HEALTHY MARKETS
TRANSPARENCY & TRUST

July 16, 2019

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

Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-86168; File No. SR-CboeEDGA-2019-012

Dear Ms. Countryman:

The Healthy Markets Association[1] appreciates the opportunity to offer our comments to the above-referenced proposal to introduce "Liquidity Provider Protection" on EDGA.[2] Healthy Markets applauds Cboe for seeking to innovate our National Market System. However, the information provided in the EDGA Delay Proposal

- is inadequate to establish its compliance with the Exchange Act and Commission rules,
- is inconsistent with existing rules and interpretations of the Commission, and
- raises significant, complex policy concerns (including the protection of investors) that must be carefully addressed.

We therefore urge the Commission to deny the EDGA Delay Proposal.

Further, because the Commission staff has previously offered significantly flawed analysis and conclusions related to the application of certain elements of Regulation NMS a previously considered time delay proposal, we urge the Commission to clarify its position and reaffirm the importance of accurate and firm quotations in the markets.

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[1] 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. 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. To learn more about Healthy Markets or our members, please see our website at http://healthymarkets.org.

[2] *Notice of Filing of a Proposed Rule Change to Introduce a Liquidity Provider Protection on EDGA*, SEC, Exch. Act Rel. No. 34-86168; Jun. 20, 2019, *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86168.pdf ("EDGA Delay Proposal" or the "Filing").

Background on the Proposal

Cboe proposes to delay all incoming "executable orders that would remove liquidity from the EDGA Book on entry."[3] The EDGA Delay Proposal calls for a delay of four milliseconds "[b]ased on the geographical latencies currently experienced between the Chicago Mercantile Exchange ("CME") data center in Aurora, IL and the Exchange's primary data center in Secaucus, NJ."[4]

Orders subject to the delay would wait the four milliseconds before executing against resting orders, but would be "released early if resting orders are cancelled or modified such that the incoming order is no longer executable against such orders."[5] However, "[s]o as to avoid unnecessarily queueing orders that are not executable when entered, order instructions that could prevent an incoming order from being executed and removing liquidity on entry (e.g., Minimum Quantity and Post Only) would be considered prior to subjecting the order to the delay mechanism."[6] Notably, however, "[t]he unrouted balance of a routable order that is entered into the EDGA Book would be treated as a new incoming order and evaluated as such by the delay mechanism."[7]

All orders that add liquidity to the exchange,[8] as well as all modifications or cancellations of those orders, would not be subject to the delay.[9] Further, "orders that are routed on entry would not be eligible for delay until entered for execution with resting orders on the EDGA Book."[10]

The Exchange would not delay its distribution or use of the information. Particularly, the Exchange would continue to disseminate quote and trade data through both its proprietary direct market data feeds and the applicable securities information processor ("SIP") without any delay.[11] Further, the Exchange's own systems "would use current, un-delayed data, for all purposes including regulatory compliance (e.g., trade-through) and pricing of orders pegged to the NBBO."[12]

Under the EDGA Delay Proposal, quotations would be treated as "manual" as opposed to "automated."[13] Thus, "the Exchange has determined to begin disseminating a

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[3] Filing, at 5.
[4] Filing, at 6. That said, using the data transmission periods offered by the Exchange, we still don't quite understand how the mechanism would achieve the explicitly stated result, as the four milliseconds would still not exceed the full round-trip transmission period.
[5] Filing, at 6.
[6] Filing, at 6.
[7] Filing, at 8.
[8] Filing, at 5.
[9] Filing, at 7.
[10] Filing, at 8.
[11] Filing, at 8.
[12] Filing, at 8.
[13] Filing, at 8. The SEC Staff, when evaluating IEX's time delay proposal, offered guidance that a delay of less than 1 millisecond was "de minimis," and so could still qualify as "immediate" under Rule 600(b)(3),

manual, un-protected, quotation in conjunction with the proposed implementation of its delay mechanism."[14] We assume that this would mean all quotations on EDGA would be treated as manual (including those not subject to the delay), but this is not entirely clear by the Filing.[15] Thus, despite the fact that quotes on the Exchange would not being subject to the Order Protection Rule,[16] they would be included on the SIP.

