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April 21, 2017

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

Re: Release No. 34-79998; File No. SR-NYSEMKT-2017-05

Dear Mr. Fields:

Investors Exchange LLC ("IEX) is commenting for the second time on NYSE Group's ("NYSE") proposal to apply a "speed bump" for trading on its NYSE MKT LLC ("NYSE MKT") affiliate ("Proposal"). In our first comment letter, we described various ways in which we believed the Proposal was deficient and requested justification and detail and asked for additional information about the purpose of the Proposal and how it was designed to achieve the purpose.[1]

In general, NYSE responded that it did not need to be more transparent in order to gain approval of the Proposal. NYSE argues that it is not relevant "why an exchange has proposed a rule change but whether it is consistent with" the Securities Exchange Act of 1934 ("Exchange Act").[2] Essentially, NYSE is saying that because IEX's speed bump was approved, NYSE only needs to disclose information that indicates its own proposal is based on that model.

NYSE is wrong as a matter of both law and policy. The question is not whether NYSE can compete by adopting a speed bump, but whether it is required to be *transparent and accountable* when proposing a significant change in the operation of one of its markets.

Misinterpreting the Interpretation

As to the law, when the SEC approved IEX as an exchange, it also issued an interpretation (the "Interpretation") clarifying that its rules do not preclude an exchange

[1] *See* Letter from John Ramsay, Chief Market Policy Officer, IEX, to Brent J. Fields, Secretary, SEC, dated March 10, 2017.
[2] *See* Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE Group, to Brent J. Secretary, SEC, dated March 31, 2017.

from adopting an intentional delay of less than one millisecond in duration.[3] In the same Interpretation, the SEC also said that it was doing nothing to alter the disclosure obligation of other exchanges proposing a speed bump of any type, in words that directly contradict NYSE's position: "The interpretation does not change the existing requirement that, prior to being implemented, an intentional delay of *any* duration must be fully disclosed..., where the exchange met its burden of **articulating how the purpose, operation, and application of the delay is consistent with the Act** and the rules and regulations thereunder applicable to the exchange."[4] This basic requirement is necessary to evaluate exchange rule changes by reference to the interests of the public and market participants, not just the exchange's own interests, and is one of the important ways in which exchanges are different from other businesses that do not have a public responsibility.[5]

NYSE instead is asking the SEC to rubber stamp its Proposal simply because it mimics one aspect of IEX's design. The Interpretation means only that NYSE does not need to relitigate the question of whether an exchange can adopt a speed bump of less than one millisecond and still maintain a "protected quote" under Regulation NMS. It does not affect NYSE's obligation to stand behind and fully explain its own Proposal, and NYSE is incorrect in assuming that the "why" and the thinking behind its Proposal are irrelevant to meeting that obligation.

What is the purpose of a speed bump?

Requiring NYSE to be more transparent is also important as a matter of public policy

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

[4] *Id.*, 81 FR at 40792 [emphasis added].

[5] Under the Exchange Act, because transactions in securities on exchanges are "effected with a national public interest", exchange rules are required to be consistent with the standards of Section 6. These standards include preventing fraud and manipulation, promoting just and equitable principles of trade, and protecting investors and the public interest. In order to approve a rule change, the SEC is required to make a finding that it is consistent with those standards based on representations made by the exchange about the details and the purpose of the change, public comments, and any other relevant information. *See,* e,g., SEC Form 19b-4, Item 3, reading in part: "At a minimum, the statement should: (a) Describe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (e.g., brokers, dealers, issuers, and investors), and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change..."

because the use of speed bumps relates directly to the ongoing public debate over speed advantages and the choices exchanges make to enable (or limit) them.

First, a complete explanation by NYSE would show whether it fully understands the Proposal and how it would work in relation to NYSE's own circumstances, including the other markets that NYSE operates. During IEX's application, we explained that the purpose of the IEX speed bump was meant to protect investors from the effects of the multi-tiered speed advantages being sold by other exchanges (including NYSE).[6] If these speed advantages were not being sold by other exchanges, there is a strong likelihood that IEX would not exist in the first place. Because IEX launched as an alternative trading system and then applied for exchange status, we were required to explain in great detail how the specific design of the speed bump (use of coiled optical fiber placed in a specific location) and its duration worked to protect investors and fulfill its stated objective. We explained that 350 microseconds, unique to IEX's physical architecture, was just long enough (but not longer than necessary) to update the price of "pegged" orders in order to protect these orders, many of which are sent by investors, from being traded at stale prices – a phenomenon often described as "latency arbitrage". We provided extensive data from brokers showing that the total time from sending an order to receiving a message on IEX was in line with that experienced by those firms when sending orders to other markets, based in part on IEX's unique geographical position relative to all other exchanges. And we demonstrated how the speed bump as applied to orders routed to other markets helps us to fill those orders at the best prices available by avoiding the problem of "quote fade" on those other markets. All of these factors used to justify the IEX speed bump were made in relation to IEX's unique circumstances, which are significantly different from those of NYSE and NYSE MKT.

