

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 230**

**[Release No. 33-10390; File No. S7-06-17]**

**RIN 3235-AM07**

**Covered Securities Pursuant to Section 18 of the Securities Act of 1933**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (“Commission”) proposes for comment an amendment to Rule 146 under Section 18 of the Securities Act of 1933 (“Securities Act”), as amended, to designate certain securities on Investors Exchange LLC (“IEX” or “Exchange”) as covered securities for purposes of Section 18(b) of the Securities Act. Covered securities under Section 18(b) of the Securities Act are exempt from state law registration requirements.

**DATES:** Comments should be received on or before August 21, 2017.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-06-17 on the subject line.

- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

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 S7-06-17. 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/proposed.shtml>). Comments are also 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. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at [www.sec.gov](http://www.sec.gov) to receive notifications by e-mail.

**FOR FURTHER INFORMATION CONTACT:** Richard Holley III, Assistant Director; Edward Cho, Special Counsel; or Michael Ogershok, Attorney-Adviser, Office of Market Supervision, at (202) 551-5777, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC (“NYSE”), the American Stock Exchange LLC (“Amex”) (now known as NYSE American LLC),<sup>1</sup> or the National Market System of The Nasdaq Stock Market LLC (“Nasdaq/NGM”)<sup>2</sup> (collectively, “Named Markets”), or any national securities exchange designated by the Commission to have “substantially similar” listing standards to those of the

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<sup>1</sup> On October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (“Merger”). In connection with the Merger, NYSE Amex’s predecessor, Amex, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC (“NYSE Alternext”). See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger). In 2009, NYSE Alternext changed its name to NYSE Amex LLC (“NYSE Amex”). See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR-NYSEALTR-2009-24) (approving the name change). In 2012, NYSE Amex changed its name from NYSE Amex LLC to NYSE MKT LLC (“NYSE MKT”). See Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR-NYSEAmex-2012-32) (publishing notice of the name change to NYSE MKT LLC). Effective July 24, 2017, NYSE MKT intends to change its name from NYSE MKT LLC to NYSE American LLC (“NYSE American”). See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017) (SR-NYSEMKT-2017-14). See also NYSE Trader Update, NYSE Group – Pillar Migration Update (April 13, 2017), available at <https://www.nyse.com/publicdocs/nyse/notifications/trader-update/Pillar%20Migration%20Update.pdf> (providing notification of the expected implementation date of the name change).

<sup>2</sup> As of July 1, 2006, the National Market System of The Nasdaq Stock Market LLC is known as the Nasdaq Global Market (“NGM”). See Securities Exchange Act Release Nos. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) and 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006).

Named Markets.<sup>3</sup> Specifically, Section 18(a) of the Securities Act provides that “no law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that – (A) is a covered security....”<sup>4</sup> Covered securities are defined in Section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are “substantially similar” to those of the Named Markets (“Covered Securities”).<sup>5</sup>

In 1998, the Chicago Board Options Exchange, Incorporated (“CBOE”), the Pacific Exchange, Inc. (“PCX”) (now known as NYSE Arca, Inc.), the Philadelphia Stock Exchange, Inc. (“Phlx”) (now known as NASDAQ PHLX LLC),<sup>6</sup> and the Chicago Stock Exchange, Inc. (“CHX”) each petitioned the Commission to determine by rule that specified portions of the exchanges’ listing standards were substantially similar to the listing standards of the Named

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<sup>3</sup> See National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (October 11, 1996).

<sup>4</sup> 15 U.S.C. 77r(a).

<sup>5</sup> 15 U.S.C. 77r(b)(1)(A) and (B). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of Section 18(b) of the Securities Act. See 15 U.S.C. 77r(b)(1)(C).

<sup>6</sup> On July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC.” See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31); and 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR-NASDAQ-2008-035). See also Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR-Phlx-2010-104). NASDAQ OMX PHLX LLC subsequently changed its name to “NASDAQ PHLX LLC.” See Securities Exchange Act Release No. 76654 (December 15, 2015), 80 FR 79396 (December 21, 2015) (SR-Phlx-2015-105).

