



March 10, 2017

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-NYSEMKT-2017-05

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to offer comments to the NYSE Mkt LLC's January 27, 2017 proposed changes to NYSE Mkt Rules 7.29E and 1.1E to provide for a delay mechanism.¹

We begin our remarks by reiterating our concern that the Commission still has not offered any concrete framework within which it can evaluate delay proposals, such as this one. The need for such a framework, which was high when the SEC first considered the IEX Exchange Application last year, is even more pressing now that the Commission is actively considering both the NYSE Mkt Proposal and a revised proposal from the Chicago Stock Exchange.² As we have before, we urge the Commission to establish consistent, objective, policy-based criteria for evaluating speed bump proposals, and then apply those criteria to both of the pending proposals, as well as those that may likely arise in the future.

As for the NYSE Mkt Proposal itself, we have a number of questions and concerns with it, and urge the Commission to proceed cautiously. However, we find it worth noting that the NYSE Mkt Proposal appears to raise significantly fewer concerns than the initial CHX Proposal from last fall. We are separately preparing comments to the Revised CHX Proposal.

Lastly, we wish to thank the NYSE staff for making themselves available to us, which has greatly assisted our understanding of the NYSE Mkt Proposal.

About Healthy Markets

The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges.

¹ Notice of Filing of Proposed Rule Change Amending Rules 7.29E and 1.1E to Provide for a Delay Mechanism, Feb. 9, 2017, *available at* [_____](#)



Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets.³

Develop a Consistent, Objective, Policy-Based Framework for Review of Time Delay Proposals

Over the course of less than a year, the Commission has been asked to pass judgment on no less than four time delay proposals.⁴ Unfortunately, the Commission appears to be reviewing each of the exchange time delay proposals *de novo*, without any clear or consistent framework against which to compare.

The Exchange Act obligates the SEC to affirmatively determine that an exchange's overall rules are "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, ..., to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and [] not designed to permit unfair discrimination between customers, issuers, brokers, or dealers."⁵

Last year, as the SEC considered the IEX application, we warned that "[a]n unrestricted, sub-millisecond "de minimis" interpretation would leave the door open for a myriad of time delay and order type combinations, leading to excessive complexity, segmentation, and exchanges selectively advantaging certain groups of clients over others. It would also render the markets more susceptible to manipulation while simultaneously making them more difficult to police."⁶

At the time the Commission was considering the IEX application, it was abundantly clear that if the Commission approved IEX's application, other exchanges would likely soon follow suit with their own time delay proposals.⁷ Nevertheless, when approving IEX, the Commission declined to provide guidance as to what types of delays could be problematic, and which would be more likely permitted.⁸

³ To learn more about Healthy Markets, or our Buyside and Working Group Members, please see our website at <http://www.healthymarkets.org>.

⁴ The initial CHX Proposal was ultimately withdrawn before significant Commission action was taken, and a Revised CHX Proposal has been submitted for evaluation.

⁵ Securities Exchange Act of 1934, Section 6.

⁶ Letter from Healthy Markets Association to SEC, April 1, 2016, available at <https://www.sec.gov/comments/s7-03-16/s70316-3.pdf>.

⁷ See Nicole Bullock, *SEC interpretation could lead to IEX copycats*, Financial Times, (Mar. 21, 2016).

⁸ At the time, the Commission defined its issues narrowly to whether a 350 microsecond delay was "de minimis" so as to qualify as an automated quote. See Commission Interpretation Regarding Automated Quotations Under Regulation NMS, Rel. No. 34-78102; File No. S7-03-16, Jun. 17, 2016, available at https://docs.google.com/document/d/1Kw6-jL6tdKoxAeN2-RtlGV5X5_3mfWnYBUyBUBfpJGs/edit# ("Interpretive Guidance").



As the SEC Staff noted in its June 2016 Guidance allowing for sub-millisecond delays, the Guidance

does not address whether any particular access delay would be approved by the Commission as consistent with the Commission's interpretation regarding automated quotation under Rule 600(b)(3) of Regulation NMS, or as being not unfairly discriminatory, not an inappropriate or unnecessary burden on competition, and otherwise consistent with the Act.⁹

As a result, the Commission has left open the door for exchanges to propose delays that could be discriminatory, inhibit competition, or otherwise negatively impact investors and the markets. Put simply, the Commission has opted to consider each application without any standard against which to measure other than the vague language of the Exchange Act. Now, the Commission is actively facing two, very different, time delay proposals.

As we have said repeatedly, the SEC should determine whether, and under what circumstances, a delay promotes fair and efficient markets, and whether, and under what circumstances, a delay may protect investors. The following factors are essential to evaluating whether a delay could be consistent with the Exchange Act's obligations.

