

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93627; File No. SR-IEX-2021-16)

November 19, 2021

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Definition of a Retail Order for the Retail Price Improvement Program

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 12, 2021, the Investors Exchange LLC (“IEX” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Act,<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> the Exchange is filing with the Commission a proposed rule change to modify the definition of a Retail order set forth in IEX Rule 11.190(b)(15) to encourage the submission of more Retail orders. The Exchange has designated this rule change as “non-controversial” under Section 19(b)(3)(A) of the Act<sup>5</sup> and provided the Commission with the notice required by Rule 19b-4(f)(6) thereunder.<sup>6</sup>

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(1).

<sup>4</sup> 17 CFR 240.19b-4.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available at the Exchange’s website at [www.iextrading.com](http://www.iextrading.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statement may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the definition of a Retail order<sup>7</sup> set forth in IEX Rule 11.190(b)(15) for the benefit of retail investors. Specifically, IEX is proposing to revert a recent change to IEX Rule 11.190(b)(15), so that Retail orders can once again be submitted on behalf of all retail customers without the requirements that the retail customer submits no more than 390 orders per day on average (the “390-order threshold”). The Exchange proposes to make this change to offer the benefits of IEX’s Retail Price Improvement Program (“Retail Program”) to as many retail investors as possible.

Background

In 2019 the Commission approved the Retail Program<sup>8</sup>, which is designed to provide

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<sup>7</sup> See IEX Rule 11.190(b)(15).

<sup>8</sup> See Securities Exchange Act Release No. 86619 (August 9, 2019), 84 FR 41769 (August 15, 2019) (SR-IEX-2019-05) (SEC order approving IEX’s Retail Program).

retail investors with meaningful price improvement opportunities through trading at the Midpoint Price<sup>9</sup> or better.<sup>10</sup> The Exchange launched the Retail Program on October 1, 2019.<sup>11</sup>

Under IEX’s Retail Program, Members<sup>12</sup> that qualify as Retail Member Organizations (“RMOs”)<sup>13</sup> are eligible to submit Retail orders<sup>14</sup> to the Exchange. Any Member is able to provide price improvement to Retail orders through orders priced to execute at the Midpoint Price or better, including Retail Liquidity Provider (“RLP”) orders<sup>15</sup> that are only eligible to execute against a Retail order at the Midpoint Price and execute in price-time priority with other

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<sup>9</sup> The term “Midpoint Price” means the midpoint of the NBBO. See IEX Rule 1.160(t). The term “NBBO” means the national best bid or offer, as set forth in Rule 600(b) of Regulation NMS under the Act, determined as set forth in IEX Rule 11.410(b).

<sup>10</sup> On March 1, 2021, IEX filed an immediately effective rule change proposal to provide that, in addition to executing at the Midpoint Price, a Retail order can execute against a displayed unprotected odd lot order that is resting on the Order Book at a price more aggressive than the Midpoint Price (*i.e.*, above the Midpoint Price in the case of an odd lot buy order and below the Midpoint Price in the case of an odd lot sell order). Executing against such an odd lot order thus provides more price improvement to the Retail order than executing at the Midpoint Price. See Securities Exchange Act Release No. 91324 (March 15, 2021), 86 FR 15015 (March 19, 2021) (SR-IEX-2021-03).

<sup>11</sup> See Trading Alert #2019-026, available at <https://iextrading.com/alerts/#/82>.

<sup>12</sup> See IEX Rule 1.160(s).

<sup>13</sup> See IEX Rule 11.232(a)(1).

<sup>14</sup> A Retail order is currently defined as an order submitted by an RMO and designated with a “Retail order” modifier. A Retail order must be an agency order, or riskless principal order that satisfies the criteria of FINRA Rule 5320.03, and must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology (a “retail customer”). An order from a retail customer can include orders submitted on behalf of accounts that are held in a corporate legal form that have been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. A Retail order may only be submitted on behalf of a retail customer that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s). See IEX Rule 11.190(b)(15).

<sup>15</sup> See IEX Rule 11.190(b)(14).

orders resting on the Order Book priced to trade at the Midpoint Price.

