POSTAL SERVICE

Product Change—Parcel Select Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule’s Competitive Products List.

DATES: Effective date: July 13, 2017.

FOR FURTHER INFORMATION CONTACT: Maria W. Votsch, 202–268–6525.


Stanley F. Mires, Attorney, Federal Compliance.

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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

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.\textsuperscript{14} As proposed, the ELO attribute would be available only for displayed orders that qualify as Designated Retail Orders,\textsuperscript{15} and would be available during System Hours.\textsuperscript{16} 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.\textsuperscript{17}

As proposed, 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.\textsuperscript{18} Exchange members would be required to submit a signed written attestation that they will comply with these eligibility requirements.\textsuperscript{19}

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.\textsuperscript{20} 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.\textsuperscript{21} 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.\textsuperscript{22} 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, that each time an ELO order is updated due to pegging,\textsuperscript{23} re-pricing, or reserve replenishment, the one-second timer would restart.\textsuperscript{24}

The Exchange also stated that full cancellations would stop the timer.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27} 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.\textsuperscript{28}

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.\textsuperscript{29} 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.\textsuperscript{30} The Exchange also 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.\textsuperscript{31} 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.\textsuperscript{32}

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.\textsuperscript{33} 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 Process), Rule 4753 (Nasdaq Halt Cross), or Rule 4754 (Nasdaq Closing Cross), as applicable.\textsuperscript{34} 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,\textsuperscript{35} but would be assigned Extended Life Priority if the order joins the Nasdaq book upon completion of the cross.\textsuperscript{36} Any orders with Extended Life Priority that are not executed in a cross would be ranked on the Nasdaq book with Extended Life Priority.\textsuperscript{37}

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.\textsuperscript{38} 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.\textsuperscript{39} 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 immediately following month in which it did not comply.\textsuperscript{40} Following the end of the ineligible month, a member would once again be able to enter ELO orders if it completes a new attestation.\textsuperscript{41} 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.\textsuperscript{42} 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.\textsuperscript{43} 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.\textsuperscript{44} 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.\textsuperscript{45}

The Exchange has proposed to designate orders with the ELO attribute with a new, unique identifier.\textsuperscript{46} 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 default, all orders with the new identifier.\textsuperscript{47} 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.\textsuperscript{48}

### 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.\textsuperscript{49} 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 Web site.\textsuperscript{50} According to the Exchange, the exact implementation date would be reliant on several factors, such as the results of extensive testing and industry events and initiatives.\textsuperscript{51}

The Exchange currently plans to implement the initial set of symbols for ELO in the third quarter of 2017.\textsuperscript{52}

### 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.\textsuperscript{53} In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,\textsuperscript{54} 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,\textsuperscript{55} which requires that the rules of a national securities exchange be designed to promote, rather than impede, competition among national securities exchanges and to promote and facilitate transactions in 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 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, and two response letters from the Exchange.

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. 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. One commenter argued that the proposal would unfairly burden

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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. 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.

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.

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. 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.

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.

In response, the Exchange stated its belief that the growth in internalization and the speed of execution has required differentiation in retail orders, which are typically entered by long-term investors, from those of other market participants. 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.

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Annex notes:

- See supra notes 6, 9, and 12. The IMC Letter broadly supported the comments articulated in FIA PTG Letter I.
- See supra notes 8 and 13. 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.
- See supra notes 8, 10, and 12. See FIA PTG Letter I at 1–2; Citadel 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 they were not aware of the ELO functionality beyond retail orders, and therefore would be subject to a separate rule filing with the Commission. See Nasdaq Response Letter I at 7. See also Amendment No. 1.

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Exchange exchange notes:

- See Nasdaq Response Letter I at 3 and 7; NASDAQ Response Letter II at 1.

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Exchange exchange citation notes:

- See Amendment No. 1.
- See Notice, 81 FR at 87630; see also Amendment No. 1.
- See Amendment No. 7.
- See Nasdaq Response Letter I at 3 and 7; NASDAQ Response Letter II at 1.
- 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 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.
- See NASDAQ Response Letter II at 1.
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 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.73 Two of these commenters advocated for stronger or more immediate penalties for failure to comply with the ELO eligibility requirements.74 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.75 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.76 Moreover, two commenters suggested that the Exchange should automate the one second resting time for ELO orders.77

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.78

The Commission notes 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.86

One commenter noted that the 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.88 Another commenter was supportive of the changes proposed in Amendment No. 1 (i.e., shortening of the review period from quarterly to monthly; 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.89

Similarly, one commenter noted that the Exchange has not explained how highly sophisticated day traders or other professional traders, who are natural persons, would be prevented from utilizing the ELO attribute.90

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.91 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.92 Finally, the Exchange reiterated that it would monitor behavior to ensure that market participants are not taking steps to

