April 14, 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 LLC Form 1 Application [Release No. 34-77406; File No. 10-222]

Dear Mr. Fields:

We thank you for this opportunity to join the hundreds of others who have submitted comment letters urging you to promptly approve the Form 1 application of Investors' Exchange LLC ("IEX" or "IEX Exchange") pursuant to Section 6 of the Securities Exchange Act of 1934 ("Act").[1] In response to your March 18th notice instituting proceedings to determine whether to grant the application,[2] our comment letter proceeds in three parts. Part I begins by arguing that IEX's revised proposal comports with Regulation National Market System ("NMS").[3] Drawing on a range of scholarship, Part II then makes the case that IEX's application would comport with the statutory purposes and mission of the Securities and Exchange Commission ("SEC" or "Commission"). Part III concludes by highlighting the legal questions that would inevitably arise in the event that IEX's application were denied.

## I. IEX'S REVISED PROPOSAL COMPORTS WITH REGULATION NMS

As a threshold matter, the Commission has asked whether IEX's proposed trading system is consistent with the requirements of both Section 6(b)(5)[4] and Section 6(b)(8)[5] of the Act. The key questions before the Commission concern the design and operation of IEX's Smart Order Router ("SOR") as well as IEX's Point-of-Presence ("POP") and "coil" access delay ("speed bump").[6]

IEX's revised proposal for handling routable orders comports with both the letter and the spirit of Regulation NMS.[7] In Amendment No. 2 to its Form 1 Application, IEX makes clear that its technology is designed to equalize the application of the speed bump such that the IEX Router

[1] 15 U.S.C. 78f.
[2] *See* Securities Exchange Act Release No. 77406 (March 18, 2016).
[3] *See generally* 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), *available at* https://www.sec.gov/rules/final/34-51808.pdf.
[4] 15 U.S.C. 78(f)(b)(5) (requiring that the rules of the exchange protect against unfair discrimination between customers).
[5] 15 U.S.C. 78f (requiring the that that the rules of the exchange do not impose any burden on competition that is not necessary or appropriate for furtherance of the Act).
[6] https://www.sec.gov/rules/final/34-51808.pdf
[7] *Cf.* Rick Ketchum, the chief executive officer of the Financial Industry Regulatory Authority. http://www.bloomberg.com/news/articles/2016-02-18/iex-speed-bump-seems-to-comply-with-u-s-rules-finra-ceo-says.

("Router") has no advantage over third party brokers.[8] In subjecting all participants connecting at its point-of-presence to a 350-microsecond speed bump – and further subjecting orders sent from the Router to the IEX matching engine to an *additional* speed bump – IEX has directly addressed the concerns raised by its fiercest critics and foreclosed the possibility that its Router would enjoy an unfair advantage over other industry routers in contravention of Regulation NMS.[9]

Moreover, the claim that IEX's coil precludes IEX's best-priced quotation from qualifying as an "automated quotation" under Regulation NMS relies upon an erroneous reading of the relevant rules and regulations.[10] Critics have charged in particular that IEX's quotations do not comport with Rule 611 ("Order Protection Rule"). However, as the Commission has made clear in recent interpretive guidance, "delays of less than a millisecond in quotation response times may be at a de minimis level that would not impair a market participant's ability to access a quote, consistent with the goals of Rule 611."[11] In addition, the Commission has recognized that speed bumps like the one developed by IEX "could encourage innovative ways to address market structure issues."[12]

In addition, as we discuss in more detail in Part II below, IEX's technology also prevents latency arbitrage on the part of high-frequency traders ("HFTs").[13] We note that IEX's additional compromise changes raise questions about whether the overall percentage of routable shares filled in IEX will decline as a result of its efforts to go above and beyond the requirements of Regulation NMS to satisfy the concerns of its critics. Specifically, IEX proposes to redesign its order routing system such that routable orders travel first to the Router rather than to the IEX matching system, introducing an additional speed bump between the Router and the matching system. While these measures will not compromise the Router's effectiveness, they may insulate IEX from liquidity and, in turn, reduce the proportion of total routable orders fulfilled on IEX.[14] IEX's willingness to adopt these additional precautions is fitting with the goal that has animated its mission from the start: to be a "fair, simple and transparent market center dedicated to investor protection."[15]

