

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77213; File No. SR-BYX-2016-03)

February 23, 2016

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Adopt an Early Trading Session and Three New Time-in Force Instructions

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 16, 2016, BATS Y-Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III 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 Substance of the Proposed Rule Change

The Exchange filed a proposal to amend its rules to: (i) create a new trading session to be known as the Early Trading Session, which will run from 7:00 a.m. to 8:00 a.m. Eastern Time; and (ii) adopt three new Time-in-Force (“TIF”) instructions.³

The text of the proposed rule change is available at the Exchange’s website at www.batstrading.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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange notes that its affiliate, BATS Exchange, Inc., (“BZX”) filed a proposed rule change for immediate effectiveness with the Commission on January 7, 2016 to amend its rules to also: (i) create a new trading session to be known as the Early Trading Session, which will run from 7:00 a.m. to 8:00 a.m. Eastern Time; and (ii) adopt identical TIF instructions. See file no. SR-BATS-2016-01 [sic].

Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its rules to: (i) create a new trading session to be known as the Early Trading Session, which will run from 7:00 a.m. to 8:00 a.m. Eastern Time; and (ii) adopt three new TIF instructions.

Early Trading Session

The Exchange trading day is currently divided into three sessions of which a User⁴ may select their order(s) be eligible for execution: (i) the Pre-Opening Session which starts at 8:00 a.m. and ends at 9:30 a.m. Eastern Time; (ii) Regular Trading Hours which runs from 9:30 a.m. to 4:00 p.m. Eastern Time; and (iii) the After Hours Session, which runs from 4:00 p.m. to 5:00 p.m. Eastern Time. The Exchange proposes to amend its rules to create a new trading session to be known as the Early Trading Session, which will run from 7:00 a.m. to 8:00 a.m. Eastern Time.⁵ Exchange Rule 1.5 would be amended to add a new definition for the term "Early

⁴ "User" is defined as "any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3." See Exchange Rule 1.5(cc).

⁵ The Exchange notes that NYSE Arca, Inc. ("NYSE Arca") operates an Opening Session that starts at 4:00 a.m. Eastern Time (1:00 a.m. Pacific Time) and ends at 9:30 a.m. Eastern Time (6:30 a.m. Pacific Time). See NYSE Arca Rule 7.34(a)(1). The Nasdaq

Trading Session” under new paragraph (ee). “Early Trading Session” would be defined as “the time between 7:00 a.m. and 8:00 a.m. Eastern Time.”⁶

The Exchange also proposes to amend Rule 11.1(a) to account for the Early Trading Session starting at 7:00 a.m. Eastern Time. Other than the proposal to adopt an Early Trading Session starting at 7:00 a.m. Eastern Time, the Exchange does not propose to amend the substance or operation of Rule 11.1(a).

Users currently designate when their orders are eligible for execution by selecting the desired TIF instruction under Exchange Rule 11.9(b). Orders entered between 6:00 a.m. and 8:00 a.m. Eastern Time are not eligible for execution until the start of the Pre-Opening Session, or Regular Trading Hours,⁷ depending on the TIF selected by the User. Users may enter orders in advance of the trading session they intend the order to be eligible for. For example, Users may enter orders starting at 6:00 a.m. Eastern Time with a TIF of Regular Hours Only, which designates that the order only be eligible for execution during Regular Trading Hours.⁸ As stated above, Users may enter orders as early as 6:00 a.m. Eastern Time, but those orders would not be eligible for execution until the start of the Pre-Opening Session at 8:00 a.m. Some Users have

Stock Market LLC (“Nasdaq”) operates a pre-market session that also opens at 4:00 a.m. and ends at 9:30 a.m. Eastern Time. See Nasdaq Rule 4701(g). See also Securities Exchange Act Release No. 69151 (March 15, 2013), 78 FR 17464 (March 21, 2013) (SR-Nasdaq-2013-033) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend the Pre-Market Hours of the Exchange to 4:00 a.m. EST).