On July 13, 2021, the Commission approved an IEX rule change proposal that revised its Retail Program (the “Retail Program Update Filing”).<sup>16</sup> The Retail Program Update Filing was designed to further support and enhance the ability of non-professional retail investors to obtain meaningful price improvement by incentivizing market participants to compete to provide such price improvement.<sup>17</sup> Specifically, the Retail Program Update Filing contained the following four enhancements to the Retail Program: (i) revised the definition of Retail order in IEX Rule 11.190(b)(15) to apply only to the trading interest of a natural person that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s); (ii) modified RLP orders from Discretionary Peg<sup>18</sup> to midpoint peg<sup>19</sup> orders; (iii) modified RLP order priority so that they execute in time priority with other orders priced to trade at the Midpoint Price; and (iv) introduced a “Retail Liquidity Identifier” that is disseminated through the Exchange’s proprietary market data feeds and the appropriate securities information processor when RLP order interest aggregated to form at least one round lot for a particular security is available in the System<sup>20</sup>, provided that the RLP order interest is resting at the Midpoint Price and is priced at least \$0.001 better than the NBB<sup>21</sup> or NBO.<sup>22</sup>

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<sup>16</sup> See Securities Exchange Act Release No. 92398 (July 13, 2021), 86 FR 38166 (July 19, 2021) (approving SR-IEX-2021-06).

<sup>17</sup> See supra note 16.

<sup>18</sup> See IEX Rule 11.190(b)(10).

<sup>19</sup> See IEX Rule 11.190(b)(9).

<sup>20</sup> See IEX Rule 1.160(nn).

<sup>21</sup> See IEX Rule 1.160(u).

<sup>22</sup> See IEX Rule 1.160(u).

IEX implemented the Retail Program Update Filing on October 13, 2021.<sup>23</sup> Subsequently, and notwithstanding prior informal feedback from Members and market participants, IEX became aware that several existing and potential RMOs have not implemented a counting methodology to determine the number of equities orders submitted by each of their retail customers, as well as by the customers of broker-dealers that route Retail orders through the RMO. As a result, such RMOs cannot submit Retail orders to IEX because they are unable to reasonably assure that such orders would be in compliance with the recent changes to IEX Rule 11.190(b)(15) which specifies that Retail orders may only be submitted on behalf of a natural person who submits no more than 390 equity orders per day on average during a calendar month for its own beneficial account(s). Thus, while the 390-order threshold was intended to limit the use of Retail orders to retail investors who do not appear to be engaged in trading activity akin to that of a professional, it has had the unintended consequence of limiting the number of actual retail customers who are able to obtain the beneficial execution opportunities offered by the Exchange's Retail Program. As discussed more fully below, no other equities exchanges restrict retail orders in the same manner as IEX, and IEX believes that this factor may impact the willingness of Members representing retail orders to devote technology resources to implementing a counting methodology.

Accordingly, IEX proposes to revert the recent changes to the definition of a Retail order that limits Retail orders to customers who place no more than 390 equity orders per day on average during a calendar month for their own beneficial account(s). Thus, IEX proposes to delete the last sentence in IEX Rule 11.190(b)(15) which imposes the 390-order threshold, as well as Supplementary Materials .01 and .02 appended thereto that specify how RMOs should

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<sup>23</sup> See Trading Alert # 2021-036, available at <https://iextrading.com/alerts/#/169>.

count orders for purposes of determining if a retail customer has placed no more than 390 orders per day and establish new compliance requirements for the RMOs with respect to the 390-order threshold.

IEX notes that no other exchange with a retail price improvement program restricts retail orders based upon the volume of trading of the retail customer, and that the proposed changes to IEX Rule 11.190(b)(15) will make it substantially similar to those exchanges' definitions of a retail order.<sup>24</sup> As noted in the Retail Program Update Filing, the 390-order threshold is also used by Cboe EDGX Exchange, Inc. ("EDGX") with respect to its equity market, but EDGX only uses the 390-order threshold to delineate retail priority orders that receive execution priority over most other orders resting on its order book.<sup>25</sup> EDGX continues to allow its RMOs to submit regular priority retail orders for retail customers without any assurance that the retail customer submits no more than 390 orders per day on average.<sup>26</sup>

Furthermore, IEX notes that nothing in this proposed rule change will modify the pre-existing compliance obligations of RMOs to assure they are only submitting Retail orders on behalf of actual retail customers.<sup>27</sup> IEX believes these ongoing compliance obligations of RMOs will continue to assure that they only submit Retail orders to the Exchange that represent the trading interest of natural persons.

