

January 24, 2018

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

**Re: Release No. 34-82034;<sup>1</sup> 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 (File No. SR-CHX-2017-04)<sup>2</sup>**

Dear Mr. Fields:

The Chicago Stock Exchange, Inc. (“CHX” or “Exchange”) submits this letter with respect to the ongoing review (“Review”), pursuant to Rule 431(c) of the Rules of Practice,<sup>3</sup> by the U.S. Securities and Exchange Commission (“SEC” or “Commission”), of the Approval Order related to the Exchange’s Proposed Rule Change to Adopt the CHX Liquidity Enhancing Access Delay (“LEAD”).<sup>4</sup> With the Commission now at full complement, the Exchange submits this letter to request that the Commission consider the resolution of this matter as a top priority, for several reasons. First, the Review itself violates Section 19(b) of the Securities Exchange Act of 1934 (“Act”),<sup>5</sup> as amended by Sec. 916(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), as more than 240 days have elapsed since the date of publication

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<sup>1</sup> Securities Exchange Act Release No. 82034 (November 8, 2017), 82 FR 52762 (November 14, 2017) (“Review Order”).

<sup>2</sup> See Exchange Act Release No. 81913 (October 19, 2017), 82 FR 49433 (October 25, 2017) (“Approval Order” or “Amendments No. 1 and No. 2”); see also Securities Exchange Act Release No. 80041 (February 14, 2017), 82 FR 11252 (February 21, 2017) (SR-CHX-2017-04) (“Initial Filing”).

<sup>3</sup> 17 CFR 201.431(c).

<sup>4</sup> See Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from James G. Ongena, Executive Vice President and General Counsel, CHX (March 24, 2017) (“First CHX Letter”); see also Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from James G. Ongena, Executive Vice President and General Counsel, CHX (June 30, 2017) (“Second CHX Letter”); see also Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from Albert J. Kim, Vice President and Associate General Counsel, CHX (September 9, 2017) (“Third CHX Letter”); see also Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from Albert J. Kim, Vice President and Associate General Counsel, CHX (October 18, 2017) (“Fourth CHX Letter”); see also Letter to Eduardo A. Aleman, Assistant Secretary, Commission, from James G. Ongena, Executive Vice President and General Counsel, CHX (December 8, 2017) (“Fifth CHX Letter”). All comment letters on the proposal may be found at <https://www.sec.gov/comments/sr-chx-2017-04/chx201704.htm>.

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

of the proposed rule change.<sup>6</sup> Second, the Review violates the Commission's own Rules of Practice, specifically Rule 431 requires that such review shall not be ordered more than ten days after the action in question.<sup>7</sup> Third, the Review also violates Rule 103 of the Commission's Rules of Practice governing the construction of the Rules of Practice.<sup>8</sup> Fourth, the ongoing delay has undermined efficiency and competition within the national market system, which is inconsistent with the Commission's mandate pursuant to Section 3(f) of the Act, by significantly delaying the implementation of LEAD and denying the Exchange the competitive advantage from innovation that it would have enjoyed, which is critical to the Exchange's competitiveness within the national market system.<sup>9</sup> Accordingly, the Exchange respectfully requests that the Commission lift the ill-advised and improper stay and affirm the Approval Order, as amended by Amendments No. 1 and No. 2, without further delay.

### **1. The Review Violates Section 19(b) of the Act**

Section 19(b) of the Act requires in pertinent part that the Commission approve or disapprove a proposed rule change submitted by a national securities exchange not later than 240 days after the date of publication of the proposed rule change in the Federal Register.<sup>10</sup> Notably, Section 19(b) of the Act utilizes the terms "approve" and "disapprove" without qualification and makes no distinction between direct Commission action and Commission action by delegated authority. In addition, Section 19(b) of the Act provides absolutely no allowances for reviews of delegated authority beyond the 240<sup>th</sup> day. A failure to issue an effective approval or disapproval order within the time limits set forth under Section 19(b) would trigger Section 19(b)(2)(D)(ii) of the Act, which provides that if the Commission fails to approve or disapprove a proposed rule change within the 240-day period, the proposed rule change shall be deemed to have been approved by the Commission. Thus, the Exchange submits that the time limits set forth under Section 19(b) of the Act control and any review pursuant to Rule 431(c) of the Rules of Practice must be conducted and concluded within the time requirements of Section 19(b) of the Act. The review process in support of the Commission's decision to delegate authority cannot be used to abrogate the provisions of a statute that states, unequivocally that a rule will be considered approved if not disapproved within the 240-day period.

