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May 30, 2017

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

Re: Securities Exchange Act Release No. 80583 (May 3, 2017) (SR-IEX-2017-10)

Dear Mr. Fields:

The NASDAQ Stock Market LLC (“Nasdaq”) appreciates the opportunity to comment on the above-captioned proposal by Investors Exchange LLC (“IEX”) to adopt rules governing auctions for securities listed on IEX, including rules governing the dissemination of auction-related market data (“IEX Auction Information”). IEX states in its filing that it wishes to introduce auctions on IEX in support of its planned operation of a listing market, and the proposal focuses extensively on the structure of IEX’s proposed auction mechanisms. IEX proposes an Opening Auction and a Closing Auction for the daily start and close of trading in IEX-listed securities, an IPO Auction for securities that are the subject of an initial public offering (“IPO”) on IEX, a Halt Auction for securities that have been the subject of a trading halt, and a Volatility Auction for resuming trading in securities that have been the subject of a limit-up, limit-down trading pause under IEX rules to implement the national market system Plan to Address Extraordinary Volatility (the “LULD Plan”).¹ At this time, Nasdaq is not submitting comments on these aspects of IEX’s proposal.

Nasdaq does, however, wish to draw the attention of the Securities and Exchange Commission and its staff (collectively, the “Commission”) to the data-related aspects of IEX’s proposal. IEX Auction Information includes a range of data designed to inform interested market participants about what the results of an auction would be if it occurred at the time of dissemination of the data. Thus, IEX Auction Information does not inform market participants about the price and size of orders that are definitively accessible on the IEX order book. Rather, the information is designed to allow market participants to make determinations about the probability that submitting an order for participation in an auction may result in an execution that the submitter of the order would find acceptable. Depending on the behavior of other market participants with

¹ Available at <http://www.finra.org/sites/default/files/regulation-NMS-plan-to-address-extraordinary-market-volatility.pdf>.

respect to order entry and cancellation, a particular auction order may or may not be executed at all, and the execution price may or may not be consistent with the data disseminated prior to the auction occurring.

The proposed array of IEX Auction Information includes the Reference Price, the number of Paired Shares, the number of Imbalance Shares, the Imbalance Side, the Indicative Clearing Price, the Auction Book Clearing Price, the Collar Reference Price, the Lower Auction Collar, the Upper Auction Collar, the Scheduled Auction Time, and the number of auction extensions, all of which will be disseminated each and every second during a period prior to an auction. While the exact meaning of these terms is explained in detail in IEX's 361-page filing, it suffices for purposes of this letter to summarize them as indications of possible execution prices, limitations on the range of possible execution prices, and estimates about the number of shares that may or may not be executed in an auction. In its proposed rules, IEX offers to make IEX Auction Information available free of charge on its publicly accessible website. IEX goes on to state, however, that it plans to propose the dissemination of IEX Auction Information through the Consolidated Quotation System ("CQS") operated by the Consolidated Tape Association ("CTA") securities information processor ("SIP") at a later date, "pending approval by the Operating Committee of the CTA." The CQS is operated pursuant to a national market system plan known as the "CQ Plan."²

Nasdaq is writing to emphasize that IEX's current proposed rule change does not address the issues raised by inclusion of an individual exchange's auction data under the framework of a national market system plan; thus, any approval of the current proposed rule change should not be construed as approval for dissemination of such data through the CQS. Indeed, in the interest of clarity, Nasdaq believes that in the event that the Commission approves the proposed rule change, it should make clear that it is not thereby approving inclusion of IEX Auction Information in the CQS. We also believe that the Operating Committee of the CTA should not give consideration to any proposal by IEX with regard to the use of the CQS for disseminating IEX Auction Information until one of two events occurs:

- (i) IEX submits to the Operating Committee a formal written proposal to amend the CQ Plan to govern the proposed use of the CQS for disseminating non-quotation data sponsored by an individual exchange member of the CQ Plan; or
- (ii) IEX submits a proposed rule change that provides a detailed description of IEX's proposed use of the CQS and explains why IEX believes that its proposal is consistent with the Securities Exchange Act of 1934 (the "Act") and the terms of the CQ Plan and why an amendment to the CQ Plan is not required; the filing provides the public with an opportunity to comment; the Commission approves the proposal in a manner constituting final agency action; and any judicial review of such approval is completed.