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<sup>24</sup> See Cboe BYX Exchange, Inc. ("Cboe BYX") Rule 11.24(a)(2); Nasdaq BX, Inc. ("Nasdaq BX") Rule 4702(b)(6)(A); New York Stock Exchange LLC ("NYSE") Rule 7.44(a)(3); NYSE Arca, Inc. ("NYSE Arca") Rule 7.44-E(a)(3).

<sup>25</sup> See EDGX Rule 11.9 Interpretations and Policies .01 and .02. EDGX does not have a retail price improvement program, but does offer both retail orders and retail priority orders.

<sup>26</sup> See EDGX Rule 11.21(a)(2).

<sup>27</sup> See IEX Rule 11.232(b)(6).

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>28</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>29</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission has consistently emphasized that the U.S. capital markets should be structured with the interests of retail investors in mind<sup>30</sup> and the proposed change to the Retail Program is explicitly designed with that goal in mind. Specifically, reversing the recent change to the definition of Retail orders at IEX is designed to benefit retail investors by providing enhanced opportunities for as many retail investors as possible to obtain meaningful price improvement. IEX believes that encouraging the submission of more Retail orders to the Exchange should attract increased contra-side liquidity seeking to trade against and provide meaningful price improvement to such Retail orders.

Additionally, the Exchange believes that the proposed rule change is consistent with the protection of investors because, as described in the Purpose section, it will align its definition of Retail orders with that of all other exchanges that offer a retail price improvement program, thereby reducing potential confusion to market participants and increasing the ability of all market participants to participate in IEX's Retail Program as well as those of its competitors.

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<sup>28</sup> 15 U.S.C. 78f(b).

<sup>29</sup> 15 U.S.C. 78f(b)(5).

<sup>30</sup> See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018-2022, available at [https://www.sec.gov/files/SEC\\_Strategic\\_Plan\\_FY18-FY22\\_FINAL\\_0.pdf](https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf).

The Exchange also believes that the proposed rule change is consistent with the protection of investors because it is designed to increase competition among execution venues by enhancing IEX's Retail Program which offers the potential for meaningful price improvement to orders of retail investors, including through incentivizing market participants to provide additional liquidity to execute against the orders of retail investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, IEX believes that the proposed enhancements to our Retail Program would continue to enhance competition and execution quality for retail customers.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition since competing venues have and can continue to adopt similar retail programs, subject to the SEC rule change process. The Exchange operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. While orders submitted by RMOs will be treated differently than orders submitted by other Members, as described in the Purpose section, those differences are not based on the type of Member entering orders but on whether the order is for a retail customer, and there is no restriction on whether a Member can handle retail customer orders. Further, any Member can enter an RLP order.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>31</sup> and Rule 19b-4(f)(6) thereunder.<sup>32</sup> Because the proposed rule change does not:

(i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>33</sup> and Rule 19b-4(f)(6) thereunder.<sup>34</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>35</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>36</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately. As explained above, the Exchange believes that this proposal will allow a greater

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<sup>31</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>32</sup> 17 CFR 240.19b-4(f)(6).

<sup>33</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>34</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange’s intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>35</sup> 17 CFR 240.19b-4(f)(6).

<sup>36</sup> 17 CFR 240.19b-4(f)(6)(iii).

pool of retail investors that were once able to participate in IEX's Retail Program to again obtain the price improvement benefits thereunder. IEX also states that allowing RMOs to begin submitting a greater pool of Retail orders upon effectiveness of this rule change will benefit retail investors who may be able to obtain meaningful price improvement opportunities through IEX's Retail program. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the change is intended to offer immediate benefit to retail investors by expanding the pool of RMOs eligible to partake in IEX's Retail Program and thus, allow additional retail orders to benefit from price improvement opportunities. Further, by reverting to the previously-approved definition of Retail order, the proposal does not raise any new or novel issues. For these reasons, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>37</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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<sup>37</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-IEX-2021-16 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-IEX-2021-16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File Number SR-IEX-2021-16, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>38</sup> 17 CFR 200.30-3(a)(12), (59).