SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79998; File No. SR-NYSEMKT-2017-05)

February 9, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rules 7.29E and 1.1E to Provide for a Delay Mechanism

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b-4 thereunder,[3] notice is hereby given that on January 27, 2017, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 proposes to amend Rules 7.29E and 1.1E to provide for a Delay Mechanism. The proposed rule change is available on the Exchange's website at www.nyse.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 Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those 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.

---

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

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

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

1. Purpose

The Exchange proposes to amend Rules 7.29E and 1.1E to provide for an intentional delay to specified order processing, which would be referred to as the "Delay Mechanism."

To effect its transition to Pillar, the Exchange has adopted the rule numbering framework of the NYSE Arca Equities, Inc. ("NYSE Arca Equities") rules for Exchange cash equities trading on the Pillar trading platform.[4] As described in the Framework Filing, the Exchange is denoting the rules applicable to cash equities trading on Pillar with the letter "E" to distinguish such rules from current Exchange rules with the same numbering.

The Exchange has also proposed trading rules for cash equity trading on Pillar, which are based on the trading rules of NYSE Arca Equities.[5] With Pillar, the Exchange has proposed to transition its cash equities trading platform from a Floor-based market with a parity allocation model to a fully automated price-time priority allocation model that trades all NMS Stocks.

The Exchange proposes a delay mechanism on Pillar that would add the equivalent of 350 microseconds of latency to inbound and outbound order messages, as described in greater

---

4 See Securities Exchange Act Release No. 79242 (November 4, 2016), 81 FR 79081 (November 10, 2016) (SR-NYSEMKT-2016-97) (Notice and Filing of Immediate Effectiveness of Proposed Rule Change) (the "Framework Filing"). In addition, the Exchange has filed a proposed rule change to support Exchange trading of securities listed on other national securities exchanges on an unlisted trading privileges basis, including Exchange Traded Products ("ETP") listed on other exchanges. See Securities Exchange Act Release No. 79400 (November 25, 2016), 81 FR 86750 (December 1, 2016) (SR-NYSEMKT-2016-103) (Notice) (the "ETP Listing Rules Filing").

5 See SR-NYSEMKT-2017-1 (the "Trading Rules Filing"). The Exchange has also filed a proposed rule change to establish market maker obligations when trading on the Pillar trading platform. See SR-NYSEMKT-2017-04 (the "Market Maker Filing"). After the Commission approves the ETP Listing Rules Filing, Market Maker Filing, and Trading Rules Filing, the Exchange will transition to Pillar on a date announced by Trader Update.

detail below. The requirements for the proposed Delay Mechanism would be set forth in Rule 7.29E, and a definition of "Delay Mechanism" would be in Rule 1.1E. The Exchange's proposed Delay Mechanism is based in part on the operation of the intentional delay mechanism of Investors Exchange LLC ("IEX"). In addition, when the Exchange implements the Delay Mechanism, it would no longer offer Add Liquidity Only ("ALO") Order or Day Intermarket Sweep Order ("ISO") functionality and all Pegged Orders would not be displayed.[6]

Proposed Rule Changes

As noted above, the proposed Delay Mechanism would function similarly to the intentional delay mechanism of IEX, which IEX refers to as the "IEX POP." The IEX POP adds the equivalent of 350 microseconds of latency between the network access point of the POP and IEX's matching engines at its primary data center.[7] IEX uses a hardware solution to add its intentional delay via physical distance and coiled optical fiber. Similarly, using a software solution, the Exchange proposes that the Delay Mechanism would add 350 microseconds of latency to the processing of specified inbound and outbound communications.

As described in greater detail below, except when routing orders, the Exchange's proposed Delay Mechanism would provide for the addition of latency under the same circumstances as the IEX POP.

---

[6] In the Trading Rules Filing, the Exchange proposes Rule 7.31E (Orders and Modifiers), which is based on NYSE Arca Equities Rule 7.31. Therefore, as proposed, ALO Order, Day ISO Order, and Pegged Order functionality for the Exchange would be based on NYSE Arca Equities ALO, Day ISO, and Pegged Order functionality, including that Primary Pegged Orders would be required to have a minimum display quantity. Because the Exchange would transition to Pillar once the Commission approves the ETP Listing Rules Filing, Market Maker Filing, and Trading Rules Filing, which may be prior to approval of the Delay Mechanism, before implementing the Delay Mechanism, the Exchange will file a separate proposed rule change to eliminate ALO and Day ISO Orders and related functionality and to provide that Primary Pegged Orders would not be displayed.

[7] See IEX Rule 11.510 (Connectivity).