² Available at https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/CQ_Plan_Composite_as_of_April_11_2017.pdf. The arguments raised herein with regard to the CQ Plan would apply equally to the CTA Plan or any other national market system plan.

Nasdaq believes that there are serious legal and policy impediments to the dissemination of IEX Auction Information, or any other exchange-specific information that does not pertain to quotations for a security, through the facilities of the CQ Plan; accordingly, Nasdaq believes that an opportunity for public comment and formal action by the Commission, either in the context of a proposed CQ Plan amendment or a proposed rule change, is needed to ensure that these issues are given adequate consideration.³

Inclusion of Auction Data of an Individual Exchange in the CQS May Exceed the Permissible Authority of National Market System Plans.

The CQ Plan was adopted in 1978 to enable its Participants to implement congressional and Commission mandates to make quotation information available in a consolidated data stream as part of the national market system.⁴ By their very nature, national market system plans such as the CQ Plan have a unique status because they provide a forum for competing exchanges to engage in coordinated action. This is permissible under the antitrust laws only because of the direct congressional authorization provided by Section 11A of the Act⁵ and the direct participation by the Commission in CQ Plan meetings and approval of CQ Plan action. Nasdaq believes that it would be inappropriate, and possibly beyond the scope of the Commission's authority, to allow national market system plans to be used for the specialized competitive purposes of an individual exchange. Specifically, the authorization for national market system plans allows self-regulatory organizations "to act jointly with respect to matters as to which they share authority ... in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof."⁶ Thus, the statutory authority for the CQ Plan requires joint action and shared authority with respect to the national market system or a facility thereof. This language is antithetical to the use of the CQ Plan to advance the competitive efforts of a single member. Moreover, Nasdaq believes that the Commission and all market participants should be concerned if the competitive efforts of particular exchanges are advanced within the framework of the antitrust exemption enjoyed by the SIPs.

Similarly, the language of Regulations NMS defines a national market system plan as "any joint self-regulatory organization plan in connection with: (i) The planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or (ii) The development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with" SEC rules promulgated

³ Since the issue is not directly before the Commission at this time, this letter does not reflect an exhaustive analysis of these concerns. Nasdaq reserves the right to provide additional analysis, and to raise additional concerns, in the event that IEX presents a concrete proposal to include IEX Auction Information in the CQS.

⁴ Securities Exchange Act Release No. 15009 (August 4, 1978), 43 FR 34851 (August 7, 1978) (File No. 4-281).

⁵ 15 USC 78k-1.

⁶ 15 USC 78k-1(a)(3).

pursuant to Section 11A of the Act.⁷ In adopting former Rule 11Aa3-2, which included the predecessor version of this definition, the Commission stressed that it used the term “joint self-regulatory organization plan” in order “to remove any doubt that the Rule was not intended to apply to facilities which relate solely to an individual SRO.”⁸ In light of this statutory and regulatory framework, the Commission must carefully consider whether the operations of the CQS may be expanded to support the avowed competitive agenda of a single CQ Plan member.

Inclusion of IEX Auction Information in the CQS Would, At a Minimum, Require an Amendment to the CQ Plan.

Even if the use of the CQ Plan by a single exchange is determined to be consistent with the Act, the Commission and the CQ Plan Participants must consider whether the CQ Plan can be used for such purposes without adopting a plan amendment. Both the history and the language of the CQ Plan reflect the CQ Plan’s stated purpose of allowing dissemination of quotation information, and the CQ Plan is devoid of provisions that would govern an expansion of the CQ Plan to cover an individual exchange’s auction information. The CQ Plan states that its purpose is “to enable the Participants, through joint procedures, to make quotation information available to vendors and others in accordance with paragraph (b)(1) of the Rule.”⁹ Quotation information is defined as:

[A]ll bids, offers, quotation sizes, aggregate quotation sizes, identities of brokers or dealers making bids or offers (in the case of a Participant that is a national securities association) and other information with respect to Eligible Securities required to be collected and made available by any Participant to vendors by paragraph (b) of the Rule; (ii) the identifier of the Participant furnishing each bid or offer; (iii) each consolidated BBO contained in the foregoing information and any identifier associated therewith; and (iv) each ITS/CAES BBO and any identifier associated therewith.¹⁰

Thus, the stated purpose of the CQ Plan is limited to dissemination of quotation information. This is scarcely surprising, since the CQ Plan itself is designed to implement Rule 602 under Regulation NMS, which governs the “dissemination of quotations in Regulation NMS securities.”¹¹ Regulation NMS, in turn, defines “quotation” as a “bid or offer,” and defines those terms to mean “the bid price or the offer price communicated by a member of a national

⁷ 17 CFR 242.600.

