

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86938; File No. SR-NASDAQ-2019-048)

September 11, 2019

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, to Establish the “Midpoint Extended Life Order + Continuous Book” as a New Order Type

I. Introduction

On May 29, 2019, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish the Midpoint Extended Life Order + Continuous Book (“M-ELO+CB”) as a new order type. The proposed rule change was published for comment in the Federal Register on June 17, 2019.³ On July 1, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed. On July 30, 2019, pursuant to Section 19(b)(2) of the Act,⁴ 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 disapprove the proposed rule change.⁵ On July 31, 2019, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 86083 (June 11, 2019), 84 FR 28107.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 86512, 84 FR 38078 (August 5, 2019). The Commission designated September 15, 2019 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

superseded the proposed rule change, as modified by Amendment No. 1.⁶ On August 30, 2019, the Exchange filed Amendment No. 3 to the proposed rule change.⁷ The Commission received no comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment Nos. 2 and 3 from interested persons, and is approving the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

II. Description of the Proposal

Currently, the Exchange offers the Midpoint Extended Life Order (“M-ELO”).⁸ A M-ELO is a non-displayed order priced at the midpoint between the National Best Bid and National Best Offer (“NBBO”) that is not eligible for execution until it completes a one-half second

⁶ In Amendment No. 2, the Exchange revised the proposal to: (1) explain in greater detail the order entry protocols available for M-ELO+CBs; (2) provide additional specificity about the resting period for midpoint orders; (3) provide additional specificity about the execution priority of M-ELO+CBs, M-ELOs, and midpoint orders; (4) conform the proposal to a recently approved proposed rule change permitting M-ELOs to be entered in odd-lot sizes; (5) specify that any punitive fees or participant requirements determined to be necessary by the Exchange for M-ELO+CB usage would be implemented pursuant to a future proposed rule change; and (6) make technical, clarifying, and conforming changes. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-048/srnasdaq2019048-5898749-188829.pdf>.

⁷ In Amendment No. 3, the Exchange further revised the proposal to: (1) clarify that the statistical information it proposes to publish for M-ELO+CBs would be aggregated with the statistical information it currently publishes for M-ELOs; (2) clarify the circumstances in which modification of a M-ELO+CB or midpoint order would trigger a new holding or resting period; and (3) make technical and conforming changes. Amendment No. 3 is available at <https://www.sec.gov/comments/sr-nasdaq-2019-048/srnasdaq2019048-6049836-191368.pdf>.

⁸ See Rule 4702(b)(14)(A). See also Securities Exchange Act Release No. 82825 (March 7, 2018), 83 FR 10937 (March 13, 2018) (“Original M-ELO Approval Order”) (order approving SR-NASDAQ-2017-074).

holding period (“Holding Period”).⁹ Once eligible to trade, M-ELOs may only execute against other M-ELOs.¹⁰

The Exchange now proposes to adopt M-ELO+CB as a variation on the M-ELO concept. That is, a M-ELO+CB would be an order type that has all of the characteristics and attributes of a M-ELO, except that, in addition to executing against other M-ELO+CBs and M-ELOs, it would also be able to execute against certain “M-ELO-like” orders on the Exchange’s continuous book.¹¹ Specifically, a M-ELO+CB would be subject to the same one-half second Holding Period as a M-ELO. A M-ELO+CB that satisfies the Holding Period would be eligible to execute, at the NBBO midpoint, against other eligible M-ELO+CBs and eligible M-ELOs.¹² However, unlike a M-ELO, the M-ELO+CB would also be eligible to execute, at the NBBO midpoint, against non-displayed orders with midpoint pegging and midpoint peg post-only orders (collectively, “Midpoint Orders”) resting on the Exchange’s continuous book, if: (1) the Midpoint Order has the midpoint trade now order attribute enabled;¹³ (2) the Midpoint Order has

⁹ See Rule 4702(b)(14)(A).

¹⁰ See id.

¹¹ See proposed Rule 4702(b)(15). Also, unlike M-ELOs, M-ELO+CBs may be entered via any of the Exchange’s order entry protocols except for QIX. See id.; Amendment No. 2, supra note 6, at 5 n.6, 7. The type of protocol used would not affect how the system handles M-ELO+CBs. See Amendment No. 2, supra note 6, at 7.

¹² See proposed Rule 4702(b)(15).

