

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82209; File No. SR-IEX-2017-41)

December 4, 2017

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rules 14.501(a)(4), 14.501(d), and 14.502(b) to Modify the Process IEX Would Follow When a Company Fails to Hold an Annual Meeting of Shareholders, and to Correct Three Nonsubstantive Typographical Errors in Rules 14.502(b) and 14.504(b)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 20, 2017, the Investors Exchange LLC (“IEX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III, below, 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 Securities Exchange Act of 1934 (“Act”),³ and Rule 19b-4 thereunder,⁴ Investors Exchange LLC (“IEX” or “Exchange”) is filing with the Commission proposed rule change to amend Rules 14.501(a)(4), 14.501(d), and 14.502(b) to modify the process IEX would follow when a company fails to hold an annual meeting of shareholders, and to correct three nonsubstantive typographical errors in Rules 14.502(b) and 14.504(b). The Exchange has designated this proposal as non-controversial and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.⁵ The text of the proposed rule change is available at the Exchange's website at 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 [sic] 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

On June 17, 2016, the Commission granted IEX's application for registration as a national securities exchange under Section 6 of the Act including approval of rules applicable to the qualification, listing and delisting of companies on the Exchange.⁶ The Exchange plans to begin listing companies in 2018.

Each company that would list common stock or voting preferred stock, and their equivalents, on IEX must hold an annual meeting of shareholders no later than one year after the end of the company's fiscal year and solicit proxies for that meeting.⁷ An annual meeting allows

⁵ 17 CFR 240.19b-4(f)(6)(iii).

⁶ See Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41141 (June 23, 2016) (File No. 10-222).

⁷ See Rules 14.408(a) and (b), respectively. Rule 14.407(a)(4)(D) also requires a limited partnership to hold an annual meeting of limited partners if required by statute or regulation in the state in which the limited partnership is formed or doing business or by the terms of the partnership's limited partnership agreement. Rule 14.407(a)(4)(F)

the equity owners of the company the opportunity to elect directors and meet with management to discuss company affairs. Currently, should a company fail to hold its annual meetings as required by Rule 14.408, staff of IEX Regulation (“Staff”) would have no discretion to allow additional time for the company to regain compliance. Rather, Staff would be required by Rule 14.501(d)(1) to issue a Delisting Determination, subjecting the company to immediate suspension and delisting unless the company appeals to the Listings Review Committee.⁸ IEX proposes to amend Rules 14.501(a)(4), 14.501(d), and 14.502(b) to provide Staff with limited discretion to grant a listed company that failed to hold its annual meeting of shareholders an extension of time to comply with the requirement.⁹

IEX notes that the only other rule where a company would be subject to immediate suspension and delisting, besides when it fails to solicit proxies and hold an annual meeting, would be when Staff makes a determination pursuant to the Rule Series 14.100 that the company’s continued listing raises a public interest concern. Such a determination would generally be made only following discussion and review of the facts and circumstances with the company. For all other deficiencies under Chapters 14 and 16 of the IEX rules, a listed company

requires the limited partnership to distribute information statements or proxies when a meeting of limited partners is required. The proposed process described herein would apply in the identical manner to limited partnerships required to hold a meeting as it does to other companies. See also Rules 14.407(a)(4)(D) and (F) (partner meetings and proxy solicitation of limited partnerships).

⁸ A listed company may request review of a Staff Delisting Determination by the Listings Review Committee. A timely request for a hearing will stay the suspension and delisting pending the issuance of a written Panel Decision. See Rule 14.502.

⁹ The Exchange notes that listed companies and certain limited partnerships are also required to solicit proxies and provide proxy statements for all meetings of shareholders or partners. See Rules 14.408(b) and 14.407(a)(4)(F), respectively. A listed company or limited partnership that has not timely held an annual meeting has not violated the proxy solicitation rule because no meeting has been held.

is provided with either a fixed compliance period within which to regain compliance,¹⁰ or given the opportunity to submit a plan to regain compliance, which Staff would review and determine whether to grant the company a limited time to implement.¹¹ Generally, a company would be allowed 45 days to submit the plan of compliance¹² and, upon review of the plan, Staff could grant the company up to 180 days from the date of Staff's initial notification of the company's non-compliance to regain compliance.¹³ If upon review of the company's plan Staff determines that an extension is not warranted, Staff would issue a Delisting Determination,¹⁴ which triggers the company's right to request review by the Listings Review Committee.¹⁵