⁸ National Market System Plans; Procedures and Requirements; Securities Exchange Act Release No. 17580 (February 26, 1981), 46 FR 15866, 15870 (March 10, 1981).

⁹ CQ Plan at 6 (available at www.nyse.com/publicdocs/ctaplan/notifications/trader-update/CQ_Plan_Composite_as_of_April_11_2017.pdf). The “Rule” is defined in the CQ Plan to mean Rule 602 under Regulation NMS, 17 CFR 242.602.

¹⁰ *Id.* at 4.

¹¹ 17 CFR 242.602.

securities exchange ... to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.”¹² As discussed above, IEX Auction Information provides information about possible future transactions, and cannot in any respect be construed to constitute a quotation within the meaning of the CQ Plan or Regulation NMS. Moreover, one can scour both the CQ Plan and Rule 602 for references to information other than quotations and find nothing. Under the familiar maxim of statutory and contract construction – expressio unius est exclusio alterius – it should be clear that neither the CQ Plan nor the Rule may be construed to govern matters that they do not address.

The complete absence of CQ Plan provisions to govern IEX’s suggested use of the CQS is underscored by an examination of Section X of the CQ Plan. That Section has provisions that establish a framework for a single Participant to use the CQ Plan for “concurrent use,” which is defined as disseminating “bids, offers and related information” (i.e., quotation information) for certain bonds and for listed equity securities other than “Eligible Securities.”¹³ The Section contains specific provisions to address matters such as ensuring that concurrent use does not interfere with disseminating quotation information for Eligible Securities, indemnification of other Participants by the Participant requesting concurrent use, and the impact of concurrent use on costs and revenue sharing. Given the existence of these very specific provisions to address a single exchange’s use of the CQ Plan for narrowly defined purposes, it is simply not plausible to suggest that the CQ Plan could be construed to cover use of its facilities by a single exchange for disseminating its own non-quotation information, a purpose that is not covered by Section X. In other words, if these provisions are needed to establish a framework for the quotation information of a single exchange, it follows a fortiori that a written framework must be established for non-quotation information.

Nasdaq is aware that the New York Stock Exchange (“NYSE”) has for many years disseminated the limited auction imbalance information provided for under NYSE Rules 15 and 123C through the CQS. Specifically, Rule 15 allows a NYSE specialist to publish an indication that the opening price for a security may deviate significantly from a Reference Price (such as the prior day’s closing price), while NYSE Rule 123C provides for the publication of an indication of the existence of a significant imbalance between market-on-close and marketable limit-on-close orders. In approving NYSE rules regarding this information, however, the Commission never specifically addressed the use of the CQ Plan, whether a CQ Plan amendment should have been adopted to govern the use of the CQS for this purpose, or what provisions of the CQ Plan might be construed to cover this use.¹⁴ Accordingly, Nasdaq does not believe that these rules provide meaningful precedents to support the dissemination of IEX Auction Information through the

¹² 17 CFR 242.600.

¹³ “Eligible Securities” are generally defined by the CQ Plan to include listed common stocks, preferred stocks, and warrants.

¹⁴ See, e.g., Securities Exchange Act Release No. 40094 (June 15, 1998), 63 FR 33975 (June 22, 1998) (SR-NYSE-97-36) (noting only that a commenter had suggested disseminating imbalance information through the CQS).

CQS. Rather, they appear to be a historical anomaly that is inconsistent with the CQ Plan's governing framework and that should not be repeated.

