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November 10, 2015

Brent J. Fields
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Investors' Exchange LLC; Application for Registration as a National Securities Exchange (File No. 10-222)

Dear Mr. Fields:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on the application of Investors' Exchange LLC ("IEX") to register as a national securities exchange. We support competition, because it typically benefits investors and ultimately makes us all better, and IEX's application reflects many interesting ideas regarding market structure. Given our position and experience in the market, however, we do believe that there are a few features of the application that require careful review and analysis by the Securities and Exchange Commission (the "Commission"), or additional information or clarification from IEX, before the application should be permitted to move forward. In particular, as discussed in detail below, some aspects of the application appear to be contrary to past interpretations of Regulation NMS, while other features of IEX's proposed market structure are not adequately explained. All of our comments are written in the spirit of ensuring that the markets – regardless of participants, existing or new – are operating in the most stable, efficient, secure, and transparent manner possible.

Order Types: Nasdaq notes that the level of detail provided in IEX's Form 1 regarding the operation of its order types is far less than the level of detail recently required in Form 19b-4 filings with respect to order types offered by existing exchanges.[1] Certainly, there is no reason for requiring less detailed explanations of order types when offered by a new exchange than when offered by existing exchanges. By way of example, in the Supplementary Material appended to Rule 11.190, IEX states that "[d]ue to the way in which IEX processes actions to resting orders, specifically when re-pricing, orders' relative time priority is generally preserved"

1 See, e.g., SR-NASDAQ-2015-135 (November 2, 2015) (available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2015/SR-NASDAQ-2015-135.pdf); Securities Exchange Act Release No. 74558 (March 20, 2015), 80 FR 16050 (March 26, 2015) (SR-NASDAQ-2015-024); Securities Exchange Act Release No. 74247 (February 11, 2015), 80 FR 8720 (February 18, 2015) (SR-BATS-2015-09).

(emphasis added). The reader is thus left to wonder under what circumstances time priority is not preserved. As another example, Nasdaq believes that IEX has not adequately explained the operation of its complex order type known as the "discretionary peg order." Notably, this order type may not execute in circumstances where IEX's "proprietary mathematical calculation" determines that the current NBBO may not be stable. In this regard, the Commission should consider whether IEX's proposed rules provide adequate explanation regarding the selection of the parameters used to determine whether the order will execute and adequate examples of how the order type would operate in practice. Thus, we believe that the IEX Form 1 in its current form is inadequate and should be revised to allow the investing public and other market participants to understand the proposed functionality and to comment accordingly.

Accessibility of IEX's Quotations: The most notable feature of IEX's proposed market structure is its much-touted pre-programmed 350 microsecond delay between the "point of presence" (or "POP") that provides connectivity to IEX and IEX's primary trading platform. In considering IEX's application, the Commission must determine whether, under the Commission's past interpretations of Regulation NMS, IEX's artificially delayed quotation would be considered a protected quotation. Under Rules 600 and 611 under Regulation NMS,[2] an exchange's displayed quotation at the national best bid or best offer ("NBBO") is a "protected quotation" that is protected against trade-throughs if it is an "automated quotation," defined as a quotation that is "immediately and automatically" accessible. In the adopting release for Regulation NMS, the Commission stated: "The definition of automated quotation as adopted does not set forth a specific time standard for responding to an incoming order. The Commission agrees with commenters that the standard should be "immediate" – i.e., a trading center's systems should provide the fastest response possible <u>without any programmed delay</u>" (emphasis added).[3]

In 2012, NASDAQ OMX PSX ("PSX"), the cash equities trading facility of NASDAQ OMX PHLX LLC ("Phlx"),[4] proposed instituting a five millisecond delay in the time between the receipt of an order and the time when it would be presented for execution against the PSX order book.[5] In reviewing that filing, staff of the Commission's Division of Trading & Markets opined that this programmed delay would cause PSX's quotations to lose their status as protected quotations.[6] Moreover, staff also questioned whether a programmed delay, during which a

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2 17 CFR 242.600, 242.611.

3 Regulation NMS, Securities Exchange Act Release No. 51808 (June 9, 2005) (File No. S7-10-04), 70 FR 37496, 37519 (June 29, 2005) ("Regulation NMS Adopting Release").