Nor, the Exchange submits, can the Commission properly evade the dictates of the statute through the artifice of saying that the rule has been approved but that approval is stayed indefinitely. Moreover, the Exchange submits that an approval or disapproval order that is not effective (e.g., an approval order that is stayed) does not constitute a valid Commission action under Section 19(b) of the Act. Any interpretation to the contrary would render these provisions

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<sup>6</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. 78o).

<sup>7</sup> 17 CFR 201.431.

<sup>8</sup> 17 CFR 201.103.

<sup>9</sup> 15 U.S.C. 78c(f).

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

of Section 19 meaningless and send the ominous signal to self-regulatory organizations (“SROs”) that the Commission can choose to “pocket veto” proposals it does not want to decide.

In this matter, the Commission, by the Commission staff, pursuant to delegated authority,<sup>11</sup> issued the Approval Order on October 19, 2017, which was issued 240 days after the Initial Filing was published in the Federal Register on February 21, 2017.<sup>12</sup> However, on November 8, 2017, the Commission issued a Review Order and stayed the Approval Order.<sup>13</sup> Under these circumstances, the Exchange submits that either:

(1) the stay of the Approval Order nullified the effectiveness of the Approval Order, as the Exchange cannot act upon the stayed Approval Order, and the 240-day statutory period expired on October 19, 2017, in which case the Commission did not approve or disapprove the rule within the statutory required time, and therefore the proposed rule change is deemed approved pursuant to Section 19(b)(2)(D)(ii) of the Act, or

(2) the stay of the Approval Order was invalid, as the Review Order was issued after, and any subsequent review was not concluded prior to, the expiration of the 240-day statutory period, and therefore the Approval Order is effective.

## **2. The Review Violates Rule 431 of the Commission’s Rules of Practice**

Rule 431(c) of the Commission’s Rules of Practice provides that the Commission “may, on its own initiative, order review of any action made pursuant to delegated authority at any time, provided, however, that where there are one or more parties to the matter, such review shall not be ordered more than ten days after the action.”<sup>14</sup> In turn, Rule 431(d) provides that such an order “shall set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority.”<sup>15</sup>

The Commission’s letter to the Exchange dated October 24, 2017 (“October 24<sup>th</sup> Letter”)<sup>16</sup> does not meet the requirements of Rules 431(d) as it fails to set forth the time within which any party or other person may file a statement in support of or in opposition to the action made by delegated authority. Rather, the October 24<sup>th</sup> Letter merely notifies the Exchange of actions taken by the Commission with respect to the Approval Order, as well as the automatic stay of the

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<sup>11</sup> See 17 CFR 200.30-3(a)(12).

<sup>12</sup> See Approval Order, *supra* note 2

<sup>13</sup> See Review Order, *supra* note 1 (setting December 8, 2017 as the date by which any party or other person may file any additional comment).

<sup>14</sup> 17 CFR 201.431(c) (emphasis added).

<sup>15</sup> 17 CFR 201.431(d).

<sup>16</sup> See Letter to Albert J. Kim, Vice President and Associate General Counsel, CHX, from Robert Errett, Deputy Secretary, CHX (October 24, 2017).

delegated action, pursuant to Rule 431(e).<sup>17</sup> As such, the October 24<sup>th</sup> Letter is not a valid order pursuant to Rule 431(d).

In this case, the Approval Order was issued, pursuant to delegated authority, on October 19, 2017; however, the Commission issued its Review Order on November 8, 2017, which is twenty days after its Approval Order.<sup>18</sup> Consequently, the Commission's stay of the Approval Order is inconsistent with the Rules of Practice as the Commission failed to issue its Review Order in a timely manner.

### **3. The Review Violates Rule 103 of the Commission's Rules of Practice**

Rule 103(a) of the Commission's Rules of Practice provides that the Rules of Practice "shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding."<sup>19</sup> It has been over 78 days since the Commission initiated its Review and stay of the Approval Order and 48 days since the close of the time period for the filing of additional statements on the Commission's Review.<sup>20</sup> The length of this delay cannot be construed as the "just and speedy" administration of the Commission's Rules of Practice. Consequently, the Exchange believes that the Commission's stay of the Approval Order is inconsistent with the Commission's Rules of Practice as the Commission has failed to resolve the Review in a timely manner.