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[8] On February 29, 2016, IEX proposed changes to its Form 1 application to, among other things, redesign its outbound routing functionality to direct routable orders first to the IEX router instead of directly to the IEX matching engine. *See* Letter from Sophia Lee, General Counsel, IEX, to Brent J. Fields, Secretary, Commission, dated February 29, 2016, at 1, *available at* https://www.sec.gov/comments/10-222/10222-421.pdf.
[9] *See, e.g.*, Letter from John C. Nagel, Managing Director, Citadel LLC, dated December 5, 2015.
[10] *Cf.* Letter from Michael Chung and Jayoung Jeon, Yale Law School Students, dated April 10, 2016 (providing a careful reading of the Commission's 2005 Adopting Release to Regulation NMS, 2016 Preliminary Interpretation, and the original meaning of the term "immediate" to argue that "IEX's quotation is sufficiently 'immediate'").
[11] Notice of Proposed Commission Interpretation Regarding Automated Queotations Under Regulation NMS ("Preliminary Interpretation"), 81 Fed. Reg., 15,660, 15,661 (March 24, 2016).
[12] *Id.* at 15,665.
[13] *See* Letter from Sophia Lee, General Counsel, IEX, at 1, dated November 13, 2015, *available at* https://www.sec.gov/comments/10-222/10222-20.pdf.
[14] *See* Letter from Sophia Lee, General Counsel, IEX, to Brent J. Fields, Secretary, Commission, dated February 29, 2016, at 1, *available at* https://www.sec.gov/comments/10-222/10222-421.pdf.
[15] *See* IEX Website *available at* [https://www.iextrading.com/about/](https://www.iextrading.com/about/) (last access April 14, 2016).

## II. APPROVING IEX'S FORM 1 WOULD ADVANCE THE PURPOSES AND MISSION OF THE SEC

Approving IEX's Form 1 application is consistent with the statutory purposes and mission of the SEC,[16] as well as the stated purposes of Regulation NMS.[17] In particular, the SEC's approval will (1) help to thwart risks to long-term investors; (2) bolster investor confidence; (3) address market fragmentation; and (4) foster equitable competition among venues.

### *1. Thwarting Risks to Long-Term Investors Posed by High-Frequency Trading*

Approving IEX would protect long-term investors by thwarting market risks, particularly those posed by high-frequency trading ("HFT"). Although the debate over the impact of HFT strategies continues, recent empirical studies – several of which are highlighted below – confirm that certain HFT strategies impose costs on long-term investors.

- For instance, Dr. Nicolas Hirschey (2013) finds evidence that high-frequency traders engage in order anticipation strategies colloquially known as "front-running." Where these strategies are profitable, they constitute a transfer of wealth from long-term investors to HFTs. In this way, HFTs operate like toll booths, extracting rents from non-HFT market participants by virtue of their access to more up-to-date market information.[18]
- In addition, a 2016 study drawing on order and quote data from the SEC's own Market Information Data Analytic System (MIDAS) estimates that in 2014 HFTs generated profits from latency arbitrage on the S&P 500 totaling $3.3 billion.[19]
- Professor Lin Tong (2013) demonstrates that HFTs increase trading costs for institutional investors. She finds a positive correlation between aggregate HFT activity and execution

[16] 15 U.S.C.A. § 78b ("[T]ransactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions"). *See also* SEC Concept Release on Equity Market Structure, January 14, 2010, at 33 ("In assessing the performance of the current equity market structure and whether it is meeting the relevant Exchange Act objectives, the Commission is particularly focused on the interests of long-term investors.").

[17] Adopting Release to Regulation NMS, 70 Fed. Reg. 37,496, 37,534 (June 29, 2005) ("In its extended review of market structure issues and in assessing how best to achieve an appropriate balance between competition among markets and competition among orders, the Commission has been guided by a firm belief that one of the most important goals of the equity markets is to minimize the transaction costs of long-term investors and thereby to reduce the cost of capital for listed companies.").

[18] Nicholas H. Hirschey, *Do High-Frequency Traders Anticipate Buying and Selling Pressure?,* Working Paper, London Business School, November 2013, *available at* https://research.mbs.ac.uk/accounting-finance/Portals/0/docs/Do%20HighFrequency%20Traders%20Anticipate%20Buying%20and%20Selling%20Pressure.pdf.

