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VIA E-MAIL

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C., 20549-1090

Re: Securities Exchange Act Release No. 79998 (February 9, 2017), 82 FR 10828 (February 15, 2017) (SR-NYSEMKT-2017-05) (the "Proposal")

Dear Mr. Fields:

NYSE MKT LLC ("NYSE MKT" or the "Exchange") appreciates the opportunity to respond to the comment letters that have been submitted in connection with the Proposal.[1] All three letters object to the Proposal, but two come from sources that previously supported intentional delay mechanisms, including Investors Exchange LLC ("IEX"), which was recently approved as a new exchange with an intentional delay mechanism.[2] The FIA Letter objects on the basis of larger market structure issues. The IEX and HMA Letters question why the Exchange is proposing an intentional delay mechanism.

However, the applicable question is not why an exchange has proposed a rule change, but whether the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act"). As described in greater detail in the Proposal, except for the proposed treatment of routable orders, the Exchange has proposed to add a delay to the processing of messages under the same circumstances as IEX, including the proposed length of the delay.[3] As such, the Commission has already considered the issues associated with a delay mechanism in connection with the IEX exchange application. As set forth in the IEX Approval Order and

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1 See Letter from John Ramsay, Chief Market Policy Officer, IEX, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated March 10, 2017 ("IEX Letter"); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Mr. Brent. J. Fields, Secretary, Securities and Exchange Commission, dated March 10, 2017 ("HMA Letter"); and Letter from Joanne Mallers, Secretary, FIA Principal Traders Group, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, dated March 24, 2017 ("FIA Letter").

2 See Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41141 (June 23, 2016) ("IEX Approval Order").

3 The Proposal is based in part on IEX Rule 11.510(b) because the delay would be applied to (i) all inbound communications from an ETP Holder; (ii) all outbound communications to an ETP Holder; and (iii) all outbound communications to the Exchange's proprietary data feeds. The Proposal is also based in part on IEX Rule 11.510(c) because the delay would not be applied to (i) inbound communications from data feeds; (ii) order processing and order execution on the Exchange's Book; and (iii) outbound communications to the single plan processors.

related interpretation of Rule 611 under Regulation NMS ("Rule 611"),[4] the Commission found a *de minimis* symmetrical delay on exchange response times consistent with the Act and Rule 611.

The Exchange believes that the Commission must approve the Proposal by applying the same legal standard to its review of the Proposal as it applied to approving IEX's delay mechanism. To disapprove the Proposal would impose a burden on competition not consistent with the Act, and would preclude any other exchange from offering a competition to IEX's offering. As the FIA Letter concedes, "given the IEX precedent, it may be difficult for the Commission not to approve NYSE MKT's [Proposal] without revisiting the interpretations it made in connection with the IEX speed-bump."

The Exchange's proposed delay mechanism is identical to IEX's approved delay mechanism, except with respect to the proposed treatment of routable orders, which differs as a consequence of the respective systems' technical architectures. Unlike IEX, all orders sent to the Exchange are processed by the matching engine before routing to away venues. Consequently, to establish a delay mechanism consistent with the model approved by the Commission, the Exchange has proposed to apply an intentional delay to all arriving orders (routable or non-routable) upon receipt and to also apply its delay before routing an order from the Exchange. IEX, on the other hand, applies a delay to all orders upon receipt and an additional intentional delay to routable orders that is not applicable to non-routable orders before they arrive on IEX's book, but does not add an additional delay before routing such an order. As the Exchange describes in the Proposal, the Exchange believes that its proposed added delay when routing an order would ensure that the Exchange would not have a speed advantage over ETP Holders who choose to route the unexecuted quantity of an order to an Away Market, rather than the Exchange routing the unexecuted quantity on the ETP Holders' behalf. In addition, the Exchange believes that its proposed added delay when routing an order would not disadvantage routable orders versus non-routable orders with respect to how long it would take for such orders to access the Exchange's matching engines. As such, the Exchange believes that how it proposes to add latency to routable orders is consistent with the Act because it would not be unfairly discriminatory and it would not impose a burden on competition.

The IEX Letter and HMA Letter raise questions about the Exchange's proposed use of a software solution to implement its proposed Delay Mechanism. The Exchange does not believe the means by which a delay is added to the processing of orders is relevant to whether the Proposal is consistent with the Act. For example, in the IEX Approval Order, the Commission evaluated the purpose, operation, and effect of the delay for consistency with the Act, and not the manner by which the delay would be implemented.[5] Similarly, the Rule 611 Interpretation is silent with respect to whether a delay mechanism must be hardware-based. Like IEX, under Section 19(g)(1) of the Act, the Exchange is required, among other things, to comply with its

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[4] 17 CFR 242.611 and Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7-03-16) ("Rule 611 Interpretation").