Markets.<sup>7</sup> In response to the petitions, and after extensive review of the petitioners' listing standards, the Commission adopted Rule 146(b) pursuant to Section 18(b)(1)(B) of the Securities Act, having determined that the listing standards of CBOE, Tier 1 of PCX, and Tier 1 of Phlx were substantially similar to those of the Named Markets, and thus securities listed pursuant to those standards are deemed Covered Securities.<sup>8</sup>

Accordingly, Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards that are "substantially similar" to those of the Named Markets and thus securities listed on such exchanges are deemed Covered Securities.<sup>9</sup>

The Commission has since amended Rule 146(b) several times in response to petitions after having determined that the listing standards for securities listed, or authorized for listing, on the petitioning markets were substantially similar to those of the Named Markets and,

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<sup>7</sup> See Letter from David P. Semak, Vice President, Regulation, PCX, to Arthur Levitt, Jr., Chairman, Commission, dated November 15, 1996; Letter from Alger B. Chapman, Chairman, CBOE, to Jonathan G. Katz, Secretary, Commission, dated November 18, 1996; Letter from J. Craig Long, Esq., Foley & Lardner, Counsel to CHX, to Jonathan G. Katz, Secretary, Commission, dated February 4, 1997; and Letter from Michele R. Weisbaum, Vice President and Associate General Counsel, Phlx, to Jonathan G. Katz, Secretary, Commission, dated March 31, 1997.

<sup>8</sup> See Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998) (determining that the listing standards of CBOE, Tier 1 of PCX, and Tier 1 of Phlx were substantially similar to those of the Named Markets). The Commission did not include Tier 1 of CHX in Rule 146 because of "concerns regarding the CHX's listing and maintenance procedures." *Id.* at 3032.

<sup>9</sup> 17 CFR 230.146(b).

accordingly, that such securities listed pursuant to such listing standards qualified as Covered Securities for purposes of Section 18(b) of the Securities Act.<sup>10</sup>

## II. Petition from IEX

In June 2016, the Commission granted the application of IEX to become a registered national securities exchange.<sup>11</sup> IEX's exchange registration application included a rulebook, which contained a complete set of listing rules and standards that were based on those of Nasdaq/NGM.<sup>12</sup> When the Commission granted IEX's exchange registration it stated, among other

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<sup>10</sup> In 2004, the Commission amended Rule 146(b) to designate options listed on the International Securities Exchange, Inc. ("ISE") (now known as Nasdaq ISE, LLC) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (July 20, 2004). The Commission notes that, in March 2017, ISE changed its name from International Securities Exchange, LLC to "Nasdaq ISE, LLC." See Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017) (SR-ISE-2017-25) (publishing notice of the name change to Nasdaq ISE, LLC). In 2007, the Commission amended Rule 146(b) to designate securities listed on the Nasdaq Capital Market ("NCM") as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007). In 2012, the Commission amended Rule 146(b) to designate securities listed on Tiers I and II of BATS Exchange, Inc. ("BATS") as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 9295 (January 20, 2012), 77 FR 3590 (January 25, 2012). The Commission notes that, in March 2016, BATS changed its name from BATS Exchange, Inc. to "Bats BZX Exchange, Inc." See Securities Exchange Act Release No. 77307 (March 7, 2016), 81 FR 12996 (March 11, 2016) (SR-BATS-2016-25) (publishing notice of the name change to Bats BZX Exchange, Inc.).

<sup>11</sup> See Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10-222) (order granting IEX's exchange registration).

<sup>12</sup> See Securities Exchange Act Release No. 75925 (September 15, 2015), 80 FR 57261 (September 22, 2015) (File No. 10-222) (Notice of Filing of Application of IEX). See also Securities Exchange Act Release Nos. 77406 (March 18, 2016), 81 FR 15765 (March 24, 2016) (File No. 10-222) (Notice of Filing of Amendment Nos. 2, 3, and 4 to, and Order Instituting Proceedings To Determine Whether To Grant or Deny, and Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Grant or Deny, an Application for Registration as a National Securities

things, that it believed IEX's proposed initial and continuing listing standards are consistent with the requirements of the Securities Exchange Act of 1934 ("Exchange Act").<sup>13</sup>

Subsequent to its exchange registration, IEX petitioned the Commission to amend Rule 146(b) and determine that the listing standards for securities listed on IEX are substantially similar to those of the Named Markets, such that IEX listed securities would be Covered Securities under Section 18(b) of the Securities Act.<sup>14</sup>

For the reasons discussed below, the Commission preliminarily believes that IEX's listing standards are substantially similar to those of the Named Markets and, therefore, securities listed, or authorized for listing, on IEX would be eligible to be designated as Covered Securities under Rule 146(b)(1) under the Securities Act, which, as described above, are exempt from state law registration requirements. The Commission notes that, as provided in Rule 146(b)(2) under the Securities Act, the designation of IEX's listed securities as Covered Securities under Rule 146(b)(1) would be conditioned on IEX maintaining listing standards for equity securities that continue to be substantially similar to those of the Named Markets.<sup>15</sup>

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Exchange Under Section 6 of the Securities Exchange Act of 1934, as Modified by Amendment Nos. 1, 2, 3, and 4 Thereto).