[19] Elaine Wah, *How Prevalent and Profitable are Latency Arbitrage Opportunities on U.S. Stock Exchanges?* (Feb. 8, 2016), *available at* SSRN: http://ssrn.com/abstract=2729109 or http://dx.doi.org/10.2139/ssrn.2729109

shortfall, which she defines as the percentage difference between the execution price and the benchmark price prevailing in the market when the order was placed.[20]

- Professors Brogaard, Hendershott and Riordan (2014) supplement these findings, showing that HFTs impose adverse selection costs on other traders.[21] And Professors Jarrow and Protter (2011) find that HFTs actually create mispricings, which they in turn exploit at the expense of other investors.[22]

Other costs of HFT are less direct but no less problematic. Among these costs are high order cancellation rates, which are a direct consequence of HFT activity. The SEC and leading thinkers in the field have acknowledged this problem.[23] The Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues advised action on the issue in 2010: "The Committee recommends that the SEC and CFTC explore ways to fairly allocate the costs imposed by high levels of order cancellations."[24] Additionally, deadweight losses created by HFTs pervert incentives for long-term investors and bring about detrimental results for market quality. Hirschey (2013) argues that investors have less incentive to do fundamental research, since the fruits of that labor now accrue in part to HFTs, and that this, in turn, causes efficient asset pricing to suffer.[25]

While some research suggests that HFT may serve a market-making role, any benefits HFT theoretically creates come at the expense of long-term investors. In addressing such conflicts, the Commission has made its mandate clear in the event of a divergence of interests: "Where the interests of long-term investors and short-term professional traders diverge, the Commission repeatedly has emphasized that its duty is to uphold the interests of long-term investors."[26]

We note that the hundreds of comment letters submitted to date are themselves clear evidence of such a divergence. As the SEC has acknowledged, comment letters in support of

[20] Lin Tong, *A Blessing or a Curse? The Impact of High Frequency Trading on Institutional Investors*, Working Paper, New York University Stern School of Business, November 2013, *available at* http://people.stern.nyu.edu/jhasbrou/SternMicroMtg/SternMicroMtg2014/Papers/TongHFT20131117.pdf.

[21] Brogaard, J., T.J. Hendershott, and R. Riordan, *High Frequency Trading and Price Discovery*, 27 Review of Financial Studies 2267–2306 (2014), *available at* http://faculty.haas.berkeley.edu/hender/hft-pd.pdf.

[22] Jarrow, R., and P. Protter, *A Dysfunctional Role of High Frequency Trading in Electronic Markets*, Working Paper, Johnson Cornell University (June 2011).

[23] *See, e.g.*, Jonathan Macey and David Swensen, *One Way to Unrig Stock Trading*, N.Y. TIMES (Dec. 24, 2015), http://www.nytimes.com/2015/12/24/opinion/one-way-to-unrig-stock-trading.html?_r=0 (noting that "[s]tartling evidence for the lack of robustness in today's market comes from a 2013 Securities and Exchange Commission report that found order cancellation rates as high as 95 to 97 percent, a result of high-frequency traders' playing their cat and mouse game. Market depth is an illusion that fades in the face of real buying and selling.").

[24] Securities and Exchange Commission, *Summary Report of the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues*, May 6, 2010, at 11, *available at* https://www.sec.gov/spotlight/sec-cftcjointcommittee/021811-report.pdf.

[25] *See supra* note 17. *See also* Foucault, T., Moinas, S., and Biais, B., *Equilibrium High Frequency Trading* (September 2011). International Conference of the French Finance Association (AFFI), May 2011. Available at SSRN: http://ssrn.com/abstract=1834344 (arguing that adverse selection costs can drive non-HFT investors out of the market entirely).

[26] *See, e.g.,* SEC Concept Release on Equity Market Structure, January 14, 2010; Flash Order Release, 74 FR at 48635-48636; Regulation NMS Release, 70 FR at 37499-37501; Fragmentation Concept Release, 65 FR at 10581 n. 26; see also S. Rep. No. 73-1455, 73rd Cong., 2d Sess. 5 (1934)).

IEX's Form 1 application have come overwhelmingly from individual and long-term institutional investors.[27] By contrast, short-term professional traders and IEX's competitors stand alone in opposition.[28] Approving IEX's application would resolve this divergence of interest in favor of long-term investors.

