>

In response, the Exchange amended its proposal to add additional detail regarding the ELO functionality, including how the proposed one-second timer would operate and how the 99% threshold would be calculated, as well as to shorten the review period for determining compliance with the eligibility requirements from a quarterly review to a monthly review period.<sup>81</sup> The Exchange also stated that it believes its proposed 99% threshold is appropriate, noting that the standard would require “near perfect performance” while allowing some flexibility in the event any unforeseen issues may result in de minimis non-compliance.<sup>82</sup> Further, the Exchange stated that it would establish new surveillances to detect potential misuse of the proposed functionality and noted that any attempt to game or otherwise abuse the ELO functionality would be a violation of the Exchange’s rules and would subject the member to potential disciplinary action.<sup>83</sup>

In addition, the Exchange stated that the definition of Designated Retail Order is clear that the member entering such an order must have policies and procedures designed to ensure that the order complies with the requirements of the definition, including that the order originate

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<sup>79</sup> See FIA PTG Letter I at 4. See also IMC Letter.

<sup>80</sup> See FIA PTG Letter I at 4; Citadel Letter I at 4-5.

<sup>81</sup> See Nasdaq Response Letter I at 4 and Amendment No. 1. See also supra notes 20-28 and 38-43 and accompanying text.

<sup>82</sup> See Nasdaq Response Letter I at 4.

<sup>83</sup> See id. See also supra notes 44-45 and accompanying text.

from a natural person.<sup>84</sup> The Exchange also stated that the definition of Designated Retail Order allows for orders to originate from organizations in very limited circumstances.<sup>85</sup> The Exchange noted that, accordingly, it does not believe that there is latitude for a member to legally represent itself as eligible to enter an order with ELO priority when the order does not fit within the definition of Designated Retail Order.<sup>86</sup>

One commenter asserted that the increased frequency of monitoring proposed in Amendment No. 1 did not address its concerns with the Exchange's proposed monitoring and enforcement mechanisms.<sup>87</sup> This commenter stated that the Exchange has not offered any specifics about its proposed new surveillance mechanisms, and that the proposed penalties for misuse of the ELO attribute would not address the problem that other market participants that traded with non-compliant ELO orders were doing so under false assumptions.<sup>88</sup> Another commenter was supportive of the changes proposed in Amendment No. 1 (i.e., shortening of the review period from quarterly to monthly; addition of details regarding how the ELO eligibility requirements operate; and development of new surveillances to detect potential misuse of the ELO attribute), but noted that the amendment and the Exchange's response did not fully alleviate its specific concerns regarding the definition of "Designated Retail Order" and the potential for gaming.<sup>89</sup> Similarly, one commenter noted that the Exchange has not explained how highly

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<sup>84</sup> See Nasdaq Response Letter I at 6. See also Rule 7018 (defining "Designated Retail Order").

<sup>85</sup> See Nasdaq Response Letter I at 6.

<sup>86</sup> See id.

<sup>87</sup> See IEX Letter at 3.

<sup>88</sup> See id. at 2-3.

<sup>89</sup> See FIA PTG Letter II at 2.

sophisticated day traders or other professional traders who are natural persons would be prevented from utilizing the ELO attribute.<sup>90</sup>

In reply, the Exchange noted that its proposed rules are properly designed to maintain compliance and that it would actively enforce the proposed rules to achieve compliance.<sup>91</sup> The Exchange also asserted that, because a market participant's broker-dealer would make the determination to enter an order as ELO, if a professional trader were to make consistent sub-second cancellations of its orders, presumably the broker-dealer would determine that orders entered by this customer are not best suited for ELO usage.<sup>92</sup> Finally, the Exchange reiterated that it would monitor behavior to ensure that market participants are not taking steps to circumvent the letter, intent, or spirit of the rule.<sup>93</sup>

