For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[62]

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Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–80700; File No. SR–NYSEMKT–2017–05]

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change Amending Rules 7.29E and 1.1E To Provide for a Delay Mechanism

May 16, 2017.

I. Introduction

On January 27, 2017, NYSE MKT LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 7.29E and 1.1E to provide for an intentional access delay to certain inbound and outbound order messages on the Exchange. The proposed rule change was published for comment in the **Federal Register** on February 15, 2017.[3] On March 17, 2017, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[5] The Commission has received six comment letters on the proposal from five commenters.[6] On March 31, 2017, the Exchange submitted a comment response letter.[7] On April 28, 2017, the Exchange submitted a second comment response letter.[8] On May 11, 2017, the Exchange submitted a third comment response letter.[9] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Rules 7.29E and 1.1E to provide for an intentional delay to specified message and order processing (the ''Delay Mechanism''). The Exchange has separately proposed rules to transition its cash equities trading to the Pillar trading platform and to transition its cash equities market from a Floor-based market with a parity allocation model to a fully automated price-time-priority allocation model that trades all NMS Stocks.[10]

The Exchange now proposes to include an intentional access delay on Pillar that would add 350 microseconds of latency to inbound and outbound order messages, as described in greater detail below.[11] The Exchange states that its proposed Delay Mechanism is based in part on the operation of the intentional 350-microsecond delay mechanism of Investors Exchange LLC (''IEX'')[12] and that the proposed rule change is ''designed to create a competitive trading model to IEX.''[13]

Unlike IEX, the Exchange proposes to use a software solution to create the delay. The delay added by the Exchange would be in addition to any natural latency inherent in accessing the Exchange and Away Markets.[14] In addition, the Exchange would further provide that it would periodically monitor the latency and adjust the latency as necessary to achieve consistency with the 350 microsecond target.[15] If the Exchange determines to increase or decrease the delay period, it would be required to submit a rule filing pursuant to Section 19 of the Act.[16]

The Exchange proposes to apply the Delay Mechanism to the following:

- *All inbound communications from an ETP Holder.*[17] The Exchange's proposal to apply the Delay Mechanism to all inbound communications from an ETP Holder would cover all incoming orders, as well as any requests to cancel or modify a resting order.
- *All outbound communications to an ETP Holder.*[18] The Exchange's proposal to apply the Delay Mechanism to all outbound communications to an ETP Holder would cover Exchange messages to an ETP Holder that an order has been accepted, rejected, cancelled, modified, or executed. Together with the application of the proposed Delay Mechanism to all inbound communications to the Exchange, there would be 700 microseconds of round-trip latency for an ETP Holder to receive a report of an execution or partial execution on the Exchange.
- *All outbound communications the Exchange routes to an Away Market,*[19] *and all inbound communications from an Away Market about a routed order.*[20] If the Exchange determines to route an order, either because it would trade through a protected quotation or has an instruction to be routed to a primary

[62] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 79998 (Feb. 9, 2017), 82 FR 10828 (Feb. 15, 2017) (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 80268 (Mar. 17, 2017), 82 FR 14932 (Mar. 23, 2017). The Commission designated May 16, 2017 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] *See* Letters to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (Mar. 10, 2017) (''IEX Letter I''); Tyler Gellasch, Executive Director, Healthy Markets Association (Mar. 10, 2017) (''HMA Letter''); Joanna Mallers, Secretary, FIA Principal Traders Group (Mar. 24, 2017) (''FIA PTG Letter''); John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (Apr. 21, 2017) (''IEX Letter II''); Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc. (Apr. 24, 2017) (''Bats Letter''); and Stephen John Berger, Managing Director, Government & Regulatory Policy, Citadel Securities (Apr. 28, 2017) (''Citadel Letter'').

[7] *See* Letter to Brent J. Fields, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange (Mar. 31, 2017) (''NYSE MKT Response Letter I'').

[8] *See* Letter to Brent J. Fields, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange (Apr. 28, 2017) (''NYSE MKT Response Letter II'').

[9] *See* Letter to Brent J. Fields, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange (May 11, 2017) (''NYSE MKT Response Letter III'').