[5] See IEX Approval Order, supra note 2 at 41154 – 60 (reviewing the operation and effect of the IEX delay on inbound and outbound order processing and outbound routing).

own rules, which would include the time period of the proposed Delay Mechanism.[6] In addition, the commenters express concerns that a software-based implementation will cause nondeterministic delay durations. This argument fails to acknowledge that all computer systems, including those relying on hardware-based delays, experience periods of relatively high and low message traffic that can cause variability in processing speeds. For example, networking equipment preceding a fiber coil may be more or less saturated at a given moment, resulting in slower or faster overall processing of messages traversing a hardware-based delay. In any event, the Exchange proposes to adopt rules identical to those approved for IEX that require the Exchange to monitor the latency of the delay mechanism, make reasonable adjustments to achieve consistency with the 350 microsecond target, but do not guarantee that the delay will always be precisely 350 microseconds.

IEX also raised questions about designated market makers ("DMM") on both the Exchange and the New York Stock Exchange LLC ("NYSE"). The Exchange has proposed that it would only implement its proposed Delay Mechanism once the Exchange has transitioned to its new trading platform, which would be an automated price-time priority allocation model with no trading floor.[7] In a separate filing, the Exchange has proposed rules that would govern market makers on its automated trading platform.[8] The Exchange has proposed that electronic DMMs ("e-DMM") on this automated trading platform would be assigned Exchange-listed securities and would have heightened quoting obligations in those securities, but would otherwise be subject to the same rules, including execution logic, as other market participants on the Exchange. E-DMMs would therefore be subject to the proposed Delay Mechanism, just as market makers on IEX are subject to IEX's intentional delay.

IEX raises concerns about potential conflicts if an NYSE DMM is also Exchange e-DMM.[9] The Exchange notes that this comment does not relate to the Exchange's Proposal, but instead to a different filing by the NYSE. The Exchange does not believe there would be a conflict because, as proposed in the NYSE Filing, while on the NYSE trading floor, NYSE DMMs would be permitted to trade their assigned NYSE-listed securities only on or through the systems and facilities of the NYSE at the DMM's assigned stock trading post. In other words, while on the NYSE trading floor, NYSE DMMs would not be able to trade their assigned NYSE-listed securities on the Exchange. Because an NYSE DMM would not be able to trade its assigned securities on the Exchange while on the NYSE trading floor, the Exchange does not believe that there would be any potential for conflict.

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6 15 U.S.C. 78s(g)(1). Proposed Rule 1.1E(y), which sets forth the length of the delay and Exchange's proposed obligation to monitor the delay period, is based on Supplementary Material .20 to IEX Rule 11.510. Accordingly, the Commission has already found the proposed rule consistent with the Act.

7 See Proposal, at 10829.

8 See Securities Exchange Act Release No. 79982 (February 7, 2017), 82 FR 10508 (February 13, 2017) (SR-NYSEMKT-2017-04).

9 See Securities Exchange Act Release No. 80019 (February 10, 2017), 82 FR 10942 (February 16, 2017) (SR-NYSE-2017-03) ("NYSE Filing").

As the Commission noted in the Rule 611 Interpretation, "the Commission would be concerned about access delays that were imposed on only certain market participants or intentional access delays that were relieved based upon payment of certain fees."[10] To this end, the NYSE has objected to a proposal filed by the Chicago Stock Exchange, Inc. to offer an intentional asymmetrical delay that would be not be applicable to a sub-set of participants.[11] However, the Exchange is not seeking to introduce a novel intentional delay mechanism. Rather, in order to provide broker-dealers and issuers with a competitive model and consistent with the Commission's approval of IEX, the Exchange has proposed an intentional delay mechanism that would operate in substantially the same manner as the approved IEX intentional delay mechanism. Because the Proposal is based on functionality that the Commission has already found consistent with the Act, the Exchange believes that its Proposal is also consistent with the Act and thus should be approved.

Sincerely,

Elizabeth K. King

cc: Hon. Michael Piwowar, Acting Chairman
Hon. Kara Stein, Commissioner
Heather Seidel, Acting Director of Trading and Markets
David Shillman, Associate Director of Trading and Markets

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10 Rule 611 Interpretation, supra note 4 at 40792 n. 75.

11 See Letter from Elizabeth K. King, General Counsel & Secretary, New York Stock Exchange, to Brent J. fields, Secretary, Securities and Exchange Commission, dated March 20, 2017, available here: https://www.sec.gov/comments/sr-chx-2017-04/chx201704-1653688-148641.pdf.