<sup>13</sup> See Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142, 41136 (June 23, 2016) (File No. 10-222) (order granting IEX's exchange registration).

<sup>14</sup> See Letter from Sophia Lee, General Counsel, IEX, to Brent J. Fields, Secretary, Commission, dated September 22, 2016 ("IEX Petition").

<sup>15</sup> See 17 CFR 240.146(b)(2). In response to recent proposed rule changes made by Nasdaq to its NGM listing standards since IEX first adopted its listing standards as part of its Form 1 exchange application, IEX submitted several proposed rule changes to conform its listing standards to those recent changes made by Nasdaq. See, e.g., Securities Exchange Act Release Nos. 79652 (December 21, 2016), 81 FR 95664 (December 28, 2016) (SR-IEX-2016-21) (incorporating substantially similar changes concerning substitution listing events in response to changes made by Nasdaq); and 80905 (June 12,

### III. Discussion

Under Section 18(b)(1)(B) of the Securities Act,<sup>16</sup> the Commission has the authority to determine that the listing standards of an exchange, or tier or segment thereof, are substantially similar with those of the NYSE, NYSE American, or Nasdaq/NGM. The Commission has compared IEX's listing standards with these Named Markets.<sup>17</sup> In addition, as it has done previously, the Commission has interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the Named Markets.<sup>18</sup> If a petitioner's listing standards are higher than the Named Markets, then the Commission may still determine that the petitioner's listing standards are substantially similar to those of the Named Markets.<sup>19</sup> Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that the listing standards of the petitioner are not substantially similar to those of any Named Market.<sup>20</sup>

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2017), 82 FR 27748 (June 16, 2017) (SR-IEX-2017-14) (incorporating substantially similar continued listing requirements approved for Nasdaq).

<sup>16</sup> 15 U.S.C. 77r(b)(1)(B).

<sup>17</sup> Specifically, the Commission compared IEX's listing standards with those of Nasdaq/NGM, upon which IEX based almost all of its listing rules. If, as discussed further below, a particular listing standard was not substantially similar to the standards of that market, the Commission compared IEX's listing standard to one of the other two Named Markets. This approach is consistent with the approach that the Commission has previously taken. *See, e.g.*, Securities Act Release No. 7494 (January 13, 1998), 63 FR 3032 (January 21, 1998).

<sup>18</sup> See id.

<sup>19</sup> See id.

<sup>20</sup> See id.

The Commission has reviewed the listing standards for securities to be listed and traded on IEX and, for the reasons discussed below, preliminarily believes that the standards are substantially similar to those of the Named Markets.<sup>21</sup>

A. IEX Quantitative Listing Standards

The Commission preliminarily believes that IEX's initial and continued quantitative listing standards for its securities are substantively identical to, and thus substantially similar to, the initial and continued quantitative listing standards for securities listed on Nasdaq/NGM.<sup>22</sup> Therefore, the Commission preliminarily believes that IEX's quantitative listing standards are substantially similar to a Named Market.

The Commission requests comment on whether IEX's quantitative listing rules are "substantially similar" to Nasdaq/NGM's listing rules.

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<sup>21</sup> See generally IEX Rules Chapters 14 (IEX Listing Rules) and 16 (Other Securities). See also Securities Exchange Act Release No. 75925, supra note 12, 80 FR 57261. In making its preliminary determination of substantial similarity, as discussed in detail below, the Commission compared IEX's qualitative listing standards to Nasdaq/NGM's qualitative listing standards and, with respect to the rules relating to the listing application process and internal audit function, with NYSE's and NYSE American's applicable qualitative listing standards; IEX's quantitative listing standards with Nasdaq/NGM's quantitative listing standards; and IEX's listing standards for other securities, including portfolio depository receipts, index fund shares, and managed fund shares, with the corresponding listing standards of Nasdaq/NGM.