⁶ An Exchange having bifurcated after hours trading sessions is not novel. For example, the Chicago Stock Exchange, Inc. (“CHX”) maintains two after hours trading sessions. See CHX Article 20, Rule 1(b). See also Securities Exchange Act Release No. 60605 (September 1, 2009), 74 FR 46277 (September 8, 2009) (SR-CHX-2009-13) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding Additional Trading Sessions).

⁷ “Regular Trading Hours” is defined as “the time between 9:30 a.m. and 4:00 p.m. Eastern Time.” See Exchange Rule 1.5(w).

⁸ See Exchange Rule 11.9(b)(7).

requested the ability for their orders to be eligible for execution starting at 7:00 a.m. Eastern Time. Therefore, the Exchange is proposing to adopt the Early Trading Session as discussed herein.

Order entry and execution during the Early Trading Session would operate in the same manner as it does during the Pre-Opening Session. As amended, Exchange Rule 11.1(a) would state that orders entered between 6:00 a.m. and 7:00 a.m. Eastern Time, rather than 6:00 a.m. and 8:00 a.m. Eastern Time, would not be eligible for execution until the start of the Early Trading Session, Pre-Opening Session, or Regular Trading Hours, depending on the TIF selected by the User. Exchange Rule 11.1(a) will also be amended to state that the Exchange will not accept the following orders prior to 7:00 a.m. Eastern Time, rather than 8:00 a.m.: BATS Post Only Orders,⁹ Partial Post Only at Limit Orders,¹⁰ Intermarket Sweep Orders (“ISOs”),¹¹ BATS Market Orders¹² with a TIF other than Regular Hours Only, Minimum Quantity Orders¹³ that also include a TIF of Regular Hours Only, and all orders with a TIF instruction of Immediate-or-Cancel (“IOC”)¹⁴ or Fill-or-Kill (“FOK”).¹⁵ At the commencement of the Early Trading Session, orders entered between 6:00 a.m. and 7:00 a.m. Eastern Time, rather than 6:00 a.m. and 8:00 a.m. Eastern Time, will be handled in time sequence, beginning with the order with the oldest

⁹ See Exchange Rule 11.9(c)(6).

¹⁰ See Exchange Rule 11.9(c)(7).

¹¹ See Exchange Rule 11.9(d).

¹² See Exchange Rule 11.9(a)(2).

¹³ See Exchange Rule 11.9(c)(5).

¹⁴ See Exchange Rule 11.9(b)(1).

¹⁵ See Exchange Rule 11.9(b)(6).

time stamp, and will be placed on the BATS Book,¹⁶ routed, cancelled, or executed in accordance with the terms of the order. As amended, Rule 11.1(a) would state that orders may be executed on the Exchange or routed away from the Exchange during Regular Trading Hours and during the Early Trading, Pre-Opening and After Hours Trading Sessions.

Operations. From the Members' operational perspective, the Exchange's goal is to permit trading for those that choose to trade, without imposing burdens on those that do not. Thus, for example, the Exchange will not require any Member to participate in the Early Trading Session, including not requiring registered market makers to make two-sided markets between 7:00 a.m. and 8:00 a.m., just as it does not require such participation between 8:00 a.m. and 9:30 a.m.¹⁷ The Exchange will minimize Members' preparation efforts to the greatest extent possible by allowing Members to trade beginning at 7:00 a.m. with the same equipment, connectivity, order types, and data feeds they currently use from 8:00 a.m. onwards.

Opening Process. The Exchange will offer no opening process at 7:00 a.m., just as it offers no opening process at 8:00 a.m. today. Instead, at 7:00 a.m., the System will "wake up" by loading in price/time priority all open trading interest entered after 6:00 a.m.¹⁸ Also at 7:00 a.m., the Exchange will open the execution system and accept new eligible orders, just as it currently does at 8:00 a.m. Members will be permitted to enter orders beginning at 6:00 a.m. Market Makers will be permitted but not required to open their quotes beginning at 7:00 a.m. in the same manner they open their quotes today beginning at 8:00 a.m.