[10] *See* Securities Exchange Act Release Nos. 79242 (Nov. 4, 2016), 81 FR 79081 (Nov. 10, 2016) (SR–NYSEMKT–2016–97); 79400 (November 25, 2016), 81 FR 86750 (Dec. 1, 2016) (SR–NYSEMKT–2016–103); 79993 (Feb. 9, 2017); 82 FR 10814 (Feb. 15, 2017) (SR–NYSEMKT–2017–01); and 79982 (Feb. 7, 2017); 82 FR 10508 (Feb. 13, 2017) (SR–NYSEMKT–2017–04). According to the Exchange, if the Commission approves these proposed rule changes, it will transition to Pillar on a date announced by Trader Update.

[11] The Exchange notes that, when it implements the Delay Mechanism, it will no longer offer Add Liquidity Only (''ALO'') Order or Day Intermarket Sweep Order (''ISO'') functionality and all Pegged Orders will not be displayed. The Exchange represents that, before implementing the Delay Mechanism, it will file a separate proposed rule change to eliminate ALO and Day ISO Orders and related functionality and to provide that Primary Pegged Orders will not be displayed. *See* Notice, *supra* note 3, 82 FR at 10829 n.6.

[12] IEX uses a hardware solution to add the equivalent of 350 microseconds of latency between the network access point of the ''POP'' and IEX's matching engine at its primary data center through geographic distance and coiled optical fiber. *See* IEX Rule 11.510.

[13] *See* Notice, *supra* note 3, 82 FR at 10831.

[14] The term ''Away Market'' is any exchange, alternate trading system (''ATS'') or other broker-dealer (1) with which the Exchange maintains an electronic linkage and (2) that provides instantaneous responses to orders routed from the Exchange and that the Exchange will designate from time to time those ATS's or other broker-dealers that qualify as Away Markets. *See* Rule 1.1E(ff).

[15] *See* Proposed Rule 1.1E(y).

[16] *See id.*

[17] *See* Proposed Rule 7.29E(b)(1)(A).

[18] *See* Proposed Rule 7.29E(b)(1)(B).

[19] *See* Proposed Rule 7.29E(b)(1)(C).

[20] *See* Proposed Rule 7.29E(b)(1)(D).

listing market, the Exchange would apply the Delay Mechanism before routing such order. This proposed rule text would therefore provide that an order that the Exchange routes to an Away Market would have 700 microseconds of added delay before it is routed: First, a 350 microsecond delay before the order is received by the Exchange's matching engines; and second, an additional 350 microsecond delay when the order is routed.[21] Any inbound communications to the Exchange from the Away Market about such routed order, whether a rejection or execution report, would also be subject to the Delay Mechanism. In addition, any such report forwarded to the ETP Holder that entered the order would then be subject to an additional Delay Mechanism. Accordingly, the Exchange would add a total of 1,400 microseconds of round-trip delay to an order that the Exchange routes to an Away Market.

- *All outbound communications (e.g., bids, offers, and trades) to the Exchange's proprietary data feeds.*[22] The Exchange proposes to apply add 350 microseconds of delay to all outbound messages to its proprietary data feeds.

Finally, the Exchange proposes also to apply the Delay Mechanism when the Exchange is operating out of its secondary data center.

The Exchange proposes *not* to apply the Delay Mechanism to the following:

- *All inbound communications from data feeds.*[23] The Delay Mechanism would not apply to communications to the Exchange from data feeds received directly from Away Markets and data feeds disseminated by a plan processor.
- *Order processing and order execution on the Exchange's Book.*[24] All actions taken within the Exchange's Book, including calculating the BBO, NBBO, or PBBO,[25] assigning working prices and working times to orders,[26] and ranking and executing orders, would not be subject to the Delay Mechanism. For example, the Exchange would not apply the Delay Mechanism to update the working price of Pegged Orders, which would not be displayed on the Exchange, based on an updated PBBO.
- *All outbound communications (e.g., bids, offers, and trades) to the plan processors under Rules 601 and 602 of Regulation NMS.*[27] The Exchange proposes not to apply the Delay Mechanism to outbound communications with the SIP to disseminate quotation and last sale information.