<sup>22</sup> Quantitative listing standards relate to, among other things, the requirements for bid price, number of publicly held shares, number of shareholders, market value of publicly held shares, and market capitalization. Compare IEX Rules 14.300 series with Nasdaq/NGM Rule 5300 and 5400 series (providing for identical rules concerning initial listing and maintenance standards for units, primary equity securities, preferred stock and secondary classes of common stock, rights, warrants, and convertible debt on IEX and Nasdaq/NGM).

B. IEX Qualitative Listing Standards

The Commission preliminarily believes that IEX's initial and continued qualitative listing standards for its securities are substantively identical to, and thus substantially similar to, the qualitative listing standards for securities listed on Nasdaq/NGM, with the exception of IEX Rule 14.201 (Confidential Pre-Application Review of Eligibility), discussed below, which is substantively similar to rules of NYSE and NYSE American, and IEX Rule 14.414 (Internal Audit Function), also discussed below, which is substantively similar to a rule of NYSE.<sup>23</sup>

With respect to the standards relating to the listing and delisting of companies, including prerequisites for initial and continued listing on IEX, obligations of security issuers listed on IEX, as well as rules describing the application and qualification process,<sup>24</sup> IEX's listing rules for securities are virtually identical to, and thus the Commission preliminarily believes they are substantially similar to, those of Nasdaq/NGM.<sup>25</sup> With respect to IEX Rule 14.201, which

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<sup>23</sup> Qualitative listing standards relate to, among other things, the number of independent directors required, conflicts of interest, composition of the audit committee, executive compensation, shareholder meeting requirements, voting rights, quorum, code of conduct, proxies, shareholder approval of certain corporate actions, and the annual and interim reports requirements. Compare IEX Rules 14.200 and 14.400 series with Nasdaq/NGM Rule 5200 and 5600 series (providing for virtually identical rules concerning procedures and prerequisites for initial and continued listing, obligations of security issuers, the application and qualification process, and corporate governance standards on IEX and Nasdaq/NGM).

<sup>24</sup> See IEX Rule 14.200 series. The Commission notes that, while IEX Rule 14.201 is substantially similar to the equivalent NYSE and NYSE American rules (all of which relate to the confidential pre-application review for eligibility for companies seeking to list on the Exchange), IEX's rule contains an additional provision stating that a company deemed eligible for listing will be provided with written notification valid for nine months that it has been cleared to submit an original listing application. See IEX Rule 14.201. See also NYSE Listed Company Manual Sections 101 and 104; NYSE American Company Guide Section 201.

<sup>25</sup> See Nasdaq/NGM Rule 5200 series.

relates to confidential pre-application review for listing eligibility, the Commission preliminarily believes that this rule is substantially similar to the corresponding rules of NYSE and NYSE American.<sup>26</sup> This rule requires a company seeking the initial listing of one or more classes of securities to participate in a free, confidential pre-application eligibility review to determine whether the company meets the applicable listing criteria and, if, upon completion of this review, IEX determines that a company is eligible for listing, IEX will notify that company in writing that it has been cleared to submit an original listing application.<sup>27</sup>

The Commission also notes that IEX's corporate governance standards in connection with securities to be listed and traded on IEX are virtually identical to, and thus the Commission preliminarily believes they are substantially similar to, the current rules of Nasdaq/NGM and NYSE.<sup>28</sup> With respect to IEX Rule 14.414, concerning the internal audit function for a listed issuer, the Commission preliminarily believes that this rule is substantially similar to the corresponding rule of NYSE.<sup>29</sup> Therefore, the Commission preliminarily believes that IEX's qualitative listing standards are substantially similar to a Named Market.

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<sup>26</sup> See IEX Rule 14.201; NYSE Listed Company Manual Sections 101 and 104; and NYSE American Company Guide Section 201.

<sup>27</sup> IEX represents that an issuer that does not clear the pre-application eligibility review process or receive a timely response as part of that process on IEX after the confidential pre-application eligibility review would be permitted to appeal such determination under the procedures set forth in IEX Rule Series 9.500. See IEX Petition, *supra* note 14, at 5.

<sup>28</sup> Compare IEX Rule 14.400 series with Nasdaq/NGM Rule 5600 series.