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73 See BATS Letter at 1–2; Citadel Letter I at 4; Themis Letter I at 2–3; Virtu Letter at 2.
74 See BATS Letter at 2; Virtu Letter at 2.
75 See BATS Letter at 1–2.
76 See Virtu Letter at 2.
77 See FIA PTG Letter I at 1; Themis Letter I at 3.
78 See FIA PTG Letter I at 1; Citidel Letter I at 6; IEX Letter at 2.
79 See FIA PTG Letter I at 4. See also IMC Letter.
80 See FIA PTG Letter I at 4; Citadel Letter I at 4–5.
81 See Nasdaq Response Letter I at 4 and Amendment No. 1. See also supra notes 20–28 and 38–41 and accompanying text.
82 See Nasdaq Response Letter I at 4.
83 See id. See also supra notes 44–45 and accompanying text.
84 See Nasdaq Response Letter I at 4. See also Rule 7018 (defining “Designated Retail Order”).
85 See also FIA PTG Letter I at 4; Citadel Letter I at 6.
86 See id.
87 See IEX Letter at 3.
88 See id. at 2–3.
89 See FIA PTG Letter II at 2.
90 See Citadel Letter I at 4–5; Citadel Letter II at 3.
91 See Nasdaq Response Letter II at 5–6.
92 See id. at 6.
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 basis and not rely solely on a member’s attestation with regard to ELO usage.94 If a member does not comply with the ELO eligibility requirements, it will face suspension, and ultimately prohibition, from ELO usage.95 The Exchange also has proposed to implement new surveillances that are designed to identify any potential misuse of the ELO attribute.96 Any potentially violative conduct identified by the new surveillances would be investigated.97 If the conduct is found to be violative, the offending member(s) would be subject to disciplinary action.98 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.99 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.100 One of these commenters also contended, however, that not tagging ELO orders would prevent liquidity providers from being able to identify their place in the queue, and that this uncertainty would lead to wider spreads and smaller order size.101 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.102 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.103

One commenter disagreed with the Exchange’s argument that information leakage would not be a concern with respect to retail orders.104 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.105 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 through a particular entry port as ELO orders.106 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.107

In reply, the Exchange asserted that the proposal would create transparency, not information leakage.108 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.109 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.110

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.111 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.112

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.113 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.114

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93 See id.; see also Nasdaq Rule 9000 Series.
94 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 id. at 7; see also Amendment No. 1 and the designated retail order attestation form at Exhibit 3 to Amendment No. 1.
95 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.
96 See Amendment No. 1.
97 See id.
98 See id. and supra note 45 and accompanying text; see also Nasdaq Rule 9000 Series.
99 See id.
100 See id. at 5; FIA PTG Letter 1 at 5; Themis Letter I at 1–2; IEX Letter at 1–2.
101 See id. at 5; FIA PTG Letter 1 at 5; IEX Letter at 1–2.
102 See FIA PTG Letter 1 at 5.
103 See FIA PTG Letter 1 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.
104 See id.
105 See id. at 7.
106 See Citiadel Letter II at 2.
107 See Citiadel Letter II at 2.
108 See IEX Letter at 1–2; Themis Letter II at 2.
109 See id. at 4.
110 See id.
111 See id.
112 See id.
113 See id.
114 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.
The Commission believes that 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.\textsuperscript{115} 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.\textsuperscript{116} 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.\textsuperscript{117} In addition, the Commission notes that the use of the ELO attribute is voluntary.

Finally, one commenter suggested that the proposal could create a conflict with FINRA Rule 5320, commonly known as the Manning rule.\textsuperscript{118} 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.\textsuperscript{119} This commenter also asserted that an Exchange member seeking to utilize the ELO functionality and become ineligible to submit ELO orders on behalf of other customers.\textsuperscript{120}

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.\textsuperscript{121} The Exchange stated that this exception should be equally applicable to a member using the ELO functionality.\textsuperscript{122} 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-term investment goals and increasing the chance of receiving an execution is worth the risk of their order resting for one second or longer.\textsuperscript{123}

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.\textsuperscript{124} 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.\textsuperscript{125}

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.\textsuperscript{126} 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.

\textsuperscript{115} See supra note 102 and accompanying text.
\textsuperscript{116} See supra notes 113–114 and accompanying text.
\textsuperscript{117} See supra note 105 and accompanying text.
\textsuperscript{118} 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.”
\textsuperscript{119} See Citadel Letter I at 2.
\textsuperscript{120} See id. at 5.
\textsuperscript{121} See Nasdaq Response Letter I at 5. See also Supplementary Material. 02 to FINRA Rule 5320.
\textsuperscript{122} See Nasdaq Response Letter I at 5.
\textsuperscript{123} See id. at 4. See also FIA PTG Letter I at 3 (stating that most retail participants do not cancel orders within one second).
\textsuperscript{124} See Citadel Letter II at 3–4.
\textsuperscript{125} See Nasdaq Response Letter II at 7.
\textsuperscript{126} 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,\textsuperscript{127} 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.\textsuperscript{128}

Eduardo A. Aleman,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the SPY Pilot Program


Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),\textsuperscript{129} and Rule 19b–4 thereunder,\textsuperscript{130} notice is hereby given that on July 5, 2017, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 the Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to extend the pilot program that eliminated position and exercise limits for physically-settled options on the SPDR S&P ETF Trust (“SPY”) (“SPY Pilot Program”).

The text of the proposed rule change is available on the Exchange’s Web site at www.ise.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

\textsuperscript{128} 17 CFR 200.30–3(a)(12).