¹³ The midpoint trade now order attribute currently allows a resting order that becomes locked at its non-displayed price by an incoming midpoint peg post-only order to automatically execute against crossing or locking interest, including potentially against the locking midpoint peg post-only order, as a liquidity taker. See Rule 4703(n). The Exchange proposes to amend the midpoint trade now order attribute to provide that, in addition to the functionality the attribute currently provides, enabling the attribute would also permit a Midpoint Order to execute against a M-ELO+CB, provided that the Midpoint Order meets the eligibility requirements for doing so. See proposed Rule 4703(n). The Exchange also proposes to specify that, if there is a resting Midpoint Order on the Nasdaq book without the midpoint trade now order attribute, a new incoming

rested on the continuous book for at least one-half second after the NBBO midpoint falls within the limit price set by the participant;¹⁴ (3) no other order is resting on the continuous book that has a more aggressive price than the current NBBO midpoint; and (4) the Midpoint Order satisfies any minimum quantity requirement of the M-ELO+CB.¹⁵ A buy (sell) M-ELO+CB would be ranked in time order at the NBBO midpoint among other buy (sell) M-ELO+CBs, buy (sell) M-ELOs, and buy (sell) Midpoint Orders, as of the time when such orders become eligible to execute (i.e., the time at which they exit their respective one-half second Holding Periods or resting periods, as applicable, and satisfy any other conditions for marketability).¹⁶

In all other respects, a M-ELO+CB would be identical to a M-ELO. For example, a M-ELO+CB may be assigned a limit price, in which case it would be: (1) eligible for execution in time priority after satisfying the Holding Period if, upon acceptance of the order by the system, the midpoint price is within the limit price set by the participant; or (2) held until the midpoint falls within the limit price set by the participant, at which time the Holding Period would commence and thereafter the system would make the order eligible for execution in time priority.¹⁷ If a M-ELO+CB is modified by a member (other than to decrease the size of the order

Midpoint Order with the midpoint trade now order attribute will be able to execute against a M-ELO+CB (after meeting the eligibility requirements). See id. The resting Midpoint Order without the midpoint trade now order attribute will thereafter remain on the Nasdaq book and retain its priority relative to other resting orders on the same side of the market. See id.

¹⁴ If a Midpoint Order with the midpoint trade now order attribute enabled is modified during its resting period or after its resting 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, such modification would trigger a new resting period for the Midpoint Order. See Amendment No. 3, supra note 7, at 4.

¹⁵ See proposed Rule 4702(b)(15).

¹⁶ See id.; Amendment No. 2, supra note 6, at 6.

¹⁷ See Amendment No. 2, supra note 6, at 6-7.

or to modify the marking of a sell order as long, short, or short exempt) during the Holding Period, the system would restart the Holding Period.¹⁸ If a M-ELO+CB is modified by a member (other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt) after it is eligible to execute, the order would have to satisfy a new Holding Period to become eligible to execute. If the NBBO changes while a M-ELO+CB is in the Holding Period, the Holding Period would not reset, even if, as a result of the NBBO change, the M-ELO+CB's limit price is less aggressive than the NBBO midpoint.¹⁹ If a M-ELO+CB satisfies the Holding Period, but the NBBO midpoint is no longer within its limit, it would nonetheless be ranked in time priority among other M-ELO+CBs, M-ELOs, and Midpoint Orders if the NBBO later moves such that the midpoint is within the order's limit price (i.e., the Holding Period would not reset).²⁰

If there is no National Best Bid or National Best Offer, the Exchange would accept M-ELO+CBs but would not allow M-ELO+CB executions until there is an NBBO.²¹ M-ELO+CBs would be eligible to execute if the NBBO is locked.²² If the NBBO is crossed, M-ELO+CBs would be held by the system until the NBBO is no longer crossed, at which time they would be eligible to trade.²³ M-ELO+CBs may be cancelled at any time, including during the Holding Period.²⁴

¹⁸ See id. at 7.

¹⁹ See id.

²⁰ See id.

²¹ See id.

²² See id.

²³ See id.

²⁴ See id.