The EDGA Delay Proposal also seeks an exemption from Rule 610(d), which would otherwise "require that EDGA avoid locking or crossing any quotation in an NMS stock disseminated pursuant to an effective national market system ("NMS") plan instead of only protected quotations as required pursuant to Rule 610(d)(1)(i)."[17] Specifically, the Filing seeks to revise its Exchange Rule 11.10(f) to

> permit the Exchange to continue to lock or cross potentially stale manual quotations disseminated by the New York Stock Exchange LLC ("NYSE") pursuant to an effective NMS plan… [which it argues] would permit EDGA to continue to operate in the manner that it does today with respect to locked and crossed markets, notwithstanding the proposed dissemination of a manual, un-protected, quotation.[18]

Further, the EDGA Delay Filing seeks an exemption from Rule 611 to permit the Exchange to execute an automated quotation that would come in to cross against its disseminated manual quotation, even though it hasn't also crossed another market's protected quotation.[19]

As the EDGA Delay Proposal explains,

> Based on the Exchange's analysis, crossed market scenarios are infrequent in today's highly efficient market, and tend to be short lived, with 99% of crossed markets being resolved within 25 milliseconds or less. As a result, the Exchange is proposing to implement delayed cancellation behavior to allow an aggressively priced order to remain posted at its limit price for as long as it is executable pursuant to Rule 611(b)(8) – i.e., the "Flickering Quote

thus allowing sub-millisecond-delayed quotes to qualify as "automated." *Staff Guidance on Automated Quotations under Regulation NMS*, Sec. and Exch. Comm'n, June 17, 2016, *available at* https://www.sec.gov/divisions/marketreg/automated-quotations-under-regulation-nms.htm.

[14] Filing, at 13.

[15] See Filing, at 13. For the purposes of this letter, we assume that all quotes on EDGA would thus be treated as manual, and all of the quotes would thus be treated as "unprotected" for the purposes of Rule 611.

[16] Rule 611 of Reg. NMS.

[17] Filing, at 13.

[18] Filing, at 14.

[19] Filing, at 16.

> Exception." As proposed, a bid (offer) on the EDGA Book would be eligible to remain posted to the EDGA Book for one second after such bid (offer) is crossed by a Protected Offer (Protected Bid). Such bid (offer) would be executable during this one second period pursuant to Rule 611(b)(8) of Regulation NMS, notwithstanding the fact that it is higher (lower) than a Protected Offer (Protected Bid). In turn, the bid (offer) on the EDGA Book would be cancelled if it continues to be higher (lower) than a Protected Offer (Protected Bid) after this one second period.[20]

Put simply, in addition to the delay mechanism itself, the Exchange is proposing that it receive a very unique regulatory treatment, including exemptions from several different existing SEC rules and interpretations.

Purported Purpose of the Delay

According to the Filing, the EDGA Delay Proposal is intended to "reduc[e] the ability for firms to engage in latency arbitrage, in general, and cross-asset latency arbitrage, in particular."[21] Specifically, the EDGA Delay Proposal notes that "a single tick of an index futures contract thus often requires firms to adjust their quotes in a number of related equity securities at once."[22] Thus, once a tick happens in a CME-traded product, there is then a race to adjust quotes on impacted equities markets. However, because it takes time to transmit data from Illinois (where CME's data center is located) to New Jersey (where EDGA's data center is located), the "losers" of the race could find themselves having their resting orders executed against--even though they might, because of the changed index futures price, no longer want to receive an execution.