The Commission believes that the proposal is reasonably designed to ensure that the eligibility criteria for ELO usage are followed appropriately and to prevent fraudulent and manipulative acts and practices. In this regard, the Commission believes that the measures the Exchange has represented that it would take in order to address member non-compliance with the ELO eligibility criteria, and to surveil for, investigate, and punish misuse or gaming of the ELO functionality, are sufficient to encourage members to take all reasonable steps necessary to comply with the ELO eligibility criteria and provide sufficient deterrence to members who otherwise would abuse the functionality. In particular, the Commission notes that the Exchange has represented that it will carefully monitor its members' use of the ELO attribute on a monthly

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<sup>90</sup> See Citadel Letter I at 4-5; Citadel Letter II at 3.

<sup>91</sup> See Nasdaq Response Letter II at 5-6.

<sup>92</sup> See id. at 6.

<sup>93</sup> See id.

basis and not rely solely on a member's attestation with regard to ELO usage.<sup>94</sup> If a member does not comply with the ELO eligibility requirements, it will face suspension, and ultimately prohibition, from ELO usage.<sup>95</sup> The Exchange also has proposed to implement new surveillances that are designed to identify any potential misuse of the ELO attribute.<sup>96</sup> Any potentially violative conduct identified by the new surveillances would be investigated.<sup>97</sup> If the conduct is found to be violative, the offending member(s) would be subject to disciplinary action.<sup>98</sup> The Commission notes that disciplinary actions could result in penalties that are in addition to the suspension or prohibition of ELO usage.

With regard to the identification of ELO orders in Nasdaq's TotalView ITCH market data feed, four commenters expressed concern that the proposed ELO order identifier would reveal to market participants that certain orders are retail orders and must remain unaltered for at least one second.<sup>99</sup> Two of these commenters noted that, through the process of elimination, market participants also would be able to identify the preponderance of other quotes as coming from institutions or professional market makers.<sup>100</sup> One of these commenters also contended, however, that not tagging ELO orders would prevent liquidity providers from being able to

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<sup>94</sup> See Amendment No. 1. The attestation form for ELO usage would require the member to attest, among other things, that it has implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as Designated Retail Orders comply with the requirements for such orders. See Notice, 81 FR at 87630 n.15; see also Amendment No. 1 and the designated retail order attestation form at Exhibit 3 to Amendment No. 1.

<sup>95</sup> See Amendment No. 1; see also proposed new attachment B to the Exchange's designated retail order attestation form at Exhibit 3 to Amendment No. 1.

<sup>96</sup> See Amendment No. 1.

<sup>97</sup> See id.

<sup>98</sup> See id. and supra note 45 and accompanying text; see also Nasdaq Rule 9000 Series.

<sup>99</sup> See Citadel Letter I at 5; FIA PTG Letter I at 5; Themis Letter I at 1-2; IEX Letter at 1-2.

<sup>100</sup> See FIA PTG Letter I at 5; IEX Letter at 1-2.

identify their place in the queue, and that this uncertainty would lead to wider spreads and smaller order size.<sup>101</sup>

The Exchange stated that it does not believe that information leakage is a concern with respect to the current proposal because the ELO functionality would be available only to retail orders, and retail investor interest is most often represented by one order at a single price.<sup>102</sup> In addition, according to the Exchange, the identification of ELO orders in the Exchange's TotalView ITCH market data feed would provide transparency that would be valuable for the industry in evaluating the efficacy of the proposal.<sup>103</sup>

One commenter disagreed with the Exchange's argument that information leakage would not be a concern with respect to retail orders.<sup>104</sup> This commenter suggested that with knowledge that an order has selected the ELO attribute, a market participant may choose to route to that order last, knowing it would have to remain unaltered for at least one second, which could provide lower fill rates for ELO orders if the market participant is able to complete its order on other venues before routing to Nasdaq to interact with the ELO order.<sup>105</sup> This commenter also suggested that it is not clear how a retail investor could opt out of the ELO functionality in light of the fact that Nasdaq would permit Exchange members to designate all orders submitted

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<sup>101</sup> See FIA PTG Letter I at 5.