If these rules were construed to stand for the proposition that each exchange Participant in the CQ Plan is free to use the CQS to disseminate its own proprietary exchange information, there would be no discernable limit on the uses to which the SIPs might be put. For example, one exchange might opt to include specialized analytical data feeds, another might opt to include its depth-of-book data, and a third might even choose to disseminate advertising material, all without any CQ Plan provisions or other rules to govern the activity. Alternatively, if the NYSE Rules were somehow construed only to countenance the use of the CQS to disseminate the same information as NYSE, the argument would still prove too much. Specifically, NYSE currently disseminates only limited indications of the existence of an imbalance prior to an auction, whereas IEX is proposing to burden the CQS and its vendors and end-users with a vast array of information, including the Reference Price, the number of Paired Shares, the number of Imbalance Shares, the Imbalance Side, the Indicative Clearing Price, the Auction Book Clearing Price, the Collar Reference Price, the Lower Auction Collar, the Upper Auction Collar, the Scheduled Auction Time, and the number of auction extensions for opening, closing, IPO, halt, and volatility auctions, to be disseminated each and every second in the period prior to an auction. Thus, merely by labeling its information as "auction information," IEX would vastly expand the scope of information included within the CQ Plan. However, since literally no provision of the CQ Plan addresses this use of the CQS, Participants, vendors, and end-users can only speculate regarding the scope of their rights, responsibilities, and potential liabilities.¹⁵

An examination of SEC Rule 608 under Regulation NMS,¹⁶ which governs the filing and amendment of national market system plans, further underscores this point. That rule provides that when a national market system plan is amended, the amendment must include, among other things, a detailed description of the manner in which the amendment will be implemented, an analysis of the impact on competition of the implementation of the amendment, a description of any understanding or agreements between or among plan participants relating to plan interpretations, and a description of the manner in which a facility contemplated by an

¹⁵ Nasdaq is also aware that the Commission has approved a filing under which NYSE and NYSEAmex were authorized to use the CQ Plan to disseminate "Retail Liquidity Indicators," which alert market participants that the exchange's quotation includes an order that may provide price improvement to retail investors. Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR-NYSE-2011-55, SR-NYSEAmex-2011-84). However, this use is clearly distinguishable from a proposal to disseminate IEX Auction Information, since the modifiers are information about quotations, and therefore more clearly within the scope of the CQ Plan and its authorizing framework. Likewise, the use of the SIP to disseminate limit-up, limit-down band information does not provide a meaningful precedent, since this use is specifically addressed in its own national market system plan, the LULD Plan, which was approved by all exchanges and by the Commission in support of the national market system. Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4-631).

¹⁶ 17 CFR 242.608.

amendment will be operated, including with respect to granting and denial of access, fees, and dispute resolution. Thus, even if IEX's suggested use of the CQS is permissible under the Act, it would strain credulity to suggest that IEX could proceed without providing Participants, vendors and end-users with the degree of clarity regarding their rights and responsibilities that Rule 608 requires when a plan is amended. The fact that this clarity was lacking decades ago when the NYSE Rules discussed above were adopted does not justify failing to provide that clarity in the future, especially when Rule 608 provides a mechanism for doing so.

CQ Plan Participants and the Commission Must Consider Several Additional Policy and Legal Issues in Examining Whether to Allow the Dissemination of IEX Auction Information through the CQS.

Once IEX has presented a concrete proposal to disseminate IEX Auction Information through the CQS, the Commission will need to consider an array of associated issues. Nasdaq wishes to take this opportunity to highlight several issues that may arise from a future proposal.

- Including IEX Auction Information in the CQS May Place an Unreasonable Burden on Competition. IEX states that it is proposing auction functionality to support its efforts to launch a listing business. While Nasdaq has no objection to IEX engaging in a fair competition for listings, it should not be permitted do so through the facilities of a plan that allows collective action under the shelter of an antitrust exemption. It should also not be permitted to free-ride on the investments of others in the CQS Plan in order to do. The CQS is the product of 40 years of effort and millions of dollars of investment by the CQ Plan Participants and the CQ Plan's vendors and end-users. If IEX is permitted to disseminate IEX Auction Information through the CQS, it will receive immediate access to a highly reliable, low-latency network that is widely received by brokers and institutional and retail investors. By contrast, when Nasdaq developed auctions in support of its listing business, it expended substantial resources of its own to develop systems to support dissemination of the data and to market and sell the data to its vendors and end-users. While Nasdaq understands that IEX has expressed a willingness to pay any marginal costs associated with including IEX Auction Information in the CQS, we do not believe that it has offered to pay any portion of the substantial sunk costs incurred by CQ Plan Participants, vendors, and end-users over the years in order to make the CQS possible. Thus, CQ Plan Participants and others would be providing a substantial subsidy to IEX in its efforts to compete with them. Moreover, in the absence of a CQ Plan amendment, there is no binding means to determine what marginal costs would be borne by IEX.¹⁷