Thus, the EDGA Delay Proposal is expressly intended to permit the ultra-sophisticated traders who have resting orders on the Exchange to avoid (or increase) trade executions at what they now think are "stale" prices (based on price changes in financial products in different asset classes that are traded on a different exchange and regulated by different regulators).[23]

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[20] Filing, at 16-17 (citing a study of seven securities during a single trading day).
[21] Filing, at 3.
[22] Filing, at 3-4.
[23] Filing, at 7 (noting that it is "designed to protect orders that add liquidity to the EDGA Book by giving Users the opportunity to adjust their quotes [during the four millisecond delay] based on market signals before trading at a stale price."). However, despite the lengthy delay, it still does not appear to exceed the stated transmission time from Illinois to New Jersey. Thus, we are somewhat puzzled as to how this proposal could achieve its stated objective.

The EDGA Delay Proposal Fails to Comply with the Exchange Act and Commission Rules

The EDGA Delay Proposal provides insufficient information for the Commission to conclude that EDGA has established that its proposed changes are consistent with the Exchange Act.

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,[24] including, inter alia, that an exchange's rules:

- "perfect the mechanism of a free and open market and a national market system,"[25]
- "protect investors and the public interest,"[26]
- "not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers";[27] and
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[28]

The Commission's Rules of Practice clearly place the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder" on the Exchange proposing a rule change.[29] In addition

> [t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[30]

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[24] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017).
[25] 15 U.S.C.§ 78f(b)(5).
[26] 15 U.S.C.§ 78f(b)(5).
[27] 15 U.S.C.§ 78f(b)(5).
[28] 15 U.S.C.§ 78f(b)(8).
[29] Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).
[30] *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, *available at* https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf.

The EDGA Delay Proposal offers almost none of this information. For example, the Exchange broadly asserts "that reducing cross-market latency arbitrage would enable liquidity providers to increase market quality by maintaining tighter spreads, longer inside quote durations, and posting larger size."[31] But the Exchange offers no details on how each of the several proposed changes would help to achieve that objective. The Filing does not include whether the Exchange discussed any of its proposed changes with any market participants, and if so, with whom. Frankly, given the nature of the proposal and other considerations, we suspect strongly that it may be an effort to address business concerns of a single firm, or a small handful of firms. None of this is disclosed in the Filing.

Further, it is neither intuitive nor offered within the EDGA Delay Proposal how the EDGA Delay Proposal, which is expressly designed to permit market participants to cancel or modify their quotations -- rendering them inaccessible to market participants seeking to interact with them, is a permissible objective under the Exchange Act. Generally speaking, the entire premise seems contrary to the promotion of fair and orderly markets. The Exchange offers no justification for why investors seeking to access quotations on EDGA should be systematically disadvantaged over those who provide the quotations.

Apart from broad generalizations and conclusory statements, the Exchange has offered no data or analysis to support either its logic or its conclusion that the Filing complies with the Exchange Act.

The EDGA Delay Proposal Is Insufficiently Clear on How the Delay Would Operate

One of the most significant concerns we have is that we don't have sufficient clarity on how the delay itself would operate, particularly in circumstances with intervening orders or actions are taken. While we applaud the examples provided by the Exchange (which we found very helpful),[32] they simply do not cover all relevant possible situations for market participants and the Exchange. In particular, these highly stylized examples do not address orders of different types and sizes, nor do they reflect orders from additional market participants.

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[31] Filing, at 4. Notably, we would not be surprised if market makers were to post narrower spreads or post larger sized quotations on EDGA, precisely because the market maker would retain the option to walk away from a trade. We fail to see how this promotes either actual price transparency and trading. The quotations offered on EDGA would not be the prices and sizes at which market participants can actually trade by submitting a matching order. Rather, they would be the prices and sizes at which investors might be able to trade, if they submit a matching order ***AND*** the market maker who provided the initial quotation subsequently determines to honor its prior quotation.

[32] Filing, at 9-12.