NYSE has said nothing about what it is trying to achieve, or how its design is tailored to its own situation. With no justification or additional detail, investors, brokers, exchanges, and other commenters are simply left to guess as to the purpose of the NYSE MKT speed bump and how its features were determined relative to NYSE's own physical architecture.

Transparency would also help to shed light on why a market participant would choose to send orders to NYSE MKT, and to hold the exchange accountable for implementing it in

[6] *See* Letters from Sophia Lee, General Counsel, IEX, to Brent J. Fields, Secretary, SEC, dated November 13, 2015, November 22, 2015, and February 9, 2016, avail. at https://www.sec.gov/comments/10-222/10-222.shtml.

a way that is consistent with the stated purpose. We note that the President of NYSE said in a published interview that the NYSE MKT speed bump could help "our institutional customers who are working hard to satisfy their fiduciary obligation."[7] If this is indeed a justification, then NYSE should elaborate on this statement. We find it ironic that NYSE would be more open with the financial press about its Proposal than it has been with the SEC as part of the comment and approval process.

Who is NYSE trying to protect?

It would be simple enough for NYSE to copy IEX's rationale in addition to aspects of its speed bump design.[8] IEX has been clear and consistent in saying that its speed bump was designed to protect investors by preventing any participant from trading on IEX with advanced information to the detriment of those who have not purchased the same speed and data advantages from other exchanges. But on this question, which is at the core of the same design that NYSE says it is copying, NYSE refuses to say a word despite its legal requirement to do so.

In the absence of another explanation, we can only conclude that NYSE is trying hard to say as little as possible in order to avoid drawing attention to the contradiction between the reasons IEX was approved and the ways that NYSE (with multiple exchanges) operates today, or to avoid potential legal exposure if it says anything that calls into question those practices from an investor-protection perspective.[9] Whatever the reason, NYSE is not free to define for itself the scope of its disclosure obligations.

Conclusion

Without additional disclosure and justification for the NYSE MKT Proposal, we cannot see how it can be found to meet the standards set forth in the Exchange Act. We do not object to measures by other markets to reduce speed advantages that favor only a few

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[7] http://www.businessinsider.com/nyse-president-tom-farley-interview-2017-1.

[8] The Proposal would use software rather than a physical design to impose the delay, and it omits any discussion of whether that difference is relevant to the purpose because, again, it fails to enunciate a purpose.

[9] The Commission has taken the position in a pending case that exchanges are not immune from liability when acting as commercial entities, rather than regulators of their members, in the context of challenges to exchange practices involving co-location, proprietary market data, and complex order types that are central to the use of high-speed trading strategies. Brief of the SEC, Amicus Curiae, City of Providence, Rhode Island v. Bats Global Markets, Inc., et al., avail. at https://www.sec.gov/litigation/briefs/2016/providence-bats-global-markets-1116.pdf.

participants. To the contrary, we welcome efforts by other exchanges to innovate in ways that consciously prioritize the needs of long-term investors, but the public interest requires that they do so in a transparent way that actually *speaks to the public interest.* Otherwise, exchanges could avoid accountability for anything they propose as long as they are careful not to vouch for it in their public filings.

If transparency is not provided in this case, then the SEC, investors, and the public are left to wonder whether NYSE can claim *any* additional purpose for its proposal other than seeking a new way to justify further access and data fee price increases on the industry and perpetuating an already fragmented market by borrowing an idea that it doesn't endorse. If that is truly the case, then NYSE should be explicit that the public cannot expect any other results. And if the Commission approves it without any more disclosure, it should clarify how its prior statements about exchange obligations bear on that decision.

Sincerely,

John Ramsay
Chief Market Policy Officer

cc: Hon. Michael Piwowar, Acting Chairman
Hon. Kara Stein, Commissioner
Heather Seidel, Acting Director, Division of Trading and Markets
Gary Goldsholle, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Michael Coe, Assistant Director, Division of Trading and Markets