III. Summary of Comments and NYSE MKT's Responses

As noted above, the Commission has received six letters from five commenters on the proposal, as well as three response letters from the Exchange.[28] Three commenters express opposition to the proposal in its current form.[29] One commenter generally opposes the proposal, but acknowledged that it would be difficult for the Commission to disapprove the proposal in light of the Commission's interpretation relating to exchange access delays.[30] Another commenter expresses concerns with exchange access delays more generally, but also notes that it does not see any legal grounds for disapproval of the Exchange's proposal in light of the Commission's interpretation and approval of IEX's access delay.[31] As discussed in more detail below, commenters generally: (i) Request additional information regarding the proposal (including the Exchange's rationale for proposing a delay, the objective of the delay, and how the delay will protect investors); (ii) raise questions regarding the differences between the Exchange's proposal and the IEX access delay; and (iii) urge the Commission to complete a holistic review of equity market structure or the impact of access delays in particular and to provide more comprehensive guidance with respect to access delays, rather than considering new delays on an ad hoc basis through the SRO rule filing process.

First, the three commenters that oppose the proposal in its current form request additional information from the Exchange to better understand its proposal and the Exchange's underlying rationale.[32] These commenters note the opposition of the New York Stock Exchange (''NYSE''), an affiliate of the Exchange, to IEX's application for registration as a national securities exchange and, in particular, to IEX's proposal to utilize an intentional delay on its market.[33] These commenters request that the Exchange provide more detail regarding the reasoning behind its decision to adopt an intentional delay, including the objectives of the delay and how it will accomplish those objectives, how it is intended to benefit investors and promote fair and orderly markets, and whether the Exchange's views about the impact of such a delay differ from those raised in NYSE's comments on IEX's application.[34] One commenter argues that the Exchange should not be permitted to rely simply on its similarity to the IEX access delay, and must instead provide a more thorough explanation as to why it proposes to implement an access delay.[35] Two commenters request that the Exchange provide an explanation as to how it determined to set the latency of the Delay Mechanism at 350 microseconds.[36]

Second, commenters raise questions related to the specifics of the Exchange's proposal, in particular how it differs from IEX's access delay. Two commenters ask about the impact of the delay being implemented through a software process rather than a hardware mechanism, and they ask whether this could lead to any variability in the delay and how the Exchange would monitor any such variation from the 350 microsecond target.[37] One commenter asks the Exchange to clarify how the additional delay it proposes for routable orders would impact the ability to access quotations on other exchanges that may be modified before the routed order subject to the delay is received by the away exchange.[38] This commenter also asks whether the intentional delay on the Exchange would unfairly harm

[21] After the Exchange applies the Delay Mechanism to a routable order, the routed order would be subject to any natural latency inherent in accessing such Away Market.

[22] *See* Proposed Rule 7.29E(b)(1)(E).

[23] *See* Proposed Rule 7.29E(b)(2)(A).

[24] *See* Proposed Rule 7.29E(b)(2)(B).

[25] The term ''BBO'' is the best bid or offer that is a protected quotation on the Exchange. *See* Rule 1.1E(h). The terms ''NBBO'' and ''PBBO'' are the national best bid or offer and the protected best bid and offer, respectively. *See* Rule 1.1E(dd).

[26] The Exchange proposed to define the term ''working price'' as the price at which an order is eligible to trade at any given time, which may be different from the limit price or display price of the order, and to define the term ''working time'' as the effective time sequence assigned to an order for purposes of determining its priority ranking. *See* Securities Exchange Act Release No. 79993 (Feb. 9, 2017), 82 FR 10814 (Feb. 15, 2017) (SR–NYSEMKT–2017–01).

[27] *See* Proposed Rule 7.29E(b)(2)(C).

[28] *See supra* notes 6–9.

[29] *See* IEX Letter I; IEX Letter II; HMA Letter; Citadel Letter.

[30] *See* FIA PTG Letter at 2. *See also* Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7–03–16) (''Interpretation''); *infra* note 82.

[31] *See* Bats Letter at 1.

[32] *See* IEX Letter I at 2–3; HMA Letter at 4; Citadel Letter at 2–3.

[33] *See* IEX Letter I at 2; HMA Letter at 4; Citadel Letter at 1.

[34] *See* IEX Letter I at 2; HMA Letter at 4; Citadel Letter at 2–3.

[35] *See* IEX Letter II at 2–3. This commenter explains that, in connection with its exchange application, it provided the Commission with a detailed explanation of the IEX POP, including its intent in implementing the IEX POP and how its features were determined relevant to its unique circumstances. *See id.* at 3.

[36] *See* IEX Letter I at 2; HMA Letter at 4.

[37] *See* IEX Letter I at 3; HMA Letter at 5.