For example, suppose a 100 share order is resting on the Exchange. Suppose further that a 200 share order is submitted that would partially execute against it. Is the full 200 share order delayed? Why or why not? Or is 100 shares of the order delayed, and 100 shares allowed to post? Would the additional 100 shares that isn't delayed be sent out to other market centers? Would the firm who submitted the resting order that triggered the delay be able to modify its order to increase its size in the interim, perhaps to 200 shares? What would be the impact of the change? Would the answers to these questions be dependent upon order types used or other factors? What are those factors and how are they determinative? Would a new order that is submitted while a delayed order is waiting be able to immediately execute against the now-delayed order once it waits out the four milliseconds, or would it also be subject to a delay? Again, why or why not?

The Exchange also makes several curious logical implementation decisions. For example, "If a User enters multiple cancel or cancel/replace messages for a liquidity taking order during the four millisecond delay period, the first such cancel or cancel/replace message entered would be queued and all subsequent messages would be ignored."[33] Why?

Similarly, the Exchange is proposing to implement delayed cancellation to allow an aggressively priced order to remain posted at its limit price for one full second. However, it is not abundantly clear in the proposal when an inbound order will be cancelled back. For example, to comply with the flickering quote rule, the proposal states that some quotes may not be cancelled for one second.[34] What happens to the inbound order in this scenario?

Further, as the Filing expressly recognizes, the EDGA Delay Proposal is intended to have implications for not just equities trading on EDGA, but also for other financial products in other asset classes traded on other venues. The Filing does not detail any of those implications for other equities trading venues, much less those for other asset classes.

Lastly, the Exchange offers no information on whether it discussed the EDGA Delay Proposal with market participants before the filing was made. Nor does it offer any data or analysis regarding how many members could be expected to increase quoting as a result of the change. Ultimately, we suspect that the entire Filing is expected by the Exchange to largely (if not nearly exclusively) benefit a single firm, or a very small

[33] Filing, at 8.
[34] Filing, at 17.

number of firms.[35] Again, why is this type of targeted advantage good for the markets? And why isn't all of this relevant information contained in the Filing?

Put simply, we have many basic questions regarding how the delay would operate, including how other orders could interact and how market participants could respond, but the answers to none of them appear to be clearly outlined in the Filing. Unfortunately, we would need a complete understanding of exactly how the delay would operate in a complex environment of different order types, submitted at different times, and across different exchanges before would could have a firm understanding of the risks to investors and market integrity posed by the EDGA Delay Proposal.

The EDGA Delay Proposal Violates Regulation NMS

The Quote Rule is a key investor protection component of Regulation NMS. Adopted over forty years ago, the Quote Rule ensures that quotations in the equities markets are reliable and reasonably accessible.[36] The Exchange argues that

> The LP2 delay mechanism would not result in violations of the firm quote provisions of the Quote Rule because no information is communicated about executable orders until those orders go through the LP2 delay mechanism. As such, those orders would not be "presented" to liquidity providers as contemplated by the Quote Rule until they have gone through the delay mechanism and are released for execution. Once the executable order has gone through the delay mechanism and is presented to resting orders on the EDGA Book, no liquidity provider would be given an opportunity to update its prices in response to that information.[37]

We disagree.

When the Commission was previously faced with a similarly troubling asymmetric time delay, the NYSE objected, eloquently explaining that

[35] *See Amendment No. 4 to Form S-1*, BATS Global Markets, Inc., Mar. 12, 2012, (indicating that for the years ended December 31, 2011, 2010 and 2009, as much as 51% of total liquidity payments were paid to one member), *available at* https://www.sec.gov/Archives/edgar/data/1519917/000119312512107970/d179347ds1a.htm.

[36] 17 CFR 242.602. See *Dissemination of Quotations for Reported Securities*, Sec. and Exch. Comm'n, Sec. Exch. Act Rel. No. 14415, 43 Fed. Reg. 4342 (Feb. 1, 1978) (requiring "that quotation information made available to vendors be "firm," subject to certain exceptions."), *available at* https://cdn.loc.gov/service/ll/fedreg/fr043/fr043022/fr043022.pdf; see also *Order Execution Obligations*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 37619A, 61 Fed. Reg. 48290 (Sept. 12, 1996).