1. Any response time delays, whether intentional or not, are always less than one millisecond.
2. All intentional response time delays must be applied equally to all participants in their use of the market, and across all order types. Response time delays cannot be altered by any means, including fees. This ensures fair access as well as just and equitable principles of trade. Time delays should not apply to an exchange's ability to price orders on behalf of all participants (i.e. Pegging).
3. There are no intentional delays in sending data to the Securities Information Processor.
4. The purpose of each intentional response time delay is clearly stated; the delay is expressly intended to benefit long-term investors; and the delay is the simplest means of achieving the stated purpose.¹⁰

In addition, the SEC should consider the likely different impacts of deterministic or randomized delays on market liquidity, quote accessibility and market integrity.

Developing a consistent, objective, policy-based framework for evaluating proposals for time delays, such as the one outlined above, would ensure that the Commission's determinations are made on clear, objective criteria that are consistent with the agency's statutory obligations.

⁹ Staff Guidance on Automated Quotations under Regulation NMS, SEC, June 17, 2016, *available at* <https://www.sec.gov/divisions/marketreg/automated-quotations-under-regulation-nms.htm>.

¹⁰ See Letter from Healthy Markets Association to SEC, April 1, 2016, *available at* <https://www.sec.gov/comments/s7-03-16/s70316-3.pdf>.



Lastly, we fear that, without a framework, the Commission's determinations with respect to any time delay proposal, including both the NYSE Mkt Proposal and the Revised CHX Proposal, could be viewed as arbitrary or capricious. Thus, to the extent that the Commission's determinations are challenged in court, a consistent framework against which the proposals could be compared would help ensure the determinations are afforded the appropriate level of *Chevron* deference.

Specific Questions and Concerns with NYSE Mkt Proposal

The Commission is obligated to require any exchange seeking to change its rules to explain why the exchange is doing so. Other than a vague references to "competition", we don't know why the NYSE Mkt Proposal exists. That should be disclosed.

Given the relatively tiny market share occupied by the presumed competitor (IEX), it's more than a bit puzzling why another exchange would be rushing in to compete with it.¹¹ Taken along with the extreme brevity of the the NYSE Mkt Proposal (it's only a few pages), and the vagueness of its justification, it appears as though the proposal may be being sought as a placeholder, to be further adjusted and potentially used in the future. The Commission should view such a vague proposal with a healthy skepticism.

As far as the merits go, we likewise have no information as to why certain features were selected. For example, the NYSE Mkt Proposal, much like the IEX Proposal, is for a 350 microsecond delay. The IEX Proposal was deliberately set at 350 microseconds to be fractionally longer than the delay associated with signals traveling the distance to Mahwah, New Jersey. In other words, the time delay was disclosed to be selected for geographic reasons. Why did the NYSE Mkt Proposal select that same time period? There was nothing in the SEC's approval of IEX or related guidance that so limited future applications.

Further, prior to the SEC's approval of IEX, NYSE's leadership repeatedly publicly criticized the IEX Proposal as deleterious for the markets and investors. What's different now? Does NYSE have information or analysis to support its changed position? Since IEX's application was approved, trading has proceeded on a market with a protected quote that has a time delay. There is now some data available for analysis about whether IEX provides high quality executions, as well as whether the delay has impacted overall market quality. What does that data show? NYSE and the SEC should not ignore that information.

¹¹ As the Commission and FINRA have previously noted, brokers' costs and access fees may create incentives that are, at times, in conflict with brokers' best execution obligations. IEX's unique fee structure may present such a potential conflict. For example, given what appears to be the comparatively high quality of executions on IEX versus other exchanges, and the broad swath of support IEX has received from investment advisers, we find it curious that IEX currently occupies only about 2% market share. For information on execution quality, please see "Execution Quality", BATS, *available at* http://www.bats.com/us/equities/market_statistics/execution_quality/ (last viewed Mar. 10, 2017) (showing IEX with the lowest effective spread in the most symbols, as measured to the millisecond).



As we raised in our October 13 comment on the initial CHX Proposal,¹² there are also a number of questions that the SEC should also consider. For example, are there any concerns with the delay being implemented by software as opposed to hardware? What happens in periods of high volume? Would the software processing times increase? Would that increase the delays by some unknown time period? How would NYSE Mkt ensure that the delay doesn't vary under different conditions? NYSE has, unfortunately, demonstrated that it may have significant operational problems during periods of high volumes. Would those periods not impact the software-based delay? The exchange simply saying that it would "do its best" to make the delay a consistent 350 microseconds would be cold comfort in times of significant delays and market stress. Again, the Commission should have a detailed understanding of these issues.

Conclusion

Before the Commission unintentionally enables abuses, or damages the markets by approving ill-advised time delay proposals, we again urge the Commission to establish an objective, policy-based framework with which to evaluate all exchange speed bump proposals. Further, we believe that if the Commission does not fully understand why a proposal is being sought or how it will work, it should not approve the application.

Should you have any questions or wish to discuss our comments, please do not hesitate to contact me at [REDACTED]. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch".

Tyler Gellasch
Executive Director
Healthy Markets Association

¹² See Letter from Healthy Markets Association to SEC, Oct. 13, 2016, *available at* <https://www.sec.gov/comments/sr-chx-2016-16/chx201616-8.pdf>.