<sup>29</sup> Compare NYSE Listed Company Manual Section 303A.07(c) (requiring listed companies to maintain an internal audit function to provide management and the audit committee with ongoing assessments of the listed company's risk management processes and system of internal control) with IEX Rule 14.414.

The Commission requests comment on whether IEX’s qualitative listing standards are “substantially similar” to Nasdaq/NGM’s and NYSE’s listing standards.

C. Other Securities, Including Securities of Exchange-Traded Funds and Other Exchange-Traded Derivative Securities Products

IEX has listing standards for other types of securities and exchange-traded derivative securities products, including, for example, portfolio depository receipts; index fund shares; securities linked to the performance of indexes, commodities, and currencies; index-linked exchangeable notes; partnership units; trust units; and managed fund shares.<sup>30</sup> The Commission notes that IEX’s listing rules for these other securities are virtually identical to, and thus the Commission preliminarily believes they are substantially similar to, those of Nasdaq/NGM.<sup>31</sup> Therefore, the Commission preliminarily believes that IEX’s standards for these other securities are substantially similar to those of a Named Market.

The Commission requests comment on whether IEX’s listing standards relating to other securities are “substantially similar” to Nasdaq/NGM’s listing standards.

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<sup>30</sup> See generally IEX Rules Chapter 16 (Other Securities). See also IEX Rule 16.105(a) (Portfolio Depository Receipts); Rule 16.105(b) (Index Fund Shares); Rule 16.110 (Securities Linked to the Performance of Indexes and Commodities (Including Currencies)); Rule 16.111(a) (Index-Linked Exchangeable Notes); Rule 16.111(b) (Equity Gold Shares); Rule 16.111(c) (Trust Certificates); Rule 16.111(d) (Commodity-Based Trust Shares); Rule 16.111(e) (Currency Trust Shares); Rule 16.111(f) (Commodity Index Trust Shares); Rule 16.111(g) (Commodity Futures Trust Shares); Rule 16.111(h) (Partnership Units); Rule 16.111 (i) (Trust Units); Rule 16.111 (j) (Managed Trust Securities); Rule 16.113 (Paired Class Shares); Rule 16.115 (Selected Equity-linked Debt Securities (“SEEDS”)); Rule 16.120 (Trust Issued Receipts); Rule 16.125 (Index Warrants); Rule 16.130 (Listing Requirements for Securities Not Otherwise Specified (Other Securities)); and Rule 16.135 (Managed Funds Shares).

<sup>31</sup> See Nasdaq/NGM Rule 5700 series.

D. Other Proposed Amendments to Rule 146

Paragraphs (b)(1) and (b)(2) of Rule 146 use the term “NYSE Amex” to refer to the national securities exchange formerly known as the American Stock Exchange LLC. As noted above, in 2012, NYSE Amex changed its name from NYSE Amex LLC to NYSE MKT LLC, and, in 2017, NYSE MKT LLC intends to change its name to NYSE American LLC.<sup>32</sup> In addition, paragraph (b)(1) of Rule 146 refers to Tier I of the NASDAQ OMX PHLX LLC. As noted above, in December 2015, NASDAQ OMX PHLX LLC changed its name to NASDAQ PHLX LLC.<sup>33</sup> In addition, paragraph (b)(1) of Rule 146 refers to Tier I and Tier II of BATS Exchange, Inc. As noted above, in March 2016, BATS Exchange, Inc. changed its name to Bats BZX Exchange, Inc.<sup>34</sup> Lastly, paragraph (b)(1) of Rule 146 refers to Options listed on the International Securities Exchange, LLC. As noted above, in March 2017, the International Securities Exchange, LLC changed its name to Nasdaq ISE, LLC.<sup>35</sup> This proposed rule includes changes to Rule 146(b) to account for these name changes.

E. Comments

To date, the Commission has not received any comment letters on the IEX Petition.

**IV. Solicitation of Comments**

The Commission seeks comment generally on amending Rule 146(b) to include securities listed, or authorized for listing, on IEX. As discussed above, based on its review of IEX’s listing standards, the Commission preliminarily believes that the initial and continued listing standards

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<sup>32</sup> See supra note 1 and accompanying text.

<sup>33</sup> See supra note 6 and accompanying text.

<sup>34</sup> See supra note 10 and accompanying text.