¹⁶ See Exchange Rule 1.5(e).

¹⁷ See Exchange Rule 11.8(d)(2) (stating that for NMS stocks (as defined in Rule 600 under Regulation NMS) a Market Maker shall adhere to the pricing obligations established by this Rule during Regular Trading Hours).

¹⁸ See Exchange Rule 11.1(a).

Order Types. Every order type that is currently available beginning at 8:00 a.m. will be available beginning at 7:00 a.m.¹⁹ All other order types, and all order type behaviors, will otherwise remain unchanged. The Exchange will not extend the expiration times of any orders. For example, an order that is currently available from 8:00 a.m. to 4:00 p.m. will be modified to be available from 7:00 a.m. to 4:00 p.m. An order that is available from 8:00 a.m. to 9:30 a.m. will be modified to be available from 7:00 a.m. to 9:30 a.m. Users must continue to enter a TIF instruction along with their order to indicate when the order is eligible for execution.²⁰

Routing Services. The Exchange will route orders to away markets between 7:00 a.m. and 8:00 a.m., just as it does today between 8:00 a.m. and 9:30 a.m.²¹ All routing strategies set forth in Exchange Rule 11.13 will remain otherwise unchanged, performing the same instructions they perform between 7:00 a.m. and 8:00 a.m. today.²²

Order Processing. Order processing will operate beginning at 7:00 a.m. just as it does today beginning at 8:00 a.m. There will be no changes to the ranking, display, and execution processes or rules.

Data Feeds. The Exchange will report the best bid and offer on the Exchange to the appropriate network processor, as it currently does beginning 8:00 a.m.²³ The Exchange's proprietary data feeds will be disseminated beginning at 7:00 a.m. using the same formats and delivery mechanisms with which the Exchange currently disseminates them beginning at 8:00 a.m.

¹⁹

Id.

²⁰

Id.

²¹

Id.

²²

See Exchange Rule 11.13(b) (Routing to Away Trading Centers).

²³

See Exchange Rule 11.14 (Trade Execution and Reporting).

Trade Reporting. Trades executed between 7:00 a.m. and 8:00 a.m. will be reported to the appropriate network processor with the “.T” modifier, just as they are reported today between at 8:00 a.m. and 9:30 a.m.²⁴

Market Surveillance. The Exchange’s commitment to high-quality regulation at all times will extend to 7:00 a.m. The Exchange will offer all surveillance coverage currently performed by the Exchange’s surveillance systems, which will launch by the time trading starts at 7:00 a.m.

Clearly Erroneous Trade Processing. The Exchange will process trade breaks beginning at 7:00 a.m. pursuant to Exchange Rule 11.17, just as it does today beginning at 8:00 a.m.

Related changes to Rules 3.21, 11.9, 11.13, 11.17 and 14.1. The Exchange proposes to also make the following changes to Rules 3.21, 11.9, 11.13, 11.17 and 14.1 to reflect the adoption of the Early Trading Session:

- Rule 3.21, Customer Disclosures. In sum, Exchange Rule 3.21 prohibits Members from accepting an order from a customer for execution in the Pre-Opening or After Hours Trading Session without disclosing to their customer that extended hours trading involves material trading risks, including the possibility of lower liquidity, high volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, wider spreads and any other relevant risk. The Exchange proposes to amend Rule 3.21 to include the Early Trading Session as part of the Member’s required disclosures to their customers.
- Rule 11.9, Orders and Modifiers. The Exchange proposes to amend the description of BATS Market Orders under Rule 11.9(a)(2), Market Maker Peg Orders under Rule 11.9(c)(16), and Supplemental Peg Orders under Rule

²⁴

Id.