M-ELO+CBs would only be active during market hours.²⁵ Specifically, M-ELO+CBs entered during pre-market hours would be held by the system in time priority until market hours begin, M-ELO+CBs entered during post-market hours would not be accepted by the system, and M-ELO+CBs remaining unexecuted after 4:00 p.m. Eastern time would be cancelled by the system.²⁶ M-ELO+CBs would not be eligible for the Exchange's opening, halt, and closing crosses.²⁷ M-ELO+CBs may be entered in any size and may have a minimum quantity order attribute.²⁸ M-ELO+CBs may not be designated with a time-in-force of immediate or cancel, are ineligible for routing, and may not have the discretion, reserve size, attribution, intermarket sweep order, display, trade now, or midpoint trade now order attributes.²⁹

M-ELO+CB executions would be reported to securities information processors and provided in the Exchange's proprietary data feed without any new or special indication.³⁰ The Exchange would, however, include in its existing volume reports delayed weekly aggregated statistics, as well as delayed monthly aggregated block-sized trading statistics, for M-ELO+CB executions.³¹ Specifically, the Exchange would include M-ELO+CB executions in the existing reports it publishes on Nasdaqtrader.com that provide weekly aggregated statistics showing the

²⁵ See id.

²⁶ See id. at 7-8.

²⁷ See proposed Rule 4703(l).

²⁸ See Amendment No. 2, supra note 6, at 8. See also Securities Exchange Act Release No. 86416 (July 19, 2019), 84 FR 35918 (July 25, 2019) (order approving SR-NASDAQ-2019-044 to allow M-ELOs to be odd lot-sized).

²⁹ See Amendment No. 2, supra note 6, at 8.

³⁰ See id.

³¹ See id.

number of shares and transactions of M-ELOs executed on the Exchange by security.³² The Exchange would also include M-ELO+CB executions in the existing reports it publishes on Nasdaqtrader.com that provide monthly aggregated block-sized trading statistics of total shares and total transactions of M-ELOs executed on the Exchange.³³

The Exchange represents that, as part of the surveillance it currently performs, M-ELO+CBs would be subject to real-time surveillance to determine if they are being abused by market participants.³⁴ In addition, as is the case for M-ELOs, the Exchange represents that it will monitor the use of M-ELO+CBs with the intent to apply additional measures, as necessary, to ensure their usage is appropriately tied to the intent of the order type.³⁵ According to the Exchange, 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

³² See *id.*; Amendment No. 3, *supra* note 7, at 5, 8 (clarifying that the weekly statistical information published by the Exchange would aggregate both M-ELO and M-ELO+CB executions). This information would be published with a two-week delay for NMS stocks in Tier 1 of the LULD Plan, and a four-week delay for all other NMS stocks. See Amendment No. 2, *supra* note 6, at 8.

³³ See Amendment No. 2, *supra* note 6, at 8-9; Amendment No. 3, *supra* note 7, at 5, 8 (clarifying that the monthly statistical information published by the Exchange would aggregate both M-ELO and M-ELO+CB executions). A transaction would be considered "block-sized" if it meets any of the following criteria: (1) 10,000 or more shares; (2) \$200,000 or more in value; (3) 10,000 or more shares and \$200,000 or more in value; (4) 2,000 to 9,999 shares; (5) \$100,000 to \$199,999 in value; or (6) 2,000 to 9,999 shares and \$100,000 to \$199,999 in value. See Amendment No. 2, *supra* note 6, at 9. This information would be published no earlier than one month following the end of the month for which trading was aggregated. See *id.*

³⁴ See Amendment No. 2, *supra* note 6, at 9.

³⁵ See *id.* The Exchange states that this monitoring may include metrics tied to participant behavior, such as the percentage of M-ELO+CBs that are cancelled prior to the completion of the Holding Period, the average duration of M-ELO+CBs, and the percentage of M-ELO+CBs where the NBBO midpoint is within the limit price when received. See *id.*

purposes of the M-ELO+CB order type may be subject to penalties or other participant requirements to discourage such behavior, should it occur.³⁶

The Exchange plans to implement M-ELO+CB within thirty days after its approval, and will announce the specific implementation date by Equity Trader Alert.³⁷ The Exchange states that it will make M-ELO+CB available to all members and to all securities upon implementation.³⁸

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 2 and 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁴⁰ 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

³⁶ See id. Should the Exchange determine that they are necessary to maintain a fair and orderly market, any punitive fees or other participant requirements tied to M-ELO+CB usage would be implemented by rule filing under Section 19(b) of the Act. See id. at 9 n.11.

³⁷ See id. at 11. The Exchange notes that it plans to propose a fee structure for M-ELO+CB in a subsequent proposed rule change. See id. at 11 n.13.

³⁸ See id. at 11.

³⁹ 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).

⁴⁰ 15 U.S.C. 78f(b)(5).