<sup>102</sup> See Nasdaq Response Letter I at 6-7. The Exchange acknowledged that information leakage could be a concern for some non-retail market participants who may build or unwind significant trading positions or engage in proprietary and confidential trading strategies, and that it may be an issue if the ELO attribute were to be applied as currently proposed to non-retail market participant orders. See id. at 6.

<sup>103</sup> See id. at 7.

<sup>104</sup> See Citadel Letter II at 2.

<sup>105</sup> See id.

through a particular entry port as ELO orders.<sup>106</sup> Two other commenters asserted that the Exchange's response does not address the concern that the ELO identifier could help market participants identify institutional investor orders.<sup>107</sup>

In reply, the Exchange asserted that the proposal would create transparency, not information leakage.<sup>108</sup> According to the Exchange, transparency differs from information leakage because it is purposeful, equally visible to all, and fully disclosed in public rule proposals, whereas information leakage is generally understood to be inadvertent, selective, and secretive.<sup>109</sup> The Exchange also reiterated that ELO is a voluntary feature, and its use can be quickly discontinued (and must be quickly discontinued if necessary to comply with the duty of best execution) if ELO orders produce negative results.<sup>110</sup>

In addition, the Exchange did not share the concern that the identification of ELO orders on the Exchange's data feed could affect routing strategies and lead to lower fill rates for ELO orders. According to the Exchange, most members utilize transaction cost analytic tools to evaluate and measure the related impact of an execution by weighing opportunity cost and market impact.<sup>111</sup> The Exchange stated that it expects that, as a result of ELO, Nasdaq execution quality metrics will improve over time and members will adjust routing behavior to ensure a higher degree of interaction with the Nasdaq book.<sup>112</sup>

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<sup>106</sup> See id. See also FIA PTG Letter I at 3 (stating that the decision whether to classify order flow as ELO would be made by brokers, not their retail customers).

<sup>107</sup> See IEX Letter at 1-2; Themis Letter II at 2.

<sup>108</sup> See Nasdaq Response Letter II at 3-4.

<sup>109</sup> See id. at 4.

<sup>110</sup> See id.

<sup>111</sup> See id.

<sup>112</sup> See id.

The Exchange also stated that the identification of ELO orders would not allow market participants to say with any assurance that all other orders are of a particular participant type because not all retail orders will be designated as ELO.<sup>113</sup> The Exchange also noted that retail market participants tend to invest in certain heavily-traded securities, which do not lend themselves to easy identification of the nature of the market participant behind the order.<sup>114</sup>

The Commission believes that market participants (retail and non-retail) are not likely to be detrimentally affected by other market participants' knowledge, via the ELO identifier, that certain orders originated from retail investors and must remain unchanged for at least one second. In particular, information leakage would likely not be a concern for retail interest because retail interest is most often represented by one order at a single price.<sup>115</sup> Also, the lack of an ELO attribute on any particular order would likely not allow market participants to say with any assurance that the order is of a particular participant type.<sup>116</sup> Moreover, the Commission does not believe that identification of ELO orders would necessarily result in market participants choosing to route to ELO orders last and therefore result in lower fill rates for these orders.<sup>117</sup> In addition, the Commission notes that the use of the ELO attribute is voluntary.

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<sup>113</sup> See id.

<sup>114</sup> See id. at 4-5. The Exchange also addressed the statement made by a commenter that consumers of the Exchange's proprietary data feeds already have information that can be used to identify which orders are submitted by electronic trading firms. The Exchange sought to correct this statement because its TotalView ITCH market data feed supports voluntary market maker identification or "attribution," which is used to allow identification of market maker quotes and orders to meet their quoting obligations. According to the Exchange, this specification is not limited to any type of market participant, and is wholly voluntary. See id. at 7.