[37] Filing, at 30.

> The Quote Rule requires a national securities exchange to establish procedures for collecting, processing, and making available to vendors the best bid, best offer, and aggregate quotation sizes for NMS securities that are communicated on that exchange by an exchange member to another member. In addition, the Quote Rule establishes requirements for broker-dealers. Specifically, when a broker-dealer is a member of an exchange and communicates bids or offers in NMS securities to other members of that exchange, that broker-dealer is obligated under the Quote Rule to communicate its best bids, best offers, and quotation sizes to the exchange and to be "firm" for those published quotes. To be "firm" for its published quotations under the Quote Rule means a broker-dealer has an obligation "to execute any order . . . at a price at least as favorable . . . as [its] published bid or published offer . . . in an amount up its published quotation size. The Quote Rule provides specific exceptions to a broker-dealer's obligation to be firm for its published quotes, including that "before the order sought to be executed is presented, . . . [the] broker or dealer has communicated to its exchange . . . a revised bid or offer."[38]

The EDGA Delay Proposal would explicitly permit some market participants to violate their obligations under the Quote Rule by permitting them to modify or cancel their quotations while incoming orders that would seek to access those quotations would be delayed. Put simply, the quotations in the exchange would not be "firm."

By implementing a four millisecond inbound message delay, the Exchange is seeking to provide benefits to one group of market participants at the expense of another group of market participants. The Exchange has provided no discussion, data or evidence that market quality will be improved by the proposal, but it is clear that a delay will impact investors seeking to trade on the exchange--as quotes they seek to access may not, in fact, be accessible.

In many ways the EDGA Delay Proposal harkens back to a bygone era when the markets were subject to the Intermarket Trading System, which allowed for a then 30-second cancellation to an inbound message. In fact, when implementing Regulation NMS,[39] the Commission was expressly targeted to stopping perceived abuses in that system. For example, in the adopting release, the Commission noted that:

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[38] Letter from Elizabeth King, NYSE, to Brent J. Fields, Sec. and Exch. Comm'n, Oct. 14, 2016, *available at* https://www.sec.gov/comments/sr-chx-2016-16/chx201616-10.pdf.

[39] *Regulation NMS*. Sec. and Exch. Comm'n, Exch. Act Rel. No. 51808, *available at* https://www.sec.gov/rules/final/34-51808.pdf.

> The Rule will be a significant improvement over the existing ITS trade-through rule, and will level the competitive playing field among markets by eliminating the potential advantage that the ITS rule afforded to manual markets.[40]

While not entirely clear in the Filing, it appears as though the Exchange would seek to publish an unprotected quotation that would not be differentiated in the SIP. This quotation would be included within the National Best Bid and Offer and would appear to any investor as a quote identical to that of protected exchange quotations. However, unlike any other protected quotation, this quotation would not be immediate actionable, as it would allow the quotation provider an opportunity to modify or cancel the quotation before an otherwise matching order would be matched to it.

Aside from essentially free-riding on the regulatory framework for a protected quotation system, the EDGA Delay Proposal would also introduce significant new complexities and risks for investors seeking to access it.

The Exchange has facially not established that it is consistent with the Exchange Act for some market participants to be able to back away from resting orders that they know are likely to be executed, rendering those quotes inaccessible. In fact, instead of improving the provision of liquidity, we suspect that it would lead directly to deterioration of accessibility of quotes and overall market quality.

