

Via Email

April 23, 2020

Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

*Re: File Number SR-IEX-2019-15*

Dear Madam Secretary:

I am writing on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to respond to the Securities and Exchange Commission (SEC or Commission) March 27, 2020, request for written submissions in response to the Investors Exchange LLC “proposed rule change to adopt a new order type, the Discretionary Limit or ‘D-Limit.’”(Proposal).<sup>2</sup> The proposed new D-Limit order type is ““designed to protect liquidity providers, institutional investors, as well as market makers, from potential adverse selection by latency arbitrage trading strategies in a fair and nondiscriminatory manner . . . .””<sup>3</sup>

As indicated in our letter of February 11, 2020 to the Commission (February Letter) and discussed further in this letter, CII believes the SEC should approve the Proposal.<sup>4</sup>

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<sup>1</sup> For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at <http://www.cii.org>.

<sup>2</sup> Self-Regulatory Organizations; Investors Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Add a New Discretionary Limit Order Type Called D-Limit, Exchange Act Release No. 88,501, 85 Fed. Reg. 18,612, 18,612 (Apr. 2, 2020), *available at* <https://www.federalregister.gov/documents/2020/04/02/2020-06856/self-regulatory-organizations-investors-exchange-llc-order-instituting-proceedings-to-determine>.

<sup>3</sup> *Id.* at 18,612-13.

<sup>4</sup> See Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Secretary, Securities and Exchange Commission 4 (Feb. 11, 2020), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2020/20200211%20DLimit%20Comment%20Letter%20FINAL.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2020/20200211%20DLimit%20Comment%20Letter%20FINAL.pdf) (“We strongly support the IEX proposal.”).

## CII Policy on Trading Practices

CII's long-standing membership approved policies on trading practices states:

We . . . have the broader duty to communicate the interests and desires of the institutional investor community to regulators, to the public and to the industry regarding trading practices and commissions.

Like any other expense of the plan, trading costs need to be managed to minimize the cost and ensure that maximum value is received. But current brokerage industry practices . . . may be antithetical to the fiduciary obligation of obtaining best execution, and hold too much potential for conflicts of interest and abuses.

. . . .

Clarity and transparency of . . . brokerage arrangements is essential, and it is up to plan sponsors to require it. Simple reliance on brokers . . . is insufficient to discharge the obligations of plan fiduciaries. Plan sponsors should require . . . that fiduciaries are pursuing best execution in their trading practices.<sup>5</sup>

## Order Types

We acknowledge that increasing the number of order types may be in tension with the above referenced policy. As we explained in our 2019 brief with the Investment Company Institute as *amici curiae* supporting respondent SEC and the Commission's final rule entitled Transaction Fee Pilot for NMS Stocks:

The complexity generated by the proliferation of order types harms investors. It . . . creates an informational advantage that . . . participants exploit, often to investors' detriment. These effects are inimical to . . . "the best execution" of investors' orders . . .<sup>6</sup>

Nevertheless, we favor the proposed new D-Limit order type because we believe it would increase the transparency of prices and lower trading costs without creating conflicts of interest between long-term investors and brokers. As explained in the February Letter:

Long-term investors are at real and substantial risk from speed advantages of a small number of trading firms that specialize in "latency arbitrage," which imposes a multi-billion-dollar tax on institutional investors. A recent study sponsored by the

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<sup>5</sup> Council of Institutional Investors, Policies on Other Issues, Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission (adopted Mar. 31, 1998), [https://www.cii.org/policies\\_other\\_issues#principles\\_trading\\_commission\\_softdollar](https://www.cii.org/policies_other_issues#principles_trading_commission_softdollar).

<sup>6</sup> Brief for Council of Institutional Investors & Investment Company Institute as Amici Curiae in Support of Respondent & Denial of Petitions to Review, *NYSE v. SEC* 19 (D.C. Cir. 2019) (No. 19-1042), [https://www.cii.org/files/issues\\_and\\_advocacy/correspondence/2019/ICICII%20Final%20Brief.pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/ICICII%20Final%20Brief.pdf).