11.9(c)(19) to account for the Early Trading Session. BATS Market Orders are currently not eligible for execution during the Pre-Opening Session or After Hours Trading Session. Rule 11.9(a)(2) would be amended to state that BATS Market Orders would also not be eligible for execution during the Early Trading Session. Market Maker Peg Orders may currently be submitted to the Exchange starting at the beginning of the Pre-Opening Session, but the order will not be executable or automatically priced until the beginning of Regular Trading Hours. Rule 11.9(c)(16) would be amended to state that Market Maker Peg Orders may be submitted to the Exchange starting at the beginning of the Early Trading Session. Market Maker Peg Orders would continue to not be executable or automatically priced until the beginning of Regular Trading Hours. Rule 11.9(c)(19) states that Supplemental Peg Orders are eligible for execution during the Pre-Opening Session, Regular Trading Hours, and the After Hours Trading Session. Rule 11.9(c)(19) would be amended to state that Supplemental Peg Orders are also eligible for execution during the Early Trading Session. As stated above, every order type that is currently available beginning at 8:00 a.m. will be available beginning at 7:00 a.m. for inclusion in the Early Trading Session.²⁵ All other order types, and all order type behaviors, will otherwise remain unchanged. The above rules describing BATS Market Orders, Market Maker Peg Orders, and Supplemental Peg Orders specifically reference the trading sessions during which the order type is eligible for execution. Therefore, the Exchange proposes to amend the description of each order type to account for the Early Trading Session.

²⁵ See proposed amendments to Exchange Rule 11.1(a).

- Rule 11.13, Order Execution and Routing. Exchange Rule 11.13(a)(2)(B) discusses compliance with Regulation NMS and Trade Through Protections and states that the price of any execution occurring during the Pre-Opening Session or the After Hours Trading Session must be equal to or better than the highest Protected Bid or lowest Protected Offer, unless the order is marked ISO or a Protected Bid is crossing a Protected Offer. The Exchange proposes to amend Rule 11.13(a)(2)(B) to expand the rule’s requirements to the Early Trading Session.
- Rule 11.17, Clearly Erroneous Executions. Exchange Rule 11.17 outlines under which conditions the Exchange may determine that an execution is clearly erroneous. The Exchange proposes to amend Rule 11.17 to include executions that occur during the Early Trading Session.²⁶ Exchange Rule 11.17(c)(1) sets forth the numerical guidelines the Exchange is to follow when determining whether an execution was clearly erroneous during Regular Trading Hours or the Pre-Opening or After Hours Trading Session. Exchange Rule 11.17(c)(3) sets forth additional factors the Exchange may consider in determining whether a transaction is clearly erroneous. These factors include Pre-Opening and After Hours Trading Session executions. The Exchange proposes to amend Rule 11.17(c)(1) and (3) to include executions occurring during the Early Trading Session.

²⁶ The Exchange notes that it also proposes to delete the “s” from the word “tapes” in paragraph (c)(3) of Rule 11.17.

- Rule 14.1, Unlisted Trading Privileges. The Exchange proposes to amend Rules 14.1(c)(2), and Interpretation and Policies .01(a) and (b) to account for the proposed Early Trading Session. Specifically, the Exchange proposes to amend paragraph (c)(2) to state that an information circular distributed by the Exchange prior to the commencement of trading of a UTP Derivative Security²⁷ will include the risk of trading during the Early Trading Session, in addition to the Pre-Opening Session and After Hours Trading Session. In addition, the Exchange proposes to amend Interpretation and Policies .01(a) to add Early Trading Session to the paragraph's title and to state that if a UTP Derivative Security begins trading on the Exchange in the Early Trading Session or Pre-Opening Session and subsequently a temporary interruption occurs in the calculation or wide dissemination of the Intraday Indicative Value ("IIV") or the value of the underlying index, as applicable, to such UTP Derivative Security, by a major market data vendor, the Exchange may continue to trade the UTP Derivative Security for the remainder of the Early Trading Session and Pre-Opening Session. Lastly, the Exchange proposes to amend Interpretation and Policies .01(b) to add Early Trading Session to the paragraph's title and to amend subparagraph (ii) of that section to state that if the IIV or the value of the underlying index continues not to be calculated or widely available as of the commencement of the Early Trading Session or Pre-Opening Session on the next business day, the Exchange shall not commence trading of the UTP Derivative Security in the Early Trading Session or Pre-Opening Session that day.