This concern is not just theoretical. A recent study of the impact of a similarly discriminatory time delay implemented by TSX Alpha in Canada suggests that the ramifications may be significant.[41]

We find it worth noting that the Commission has expressly addressed some, but not all, of these concerns before. In particular, the SEC staff initially approved an asymmetric time delay proposal by Chicago Stock Exchange,[42] only to nearly immediately thereafter have that approval stayed by the Commission.[43] While the Commission staff's approval was nearly immediately overturned and rendered moot by the Commission itself, the staff's interpretation of Regulation NMS's requirements at that time appeared to be both

[40] *Regulation NMS*, at 317.

[41] Haoming Chen, Sean Foley, Michael Goldstein, and Thomas Ruf, *The Value of a Millisecond: Harnessing Information in Fast, Fragmented Markets*, Jan. 18, 2017, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860359.

[42] *Notice of Filing of Amendments No. 1 and No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, to Adopt the CHX Liquidity Enhancing Access Delay on a Pilot Basis*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 81913, (Oct. 19, 2017), *available at* https://www.sec.gov/rules/sro/chx/2017/34-81913.pdf.

[43] *In the Matter of the Chicago Stock Exchange, Inc.*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 82034, (Nov. 8, 2017), *available at* https://www.sec.gov/rules/sro/chx/2017/34-82034.pdf. The proposal was subsequently dropped as the exchange was sold to another exchange family.

inconsistent with past precedents, as well as the plain meaning of the language of the rules.

Nevertheless, one point of the discussion is worth exploring here. In reviewing the CHX proposal, the staff noted that the quoting market maker would not raise concerns regarding quote accessibility because a contra-side order was not yet presented.[44] Healthy Markets disagrees with this assertion. The fact that a quoting market maker may not be expressly informed of an incoming order is irrelevant. In today's interrelated markets, a four millisecond delay is plenty of time for a trading algorithm to quantify with near absolute certainty when an incoming order is likely. In fact, that is precisely the point of the EDGA Delay Proposal -- to give the "liquidity providers" time to make this determination and walk away from their quotations.

This discriminatory advantage affords the market maker a near 100% opportunity to only provide firm quotations in the market when it is advantageous and back away from quotations that would not be advantageous. This appears to be a clear violation of the Quote Rule and does not remove impediments to and perfect the mechanism of a free and open market and a national market system, but instead seems to erect impediments.[45]

The EDGA Delay Proposal Erodes Market Integrity and the NBBO

As we mentioned above, the EDGA Delay Proposal would appear to disseminate EDGA quotations to the SIP in the **exact** same fashion that they are disseminated prior to this proposal taking effect. To any public investor, there would appear to be no way to know or visualize that the EDGA quotation was a manual, unprotected quotation within the SIP. In addition to also being included within the National Best Bid and Offer, the quotations would be included within SEC Rule 605 statistics, and the quotations would have a best execution obligation even though that quotation may never have been accessible.

When the Commission adopted Regulation NMS it stated that it:

> Is not at this time excluding manual quotations from the NBBO or from the benchmark used for calculating execution quality statistics under Rule 605. The Commission continues to emphasize that adoption of

[44] Notice of Filing of Amendments No. 1 and No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, to Adopt the CHX Liquidity Enhancing Access Delay on a Pilot Basis, Sec. and Exch. Comm'n, Exch. Act Rel. No. 81913, at 52, Oct. 19, 2017, *available at* https://www.sec.gov/rules/sro/chx/2017/34-81913.pdf.

[45] 15 U.S.C.§ 78f(b)(5).

> Rule 611 in no way lessens a broker-dealer's duty of best execution.[46]

When the Commission adopted this language, the markets and market structure were very different. Many markets were manual in nature but none had automated asymmetric delays. Today, no market contained within the SIP NBBO is manual and subject to a delay longer than 1 millisecond, which is the Commission's guidelines for automated quotations.[47] By including the exchanges quotation within the NBBO, the markets would be taking several steps backwards, something that certainly was not envisioned when adopting Regulation NMS. Additionally, if approved "as-is" the EDGA Delay Proposal would place brokers and investors in a difficult position with respect to meeting their best execution obligations.