<sup>115</sup> See supra note 102 and accompanying text.

<sup>116</sup> See supra notes 113-114 and accompanying text.

<sup>117</sup> See supra note 105 and accompanying text.

Finally, one commenter suggested that the proposal could create a conflict with FINRA Rule 5320, commonly known as the Manning rule.<sup>118</sup> According to the commenter, if a broker-dealer has routed a customer ELO order to Nasdaq but is required to pull that ELO order within one second and fill it to comply with its obligations under FINRA Rule 5320, that broker-dealer could become out of compliance with the ELO requirements and, as a result, its retail customer limit orders could be disadvantaged vis-à-vis other broker-dealers' retail customer limit orders.<sup>119</sup> This commenter also asserted that an Exchange member may receive a sub-second cancellation request from a customer, which could cause the member to fall under the 99% threshold and become ineligible to submit ELO orders on behalf of other customers.<sup>120</sup>

In response, the Exchange stated that the Manning obligations of a member using the ELO functionality would be no different from the obligations on an OTC market maker that internalizes orders and relies on the "no-knowledge" exception to separate its proprietary trading from its handling of customer orders.<sup>121</sup> The Exchange stated that this exception should be equally applicable to a member using the ELO functionality.<sup>122</sup> The Exchange also noted that it believes that retail investor limit orders that are posted on the Exchange will generally not be cancelled in a short period of time such as one second, because retail investors tend to have long-

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<sup>118</sup> See Citadel Letter I at 2. FINRA Rule 5320(a) states that "[e]xcept as provided herein, a member that accepts and holds an order in an equity security from its own customer or a customer of another broker-dealer without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account."

<sup>119</sup> See Citadel Letter I at 2.

<sup>120</sup> See id. at 5.

<sup>121</sup> See Nasdaq Response Letter I at 5. See also Supplementary Material .02 to FINRA Rule 5320.

<sup>122</sup> See Nasdaq Response Letter I at 5.



term investment goals and increasing the chance of receiving an execution is worth the risk of their order resting for one second or longer.<sup>123</sup>

In response to the Exchange, the commenter disputed the Exchange's assertion that the "no knowledge" exception to the Manning rule should address its concern, noting that it would persist where a firm may choose not to use the "no-knowledge" exception in order to provide higher fill rates or price improvement opportunities to its customers.<sup>124</sup> In reply, the Exchange noted that this scenario posited by the commenter is representative of a voluntary strategy used by the broker-dealer, and that the broker-dealer is not compelled to use ELO.<sup>125</sup>

The Commission does not believe that the commenter's assertion that broker-dealers could be conflicted in their ability to utilize the ELO functionality and also comply with their obligations under FINRA Rule 5320 is a basis for finding that the Exchange's proposal is inconsistent with the Act. As the Exchange noted, the "no-knowledge" exception to FINRA Rule 5320 could be applicable to an Exchange member using the ELO functionality.<sup>126</sup> To the extent firms choose not to rely on the "no-knowledge" exception, any limitation on such firms' ability to utilize the ELO functionality and resulting effect on their ability to compete with other broker-dealers that handle retail order flow would stem from the firms' business judgment, not the eligibility criteria for ELO attribute usage, which apply uniformly to any Exchange member seeking to utilize the ELO functionality.

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<sup>123</sup> See id. at 4. See also FIA PTG Letter I at 3 (stating that most retail participants do not cancel orders within one second).

<sup>124</sup> See Citadel Letter II at 3-4.

<sup>125</sup> See Nasdaq Response Letter II at 7.

<sup>126</sup> See Nasdaq Response Letter I at 5. See also Supplementary Material .02 to FINRA Rule 5320.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>127</sup> that the proposed rule change (SR-NASDAQ-2016-161), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>128</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>127</sup> 15 U.S.C. 78s(b)(2).

<sup>128</sup> 17 CFR 200.30-3(a)(12).