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January 29, 2016

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. supports competition and innovation, as discussed in our previous comment letter regarding the application of Investors' Exchange LLC ("IEX") for registration as a national securities exchange.¹ The Nasdaq Stock Market ("Nasdaq") was an innovator in the development of electronic trading, and we continue to seek to bring new ideas, such as the use of blockchain technology, to the financial markets. As a result, we willingly embrace the competitive challenges posed by new market entrants.

In the financial industry, competition is inevitably shaped by the rules that Congress and the Securities and Exchange Commission (the "Commission") adopt to govern the market. These rules should be continually examined, and should be adjusted for all market participants when warranted. However, an exchange application is not an appropriate vehicle for changing these rules; rather, such changes should occur through official rulemaking. In contrast to a rulemaking, an ad hoc response to market structure proposals by an exchange application does not provide an adequate vehicle for impact analysis by the Commission and its staff, evaluation of data, or public comment on all aspects of a change.² Moreover, a change for one market

¹ Letter of Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, Inc., to Brent J. Fields, Secretary, Commission (November 10, 2015).

² Thus, for example, when the Commission proposes a rule change, it poses an in-depth series of questions for commenters to consider in reacting to the proposal, seeks to evaluate available data regarding the impact of the change, and conducts a cost-benefit analysis. Moreover, a rulemaking is often preceded by a concept release that assists the Commission and the public in framing the issues to be addressed.

participant will create uncertainty among other market participants regarding the exact rules that would govern their competitive responses.

For that reason, our initial comment letter questioned whether IEX's 350 microsecond "speed bump" (referred to by IEX as the "POP") was consistent with prior Commission interpretations of Regulation NMS that require a protected quotation to have no "preprogrammed delay."³ We also highlighted aspects of the proposed operation of IEX's affiliated routing broker that might be inconsistent with the Securities Exchange Act's requirements with respect to the absence of unfair discrimination and inappropriate burdens on competition, and our concerns have been echoed by several other commenters.⁴ Since then, IEX has pointed to a rule change filed by Nasdaq in 2012⁵ and has made inaccurate depictions and comparisons in its regulatory and legislative sales material regarding the Nasdaq routing broker.⁶ Accordingly, we want to set the record straight.

IEX's proposed routing procedures differ from Nasdaq's in one key respect: no one, *other than IEX's routing broker*, would be permitted to know about an execution on IEX until the execution report is transmitted through IEX's speed bump. As commenters have pointed out,⁷ the preprogrammed delay in transmission of transaction reports would incentivize market participants to use IEX's router in order to avoid the negative effects of the delay and would thereby provide IEX with an artificial competitive advantage.

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"). As we noted in our prior comment letter, we withdrew our own proposal to adopt a speed bump on our PSX market because of these concerns.

⁴ *See, e.g.*, Letter of Elizabeth K. King, General Counsel & Secretary, New York Stock Exchange, to Brent J. Fields, Secretary, Commission (November 12, 2015); Letter of Larry Tabb, CEO, Tabb Group, to Brent J. Fields, Secretary, Commission (November 23, 2015); Letter of John C. Nagel, Managing Director & Senior Deputy General Counsel, Citadel LLC, to Brent J. Fields, Secretary, Commission (December 7, 2015); Letter of Eric Swanson, EVP and General Counsel, BATS Global Markets, Inc., to Brent J. Fields, Secretary, Commission (December 20, 2015); Letter of Adam Nunes, Head of Business Development, Hudson River Trading LLC, to Brent J. Fields, Secretary, Commission (January 7, 2016).

⁵ Securities Exchange Act Release No. 67639 (August 10, 2012), 77 FR 49034 (August 15, 2012) (SR-NASDAQ-2012-071) (the "2012 filing").

⁶ *See* Letter from Sophia Lee, General Counsel, IEX Group, Inc., to Brent J. Fields, Secretary, Commission (November 13, 2015). *See also* "IEX Exchange Application: Industry Context and Precedents" (available at <http://static.politico.com/ee/21/b30b54e64cb881072eb80a772989/iex-document-dec-14-2015.pdf>).

⁷ *See supra* n.4.