[38] *See* IEX Letter I at 3.

investors on another of the Exchange's affiliated markets.[39] This commenter further asks the Exchange to clarify if all communications with electronic designated market makers (''DMMs'') would be subject to the Delay Mechanism and what impact this may have on the DMMs.[40] This commenter expresses concern that an NYSE DMM that is also an Exchange DMM may be subject to informational advantages or conflicts if trading on both exchanges, only one of which would be subject to an access delay.[41]

Finally, two commenters assert that, rather than considering new artificial delays on an ad hoc basis through the SRO rule-filing process, the Commission should complete a holistic review of equity market structure and provide more comprehensive guidance with respect to access delays.[42] Another commenter similarly suggests that the Commission complete the comprehensive review of the market impact of exchange access delays contemplated as part of its interpretation of Rule 611 under Regulation NMS before approving any new exchange proposals seeking to implement such delays.[43] With respect to the Exchange's specific proposal, two commenters express concern that intentional delays in protected quotations increase market complexity; increase pricing uncertainty;[44] and, according to one commenter, may amplify the risk of market disruptions during periods of high volatility.[45] Finally, one commenter argues that the Delay Mechanism would encourage the use of non-displayed orders, which the commenter states would decrease market transparency and potentially harm price discovery.[46]

In response to comments, the Exchange states that it is proposing the Delay Mechanism ''in order to provide broker-dealers and issuers with a competitive model'' to the IEX access delay.[47] The Exchange argues that its proposal is consistent with the Act in that it is designed to protect investors and the public interest in a manner that is not unfairly discriminatory and does not impose an unnecessary or inappropriate burden on competition.[48] In particular, the Exchange states that the Delay Mechanism would allow non-displayed orders to dynamically update in accordance with their order instructions.[49]

In light of this purpose, the Exchange believes that the proposed length of 350 microseconds for its Delay Mechanism would provide Exchange systems with the appropriate amount of time to update prices based on market data it receives from other markets.[50] The Exchange further states that the 350 microsecond delay is not ''too short so as to frustrate the purpose of the Delay Mechanism'' nor ''overly long so as to be unfairly discriminatory to orders subject to the Delay Mechanism.''[51] In addition, the proposed delay would be applied equally to all Exchange members and could not be bypassed by payment of a fee or otherwise. Specifically, the delay on outbound market data would be applied uniformly to all Exchange data recipients except for outbound communications with the SIP to disseminate quotation and last sale information, and the delay on inbound order messages would be applied uniformly to all users.[52]

The Exchange further notes that its Delay Mechanism operates in a manner that is identical to the IEX access delay, except for its treatment of routable orders, which the Exchange believes is consistent with the model approved by the Commission for IEX.[53] The Exchange does not believe this difference would cause its proposal to be unfairly discriminatory or to impose an unfair burden on competition, and states that this difference is simply a result of its system architecture.[54] The Exchange further states that its proposed Delay Mechanism does not raise any issues that have not already been considered in connection with IEX's exchange application.[55] The Exchange also notes that the Commission's interpretation of Rule 611 under Regulation NMS found a *de minimis* delay on exchange response times to be consistent with Rule 611.[56]

The Exchange does not believe that its proposal to implement the Delay Mechanism through a software mechanism should be relevant to evaluating the proposal, noting that the Commission has not examined existing exchange access delays with respect to the manner in which the delay is implemented.[57] The Exchange further states that both hardware and software mechanisms may be subject to variability and the Exchange would be required, in accordance with its proposed rules, to monitor the latency of the Delay Mechanism and make any reasonable adjustments to ensure consistency with the 350 microsecond target.[58]

With respect to Exchange DMMs, the Exchange notes that it would only have electronic DMMs on its new trading platform and that these participants would be subject to its access delay just as any other market participant on the Exchange.[59] The Exchange further states that it does not believe that any conflicts would arise if an NYSE DMM were also an Exchange electronic DMM, because the NYSE DMM would not be able to trade its assigned securities on the Exchange while on the NYSE trading floor.[60]

IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[61] and the rules and regulations thereunder applicable to a national securities exchange.[62] In particular, the Commission finds that the proposed rule change is consistent

[39] *See id.* at 2.

[40] *See id.* at 3.