Moreover, Rule 103(b) of the Rules of Practice provides that "[i]n any particular proceeding, to the extent that there is a conflict between these rules and a procedural requirement contained in any statute, or any rule or form adopted thereunder, the latter shall control."<sup>21</sup> Section 19(b) of the Exchange Act sets forth in specific detail the procedural requirements and timeline for the SRO rule filing process, providing no mechanism by which the Commission may further delay the approval or disapproval of a SRO's proposed rule change beyond 240 days, even if the SRO were to consent to such a delay. Any fair reading of Rule 103(b) of the Rules of Practice reaffirms that the Commission has recognized in its own rules that the procedure set forth in Rule 431 of the Rules of Practice must yield to the statutory procedural requirements of Section 19(b). Under that provision, the Approval Order became effective on October 19, 2017. To interpret these provisions otherwise subverts the clear intent of Congress in enacting Section 19(b).

### **4. The Review Violates Section 3(f) of the Act**

Section 3(f) of the Act provides in pertinent part that whenever pursuant to the Act the

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<sup>17</sup> 17 CFR 201.431(e) (emphasis added).

<sup>18</sup> See Review Order, supra note 1 (issued November 8, 2017); see also Approval Order, supra note 2 (issued October 19, 2017).

<sup>19</sup> 17 CFR 201.103(a).

<sup>20</sup> See Review Order, supra note 1 (setting December 8, 2017 as the date by which any party or other person may file any additional comment).

<sup>21</sup> 17 CFR 201.103(b).

Commission is engaged in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest,<sup>22</sup> the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.<sup>23</sup>

The Exchange submits that, even if it somewhat passed muster under Section 19(b), the Review is inconsistent with Section 3(f) of the Act. As the Exchange has previously noted,<sup>24</sup> the Exchange has complied with every request made by the Commission and Commission staff, including proposing LEAD as a two-year pilot program, during which time the Exchange will be subject to comprehensive data collection and analysis obligations in order to determine the actual market impact of LEAD. It has also repeatedly provided fulsome responses to every legitimate comment letter related to the LEAD proposal.<sup>25</sup> In fact, pursuant to its comprehensive review of LEAD, in its Approval Order, the Commission staff outlined precisely why LEAD is consistent with the requirements of the Act.<sup>26</sup> Yet, the Commission's formal review of LEAD has lasted 78 days and purportedly continues on, committing even more taxpayer dollars to a Review that violates the Act. That, the Exchange asserts, is not consistent with the promotion of efficiency.

Moreover, the Review has undermined the Exchange's competitiveness within the national market system by significantly delaying the implementation of LEAD and denying the Exchange the competitive advantage from innovation that it would have enjoyed, which is critical to the Exchange's competitiveness within the national market system. The Commission's practice of requiring increasingly detailed rule change proposals, which provide a detailed "road map" to competitors, while also failing to approve or disapprove such proposals in a timely manner, is the antithesis of its obligations to promote efficiency and encourage competition within the national market.

Accordingly, any further delay, especially one in violation of Section 19(b) of the Act, is inconsistent with Section 3(f) of the Act.

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In light of the foregoing, as well as the reasons described under the Exchange's previous Rule 19b-4 filings and comment letters, the Exchange respectfully requests that the Commission conclude its Review and affirm the Approval Order, as amended by Amendments No. 1 and No. 2, without further delay.

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<sup>22</sup> Section 6(b)(5) of the Act provides in pertinent part that an exchange shall not be registered as national securities exchange unless the Commission determines that the rules of the exchange are designed to protect investors and the public interest. 15 U.S.C. 78f(b)(5).

<sup>23</sup> 15 U.S.C. 78c(f).

<sup>24</sup> See e.g., Fifth CHX Letter, supra note 4.

<sup>25</sup> See supra note 4.

<sup>26</sup> See Approval Order, supra note 2

Mr. Brent J. Fields  
January 24, 2018  
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Sincerely,



James G. Ongena

cc: Chair Jay Clayton  
Commissioner Robert J. Jackson Jr.  
Commissioner Hester M. Peirce  
Commissioner Michael S. Piwowar  
Commissioner Kara M. Stein

Robert Stebbins, General Counsel, Office of the General Counsel, Commission