<sup>35</sup> See id.

for IEX are substantially similar to those of the Named Markets. In addition to the questions posed above, commenters are welcome to offer their views on any other matter raised by the proposed amendment to Rule 146(b).

#### **V. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 does not apply because the proposed amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

#### **VI. Economic Analysis**

The Commission is sensitive to the economic consequences of its rules, including the benefits, costs, and effects on efficiency, competition, and capital formation. As noted above, the Commission preliminarily believes that the overall listing standards for securities to be listed and traded on IEX are substantially similar to those of a Named Market. As such, the Commission proposes to amend Rule 146 under Section 18 of the Securities Act, as amended, to designate securities listed, or authorized for listing, on IEX as Covered Securities. The following analysis considers the economic effects that may result from the proposed amendment.

Where possible, the Commission has quantified the economic effects of the proposed amendment; however, as explained further below, the Commission is unable to quantify all of the economic effects because it lacks the information necessary to provide reasonable estimates. In some cases, quantification depends heavily on factors outside of the control of the Commission, particularly due to the flexibility that an issuer has when choosing if and where to list and the flexibility of a registered national securities exchange to tailor its policies and rules to the nature of its business and technology. These factors make it difficult to quantify the changes

in market share of Named and Designated Markets that may result from the proposed amendment. In addition, the incumbent Named and Designated Markets and IEX each may react to the proposed amendments with respect to listing fees and services. These reactions are also difficult to quantify or predict, which further complicates quantification of changes to market share, and also makes quantification of the economic effects of the proposed amendment difficult. Therefore, some of the discussions below are qualitative in nature. The Commission encourages commenters to provide data and information to help quantify the costs, benefits, and the potential impacts on efficiency, competition, and capital formation of the proposed amendment.

A. Baseline

We compare the economic effects of the proposed rule, including benefits, costs, and effects on efficiency, competition, and capital formation, to a baseline that consists of the existing regulatory framework and market structure.

1. Regulatory Framework and Affected Parties

The listing standards of Named and Designated Markets are quantitative and qualitative requirements that issuers must satisfy before they may list on these markets. Securities listed on a Named or Designated Market are Covered Securities, which are exempt from complying with state securities law registration and qualification requirements. As mentioned above,<sup>36</sup> subsequent to its exchange registration, IEX petitioned the Commission to amend Rule 146(b) and determine that the listing standards for securities listed on IEX are substantially similar to those of the Named Markets.

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<sup>36</sup> See supra notes 11-14 and accompanying text.

Pursuant to unlisted trading privileges (“UTP”), a national securities exchange such as IEX currently can trade securities that are listed on other exchanges.<sup>37</sup> While IEX may offer to list securities for trading, currently, those securities would not be Covered Securities. Issuers of securities that are not Covered Securities must comply with state securities law registration and qualification requirements, which generally require the issuer to register such securities in each state or jurisdiction in which the issuer will offer or sell its securities. State registration and qualification requirements generally vary across the 54 U.S. jurisdictions, comprising the 50 states, the District of Columbia, and the three U.S. territories of Puerto Rico, the Virgin Islands, and Guam.<sup>38</sup> These requirements typically include: (i) filing state administrative forms and other paperwork necessary for compliance with state registration requirements; (ii) adherence to disclosure standards; and (iii) in some states, requirements based upon the merits of the offering or issuer.<sup>39</sup>

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<sup>37</sup> See 15 U.S.C. 781(f) and Rule 12f-2.

<sup>38</sup> See Office of Investor Education and Advocacy, “Blue Sky Laws” (2014), available at <https://www.sec.gov/fast-answers/answers-blueskyhtm.html>.

<sup>39</sup> See, e.g., Stuart R. Cohn, Securities Counseling for Small and Emerging Companies § 12:8 (2016) (describing merit review as “the authority of state administrators to deny, suspend or revoke an offering because the administrator believes that the offering has substantive weaknesses in structure, financial strength or fairness to investors”). Typical elements of merit review include: offering expenses, including underwriter’s compensation, issuer capitalization requirements, dilution, financial condition of the issuer, cheap stock held by insiders, types of offering (e.g., blind pool offerings), the quantity of securities subject to options and warrants, loans to insiders, and the price at which the securities will be offered. See id. The North American Securities Administrators Association (NASAA), an association of state and provincial securities regulators composed of the securities administrators from each state, Mexico, and 13 Canadian provinces, has issued guidelines intended to provide uniformity among state merit review standards. See NASAA Statements of Policy, available at <http://www.nasaa.org/regulatory-activity/statements-of-policy/>. Some exchange listing standards impose merit regulation on issuers.