Essentially, by being included within the SIP and SEC Rule 605 metrics, the Exchange will be free-riding the SIP and execution quality metrics, as they will likely show that their execution quality as better than any other exchange (since only the best orders for the exchange will be executed). Further, those statistics do not currently show how many of the quotations were not valid and subject to backing away. There was a reason why the Commission decided to not reward manual quotations with SIP revenue in the adopting release of Regulation NMS.[48]

What's more, it seems likely that the incidence of locked and crossed markets will likely increase significantly. While the Exchange cites to a "study" of a single day's worth of trading in a handful of securities, the Exchange does not explain why that is even remotely relevant.[49] For example, the EDGA Delay Proposal does not explain whether, or to what extent, the special treatment sought by the Exchange could impact those findings. We are deeply concerned about the EDGA Delay Proposal's lack of discussion regarding trading during locked and crossed markets. There are significant concerns with trading during a locked/crossed market, and the risk of investors receiving less than best execution becomes significant. None of those are addressed.

The overlap of the variations is complex. By not being recognized as an automated market, not being subject to Rule 611, changing how other exchanges will interact with the now manual exchange pursuant to SEC Rule 610, but still being included within the NBBO, it seems highly likely that locked and crossed markets would become more prevalent. Of course, again, reducing locked and crossed markets was one of the key

[46] Regulation NMS, at 157.
[47] *Staff Guidance on Automated Quotations under Regulation NMS*, Sec. and Exch. Comm'n, (June 17, 2016), *available at* https://www.sec.gov/divisions/marketreg/automated-quotations-under-regulation-nms.htm.
[48] Regulation NMS, at 251-259 (reflecting the formula considerations).
[49] See Filing, at 17,n.24.

objectives in the adoption of Regulation NMS.[50] It would be ill-advised to allow our markets to regress back to problems that were solved long ago.

We therefore request that if the EDGA Delay Proposal is approved despite ours and others' objections, that the Commission remove the quotations provided by the Exchange from the SIP NBBO,. We further request that the Commission use this opportunity to modernize best execution guidance.[51]

The EDGA Delay Proposal Would Expose Investors to Additional Risks and Impede Efforts to Combat Market Manipulations and Abuses

By expressly enabling those who submit orders the ability to modify or cancel those orders before an execution, but after other potentially matching orders are presented, the Exchange opens the door for significant manipulative or abusive practices, including spoofing. Further, the activities could be difficult, if not impossible, to identify and stop, as the executions could occur on other trading venues, and perhaps even in other correlated financial products (e.g., equity options, futures, swaps, etc.).

The Exchange has offered no discussion about how it will identify and stop any such abuses. As a practical matter, without a comprehensive view of all trading centers in all assets directly and indirectly linked to securities traded on EDGA, we have difficulty understanding how the Exchange even could fulfill this function. We request that the EDGA Delay Proposal be modified to discuss potential market abuses, including abuses involving correlated financial product which may have executions on the Exchange or other market venues.

Additional Considerations

The EDGA Delay Proposal is expressly linked to the confines of existing technology.[52] We question the wisdom of linking any particular duration or major market structure rule to the confines of existing technology, which is prone to frequent changes. Rather, we argue it is the principles that should govern.

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[50] See Ivy Schmerkin, *Battle over Locked and Crossed Markets*, Information Week: Wall Street and Technology, (Apr. 15, 2003), *available at* http://www.wallstreetandtech.com/exchanges/nasdaqandrsquos-battle-over-locked-crossed-markets/d/d-id/1255842.html.

[51] See Rob Daly, *Regulators Eye Principals Based Best Ex*, Markets Media, (May 14, 2019), *available at* https://www.marketsmedia.com/regulators-eye-principles-based-best-ex/.