[41] *See id.*

[42] *See* FIA PTG Letter at 2; Bats Letter at 1–2. These commenters acknowledge, however, that despite their concerns with exchange access delays, the precedent set by IEX's exchange approval, including the Commission's related interpretation, may make it difficult for the Commission to disapprove the Exchange's proposal. *See* FIA PTG Letter at 2; Bats Letter at 1. One of these commenters suggests that the Commission limit the approval of any exchange access delays to proposals that closely track IEX's delay mechanism, such as the current proposal. *See* FIA PTG Letter at 2.

[43] *See* Citadel Letter at 2. *See also* Interpretation, *supra* note 30, 81 FR at 40793.

[44] *See* FIA PTG Letter at 2; Citadel Letter at 3.

[45] *See* FIA PTG Letter at 2.

[46] *See* Citadel Letter at 3–4.

[47] *See* NYSE MKT Response Letter I at 4.

[48] *See* NYSE MKT Response Letter II at 2.

[49] *See id.*

[50] *See* NYSE Response Letter III at 1. Specifically, the Exchange notes that it processes market data updates and re-prices non-displayed orders in less than 100 microseconds, and that the theoretical minimum transmission time for information generated in other exchanges' primary systems located in Carteret, New Jersey to reach the Exchange's primary systems (located in Mahwah, New Jersey) is approximately 185 microseconds. *See id.* at n.1. Accounting for the Exchange's processing time and the time it takes the Exchange to receive market data updates from nearby exchanges, the Exchange believes that its proposed 350 microsecond Delay Mechanism is appropriately designed to achieve the stated purpose of allowing the Exchange to dynamically update the prices of undisplayed resting pegged orders. *See id.* at 1–2.

[51] *See id.* at 1–2.

[52] *See* NYSE MKT Response Letter II at 2.

[53] *See* NYSE MKT Response Letter I at 2.

[54] *See id.*

[55] *See* NYSE MKT Response Letter I at 1; NYSE MKT Response Letter II at 1–2.

[56] *See* NYSE MKT Response Letter I at 1–2; NYSE MKT Response Letter II at 2. *See also* Interpretation, *supra* note 30; *infra* note 82.

[57] *See* NYSE MKT Response Letter I at 2.

[58] *See id.* at 3.

[59] *See id.*

[60] *See id.*

[61] 15 U.S.C. 78f.

[62] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

with Section 6(b)(5) of the Act,[63] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and that the rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As summarized above, commenters have requested that the Exchange provide more explanation of its proposal, including the reasoning behind its decision to propose an access delay, as well as whether its views on access delays generally differ from those raised in NYSE's comments on IEX's exchange application. In particular, one commenter argues that ''NYSE has said nothing about what it is trying to achieve, or how its design is tailored to its own situation.'' [64]

The Commission believes that the Exchange has provided a sufficient description of the operation and purpose of its proposal in its initial filing and its responses to comments.[65] As described above, the Exchange's proposed Delay Mechanism would add 350 microseconds of one-way latency to inbound and outbound communications—including order messages between the Exchange and its members or other markets—as well as data messages from the Exchange's proprietary feeds. The proposal would therefore impose a cumulative inbound and outbound intentional delay of 700 microseconds on non-routable orders. The Delay Mechanism would apply to all messages except for outbound communications from the Exchange to the SIP; inbound communications from external market data feeds; and actions taken by the Exchange within the Exchange's book, including calculating the BBO, NBBO, or PBBO, assigning working prices and working times to orders, and ranking and executing orders.[66]

The Exchange states that the purpose of its proposal is to ''allow undisplayed orders to meet their order instruction to be dynamically updated to prices based on changes to the PBBO before a new, incoming order generated in response to the same PBBO change can access the resting order.'' [67] In light of this purpose, the Exchange believes that the proposed length of 350 microseconds for its Delay Mechanism would achieve this purpose by providing Exchange systems with the appropriate amount of time to update prices based on market data it receives from other markets.[68] Specifically, the Exchange notes that it processes market data updates and re-prices non-displayed orders in less than 100 microseconds, and that the theoretical minimum transmission time for information generated in other exchanges' primary systems located in Carteret, New Jersey to reach the Exchange's primary systems (located in Mahwah, New Jersey) is approximately 185 microseconds.[69] Accounting for the Exchange's processing time and the time it takes the Exchange to receive market data updates from nearby exchanges, the Exchange believes that its proposed 350 microsecond Delay Mechanism is therefore appropriately designed to achieve the stated purpose of allowing the Exchange to dynamically update the prices of undisplayed resting pegged orders and that the 350 microsecond delay is not ''too short so as to frustrate the purpose of the Delay Mechanism'' nor ''overly long so as to be unfairly discriminatory to orders subject to the Delay Mechanism.'' [70] The Exchange further asserts that its proposed Delay Mechanism ''provide[s] a competitive trading model to IEX,'' [71] so that broker-dealers and issuers seeking a trading venue that offers an intentional delay mechanism will have an additional option.[72]