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,⁴¹ 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 has carefully considered the proposal and finds that it is consistent with the Act. In its original order approving M-ELO on the Exchange, the Commission noted its belief that the M-ELO order type could create additional and more efficient trading opportunities on the Exchange for investors with longer investment time horizons, including institutional investors, and could provide these investors with an ability to limit the information leakage and the market impact that could result from their orders.⁴² While M-ELOs are currently limited to executing only against other M-ELOs, the Commission believes that the Exchange's proposal to introduce M-ELO+CBs, which would be able to interact with eligible Midpoint Orders, in addition to M-ELO+CBs and M-ELOs, could create opportunities for Exchange participants to utilize a variation of the M-ELO order type consistent with the intended purpose of the order type. In particular, the proposal would provide Exchange participants with the flexibility to allow their orders to interact with "M-ELO-like" interest on the Exchange's order book. As with M-ELOs, the Commission believes that M-ELO+CBs represent a reasonable effort to further enhance the ability of longer-term trading interest to participate effectively on an exchange.

The Commission also believes that the proposal to use the midpoint trade now order attribute to allow Midpoint Orders to execute against M-ELO+CBs would provide Exchange participants entering Midpoint Orders with additional control over the execution of their orders,

⁴¹ 15 U.S.C. 78f(b)(8).

⁴² See Original M-ELO Approval Order, *supra* note 8, at 10938-39.

specifically by allowing participants to choose whether to enable the order attribute in order to execute against M-ELO+CBs.

The Commission believes that the proposal to include M-ELO+CB executions in the Exchange's published statistics for M-ELO executions is reasonably designed to provide additional transparency regarding M-ELO+CB executions on the Exchange without undermining the usefulness of the M-ELO and M-ELO+CB order types by limiting the potential information leakage and the resulting market impact that could be associated with non-delayed identification of individual M-ELO or M-ELO+CB executions.

Finally, the Commission believes that the Exchange's proposed surveillance measures are reasonably designed to deter potential improper use of the proposed M-ELO+CB order type. In particular, the Commission notes that the Exchange has represented that, as it does for M-ELOs, it will conduct real-time surveillance to monitor the use of M-ELO+CBs and ensure that such usage is appropriately tied to the intent of the order type.⁴³ The Exchange has also represented that it will continue to evaluate whether additional measures may be necessary to ensure that M-ELO+CBs are used in a manner consistent with the intended purpose of the order type.⁴⁴

Based on the foregoing and the Exchange's representations in its proposal, the Commission finds that the proposed rule change, as modified by Amendment Nos. 2 and 3, is consistent with the Act.

⁴³ See Amendment No 2, supra note 6, at 9.

⁴⁴ See id.

IV. Solicitation of Comments on Amendment Nos. 2 and 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment Nos. 2 and 3 are 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-2019-048 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-2019-048. 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-2019-048, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 2 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 2 and 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment Nos. 2 and 3 in the Federal Register. As discussed above, in Amendment No. 2, the Exchange revised the proposal to: (1) explain in greater detail the order entry protocols available for M-ELO+CBs; (2) provide additional specificity about the resting period for Midpoint Orders; (3) provide additional specificity about the execution priority of M-ELO+CBs, M-ELOs, and Midpoint Orders; (4) conform the proposal to a recently approved proposed rule change permitting M-ELOs to be entered in odd-lot sizes; (5) specify that any punitive fees or participant requirements determined to be necessary by the Exchange for M-ELO+CB usage would be implemented pursuant to a future proposed rule change; and (6) make technical, clarifying, and conforming changes. Also as discussed above, in Amendment No. 3, the Exchange further revised the proposal to: (1) clarify that the statistical information it proposes to publish for M-ELO+CBs would be aggregated with the statistical information it currently publishes for M-ELOs; (2) clarify the circumstances in which modification of a M-ELO+CB or Midpoint Order would trigger a new holding or resting period; and (3) make technical and conforming changes. The Commission believes that Amendment Nos. 2 and 3 do not raise any novel regulatory issues or make any significant substantive changes to the original

proposal, which was subject to a full notice and comment period during which no comments were received. The Commission also notes that Amendment Nos. 2 and 3 provide additional accuracy, clarity, and justification to the proposal. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁴⁵ to approve the proposed rule change, as modified by Amendment Nos. 2 and 3, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴⁶ that the proposed rule change (SR-NASDAQ-2019-048), as modified by Amendment Nos. 2 and 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷

Jill M. Peterson
Assistant Secretary

⁴⁵ 15 U.S.C. 78s(b)(2).

⁴⁶ Id.

⁴⁷ 17 CFR 200.30-3(a)(12).