

March 17, 2016

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

Re: Investors' Exchange Form 1 Application (Release No. 34-75925; File No. 10-222)

Dear Mr. Fields:

Thank you for this opportunity to offer my input on an important question: whether Investors' Exchange LLC ("IEX") should be approved as a national securities exchange. I firmly believe that the SEC should grant exchange status to IEX. Approval would benefit long-term investors, thereby effectuating a stated purpose of Regulation National Market System ("NMS"). Furthermore, denying IEX exchange status because the coiled cable at IEX's point-of-presence ("POP") violates Regulation NMS would be arbitrary and capricious in violation of the Administrative Procedure Act.

Opponents of IEX argue that IEX's 350 microsecond POP delay is the result of an "intentional device that would delay the action taken with respect to a quotation" in violation of Regulation NMS.<sup>1</sup> This "intentional device," they argue, is IEX's 38-mile-long coiled fiber-optic cable. Persuasive arguments can be made both for a literal application (the POP coil is indeed a device, and does create a delay), and for a purposivist interpretation (the term "intentional device" is used only in the adopting release to Regulation NMS and not in the regulation itself, and should be interpreted to carry out the regulation's objective of "serving the interests of long-term investors"<sup>2</sup>). Even if the SEC determines that IEX's POP delay violates a literal reading of Regulation NMS, the Commission should not reject IEX's application. If it were to do so, the SEC would also be required to find that other major exchanges violate Regulation NMS.

Like IEX, the major exchange centers Nasdaq and BATS use coiled cable to create delays.<sup>3</sup> Their "delay coils" equalize access within each exchange's data centers. By delaying information going to customers physically located nearer to the exchanges—who would otherwise receive that information faster than slightly more distant consumers—these coils enable the exchanges to provide identically timed access to customers paying the same high co-location premiums. This allows the exchanges to charge higher fees for more up-to-date information. At Nasdaq, for example, \$30,000 a year buys a 5-12 microsecond latency advantage over 1G customers, while \$240,000 a year buys a 2-8 microsecond advantage over 10G

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<sup>1</sup> Adopting Release to Regulation NMS, 70 Fed. Reg. 37,496, 37,534 (June 29, 2005) (to be codified at 17 C.F.R. pts. 200, 201, 230, 240, 242, 249, and 270).

<sup>2</sup> *Id.* at 37,499 (capitalization omitted).

<sup>3</sup> Robert Greifeld, CEO, Nasdaq OMX Group, Inc., Investor Day Remarks (Mar. 27, 2014), [files.shareholder.com/downloads/NDAQ/906606220x0x740452/7918EF32-2541-4F6F-9144-EDC02228351B/NDAQ.20140327.pdf](https://files.shareholder.com/downloads/NDAQ/906606220x0x740452/7918EF32-2541-4F6F-9144-EDC02228351B/NDAQ.20140327.pdf) ("All right, so this is, in our data center, we call it a delay coil. So this is a – we took it out of the data center last night. If you're 31 meters away from the matching engine, all right, you have this length of delay coil, right. And again, each foot is a billionth of a second differential. If you are – now this is if you're closer, you have a longer delay coil, right. Simple technology; right out of the data center, we took it last night. So further away; shorter, closer, longer. Everybody has the same experience, down basically to three billionths of a second, right."); BATS Global Markets, *BATS Global Markets and Direct Edge Integration: What You Need to Know*, EQUINIX FORUM, [forum.equinix.com/insights/bats-global-markets-and-direct-edge-integration-what-you-need-to-know/financial](http://forum.equinix.com/insights/bats-global-markets-and-direct-edge-integration-what-you-need-to-know/financial) (last visited Mar. 16, 2016) ("BATS has engineered equal latency between NY4 and NY5 so that members that already have their infrastructure in place at NY4 will have equidistant access to the BATS exchanges in NY5 as those members with infrastructure in NY5.").

customers.<sup>4</sup> The coil equalizes access for customers in each pay level, while acting as an “intentional device” causing a “delay” to non-premium-paying customers—bringing it literally within the prohibition of Regulation NMS.

While Nasdaq and BATS use coils to provide equality among high-paying customers at the expense of baseline customers, IEX simply expands this model to provide equality to *all* participants. Both policy and legal reasons counsel against treating IEX’s coil differently from those of Nasdaq and BATS.

From a policy perspective, denying exchange status to IEX—while allowing Nasdaq and BATS to use similar delay coils—sends the message that IEX could obtain approval simply by offering a paid bypass of its own coil. This incentivizes shortcuts against the interests of long-term investors in contravention of Regulation NMS’s stated purpose.

Moreover, drawing an arbitrary distinction between IEX’s coil and those of other exchanges would violate the Administrative Procedure Act. While heated debate surrounds the question of whether the POP coil violates Regulation NMS, other exchanges have used delay coils for years with no attention paid by the SEC. Accordingly, rejecting IEX based on this interpretation of Regulation NMS would be arbitrary and capricious in violation of Section 706(2)(A) of the Administrative Procedure Act.<sup>5</sup> Under the Supreme Court’s precedent, an administrative agency that seeks to change its course must supply a reasoned analysis that considers relevant data and articulates a rational connection between the facts found and the choice made.<sup>6</sup> An IEX-specific deviation from the Commission’s longstanding acceptance of delay coils is not warranted under this standard; “relevant factors”<sup>7</sup> such as delay length and coil function suggest that the POP delay should be treated like other established exchanges’ coils.

The SEC should continue to effectuate Regulation NMS’s stated objective of serving long-term investors, and should not let its decision be unduly influenced by interest groups. The Commission should strive to act fairly, treating like the same as like. For the foregoing reasons, the SEC should grant exchange status to IEX.

Sincerely,



Marina Romani  
Yale Law School student, Class of 2016  
Yale Law School Financial Markets and Corporate Law Clinic<sup>8</sup>

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<sup>4</sup> *Low Latency Connectivity*, NASDAQ OMX, Inc. (2013), <http://www.nasdaqtrader.com/content/Productsservices/trading/CoLo/LowLatencyFS.pdf>.

<sup>5</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>6</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>7</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1977).

<sup>8</sup> This comment does not purport to express the views of Yale Law School, if any.