The Commission lacks comprehensive, independent data to precisely estimate the total time, registration and compliance costs associated with state registration and qualification. Moreover, those total costs may vary widely for issuers depending on how many states an issuer needs to register in. To provide some information about potential costs for state registration, we list examples of Blue Sky registration filing fees for several states below in Table 1.

Table 1: Examples of Blue Sky Registration Filing Fees<sup>40</sup>

State	Filing Fee
California	\$200 plus 1/5 of 1 percent of the aggregate value of the securities proposed to be sold, with a maximum fee of \$2,500.
Florida	\$1,000
Illinois	1/20 of 1 percent of the aggregate offering in Illinois, with a minimum fee of \$500 and a maximum fee of \$2,500
New York	Based on total offerings: \$500,000 or less: \$300 More than \$500,000: \$1,200
Texas	\$100 filing fee, plus examination fee of 1/10 of 1 percent of the aggregate amount of securities sold in Texas

The issuer of a non-Covered Security in multiple jurisdictions would have more compliance obligations than the issuer of a Covered Security, including the potential for considerable additional costs and legal fees associated with reviews of offering-related materials at the state

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<sup>40</sup> See CA Corp Code § 25608(e) for California filing fees; [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0500-0599/0517/Sections/0517.081.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0500-0599/0517/Sections/0517.081.html) for Florida filing fees; <http://www.cyberdriveillinois.com/departments/securities/sellingsec.html> for Illinois filing fees; <https://ag.ny.gov/investor-protection/broker-dealer-and-securities-registration-information-sheet> for New York filing fees; and <https://www.ssb.texas.gov/texas-securities-act-board-rules/fee-schedule#one> for Texas filing fees.

level.<sup>41</sup> Additionally, as discussed above, many state securities regulators also review securities offerings based upon the merits of the offering and/or the issuer of the securities, which can further increase an issuer’s compliance obligations and associated costs.<sup>42</sup> In addition, the Commission notes that one commenter estimated that an issuer seeking state registration in 50 states would incur \$50,000 to \$70,000 in filing fees and \$80,000 to \$100,000 in legal fees.<sup>43</sup> The Commission encourages commenters to provide additional information on the costs associated with complying with Blue Sky laws.<sup>44</sup>

In addition, the Commission preliminarily believes that the state registration and qualification requirements applicable to non-Covered Securities also impose costs on broker-dealers. Specifically, broker-dealers may incur costs to ensure that they are complying with

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<sup>41</sup> For a discussion of state securities law registration and qualification requirements, the obligations of issuers with respect to such requirements, and developments in coordinated state securities law review programs for offerings in multiple jurisdictions, see generally Securities Act Release No. 9741 (March 25, 2015), 80 FR 21806 (April 20, 2015) (Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A), at Section II.H.3 (“Regulation A Release”).

<sup>42</sup> See id. See also Factors that May Affect Trends in Regulation A Offerings, GAO-12-839 (July 2012) (discussing the varying standards and degrees of stringency applied during the qualification and review process in merit review states), available at <http://www.gao.gov/assets/600/592113.pdf>.

<sup>43</sup> See Regulation A Release, supra note 41; and Letter from Michael L. Zuppone, Paul Hastings LLP, to Commission, dated November 26, 2013, at 2 (further noting the “significant costs and uncertainties associated with ‘Blue Sky’ law compliance”). See also Regulation A Release, supra note 41, at n.1024 and accompanying text. The commenter did not address whether these estimated costs vary by the size of the offering. Also, we note that the estimate concerns the initial costs associated with registration. The Commission believes that the ongoing costs of compliance that the issuer bears will be lower than these initial costs.