The Exchange proposes to add paragraph (y) to Rule 1.1E, which is currently "Reserved," to define "Delay Mechanism." As proposed, the Delay Mechanism would mean a delay that is an equivalent of 350 microseconds of latency that is added to specified order processing. This delay would be in addition to any natural latency inherent in accessing the Exchange and Away Markets.[8]

Proposed Rule 1.1E(y) would further provide that due to force majeure events and acts of third parties, the Exchange does not guarantee that the delay would always be 350 microseconds and that the Exchange would periodically monitor such latency, and would make adjustments to the latency as reasonably necessary to achieve consistency with the 350 microsecond target as soon as commercially practicable. The proposed rule would further provide that, if the Exchange determines to increase or decrease the delay period, it would submit a rule filing pursuant to Section 19 of the Act. This proposed rule text is based on Supplementary Material .20 [sic] (POP Latency) to IEX Rule 11.510 without any substantive differences.

The Exchange proposes to add paragraph (b) to Rule 7.29E to describe the Delay Mechanism.[9] Under proposed Rule 7.29E(b)(1), the Exchange would apply the Delay Mechanism to the following:

- <u>All inbound communications from an ETP Holder (proposed Rule 7.29E(b)(1)(A)).</u> This proposed rule text is based on IEX Rule 11.510(b)(1), which provides that "Inbound POP Latency" applies to all

8 The term "Away Market" is defined in Rule 1.1E(ff) to mean 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.

9 In the Trading Rules Filing, the Exchange has proposed that Rule 7.29E would be titled "Access" and has proposed paragraph (a) to Rule 7.29E to specify the general access requirements to the Exchange.

inbound communications (including, without limitation, order messages and cancel messages). 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. The Exchange's proposal to apply the Delay Mechanism to all inbound communications from an ETP Holder would have the same effect as IEX's Inbound POP Latency because it would add 350 microseconds of delay to all incoming messages to the Exchange.

- <u>All outbound communications to an ETP Holder (proposed Rule 7.29E(b)(1)(B)).</u> This proposed rule text is based on IEX Rule 11.510(b)(2), which provides that "Outbound POP Latency" applies to all outbound communications (including, without limitation, execution report messages and quote update messages). 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. The Exchange's proposal to apply the Delay Mechanism to all outbound communications to an ETP Holder would have the same effect as IEX's Outbound POP Latency because it would add 350 microseconds of delay to all outgoing messages to an ETP Holder from the Exchange. Together with the application of the proposed Delay Mechanism to all inbound communications to the Exchange, there would be 700 microseconds of additional round-trip latency in a report received by an ETP Holder of an execution or partial execution on the Exchange.

- All outbound communications the Exchange routes to an Away Market (proposed Rule 7.29E(b)(1)(C)) and all inbound communications from an Away Market about a routed order (proposed Rule 7.29E(b)(1)(D)). Under proposed Rule 7.37E, the Exchange determines whether to route an order after it has matched orders for execution against orders in the Exchange Book.[10] 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 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 under proposed Rule 7.29E(b)(1)(A) and a second 350 microsecond delay under proposed Rule 7.29E(b)(1)(C) when the order is routed. 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.

  Any inbound communications to the Exchange from the Away Market about such routed order, whether a rejection or execution report, would

10 See proposed Rule 7.37E(b), Trading Rules Filing, supra note 5 ("Unless an order has an instruction not to route, after being matched for execution with any contra-side orders in the Exchange Book pursuant to paragraph (a) of this Rule, marketable orders will be routed to Away Market(s).")

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 under proposed Rule 7.29E(b)(1)(B). 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. The Exchange's proposed Delay Mechanism for orders that route would function differently from the IEX POP with respect to routable orders. Under IEX Rule 11.510, a routable order on IEX must traverse the IEX POP to access IEX's routing logic, and any orders that the IEX routing logic determines to send to the IEX matching engine must traverse an additional IEX POP. However, IEX does not include an IEX POP between its routing logic and routing to markets other than IEX.[11] Accordingly, a routable order sent to IEX has 700 microseconds of delay before it reaches the IEX matching engine and an additional 700 microseconds of delay before any reports from the IEX matching engine are sent to the order sender, for a round-trip delay of 1,400 microseconds. However, a routable order sent to IEX's routing logic that is routed to an away market has only 350 microseconds of additional delay for inbound orders and only 350 microseconds of delay for outbound information to the order sender, for a round-trip delay of 700 microseconds.