The Commission believes the Exchange has sufficiently demonstrated that the proposed rule change is consistent with the Act, and the Commission does not find any legal basis to distinguish the Exchange's proposed Delay Mechanism from the IEX access delay. In particular, the Commission believes that the Exchange has sufficiently demonstrated that its proposal would not be unfairly discriminatory. The Commission notes that the Act does not foreclose reasonable and not unfairly discriminatory innovations, including those that are designed to protect investors who seek to reliably place passive, non-displayed pegged orders on an exchange.[73]

According to the Exchange, its proposal is tailored to achieve the purposes of its proposed access delay and, as stated above, would provide additional choice for market participants desiring to trade or list on an exchange that offers a delay mechanism.[74] The Commission further notes that, as described above, the Exchange's Delay Mechanism would apply to all members equally, and may not be bypassed, for a fee or otherwise. Though the proposal would not subject order processing and order execution on the Exchange's Book to the Delay Mechanism, this aspect of the proposal is intended to allow undisplayed orders to function as intended by providing the Exchange with the time it needs to dynamically update prices of those orders based on the protected NBBO, which purpose and process the Exchange believes is not unfairly discriminatory and does not impose an unnecessary or inappropriate burden on competition.[75]

The Commission has previously found that a similar advantage provided to pegged orders by means of an exchange access delay was not unfairly discriminatory and did not impose an unnecessary or inappropriate burden on competition.[76] As the Commission noted in that case, the delay was designed to ensure that pegged orders operate as designed by accurately tracking the NBBO and to ensure that users of pegged orders can better achieve their goals when their pegged orders operate efficiently.[77]

For the current proposal, the Exchange has explained how its proposed Delay Mechanism is tailored to achieve its stated purpose of allowing the Exchange to dynamically update the prices of undisplayed pegged orders to meet their order instructions in response to market-data updates. As noted above, the Exchange has explained its choice of 350 microseconds based on its system processing time combined with its

[63] 15 U.S.C. 78f(b)(5).

[64] IEX Letter II at 3.

[65] The Commission does not believe that the comments submitted by NYSE, the Exchange's affiliate, on a separate matter previously before the Commission are relevant to the Commission's consideration of the current proposal, nor is the Exchange bound by its affiliate's prior arguments in relation to that matter.

[66] *See* Proposed Rule 7.29E(b)(2).

[67] *See* NYSE Response Letter III at 1. *See also* NYSE Response Letter II at 2.

[68] *See* NYSE Response Letter III at 1.

[69] *See id.* at n.1.

[70] *See id.* at 1–2.

[71] *See supra* note 13 and accompanying text.

[72] *See* Notice, *supra* note 3, 82 FR at 10831.

[73] *See* Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142, 41157 (June 23, 2016) (File No. 10–222) (''IEX Exchange Approval'').

[74] *See* Notice, *supra* note 3, 82 FR at 10831.

[75] *See* NYSE Response Letter II at 2. *See also* Notice, *supra* note 3, 82 FR at 10830.

[76] *See* IEX Exchange Approval, *supra* note 73, 81 FR at 41157.

[77] *See id.*

determination of the theoretical minimum transmission time of information to the Exchange from other exchanges, and has affirmed that the delay is not ''too short'' so as to not allow the Exchange to achieve the purpose of the Delay Mechanism, nor is it ''overly long'' so as to be an unnecessary burden on market participants. Accordingly, the Commission finds that the Exchange's proposed Delay Mechanism is designed to protect investors and the public interest in a manner that is not unfairly discriminatory and that does not impose an unnecessary or inappropriate burden on competition and is therefore consistent with Sections 6(b)(5) and 6(b)(8) of the Act.[78]