There are a variety of reasons a company may fail to timely hold an annual meeting. In many of these cases, the circumstances that precipitated the delay may arise just before a planned meeting. These can include, for example, situations where a company was required to adjourn and reschedule its annual meeting to allow its shareholders more time to review proxy materials in connection with a shareholder proxy contest. In other cases, a company could be unable to hold an annual meeting because it was delinquent in filing periodic reports and therefore could not include the required financial information in its proxy statement. In that case, under current listing rules, the company could receive an extension of time to regain compliance with the filing requirement. However, if during any such compliance period the company fails to hold an annual meeting of shareholders, Staff would be required to issue a delist determination at that

¹⁰ See Rule 14.501(d)(3).

¹¹ See Rule 14.501(d)(2).

¹² Companies deficient with the filing requirement for periodic reports are provided up to 60 days to submit a plan of compliance. See Rule 14.501(d)(2)(F). Staff can shorten these deadlines where deemed appropriate.

¹³ See Rule 14.501(d)(2)(B)(i).

¹⁴ See Rule 14.501(d)(2)(B)(ii).

¹⁵ See Rule 14.502.

time for both the filing delinquency and the annual meeting deficiency, even if the compliance period for the filing delinquency had not expired.¹⁶ Under these circumstances, as required by the Listing Rules, Staff would notify the company in writing of the annual meeting deficiency¹⁷ and the company would be required to publicly disclose such notification.¹⁸ The annual meeting deficiency would then be considered at the same time and together with the filing delinquency in any subsequent delisting proceeding.¹⁹

For these reasons, IEX is proposing to amend Rules 14.501(a)(4), 14.501(d), and 14.502(b) to afford those companies and limited partnerships that fail to hold an annual meeting in accordance with the listing rules an opportunity to submit a plan of compliance for Staff's review.²⁰ As proposed, Rule 14.501(d)(2)(G) is entitled "Annual Meeting" and specifies the process applicable to deficiencies from the standards of Rules 14.408(a) and 14.407(a)(4)(D), which relate to Annual Meetings and Partner Meetings respectively. Subparagraph (i) provides that the Staff's notice shall provide the Company with 45 calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the Company shall not be provided with an opportunity to submit such a plan if review under the Rule Series 14.500 of a prior Staff Delisting Determination with respect to the Company is already pending. Staff may extend this deadline for up to an additional 15 calendar days upon good cause shown and may request such additional information from the Company as is necessary to make a determination

¹⁶ See Rule 14.501(d)(2)(A).

¹⁷ See Rule 14.501(b).

¹⁸ See Rule 14.501(c).

¹⁹ See Rule 14.501(e).

²⁰ As noted above, the company or limited partnership generally would have 45 days to submit a plan to regain compliance, although Staff could shorten that period where it believes appropriate.

regarding whether to grant such an extension. Subparagraph (ii) provides that the maximum additional time provided by all exceptions granted by Staff is 180 calendar days from the deadline to hold the annual meeting (one year after the end of the Company's fiscal year). In determining whether to grant an exception, and the length of any such exception, Staff will consider, and the Company should address in its plan of compliance, the Company's specific circumstances, including the likelihood that the Company would be able to hold an annual meeting within the exception period, the Company's past compliance history, the reasons for the failure to hold the annual meeting timely, corporate events that may occur within the exception period, the Company's general financial status, and the Company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the Company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.

Additionally, proposed Rule 14.502(b)(1)(F) provides that the Listings Review Committee may grant an exception for a period not to exceed 360 days from the deadline to hold the annual meeting (one year after the end of the Company's fiscal year).²¹ This time frame is consistent with the limit on extensions that Nasdaq provides for its listed companies that fail to timely hold an annual meeting²², and would incorporate any extension of time previously provided by the Staff, and is not cumulative with the 180 calendar day extension that the Staff can provide. IEX believes that the proposed rule change would provide consistency with the administration of other continued listing standards without undermining the requirement that

²¹ It is IEX's understanding that a substantial majority of Nasdaq-listed companies that received delisting notices for failing to solicit proxies and hold their annual meetings regain compliance within a six-month period. See Securities Exchange Act Release No. 77137 (February 12, 2016), 81 FR 8582 (February 19, 2016) (SR-NASDAQ-2015-144).