### *2. Bolstering Investor Confidence*

Approving IEX as a national exchange would bolster long-term investors' confidence at a moment when many have come to believe that our equity markets are broken. HFTs have a deleterious effect on long-term investors' trust in the fairness of markets; indeed, the pervasive view among the general public that markets are "rigged" in favor of HFTs illustrates the scope of the problem.[29] In markets, the optics of fairness can be as important as actual fairness. When investors perceive markets as unfair, they are significantly less likely to participate at all. Guiso, Sapienza, and Zingales (2008) demonstrate the powerful link between investor participation and trust, which they define as the subjective probability individuals attribute to the possibility of being cheated. Investors who perceive a mere two percent chance of being cheated require a five-fold increase in their wealth before they will invest in the stock market.[30] The effect is even more pronounced for the less educated.[31]

Bolstering trust in markets is especially important in the United States, where households invest in the stock market at comparatively high rates. Approximately half of American households own stock directly or indirectly, compared to a third of households in the U.K. and a quarter in Germany.[32] Widespread equity ownership represents a comparative advantage for the United States, lowering the cost of equity capital for businesses and enabling the public writ large to participate in corporate profits.[33] However, this unique pattern is also simultaneously a

[27] *See, e.g.,* Verret Letter; Shatto Letters 1, 2, and 3; Simonelis Letter; Leuchtkafer First Letter; Leuchtkafer Second Letter; Capital Group Letter; Southeastern Letter; Navari First Letter; Navari Second Letter; DV Advisors Letter; Cowen Letter; Themis First Letter; Themis Second Letter; Oppenheimer Funds Letter; Murphy Letter; Birch Bay Letter; Healthy Markets Letter; Keblish Letter; Bowcott Letter; Secrist Letter; Stevens Letter; Oltean Letter; Park Letter; Crespo Letter; Hovanec Letter; Meskill Letter; Brian S. Letter; Glennon Letter; Shaw Letter; Upson Letter; Goldman Sachs Letter; Robeson Letter; Lynch Letter; Budish Letter; Chen & Foley Letter; Liquidnet Letter; T. Rowe Price Letter.

[28] *See, e.g.*, BATS First Letter; BATS Second Letter; NYSE First Letter; NASDAQ First Letter; NASDAQ Second Letter; Citadel First Letter; Citadel Second Letter; Citadel Third Letter; Citadel Fourth Letter.

[29] *Cf.* Jonathan Macey and David Swensen, *One Way to Unrig Stock Trading*, N.Y. Times (Dec. 24, 2015), http://www.nytimes.com/2015/12/24/opinion/one-way-to-unrig-stock-trading.html?_r=0 ("America's equity markets are broken. Individuals and institutions make transactions in rigged markets favoring short-term players.").

[30] Guiso, Luigi, Paola Sapienza, and Luigi Zingales. *Trusting the Stock Market*, 63 Journal of Finance 6, 2557, 2558, 2564 (2008), *available at http://www.kellogg.northwestern.edu/faculty/sapienza/htm/trusting_stock.pdf* (finding that "if the perceived probability of being cheated is above" around 6.25 percent "an individual will never invest in stock).

[31] *Id*., at 2582-83.

[32] Badarinza, Cristian and Campbell, John Y. and Ramadorai, Tarun, International Comparative Household Finance (March 1, 2016) at 9-10. Available at SSRN: http://ssrn.com/abstract=2644967 or http://dx.doi.org/10.2139/ssrn.2644967.

[33] *See, e.g.*, Charles Niemeier, *American Competitiveness in International Capital Markets*, Speech and Background Paper for The Atlantic's Ideas Tour (Sept. 30, 2006), *available at* http://www.pcaob.org/News_and_Events/Events/2006/Speech/09-30_Niemeier.aspx; Hail, L. and Leuz, C., *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulations Matter?*, 44 J. Accounting Res. 485, 494-95 (2006), *available at*

burden for individuals. Whereas many developed countries rely on government and employer-sponsored retirement plans, Americans must largely fend for themselves.[34] Allowing IEX to compete alongside other formal exchanges will strengthen investors' trust in the fairness of markets, in turn encouraging sensible long-term investing by ordinary Americans.