²⁷ See Exchange Rule 14.1(c).

TIF Instructions

The Exchange proposes to adopt three new TIF instructions under Rule 11.9(b). Under Rule 11.1(a), a User may designate when their order is eligible for execution by selecting the desired TIF instruction under Exchange Rule 11.9(b). Currently, orders entered between 6:00 a.m. and 8:00 a.m. Eastern Time are not eligible for execution until the start of the Pre-Opening Session, or Regular Trading Hours, depending on the TIF selected by the User. Users may enter orders in advance of the trading session they intend the order to be eligible for. For example, Users may enter orders starting at 6:00 a.m. Eastern Time with a TIF of Regular Hours Only, which designates that the order only be eligible for execution during Regular Trading Hours.²⁸ As stated above, Users may enter orders as early as 6:00 a.m. Eastern Time, but those orders would not be eligible for execution until the start of the Pre-Opening Session at 8:00 a.m.

As discussed above, the Exchange proposed the Early Trading Session in response to User requests for their orders to be eligible for execution starting at 7:00 a.m. Eastern Time. Some Users, however, do not wish for their orders to be executed during the Early Trading Session and have requested their orders continue to not be eligible for execution until the start of the Pre-Opening Session at 8:00 a.m. Therefore, the Exchange proposes to adopt the following three new TIF instructions under Rule 11.9(b):

- Pre-Opening Session Plus (“PRE”). A limit order that is designated for execution during the Pre-Opening Session and Regular Trading Hours. Like the current Good-‘til Cancel (“GTC”) TIF instruction,²⁹ any portion not executed expires at the end of Regular Trading Hours.

²⁸ See Exchange Rule 11.9(b)(7).

²⁹ See Exchange Rule 11.9(b)(3).

- Pre-Opening Session ‘til Extended Day (“PTX”). A limit order that is designated for execution during the Pre-Opening Session, Regular Trading Hours, and the After Hours Session. Like the current Good-‘til Extended Day (“GTX”) TIF instruction,³⁰ any portion not executed expires at the end of the After Hours Session.
- Pre-Opening Session ‘til Day (“PTD”). A limit order that is designated for execution during the Pre-Opening Session, Regular Trading Hours, and the After Hours Session. Like the current Good-‘til Day (“GTD”) TIF instruction,³¹ any portion not executed will be cancelled at the expiration time assigned to the order, which can be no later than the close of the After Hours Trading Session.

Under each proposed TIF instruction, Users may designate that their orders only be eligible for execution starting with the Pre-Opening Session. This is similar to the existing TIF of Regular Hours Only, which designates that the order only be eligible for execution during Regular Trading Hours, which starts at 9:30 a.m. Eastern Time. In such case, a User may enter orders starting at 6:00 a.m. Eastern Time, but such order would not be eligible for execution until 9:30 a.m. Eastern Time. Likewise, under each of the proposed TIF instructions, a User may continue to enter orders as early as 6:00 a.m., but such orders would not be eligible for execution until 8:00 a.m. Eastern Time, the start of the Pre-Opening Session.³² At the commencement of the Pre-Opening Session, orders entered between 6:00 a.m. and 8:00 a.m. Eastern Time with one of the proposed TIF instructions will be handled in time sequence, beginning with the order with

³⁰ See Exchange Rule 11.9(b)(5).

³¹ See Exchange Rule 11.9(b)(4).

³² Orders utilizing one of the proposed TIF instructions would not be eligible for execution during the proposed Early Trading Session.

the oldest time stamp, and will be placed on the BATS Book, routed, cancelled, or executed in accordance with the terms of the order.³³

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,³⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁵ in particular, in that it is 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. The Exchange also believes that the proposed rule change is non-discriminatory as it would apply to all Members uniformly. The proposed rule change in whole is designed to attract more order flow to the Exchange between 7:00 a.m. and 9:30 a.m. Eastern Time. Increased liquidity during this time will lead to improved price discovery and increased execution opportunities on the Exchange, therefore, promoting just and equitable principles of trade, and removing impediments to and perfecting the mechanism of a free and open market and a national market system.