²² See Nasdaq Rule 5815(c)(1)(G).

IEX-listed companies hold annual meetings. Specifically, under existing IEX listing rules, a company that becomes deficient with the continued listing standards identified in IEX Rule 14.501(d)(2) and (3) is provided with either an opportunity to submit a plan to regain compliance or a specified cure period (as applicable) after it becomes deficient of up to 180 calendar days. Thereafter, if such company has not regained compliance it will receive a Staff Delisting Determination, but can appeal to the Listings Review Committee which has authority to grant an exception to the continued listing standards for an additional period not to exceed 180 days from the date of the Staff Delisting Determination with respect to the deficiency for which the exception is granted.²³

A non-compliant company would have to publicly disclose, under both Commission and IEX rules, that it had received notification of non-compliance with the annual meeting rule.²⁴

IEX is also proposing to modify Rule 14.501(a)(4) to make clear that a Public Reprimand Letter²⁵ is not an available notification type for unresolved deficiencies from the standards of Rules 14.207(c) (obligation to file periodic financial reports), 14.407(a)(4)(D) (partner meetings

²³ As proposed, the 360 calendar day limit on extensions for annual meeting deficiencies would be several weeks less than the total amount of time that can be granted under current rules for the other continued listing deficiencies. As proposed, for annual meeting deficiencies, the maximum amount of time that can be granted is 360 days from deadline to hold an annual meeting (i.e., one year after the end of the Company's fiscal year end). In contrast, for other continued listing deficiencies that allow for a cure period or opportunity to submit a plan to regain compliance (except for number of market makers) the cure period or compliance plan extension can extend for 180 days, and then the Listings Review Committee can provide an additional 180 calendar days to regain compliance through an appeal. These 180 calendar day measurement periods include the time for Staff notification to the company plus the 15 calendar day appeal deadline and so in total would be greater 360 calendar days from the date of deficiency. See Rules 14.501(d)(2) and (3) and 14.502(b)(1)(A).

²⁴ See Rule 14.501(c) and Supplementary Material .01. See also Item 3.01 of SEC Form 8-K.

²⁵ See Rule 14.500(b)(5).

of limited partnerships), and 14.408(a) (meetings of shareholders). This proposed change is substantially identical to Nasdaq Rule 5810(4). IEX Rule 14.500(b)(5) provides that a “Public Reprimand Letter” may be issued by the Staff or a Decision of the Listings Review Committee in cases where the Company has violated an Exchange corporate governance or notification listing standard (other than one required by Rule 10A-3 of the Act) and Staff or the Listings Review Committee determines that delisting is an inappropriate sanction. While the Exchange does not believe that the obligation to file periodic financial reports or hold an annual meeting fall within the coverage of Rule 14.500(b)(5), in view of Nasdaq’s amendment to its comparable rule, the Exchange believes that the added clarity is appropriate to avoid any confusion among listed companies on a going forward basis.

In addition, IEX is proposing conforming amendments to Rules 14.501(d)(2)(A)(iii) and 14.501(d)(2)(B) to reflect that listed companies that are deficient with respect to the standards requiring annual meetings of shareholders or partner meetings of limited partners, pursuant to Rules 14.408(a) and 14.407(a)(4)(D) respectively, are included in the deficiencies for which a listed company may submit a Plan of Compliance for Staff review.

Finally, IEX is proposing to correct three nonsubstantive typographical errors in Rules 14.502(b) and 14.504 which incorrectly refer to the Listing Review Committee rather than the Listings Review Committee.

The Exchange does not propose to charge any fees in connection with the proposed rule change.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with Section 6(b)²⁶ of the Act in

²⁶ 15 U.S.C. 78f.

general, and furthers the objectives of Section 6(b)(5) of the Act,²⁷ 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, 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; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the proposed changes are consistent with these requirements because they would provide a more efficient process to address annual meeting deficiencies by permitting staff to grant additional time to a company to comply with the annual meeting requirement in limited situations after Staff review of a compliance plan. The proposed changes, are consistent with the time frames available to Nasdaq companies that fail to hold an annual meeting, as well as the time frames available to IEX listed companies that become noncompliant with other continued listing standards, as described in the Purpose section. Furthermore, as is the case under the current rule, a company notified that it is deficient in the annual meeting requirement is required to publicly disclose such notice and the rules basis for it. IEX will also separately publicly disclose a list of noncompliant companies and the listing standards with which they do not comply. Accordingly, the Exchange believes that the proposed rule would protect investors and the public interest.