Financial Conduct Authority suggested that this activity is endemic, and results in substantial losses to all liquidity providers. One result is limited willingness of long-term investors, as well as market makers, to display quotes. As Themis Trading put it in a comment letter, “an environment has been created that is more toxic than it needs to be for the display of institutional orders.”

The D-Limit order type provides an innovative, non-discriminatory method to protect interests of all participants. We believe it would *encourage increased displayed liquidity*, benefiting the U.S. equity markets. And D-Limit seeks to attract displayed liquidity without paying rebates, *which we view as creating potential conflicts of interest between investors and brokers.*<sup>7</sup>

We note that our support for the new D-Limit order type is shared by many institutional investors.<sup>8</sup> For example, in a recent letter to the SEC the Capital Group wrote:

Capital Group is philosophically predisposed to market structures that encourage pre-trade transparency and displayed liquidity. D-Limit will give Capital Group, other asset managers, and the broker-dealers executing orders, another tool to ensure that we are transacting at fair prices and will help to level the playing field between investors and low latency traders.<sup>9</sup>

We believe the new D-limit order type could be a particularly useful tool to investors in light of the long-term decline in displayed liquidity in the U.S. markets<sup>10</sup>—a decline that has been exacerbated by the ongoing COVID-19 crisis.<sup>11</sup>

For all of the above reasons, we believe the approval of the Proposal as a protected quote would clearly promote fairness and reduce unfair discrimination that is harmful to our members.<sup>12</sup> We

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<sup>7</sup> Letter from Kenneth A. Bertsch, Executive Director, Council of Institutional Investors et al. to Secretary, Securities and Exchange Commission at 2 (footnotes omitted & emphasis added).

<sup>8</sup> See Letter from Kevin Duggan, Managing Director, Global Trading, Capital Markets, Ontario Teachers’ Pension Plan et al. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Feb. 24, 2020), <https://www.sec.gov/comments/sr-iex-2019-15/sriex201915-6858786-210532.pdf> (signed by more than a dozen representatives of institutional investors, including the Arizona State Retirement System and the State of Wisconsin Investment Board urging the “Securities and Exchange Commission . . . to approve the D-Limit order”).

<sup>9</sup> Letter from Peter D. Stutsman, Global Head of Equity Trading, Capital Group to Ms. Vanessa Countryman, Secretary, United States Securities and Exchange Commission 2 (Mar. 16, 2020), <https://www.sec.gov/comments/sr-iex-2019-15/sriex201915-6964547-213237.pdf>.

<sup>10</sup> See, e.g., Gunjan Banerji, Buying or Selling Stocks? It Isn’t Always Easy, Wall St. J., Jan. 2, 2020, <https://www.wsj.com/articles/buying-or-selling-stocks-it-isnt-always-easy-11577961000> (“Liquidity . . . has been on the decline [and] [t]hat can mean higher costs and more volatile prices.”).

<sup>11</sup> See, e.g., Hitesh Mittal et al., US Equity Liquidity in the COVID-19 Crisis, BestEx Research (Mar. 31, 2020), available at <https://www.marketsmedia.com/u-s-equity-liquidity-in-the-covid-19-crisis/> (detailing the significant impact of the ongoing COVID-19 crisis on U.S. equity market liquidity and related investor costs).

<sup>12</sup> See 85 Fed. Reg. at 18,614 (“the Commission is providing notice of the following grounds for possible disapproval under consideration: • Whether the Exchange has demonstrated how its proposal is consistent with Section 6(b)(5) of the Exchange Act, which requires the rules of IEX to not be ‘designed to permit unfair discrimination between customers, issuers, brokers, or dealers.’”).

also believe the Proposal is a very useful market innovation that promotes competition among markets, and disapproval of the Proposal would itself hinder competition to incentivize displayed liquidity for the benefit of investors.<sup>13</sup>

We respectfully request that the Commission approve the Proposal. Thank you for considering our views on this matter. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive, flowing style.

Jeffrey P. Mahoney  
General Counsel

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<sup>13</sup> *See id.* (“the Commission is providing notice of the following grounds for possible disapproval under consideration: . . . • Whether the Exchange has demonstrated how its proposal is consistent with Section 6(b)(8) of the Exchange Act, which requires that the rules of IEX not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.”).