### *3. Addressing Market Fragmentation*

The past decade has seen a rapid increase in market fragmentation.[35] Whereas in 2006 NYSE and NASDAQ enjoyed a near duopoly in U.S. equities, a decade later, Regulation NMS has helped to spur a proliferation of alternative traditional exchanges and so-called "dark pools," which are discussed in more detail below.[36] BlackRock, the world's largest asset manager, describes today's stock markets as "a complex and highly fragmented market where trade order flow must navigate 13 exchanges, 40+ dark pools, and a handful of Electronic Communication Networks (ECNs)."[37]

While fragmented markets can be beneficial to the extent that increased fragmentation is consistent with healthy competition, our highly fragmented markets today create dangers for long-term investors. HFTs exploit fragmentation by "front-running" orders routed to multiple marketplaces. The SEC has addressed the dangers of excessive fragmentation, with a particular emphasis on the rise of "dark pools," which offer anonymous trading and obscure details about orders before they occur. As former Democratic commissioner of the SEC, Luis Aguilar, has explained, dark pools became popular as large institutional traders sought to protect themselves from the front-running strategies of HFTs.[38] Today, dark pools comprise more than a third of total equity trading volume. Chairwoman White cautions that "the consensus of the research is that the current extent of dark trading can sometimes detract from market quality, including the informational efficiency of prices."[39]

While recent SEC enforcement actions involving HFT against a number of firms are important first steps, [40] the SEC's approval of IEX's Form 1 application would be an immediate,

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http://faculty.london.edu/sbasak/assets/documents/1998_RFS_RestrictedParticipation.pdf at 312 (demonstrating that limited stock market participation increases equity risk premiums).

[34] Badarinza, Cristian and Campbell, John Y. and Ramadorai, Tarun, International Comparative Household Finance (March 1, 2016) at 9-10. Available at SSRN: http://ssrn.com/abstract=2644967 or http://dx.doi.org/10.2139/ssrn.2644967

[35] *See generally* Jonathan Macey and David Swensen, *The Cure for Stock-Market Fragmentation: More Exchanges,* Wall St. J. (May 31, 2015), http://www.wsj.com/articles/the-cure-for-stock-market-fragmentation-more-exchanges-1433109068.

[36] Aite Group, *Market Fragmentation and Its Impact: A Historical Analysis of Market Structure Evolution in the United States, Europe, Australia, and Canada*, August 2013, at 31 *available at* http://www.cvm.gov.br/export/sites/cvm/audiencias_publicas/ap_sdm/anexos/2013/sdm0513-manifestacaoBMFBovespaAnexoII_09-08-2013.pdf.

[37] Blackrock, U.S. Equity Market Structure: An Investor's Perspective, April 2014, at 2 *available at* https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf.

[38] Statement by Commissioner Luis A. Aguilar, U.S. Securities and Exchange Commission, Shedding Light on Dark Pools, Nov. 18, 2015, *available at* https://www.sec.gov/news/statement/shedding-light-on-dark-pools.html.

[39] Speech by, Chair Mary Jo White, U.S. Securities and Exchange Commission, Enhancing Our Equity Market Structure, June 5, 2014, *available at* https://www.sec.gov/News/Speech/Detail/Speech/1370542004312#_ednref17.

[40] *See, e.g.*, SEC Press Release, "Barclays, Credit Suisse Charged With Dark Pool Violations Firms Collectively

prophylactic measure to advance this effort. IEX addresses market fragmentation by providing an alternative venue for trade execution, which eliminates the deadweight loss associated with HFT. IEX's differentiated exchange offers institutional investors a transparent alternative to dark pools, furthering the SEC's goal of enhancing both market transparency and market quality.

### *4. Fostering Equitable Competition Among Venues*

Despite fervently objecting to IEX's use of coiled cable to create its speed bump, incumbent exchanges – including the NYSE, NASDAQ, and BATS – all utilize some form of latency mechanism.[41] Whereas IEX's speed bump in effect equalizes access to data for all participants, incumbent exchanges utilize latency to equalize access amongst *classes* of paying customers who in turn reap a speed advantage vis-à-vis ordinary customers. Because deliberate latency mechanisms are already widespread, approving IEX promotes equitable competition among venues.

Moreover, while IEX seeks approval, at least one incumbent exchange is attempting to appropriate IEX's technology. Although NYSE Arca, Inc. ("NYSE Arca") had previously registered its opposition to IEX's exchange application,[42] on March 24, it filed a proposed rule change with the Commission requesting authorization to add a new "Discretionary Peg Order," which NYSE Arca acknowledges "is based on the Discretionary Peg Order as proposed by IEX in its Form 1 Application."[43] Approving IEX promotes innovation and fair competition among trading venues, signaling that incumbents will not be permitted to capitalize on the lengthy exchange approval process to appropriate would-be competitors' innovations.