Early Trading Session

The Exchange believes its proposal to adopt the Early Trading Session promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, prevents fraudulent and manipulative acts and practices, and, in general, protects investors and the public interest. The Exchange believes that

³³ See Exchange Rule 11.1(a).

³⁴ 15 U.S.C. 78f.

³⁵ 15 U.S.C. 78f(b)(5).

the Early Trading Session will benefit investors, the national market system, Members, and the Exchange market by increasing competition for order flow and executions, and thereby spur product enhancements and lower prices. The Early Trading Session will benefit Members and the Exchange market by increasing trading opportunities between 7:00 a.m. and 8:00 a.m. without increasing ancillary trading costs (telecommunications, data, connectivity, etc.) and, thereby, decreasing average trading costs per share. The Exchange notes that trading during the proposed Early Trading Session has been available on NYSE Arca and Nasdaq.³⁶ The Exchange believes that the availability of trading between 7:00 a.m. and 8:00 a.m. has been beneficial to market participants including investors and issuers on other markets. Introduction of the Early Trading Session on the Exchange will further expand these benefits.

Additionally, the Exchange Act's goal of creating an efficient market system includes multiple policies such as price discovery, order interaction, and competition among markets. The Exchange believes that offering a competing trading session will promote all of these policies and will enhance quote competition, improve liquidity in the market, support the quality of price discovery, promote market transparency, and increase competition for trade executions while reducing spreads and transaction costs. Additionally, increasing liquidity during the Early Trading Session will raise investors' confidence in the fairness of the markets and their transactions, particularly due to the lower volume of trading occurring prior to opening.

Although the Exchange will be operating with bifurcated pre-opening trading sessions, the Exchange notes that having bifurcated after hours trading sessions is not novel. For example, the CHX maintains two after hours trading sessions,³⁷ the Late Trading Session, which runs from

³⁶ See supra note 5.

³⁷ See supra note 6.

4:00 p.m. to 4:15 p.m. Eastern Time, and the Late Crossing Session, which runs from 4:15 p.m. to 5:00 Eastern Time. As such, the Exchange does not believe that the proposed rule change will disproportionately increase the complexity of the market.

The expansion of trading hours through the creation of the Early Trading Session promotes just and equitable principles of trade by providing market participants with additional options in seeking execution on the Exchange. Order entry and execution during the Early Trading Session would operate in the same manner as it does today during the Pre-Opening Session. In addition, the Exchange will report the best bid and offer on the Exchange to the appropriate network processor, and the Exchange's proprietary data feeds will be disseminated, beginning at 7:00 a.m. The proposal will, therefore, facilitate a well-regulated, orderly, and efficient market during a period of time that is currently underserved.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices because all surveillance coverage currently performed by the Exchange's surveillance systems will launch by the time trading starts at 7:00 a.m. Eastern Time. Further, the Exchange believes that the proposed rule change will protect investors and the public interest because the Exchange is updating its customer disclosure requirements to prohibit Members from accepting an order from a customer for execution in the Early Trading Session without disclosing to their customer that extended hours trading involves material trading risks, including the possibility of lower liquidity, high volatility, changing prices, unlinked markets, an exaggerated effect from news announcements, wider spreads and any other relevant risk.

TIF Instructions

The Exchange believes its proposed TIF instructions promote just and equitable principles of trade, and remove impediments to and perfect the mechanism of a free and open

market and a national market system. The Exchange believes that the proposed TIF instructions will benefit investors by providing them with greater control over their orders. The proposed TIF instructions simply provide investors with additional optionality for when their orders may be eligible for execution.