4 Phlx is a wholly owned subsidiary of Nasdaq.

5 Securities Exchange Act Release No. 67680 (August 17, 2012), 77 FR 51073 (August 23, 2012) (SR-Phlx-2012-106).

6 While five milliseconds is certainly much slower than 350 microseconds, the Regulation NMS Adopting Release referred to "<u>any</u> programmed delay." Certainly, the Commission has not articulated a basis for discerning some numerical microsecond threshold that renders a quotation manual rather than protected.

broker about to receive an order marketable against its quotation could unwittingly change its quotation, was consistent the SEC Rule 602(b)(2) under Regulation NMS.[7] That rule, which is generally known as the "firm quote rule," provides that a broker or dealer must execute orders that are marketable against its published quotation, up to the full published size of the quotation.[8] PSX ultimately withdrew its proposal for a programmed delay when it concluded that the Commission was unlikely to approve it in a manner that would allow it to provide its intended benefits. Similarly, in reviewing IEX's proposal, the Commission must determine whether IEX can pursue its intended market model as an exchange in a manner consistent with Commission rules and prior interpretations of them.

Preferential Proximity: IEX's application does not answer several important questions about how the artificial delay would operate in practice. First, Nasdaq notes that IEX does not disclose whether it exercises any control over co-location services in the data center it uses. If it does so, it would be able to exercise control over how those services are structured, to ensure that they are provided to all members on an equitable basis. In particular, it would be able to ensure that all co-located members use equidistant cables for purposes of connecting to the POP, to ensure that no co-located customer is closer to the POP than any other customer. As it is, there does not appear to be any process for assuring that all client equipment in the data center has equal access to the trading system. Nothing would prevent a third-party data center provider located at or near the POP from selling preferential proximity to the POP to the highest bidder. Such preferential access has the potential to diminish whatever benefits of equitable treatment IEX presumably wishes to offer through the artificial delay.

Artificial Delay, Accuracy & Liquidity: IEX's application does not disclose whether market data being disseminated by IEX will also be subject to an artificial delay. Depending on the answer to that question, different issues may arise. If outgoing data is subject to a delay, then the data disseminated by the tape may not accurately reflect the state of IEX's quotation, resulting in confusion regarding the availability of liquidity at the venue and a likely increase in the incidence of locked and crossed markets, as other trading venues lock or cross a quotation at IEX that they cannot yet see. However, even if IEX's data is not subject to a delay, the disparity between the speed at which data is disseminated and the speed at which quotes reflected in that data are accessible also has the potential to create confusion among market participants. For example, if a market participant routed intermarket sweep orders ("ISOs") to quotations at IEX and at other trading venues, the ISOs routed to the other venues may execute and post unexecuted shares at a price equal to or inferior to the quotation at IEX that the market

7 17 CFR 242.602(b)(2).

8 "[E]ach responsible broker or dealer shall be obligated to execute any order to buy or sell a subject security, other than an odd-lot order, presented to it by another broker or dealer, or any other person belonging to a category of persons with whom such responsible broker or dealer customarily deals, at a price at least as favorable to such buyer or seller as the responsible broker's or dealer's published bid or published offer (exclusive of any commission, commission equivalent or differential customarily charged by such responsible broker or dealer in connection with execution of any such order) in any amount up to its published quotation size." 17 CFR 242.602(b)(2).

participant is also attempting to access, creating the appearance of a locked or crossed market where none would actually exist if IEX's quotation was immediately displayed and accessible.

Routing Facilities: IEX does not disclose whether or not orders routed using IEX's order routing facilities would be subject to the same artificial delay as incoming orders seeking to access IEX's quotation. If they are not, IEX members would be able to access liquidity at other trading venues more easily than any member could access liquidity at IEX. In a situation where multiple trading venues are displaying the same quotation, this disparity could give an advantage to an ISO originating at IEX over an ISO originating at any other venue. This disparity would not affect IEX's current operations, since it operates as a dark pool and does not allow its participants to post displayed, possibly protected, quotations. As an exchange seeking the benefits of advertising available liquidity in the national market system, however, IEX would be required to ensure that its facilities do not enjoy any inequitable advantages. Accordingly, Nasdaq believes that IEX should provide a more detailed analysis of the manner in which orders originating from its routing facility will compete with orders originating from other sources.

Odd-Lot Orders: IEX's proposed rule 11.190 provides that orders with a size of less than 100 shares – "odd lot orders" – are automatically non-displayed, and therefore have a lower execution priority than displayed orders at the same price. This is true whether the order is originally submitted as a displayed round- or mixed-lot order (generally 100 shares or more) that is partially executed or is originally submitted as an odd-lot order. The Commission should consider whether this rule would systematically disadvantage smaller orders that might be submitted by retail investors.

Given the material deficiencies in IEX's explanation of the foregoing aspects of its application, Nasdaq believes that IEX should be required to submit comprehensive amendments to its application to address these and any other issues raised by commenters, and that the public should be provided ample opportunity to comment on the amended application before the Commission determines whether or not to approve it.

If you have any questions regarding these comments, please do not hesitate to contact me.

Very truly yours,

Joe C. Conley