The Exchange believes its proposed application of the Delay Mechanism to routable orders is consistent with how the Exchange already functions,

11 See IEX Rule 11.510(c)(3)(A).

which is that orders are matched for execution before routing (unless the order has an instruction to route to the primary listing market). As such, if there is an execution opportunity on the Exchange, an order would be subject to the same additional latency regardless of whether the order is routable or not. Only if the Exchange were to route an order would it add the latency of the Delay Mechanism a second time. The Exchange believes that this additional application of the proposed Delay Mechanism would ensure that the Exchange would not have a speed advantage over ETP Holders in routing the unexecuted quantity of an order to an Away Market. Specifically, an ETP Holder would be subject to the same latency in learning of an execution on the Exchange (350 microseconds after the execution) as the Exchange would apply to routing such order (350 microseconds before routing such order). Accordingly, an ETP Holder that would rather route directly to Away Markets would be able to operate on a level playing field with the Exchange's routing broker.

- <u>All outbound communications (e.g., bids, offers, and trades) to the Exchange's proprietary data feeds (proposed Rule 7.29E(b)(1)(E)).</u> This proposed rule text is based on IEX Rule 11.510(b)(1) [sic], which specifies IEX's Outbound POP Latency. The Exchange's proposal to apply the Delay Mechanism to all outbound messages to its proprietary data feeds would have the same effect as IEX's Outbound POP Latency because it would add 350 microseconds of delay before providing such information to the Exchange's proprietary data feed.

Under proposed Rule 7.29E(b)(2), the Exchange would not apply the Delay Mechanism to the following:

- <u>All inbound communications from data feeds (proposed Rule 7.29E(b)(2)(A)).</u> This proposed rule text is based on IEX Rule 11.510(c)(2)(A), which provides that IEX communications with away market centers to receive proprietary market data do not traverse the IEX POP, and IEX Rule 11.510(c)(2)(B), which provides that IEX communications with the SIPs to receive data feeds do not traverse the IEX POP. By referencing data feeds, proposed Rule 7.29E(b)(2)(A) would be applicable to data feeds received directly from Away Markets and data feeds disseminated by a plan processor. Accordingly, the Exchange's proposal not to apply the Delay Mechanism in these circumstances would have the same effect as how IEX does not apply the IEX POP to its receipt of market data.
- <u>Order processing and order execution on the Exchange's Book (proposed Rule 7.29E(b)(2)(B)).</u> This proposed rule text is based on IEX Rule 11.510(c)(1), which provides that order book processing does not traverse the IEX POP. Accordingly, all actions taken within the Exchange's Book, including calculating the BBO, NBBO, or PBBO,[12] assigning working

12 The term "BBO" is defined in Rule 1.1E(h) as the best bid or offer that is a protected quotation on the Exchange. The terms "NBBO" and "PBBO" are defined in Rule 1.1E(dd) as the national best bid or offer and the protected best bid and offer, respectively.

prices and working times to orders,[13] and ranking and executing orders, would not be subject to an additional delay. The Exchange's proposal not to apply the Delay Mechanism to order processing and order execution on the Exchange's Book would have the same effect as how IEX conducts order processing and order execution within its book. For example, the Exchange would not apply the Delay Mechanism to re-price Pegged Orders, which would not be displayed on the Exchange. As with IEX, the Exchange would update the working price of Pegged Orders based on an updated PBBO without any additional delay.

- <u>All outbound communications (e.g., bids, offers, and trades) to the plan processors under Rules 601 and 602 of Regulation NMS (proposed Rule 7.29E(b)(2)(C)).</u> This proposed rule text is based on IEX Rule 11.510(c)(3)(B), which provides that IEX communications with the SIP to disseminate quotation and last sale information do not traverse the IEX POP. The Exchange's proposal not to apply the Delay Mechanism to outbound communications to the plan processors would therefore have the same effect as how IEX operates.

The Exchange proposes an additional difference between its proposed Delay Mechanism and the IEX POP. As set forth in Supplementary Material .10 [sic] to IEX Rule 11.510, IEX would not apply the IEX POP when trading out of its back up system because it does not offer

13 In the Trading Rules Filing, <u>supra</u> note 5, the Exchange proposes to define the term "working price" in Rule 7.36E(a)(3) 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 define the term "working time" in Rule 7.36E(a)(4) as the effective time sequence assigned to an order for purposes of determining its priority ranking.

connectivity from the IEX POP to its back up systems. By contrast, the Exchange proposes that the Delay Mechanism would be functional regardless of whether the Exchange is operating out of its primary or secondary data center.

*****

Subject to rule approvals, the Exchange will announce the implementation of the Delay Mechanism by Trader Update, which may be after the Exchange transitions to Pillar.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, because it is 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 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. The Exchange believes that the proposed rules to add the proposed Delay Mechanism would remove impediments to and perfect the mechanism of a free and open market because it would apply a similar delay to order message processing as the Commission has recently approved for IEX, with differences only with respect to how the Delay Mechanism would function for orders that route to an Away Market.[16] The Exchange further believes that the proposed Delay Mechanism is not unfairly discriminatory because it would be applied uniformly to all Exchange ETP Holders and may not be bypassed for a fee or otherwise.