Further, as described above, all members of the Exchange would be equally subject to the Delay Mechanism, and no member would be permitted to avoid the delay by payment of a fee or through any other means. In addition, the Commission believes the Exchange's proposal to subject all outbound routable orders to the Delay Mechanism is designed to ensure that the Exchange's ability to provide outbound routing services under the proposal will be on substantively comparable terms to a third-party routing broker that is a member of the Exchange. In particular, both the Exchange routing logic and a third-party routing broker-dealer would experience 350 microseconds of one-way latency in receiving order information about routable orders from the Exchange's matching engine. Although the Exchange's proposal is not identical in all respects to the routing structure at another exchange with an access delay,[79] the Commission believes that the Exchange's proposal would not provide it with any structural or informational advantages in its provision of routing services as compared to a third-party broker-dealer member performing a similar function for itself or others. Therefore, the Commission believes that the Exchange's proposal as applicable to routable orders would not be unfairly discriminatory and would not impose an inappropriate burden on competition and is therefore consistent with Sections 6(b)(5) and 6(b)(8) of the Act.

The Commission acknowledges that, as commenters have noted, the Exchange's proposal would differ from the access delay on another exchange in that it would be software-based, as opposed to being implemented through a physical hardware mechanism. However, the Commission does not believe that a software-based delay is inherently inferior to a hardware-based delay or that this specific distinction is material to its analysis of the proposal, and the Commission notes that the Exchange would be required, as with any hardware-based delay, to comply with its rules requiring the Exchange to periodically monitor the actual latency and make adjustments as reasonably necessary to achieve consistency with the 350 microsecond target set forth in the proposed rule.[80]

Finally, the Commission does not believe that implementation of the Exchange's Delay Mechanism would preclude the Exchange from maintaining an automated quotation. Similar to an existing access delay on another market,[81] the duration of the proposed Delay Mechanism is well within the geographic and technological latencies experienced today, and the Commission believes that it would not impair a market participant's ability to access a displayed quotation consistent with the goals of Rule 611.[82] Accordingly, the proposed intentional one-way 350 microsecond delay is *de minimis,* and thus, following approval of the instant proposal, the Exchange can maintain a protected quotation when it operates the Delay Mechanism in the manner described above.

[78] While some commenters expressed concern that intentional delays in protected quotations may increase market complexity and requested that the Commission impose a moratorium on new proposals to implement such delays, the Commission notes that it carefully considers each exchange proposal for consistency with the Act.

[79] *See* IEX Rule 11.510. *See also* IEX Exchange Approval, *supra* note 73, 81 FR at 41157–60.

[80] *See* Proposed Rule 1.1E(y).

[81] *See* IEX Exchange Approval, *supra* note 73.

[82] *See* Interpretation, *supra* note 30, 81 FR at 40792 (noting that, in response to technological and market developments since the adoption of Regulation NMS, the Commission has provided an updated interpretation of the meaning of the term ''immediate'' in Rule 600(b)(3) of Regulation NMS, when determining whether a trading center maintains an ''automated quotation'' for purposes of Rule 611 of Regulation NMS, to preclude any coding of automated systems or other type of intentional device that would delay the action taken with respect to a quotation unless such delay is *de minimis,* or as the Commission noted, so short as to not frustrate the purposes of Rule 611 by impairing fair and efficient access to an exchange's quotations). The Commission further stated that such a *de minimis* access delay would satisfy Rules 600 and 611 under the updated interpretation even if it involved the use of an ''intentional device'' to delay access to an exchange's quotation. *See id.* For purposes of determining whether an exchange access delay is *de minimis,* the Commission did not set out a specific threshold; however, Commission staff has determined that, today, any delay of less than one millisecond is a *de minimis* amount of delay in accessing an exchange's facilities for purposes of the interpretation. *See* Commission Staff Guidance on Automated Quotations under Regulation NMS (June 17, 2016), *https://www.sec.gov/divisions/marketreg/automated-quotations-under-regulation-nms.htm.*

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[83] that the proposed rule change (SR–NYSEMKT–2017–05) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[84]

Eduardo A. Aleman,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–80685; File No. SR–FINRA–2017–012]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 7730 To Reduce the Delay Period for the Historic TRACE Data Sets Relating to Corporate and Agency Debt Securities

May 16, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 12, 2017, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA.

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

FINRA is proposing to amend Rule 7730 to reduce the delay period for the Historic TRACE Data Sets relating to corporate and agency debt securities from 18 months to six months.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

[83] 15 U.S.C. 78s(b)(2).

[84] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.