The ability to select the trading sessions or time upon which an order is to be eligible for execution is not novel and is currently available on the Exchange and other market centers. For example, on the Exchange, a User may enter an order starting at 6:00 a.m. Eastern Time and select that such order not be eligible for execution until 9:30 a.m., the start of Regular Trading Hours using TIF instructions of Regular Hours Only.³⁸ In addition, like each of the proposed TIF instructions, Nasdaq utilizes a TIF, referred to as ESCN, under which an order using its SCAN routing strategy entered prior to 8:00 a.m. Eastern Time is not eligible for execution until 8:00 a.m. Eastern Time.³⁹

The Exchange proposed the Early Trading Session discussed above in response to User requests for their orders to be eligible for execution starting at 7:00 a.m. Eastern Time. However, some Users have requested their orders continue to not be eligible for execution until the start of the Pre-Opening Session at 8:00 a.m. Therefore, the Exchange proposed the three new TIF instructions in order for Users to designate their orders as eligible for execution as of the start of the Pre-Opening Session.

Members will maintain the ability to cancel or modify the terms of their order at any time, including during the time from when the order is routed to the Exchange until the start of the Pre-Opening Session. As a result, a Member who utilizes the proposed TIF instructions, but

³⁸ See Exchange Rule 11.9(b)(7). See also Nasdaq Rule 4703(a) (outlining TIF instructions that do not activate orders until 9:30 a.m. Eastern Time).

³⁹ See Nasdaq Rule 4703(a). See also Nasdaq Rule 4703(a)(7).

later determines that market conditions favor execution during Early Trading Session, can cancel the order residing at the Exchange and enter a separate order to execute during the Early Trading Session. While a User must make every effort to execute a marketable customer order it receives fully and promptly,⁴⁰ doing so might not result in the best execution possible for the customer. Such Users may wish to delay the execution of their orders until the start of the Pre-Opening Session for various reasons, including the characteristics of the market for the security as well as the amount of liquidity available in the market as part of their best execution obligations.⁴¹

Specifically, FINRA Rule 5310(a)(1) provides that a Member must use reasonable diligence to ascertain the best market for a security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. And importantly, FINRA Rule 5310(a)(1)(A) states that one of the factors that will be considered in determining whether a member has used “reasonable diligence” is “the character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communication).⁴² As such, a Member conducting “reasonable diligence” may determine that due to the character of the Early Trading Session, along with considering other relevant factors, the Member wants to utilize the proposed TIF instructions.

⁴⁰ See Supplemental Material .01 to Financial Industry Regulatory Authority, Inc. (“FINRA”) Rule 5310.

⁴¹ A Member’s best execution obligation may also include cancelling an order when market conditions deteriorate and could result in an inferior execution or informing customers where the execution of their order may be delayed intentionally as the Member utilizes reasonable diligence to ascertain the best market for the security. See FINRA Rule 5130. See also FINRA Regulatory Notice 15-46, Best Execution. Guidance on Best Execution Obligations in Equity, Options, and Fixed Income Markets, (November 2015).

⁴² Tellingly, these characteristics are reflected in the disclosure requirements mandated by Exchange Rule 3.21 before a Member may accept an order from a customer for execution in the Pre-Opening, After Hours, and proposed Early Trading Sessions.

Members will be accustomed to this additional analysis in determining whether to participate in the Early Trading Session, Pre-Opening Session, or Regular Trading Hours. The regulatory guidance with respect to best execution anticipates the continued evolution of execution venues:

[B]est execution is a facts and circumstances determination. A broker-dealer must consider several factors affecting the quality of execution, including, for example, the opportunity for price improvement, the likelihood of execution . . . , the speed of execution and the trading characteristics of the security, together with other non-price factors such as reliability and service.⁴³

To the extent there may be best execution obligations at issue, they are no different than the best execution obligations faced by brokers in the current market structure,⁴⁴ including the use of the currently available Regular Trading Hours TIF instruction or SCAN/ESCN routing strategy available on Nasdaq discussed above.⁴⁵ However, similar to why a Member may utilize the Regular Trading Hours TIF instruction, a User may wish to forgo a possible execution during the Early Trading Session and/or Pre-Opening Session if they believe doing so is consistent with their best execution obligations as they anticipate that the market for the security may improve upon the start of the Pre-Opening Session and/or Regular Trading Hours.⁴⁶ Applicable best

⁴³ See Securities Exchange Act Release No. 43950 (November 17, 2000), 65 FR 75414 (December 1, 2000) (“Disclosure of Order Execution and Routing Practices release”).