[52] Filing, at 6,n.10 (noting that "Quincy Data advertises a latency of 4.005 milliseconds for its high speed microwave connection, or about half the 7.75 milliseconds of latency experienced over a fiber connection provided by ICE Global Network. See https://www.quincy-data.com/productpage/#latencies; https://www.theice.com/publicdocs/ICE_Data_Services_Topology.pdf.").

Additionally, we question whether the EDGA Delay Proposal is consistent with Rule 610 of Regulation NMS, which generally prohibits a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the access of any person through members, subscribers, or customers of such trading center. The Commission addressed this exact issue when adopting Reg NMS. At the time, it stated:

> [b]y requiring order routers to wait for a response from a manual market, the ITS trade-through provisions can cause an order to miss both the best price of a manual quotation and slightly inferior prices at automated markets that would have been immediately accessible."[53]

That seems like it would be inconsistent with Reg NMS and investor protection.

There are also other "knock off" issues. For example, many trading venues may use the SIP NBBO for pegged orders. However, the quotations provided on EDGA may be inaccessible and yet artificially narrower than on other venues--thus impacting the mid-point pegging prices on other venues.

Similarly, how would the market center interact with ISOs that are effectively 4 milliseconds old. For example, suppose a customer seeks to sweep the market at a given price level, accessing liquidity across multiple venues. By the time the investor's order makes it through the delay, the order it would have executed against on EDGA is nearly certain to be gone.

The filing also raises significant challenges for brokers seeking to interact with EDGA, given their best execution obligations. In particular, common law, FINRA Rules, and FINRA Guidance[54] demand that brokers seek best execution. And that often means seeking to minimize information leakage.[55] Yet, the Exchange creates significant opportunities for that information leakage.

In fact, we believe that the EDGA Delay Proposal highlights the need to modernize the best execution framework for brokers. In particular, the treatment of "manual quotations" is now significantly outdated. Despite the fact that manual quotations could be effectively inaccessible for market participants, they could be included in the SIP, the

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[53] Regulation NMS.

[54] *Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets*, FINRA, Reg Notice 15-46 (Nov. 2015), *available at* https://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf ("Reg Notice 15-46").

[55] Reg. Notice 15-46, at 5 ("The firm should also examine whether any of these practices may result in information leakage, and the impact of any information leakage on execution quality. Firms should consider the risk of information leakage by routing orders to a particular venue in light of the fill rates achieved at that venue and carefully assess whether the risks outweigh the potential for an execution.").

NBBO, and the benchmark used for calculating execution quality statistics under Rule 605. That could give rise to very, very misleading statistics and inferior market quality.

As it is currently structured, the EDGA Delay Proposal would not explicitly compel brokers to seek to access its manual quotations, but it would effectively achieve that result. The concerns with brokers' best execution obligations when seeking (or not seeking) access manual quotations is not new.[56] We encourage the Commission to address this issue more directly, as it seeks to modernize best execution.

Conclusion

We urge the Commission to deny the EDGA Delay Proposal and reaffirm its commitment to the distribution of accurate and firm quotations. But perhaps the reason for denying this proposal is best said by Cboe itself when commenting on another proposal:

> These proposals are artificially determining winners and losers in the never ending battle of informational time and place advantages. It truly is a zero-sum game: those that gain a speed advantage to the detriment of others will also gain a profit advantage to the detriment of others.[57]

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact Chris Nagy at (402) 312-7918 or me at (202) 909-6138.

Sincerely,

Tyler Gellasch
Executive Director

[56] *See, e.g.*, Letter from Phylis M. Esposito, Ameritrade Inc., to Jonathan G. Katz, Sec. and Exch. Comm'n, Jan. 26, 2005, *available at* https://www.sec.gov/rules/proposed/s71004/pmesposito012605.pdf.
[57] Letter from Eric Swanson, BATS Global Markets Inc., to Brent J. Fields, Sec. and Exch. Comm'n, Oct. 25, 2016, *available at* https://www.sec.gov/comments/sr-chx-2016-16/chx201616-12.pdf.