As described in the Purpose section, there are various reasons why a company may not be able to hold an annual meeting and for which immediate delisting is an inappropriate outcome under the circumstances. In lieu of the current requirement, which would require that Staff send

²⁷ 15 U.S.C. 78f(b)(5).

an immediate Delisting Determination in such circumstances, the proposal vests Staff with discretion to determine whether the reason for the deficiency and the plan to regain compliance merit an extension. The listing rules allow Staff such discretion for other deficiencies, and the only case where Staff would be required to send an immediate Delisting Determination is where Staff concludes, after review of the facts and circumstances, that continued listing is contrary to the public interest. IEX believes that it is consistent with the Act to provide Staff with discretion to grant an extension for an annual meeting deficiency based on a plan of compliance, consistent with the process that would be applicable for the majority of deficiencies under existing IEX listing rules. Accordingly, the Exchange believes that the proposal promotes the requirements of the Act by providing Staff with such limited discretion while maintaining Staff authority to initiate delisting of a company when warranted.

The Exchange also notes that the proposed rule change is substantially identical to existing Nasdaq rules that were approved by the Commission, with differences only to account for the IEX streamlined delisting appeal structure (compared to the multiple levels of appeal provided for in Nasdaq rules) and terminology.²⁸

In its approval of the Nasdaq rule filing adopting comparable rules, the Commission stresses that “[t]he development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of substantial importance to financial markets and the investing public” as well as the critical importance of annual meetings of shareholders to allow shareholders the ability to exercise their rights to participate in corporate governance matters. The Commission also emphasized that under the Nasdaq proposal, “Staff retains discretion not to grant an exception from the continued listing requirements to a company that

²⁸ See Securities Exchange Act Release No. 77137 (February 12, 2016), 81 FR 8582 (February 19, 2016) (SR-NASDAQ-2015-144).

has failed to hold its annual meeting on time” and that “[t]he Commission expects Staff to exercise this discretion carefully and discerningly... and based on the specified rule factors.”²⁹

In approving the Nasdaq rule filing the Commission thus found that such rule change was reasonably designed to further the goals of Section 6(b)(5) of the Act. As discussed in the Purpose section, the Exchange will retain the same discretion, subject to the same standards, pursuant to proposed Rule 14.501(d)(2)(G).

The Exchange believes that the same factors and analysis that led to the Commission’s approval of the comparable Nasdaq rule change are applicable to IEX’s proposed rule change. Consequently, the Exchange does not believe that the proposed rule change raises any new or novel issues.

The Exchange also believes that it is consistent with the protection of investors and the public interest to make clear in IEX rules that a Public Reprimand Letter does not apply to deficiencies from the obligation to file periodic financial reports or the requirement to hold an annual meeting in order to provide transparency that the only cure under Exchange rules is for the company to file the periodic financial report or hold its annual meeting.

Finally, the Exchange believes that it is consistent with the protection of investors and the public interest to correct the three nonsubstantive typographical errors in Rules 14.502(b) and 14.504 to avoid any confusion among potential listed companies.

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

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to promote consistent and fair regulation, rather than for any

²⁹ See supra note 28.

competitive purpose. Moreover, as a new listing exchange, IEX has extremely limited ability to impose any burden on competition.

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 designated this rule filing as non-controversial under Section 19(b)(3)(A)³⁰ of the Act and Rule 19b-4(f)(6)³¹ thereunder. 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

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 under Section 19(b)(2)(B)³² of the Act to determine whether the proposed rule change should be approved or disapproved.

³⁰ 15 U.S.C. 78s(b)(3)(A).

³¹ 17 CFR 240.19b-4(f)(6).

³² 15 U.S.C. 78s(b)(2)(B).

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:

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. Please include File Number SR-IEX-2017-41 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-IEX-2017-41. 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 office 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-2017-41 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.³³

Eduardo A. Aleman
Assistant Secretary

³³ 17 CFR 200.30-3(a)(12).