## III. DENYING IEX'S FORM 1 APPLICATION WOULD RAISE QUESTIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

Denying IEX exchange status on account of its speed bump would raise a number of questions under the Administrative Procedure Act ("APA").[44] In particular, such an outcome could constitute an arbitrary and capricious determination in violation of 5 U.S.C. § 706(2)(A).[45]

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Paying More Than $150 Million to Settle Cases," January 31, 2016, *available at* https://www.sec.gov/news/pressrelease/2016-16.html; SEC, "SEC Charges New York-Based High Frequency Trading Firm With Fraudulent Trading to Manipulate Closing Prices," Press Release, October 16, 2014, *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/ 1370543184457; SEC, "SEC Charges Firm and Owner with Manipulative Trading," Press Release, October 8, 2015, *available at* https://www.sec.gov/news/pressrelease/2015-236.html.

[41] *See generally* Letter Brent Fields, Secretary, SEC, from Marina Romani, Yale Law School Student, dated March 17, 2016 (describing "delay coils" used by other exchanged and citing key sources). *See also* Letter to from Sophia Lee, General Counsel, IEX, dated November 13, 2015; 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 (describing delay coil).

[42] Letter to Brent Fields, Secretary, SEC, from Elizabeth K. King, General Counsel and Secretary, NYSE Group (November 12, 2015).

[43] *See* https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/rule-filings/filings/2016/NYSEArca-2016-44.pdf at 4, 5, 9 (acknowledging that NYSE Arca's proposed rule is based upon the technology proposed by IEX).

[44] 5 U.S.C. § 706 (2012).

[45] 5 U.S.C. § 706(2)(A) (2012) (requiring reviewing courts to hold unlawful and set aside agency action that is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). *See also Abbott Labs*.

The United States Supreme Court has described arbitrary and capricious review as "a substantial inquiry" characterized by "a thorough, probing, in-depth review."[46] The Court has further made clear that agencies must take into account "reliance interests created by a prior policy" and that "[i]t would be arbitrary or capricious to ignore such matters."[47]

In this case, a denial of IEX's Form 1 would be inconsistent with prior SEC policies and precedents, including policies that have engendered serious reliance interests. For instance, while critics of IEX argue that Regulation NMS should be interpreted to prohibit any intentional delay,[48] as detailed in Part I above, the Commission's current guidance clearly reaffirms its view that any delay less than one millisecond is immaterial to protecting the interests of long-term investors.[49] Moreover, the Commission has long accepted the deliberate latency mechanisms of other exchanges. In light of the shared set of "relevant factors"[50] that guide an assessment of such deliberate latency mechanisms, denying IEX exchange status would be difficult to substantiate on the record under the searching standards of judicial hard look review.[51]

For these reasons, we urge the Commission to grant exchange status to IEX and thank you for your consideration.

Sincerely,

Jason Gilliland
Yale Law School Class of 2017[52]

Maggie Goodlander
Yale Law School Class of 2016[53]

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*v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967) (finding that "the Administrative Procedure Act…embodies the basic presumption of judicial review").

[46] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

[47] *See F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 503, 129 S. Ct. 1800, 1804, 173 L. Ed. 2d 738 (2009) (noting the "need to account for…certain reliance interests created by a prior policy"); Smiley v. Citibank (S. Dakota), N.A., 517 U.S. 735, 742, 116 S. Ct. 1730, 1734, 135 L. Ed. 2d 25 (1996) (noting that a change in agency interpretation that "does not take account of legitimate reliance on prior interpretation" would violate U.S.C. § 706(2)(A)); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 295, 94 S.Ct. 1757, 1772, 40 L.Ed.2d 134 (1974); *United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670–675, 93 S.Ct. 1804, 1814–1817, 36 L.Ed.2d 567 (1973).

[48] *See* Letter from John C. Nagel, Managing Director, Citadel LLC, dated November 6, 2015.

[49] *See, e.g.*, Notice of Proposed Commission Interpretation Regarding Automated Quotations Under Regulation NMS ("Preliminary Interpretation"), 81 Fed. Reg. 15,660, 15,661 (March 24, 2016); Adopting Release to Regulation NMS ("Adopting Release"), 70 Fed. Reg. 37,496 (June 29, 2005).

[50] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 548-49, 129 S. Ct. 1800, 1830, 173 L. Ed. 2d 738 (2009).

[51] *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 430 U.S. 29, 43 (1983).

[52] This comment letter does not purport to express, if any, the views of the Yale Law School or any other individual.

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