Because of the delay, moreover, IEX would often be transmitting outdated quotation information to other exchanges and market participants, causing them to send orders seeking liquidity that is advertised at IEX but that is no longer there.⁸ Meanwhile, orders sent to IEX for routing would move on to gobble up best-priced liquidity at other venues. If IEX's proposed structure is adopted without modifications, other exchanges will introduce delays in data transmission to provide their own routing brokers with comparable advantages.⁹

In contrast, Nasdaq does not impose any artificial delays in its order processing or data transmission functionality. The 2012 filing made a fairly simple change to several of the choices that Nasdaq makes available to members that want to use Nasdaq's facilities to execute orders and route remaining shares to other trading venues. Specifically, under the 2012 filing a member can send an order to Nasdaq and direct it to execute as much of the order as possible on Nasdaq; upon receipt of the order, Nasdaq also sends a message to its routing broker-dealer, Nasdaq Execution Services, LLC ("NES"), to send shares that cannot be executed on Nasdaq to competing trading venues for execution.¹⁰ Nasdaq also transmits information about the execution of shares on Nasdaq back to the originating member and to the public via proprietary and consolidated data feeds.

The idea is to make all events associated with each order – execution on Nasdaq, routing of shares that cannot be executed on Nasdaq, and transmission of information – occur as close in time to one another as possible. Similarly, a competing routing broker that sends an order to Nasdaq receives immediate confirmation of a transaction on Nasdaq and can route to other venues accordingly. Because competing routers are permitted to operate in proximity to Nasdaq's matching engine, and because Nasdaq immediately transmits information about executions, competing routers do not face a speed disadvantage vis-à-vis NES. Prior to the 2012 filing, however, Nasdaq did not send unexecuted shares to NES for routing to other trading venues until after it had processed the entire order through the Nasdaq book. By processing the entire order, including shares that could not be executed on Nasdaq, before sending the order to NES, *Nasdaq was effectively treating its own routing broker worse than other routing brokers*. The change made in 2012 rectified that inequity.

In contrast, as IEX explains its structure, "Members enter orders to the IEX Exchange via the POP. The entire order is sent to the IEX Trading Engine (the Trading Engine does not have

⁸ These orders seeking liquidity at IEX would themselves be subject to the speed bump.

⁹ We note, however, that IEX is seeking patent protection for the speed bump, so it is also possible that IEX may seek to use the patent laws to make its advantage exclusive. See <http://www.iextrading.com/trading/router> (referring to "the IEX patent-pending PoP").

¹⁰ We note that, contrary to statements made by IEX, members do not send orders to NES, and NES does not have a "special market data feed." Cf. "IEX Exchange Application: Industry Context and Precedents," *supra* n.6. Rather, as reflected in the Commission's approval of the 2012 filing, Nasdaq gives its members the benefit of executing against both displayed and non-displayed liquidity available on Nasdaq by instructing NES to route only shares that cannot be executed on Nasdaq.

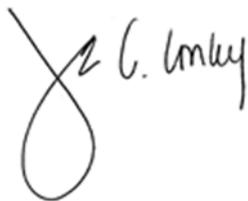
special visibility into IEX's Exchange). The IEX Trading Engine sends orders for any unexecuted shares to the IEX Router with instructions to simultaneously route those orders to other exchanges. The trade execution report from IEX's Exchange is communicated via the POP, *however the orders sent by IEX's Router do not, which gives the investor using the IEX Router a head-start prior to the trade execution report from IEX's exchange being received by its Members....*¹¹ Thus, we would expect that IEX members using its router will have a consistently better trading experience than IEX members that opt not to use its router. Indeed, IEX's broker currently operates a highly successful dark pool/order routing business under Regulation ATS, where it is legally permitted to discriminate among customers. In the absence of a rulemaking that clearly establishes applicable rules for all exchange routing brokers, however, it should not be permitted to adopt this model as an exchange.

Inevitably, transmission latencies exist in electronic financial markets due to the laws of physics, geography, and the location decisions made by trading venues and market participants. IEX's proposals reflect an interesting reaction to the effect of these factors on current market structure, and some of its ideas and concerns may merit careful consideration by the Commission. This does not mean, however, that the market and the terms of competition should be distorted through ad hoc changes that may disproportionately benefit one market participant. Rather, the market structure questions presented by IEX's application should be evaluated in the broader context of the Commission's ongoing examination of Regulation NMS.

Unfortunately, it appears that IEX is attempting to pressure the Commission to abandon its well-established and considered precedents and obligations of deliberative policy-making. We respectfully suggest the Commission should decline to follow that path.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "J. G. Linsky". The signature is stylized with a large loop at the bottom and a long horizontal stroke extending to the right.

cc: The Honorable Mary Jo White, Chair
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner
Stephen Luparello, Director, Division of Trading & Markets

¹¹ "IEX Exchange Application: Industry Context and Precedents," *supra* n.6 (emphasis added).