⁴⁴ The Commission has also indicated a User’s best execution obligation may not be satisfied simply by obtaining the best bid or offer (“BBO”). See Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (“Order Executions Obligations release”). While a User may seek the most favorable terms reasonably available under the circumstances of the transaction, such terms may not necessarily in every case be the best price available. *Id.* See also FINRA Regulatory Notice 15-46, Best Execution. Guidance on Best Execution Obligations in Equity, Options, and Fixed Income Markets, (November 2015).

⁴⁵ See supra note 39.

⁴⁶ Exchange Rule 3.21 requires Member make certain disclosures to their customers prior to accepting an order for execution outside of Regular Trading Hours. These disclosures

execution guidance contains no formulaic mandate as to whether or how brokers should direct orders. The optionality created by the proposed rule change simply represents one tool available to Members in order to meet their best execution obligations.

The Exchange notes that it would subject orders that are eligible for execution as of the start of the Pre-Opening Session to all of the Exchange's standard regulatory checks, as it currently does with all orders upon entry. These checks include compliance with Regulation NMS,⁴⁷ Regulation SHO,⁴⁸ as well as relevant Exchange rules.⁴⁹

Lastly, the Exchange reminds Members of their regulatory obligations when submitting an order one of the proposed TIF instructions. The Market Access Rule under Rule 15c3-5 of the Act requires broker-dealers to, among other things, implement regulatory risk management controls and procedures that are reasonably designed to prevent the entry of orders that fail to comply with regulatory requirements that apply on a pre-order entry basis.⁵⁰ These pre-trade controls must, for example, be reasonably designed to assure compliance with Exchange trading rules and Commission rules under Regulation SHO⁵¹ and Regulation NMS.⁵² In accordance with the Market Access Rule, a Member's procedures must be reasonably designed to ensure

include, among other things, the risk of lower liquidity, higher volatility, wider spreads, and changing prices in extended hours trading as compared to regular market hours. See Exchange Rule 3.21(a) – (g).

⁴⁷ 17 CFR 242.610 - 611.

⁴⁸ 17 CFR 242.200-204.

⁴⁹ See, e.g., Exchange Rule 11.13(a).

⁵⁰ See Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File no. S7-03-10).

⁵¹ See e.g., Question 2.6 of the Division of Trading and Markets: Response to Frequently Asked Questions Concerning Regulations SHO, available at <https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm>.

⁵² 17 CFR 240.610 - 611.

compliance with their applicable regulatory requirements, not just at the time the order is routed to the Exchange, but also at the time the order becomes eligible for execution.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that its proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will benefit investors, the national market system, Members, and the Exchange market by increasing competition for order flow and executions during the pre-market sessions, thereby spurring product enhancements and lowering prices. The Exchange believes the proposed Early Trading Session would enhance competition by enabling the Exchange to directly compete with NYSE Arca and Nasdaq for order flow and executions starting at 7:00 a.m., rather than 8:00 a.m. Eastern Time. In addition, the proposed TIF instructions will enhance competition by enabling the Exchange to offer functionality similar to Nasdaq.⁵³ The fact that the extending of the proposed Early Trading Session and TIF instructions are themselves a response to the competition provided by other markets is evidence of its pro-competitive nature.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

⁵³ See supra note 39.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BYX-2016-03 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BYX-2016-03. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BYX-2016-03 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Robert W. Errett
Deputy Secretary

⁵⁴ 17 CFR 200.30-3(a)(12).