¹⁷ Nasdaq also notes that it holds a number of patents that relate to its auction processes. To date, Nasdaq has not sought to enforce these patents. However, if improper use of the CQS to disseminate auction data does occur, Nasdaq may feel compelled to carefully examine whether such improper use infringes these patents and, if infringement is found, whether to take legal action in order to ensure that the facilities of a national market system plan are not being used in furtherance of such infringement.

- Inclusion of IEX Auction Information in the CQS Would Impose Costs on Market Participants. Changes to the CQS inevitably impose costs on its vendors and end-users, who must code their systems to receive the information and who may need to acquire additional bandwidth in order to receive added volumes of data. By including IEX Auction Information in the CQS, IEX would deprive CQ Plan vendors and end-users of the right to decide whether they wish to receive the data and incur the associated costs. As a result, IEX would be requiring all CQ Plan vendors and end-users to subsidize its competitive efforts, whether they wish to or not. IEX should not be permitted to impose these costs unless the Commission first makes appropriate findings that the action is consistent with the requirements of the Act.
- Inclusion of IEX Auction Information in the CQS May Confuse Retail Investors. Retail investors who receive SIP data are accustomed to seeing the straightforward information that is required by the SEC's vendor display rule:¹⁸ the price and displayed size of the national best bid and offer and the price and size of the most recent sale. Thus, investors can readily gauge a stock's recent performance and its supply and demand, and are presented with actionable quotations against which orders can be executed. By contrast, IEX Auction Information would present them with an array of speculative pricing data that attempts to provide indications of the price of future executions and the extent to which orders entered to participate in an auction may or may not be executed at those prices. While a knowledgeable retail investor may use this type of information to participate effectively in an auction, Nasdaq believes that some retail investors would not need this information and indeed may find it confusing since it does not represent actionable quotations. The potential for confusion would be further accentuated if competing exchanges started using the SIPs to disseminate indicative prices for auctions that they offer for stocks that they do not list.¹⁹ Therefore, Nasdaq believes that the most prudent course is to allow all investors to choose whether or not they wish to obtain auction data and from which exchange(s). Investors will choose to obtain the data only if they believe that they can use it a manner that reasonably supports their trading decisions.
- Inclusion of Auction Data in the SIP Data Stream May Distort Demand for SIP Data and Necessitate a Reappraisal of the Formula for Allocating SIP Revenue Among Exchanges. The methodology for allocating SIP revenues among exchanges was established by Commission rulemaking under Regulation NMS, and is based on a complex formula that examines each exchange's quotation and trade reporting activity. Since auction data is neither quotation nor trade reporting data, it seems clear that addition of this data to a SIP would not affect the application of the allocation formula. To the extent, however, that inclusion of the data alters the demand for SIP data, it is reasonable to expect that in time those exchanges that distribute such data through SIPs will assert that they are not being compensated fairly by the allocation formula. Thus, by countenancing inclusion of

¹⁸ 17 CFR 242.603(c).

¹⁹ In this regard, it should be noted that if a listing exchange is permitted to place its indicative auction information on the SIP, the Commission would have to determine whether barring competing exchanges from doing so would place an impermissible burden on competition.

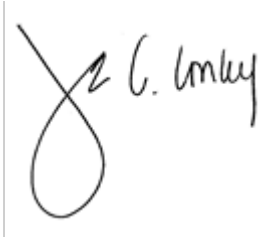
May 30, 2017

Page 9

individual exchange information in a SIP data feed that is not reflected in the revenue allocation formula, the Commission might be permitting distortions that can be remedied only through further rulemaking.

In closing, Nasdaq reiterates that it has no objection to IEX using fair methods to enter the listing business and compete for listings. However, we are concerned that a future IEX proposal to use the CQS may be contrary to the Act, and, at very least, would place impermissible burdens on competition by requiring others to subsidize IEX's competitive efforts. 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 "G. Conley". The signature is written in a cursive style with a large loop at the end. It is positioned above a horizontal line that serves as a baseline for the signature.