---

14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(5).

16 Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41141, 41155 (June 23, 2016) ("IEX Approval Order").

The Exchange further believes that the proposed Delay Mechanism would remove impediments to and perfect the mechanism of a free and open market and a national market system and would protect investors and the public interest because it would provide a choice of exchanges for market participants that prefer to trade or list on an exchange that offers a delay mechanism.

The Exchange also believes that the proposed Delay Mechanism, as it would apply to orders that are routed to Away Markets, would remove impediments to and perfect the mechanism of a free and open market and a national market system and would protect investors and the public interest because it is designed in a manner that would enable ETP Holders that would prefer to route unexecuted quantities of orders to Away Markets, rather than having the Exchange route to Away Markets, to operate on a level playing field. As such, this aspect of the proposed Delay Mechanism is not unfairly discriminatory and would not impose a burden on competition because the Exchange's outbound router would not have unique access or preferences with respect to orders routed to Away Markets. As such, the Exchange's outbound router functionality would be on substantively comparable terms to a third party routing broker that is a member of the Exchange.

In addition, the Exchange believes that the proposed Delay Mechanism is consistent with the Commission's recent interpretation of Rule 611 of Regulation NMS.[17] The Commission has interpreted the term "immediate" when determining whether a trading center maintains an "automated quotation" for purposes of Rule 611 to include response time delays at trading centers that are de minimis, whether intentional or not. As such, a trading center may implement an intentional access delay that is de minimis, i.e., a delay so short so as not to frustrate the

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

purposes of Rule 611 of Regulation NMS by impairing fair and efficient access to an exchange's quotations. In the context of IEX, the Commission has already found that an intentional delay of 350 microseconds is de minimis.[18] Accordingly, the Exchange believes that its proposed Delay Mechanism, which would provide for the same delay period as the IEX POP under the same circumstances, is similarly de minimis for purposes of the Rule 611 Interpretation.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to provide a competitive trading model to IEX. For this reason, the Exchange has proposed a Delay Mechanism that would function similarly to the IEX POP, with the exception of how the Delay Mechanism would be applied to routable orders. The Exchange believes that its proposed application of the Delay Mechanism to routable orders would not impose a burden on competition because it is designed in a manner that would enable ETP Holders that would prefer to route unexecuted quantities of orders to Away Markets, rather than having the Exchange route to Away Markets, to operate on a level playing field. The Exchange's proposal is therefore designed to promote competition by offering a choice of exchanges to those ETP Holders and issuers that prefer to trade or list on an exchange that offers a delay mechanism. Accordingly, the proposed rule change is designed to introduce additional competition among exchanges so that broker dealers and issuers have more than one option if seeking a trading venue that offers an intentional delay mechanism.

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

No written comments were solicited or received with respect to the proposed rule change.

---

[18] See IEX Approval Order, supra note 16.

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 such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the 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-NYSEMKT-2017-05 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2017-05. 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 also will 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-NYSEMKT-2017-05 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.[19]

Eduardo A. Aleman
Assistant Secretary

---

[19] 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Additions: Underlined
Deletions: [Bracketed]

Rules of NYSE MKT LLC

Equities Rules

*****

RULE 1E DEFINITIONS

Rule 1.1E. Definitions

*****

(x) Reserved

<u>Delay Mechanism</u>

(y) [Reserved] <u>The term “Delay Mechanism” means a delay that is equivalent to 350 microseconds of latency that is added to specified order processing. Due to force majeure events and acts of third parties, the Exchange does not guarantee that the delay will always be 350 microseconds. The Exchange will periodically monitor such latency, and will make adjustments to the latency as reasonably necessary to achieve consistency with the 350 microsecond target as soon as commercially practicable. If the Exchange determines to increase or decrease the delay period, it will submit a rule filing pursuant to Section 19 of the Act.</u>

****

RULE 7E - EQUITIES TRADING

****

Section 3. Exchange Trading

Rule 7.29E. *****

****

<u>(b) *Delay Mechanism.*</u>

<u>(1) The Exchange will apply the Delay Mechanism to:</u>

(A) all inbound communications from an ETP Holder;

(B) all outbound communications to an ETP Holder;

(C) all outbound communications the Exchange routes to an Away Market;

(D) all inbound communications from an Away Market about a routed order; and

(E) all outbound communications (e.g., bids, offers, and trades) to the Exchange's proprietary data feeds.

(2) The Exchange will not apply the Delay Mechanism to the following:

(A) all inbound communications from data feeds;

(B) order processing and order execution on the Exchange's Book; and

(C) all outbound communications (e.g., bids, offers, and trades) to the single plan processors under Rules 601 and 602 of Regulation NMS.

*****