<sup>44</sup> See Regulation A Release, supra note 41; and Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Elizabeth M. Murphy, Secretary, Commission, dated March 24, 2014 (“OTC Markets Group Letter”), at 4-5 (describing the costs for issuers associated with Blue Sky laws).

applicable state laws governing non-Covered Securities in each state in which they are transacting in those securities on behalf of their customers or providing advice or other information to customers related to those securities. For example, broker-dealers could incur costs associated with maintaining a compliance program to verify an issuer's state registration status and comply with any state requirements applicable to broker-dealers that transact in non-Covered Securities, which could vary depending on where the customer resides and the transaction occurs. In addition, the types and content of communications broker-dealers may have with their customers regarding non-Covered securities may be subject to regulation under Blue Sky laws, so broker-dealers may incur costs to ensure they are compliant with such requirements in each state in which they advising customers.<sup>45</sup> While some portion of these costs may be passed on to a broker-dealer's customers – i.e., the investors that transact through the broker-dealer in non-Covered Securities – through commissions or transaction fees, the Commission preliminarily believes that the compliance costs associated with Blue Sky requirements may lead some broker-dealers to only offer their services for Covered Securities.<sup>46</sup> However, the Commission lacks the data necessary to quantify the costs that broker-dealers and their customers face, and encourages commenters to provide information on these costs and the extent to which the Blue Sky requirements affect the services broker-dealers offer for non-Covered Securities.

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<sup>45</sup> See OTC Markets Group Letter, supra note 44, at 4 (describing impact of Blue Sky laws on broker-dealers).

<sup>46</sup> The OTC Markets letter also notes that broker-dealers may have increased “rescission risk” for failing to comply with each jurisdiction’s Blue Sky requirements, which OTC Markets argues “may chill some broker-dealers’ willingness to allow their customers to transact in those securities at all, including securities of SEC reporting companies.” See OTC Markets Group letter, supra note 44, at 4.

The proposed amendment, which would make IEX a Designated Market, would preempt the application of state securities law registration and qualification requirements for securities that are listed or authorized for listing on IEX, and would impact (i) issuers who currently list their securities on a Named or Designated Market; (ii) issuers with securities not currently listed on any incumbent Named or Designated Market but who would consider listing on IEX, or on an incumbent Named or Designated Market, as a result of the competition from IEX if IEX enters the listing market; and (iii) issuers with securities not currently listed on any incumbent Named or Designated Market and would eventually list on a Named or Designated Market, regardless of IEX's entry into the market. Given that issuers who meet the listing standards of IEX are likely to meet the listing standards of other Named or Designated Markets, the number of issuers that would list on a Named or Designated Market solely as a result of the proposed amendment (i.e., those in category (ii) above) may be small. The proposed amendment would also affect IEX and the existing trading venues for securities that IEX would be able to list.<sup>47</sup>

## 2. Current Practices in the Market for Listings

Issuers of public securities make several considerations when deciding on which exchange to list their securities. These considerations include, among other things, the visibility and publicity provided by the exchange, the listing services and fees, and the exchange's listing standards. The Named and Designated Markets may provide issuers of Covered Securities with additional visibility over that of securities traded over the counter, which may, in turn, increase the pool of potential investors for an issuer and thereby improve an investor's access to capital.

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<sup>47</sup> The Commission preliminarily believes that the proposed amendment may also impact exchanges that are not Named or Designated Markets indirectly as explained below.

In addition, the Named and Designated Markets provide listing services for their listed issuers, which can include monitoring, communication, and regulatory compliance services. These services may help issuers by reducing the cost of raising capital and the costs associated with going or remaining public. However, many issuers that list for the first time do so as part of an initial public offering, which can include considerations not related to listing on an exchange, such as SEC reporting obligations, as well as legal, accounting, and other expenses (both for the initial offering and the ongoing requirements of remaining public), as well as the benefits of going public, such as increased access to capital and providing investors with a signal of an issuer's ability to meet obligations, such as reporting requirements, that apply to public companies. In this case, the decision of which exchange to list on is made along with the decision about whether or not to go public.

Issuers must pay listing fees and meet listing standards to list on a Named or Designated Market. Listing fees may include an initial application fee as well as an ongoing annual fee, and may vary by the number of shares in the initial offering or be a fixed fee. However, listing fees typically represent a small portion of the overall cost of an initial public offering or the ongoing costs of remaining public,<sup>48</sup> and thus may not be a significant factor that issuers consider when

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<sup>48</sup> Listing fees for equity securities can range from \$55,000 (NYSE American) to \$295,000 (NYSE). See NYSE MKT Company Guide at Sec. 140, available at [http://wallstreet.cch.com/MKTtools/PlatformViewer.asp?SelectedNode=chp\\_1\\_1\\_1&manual=/MKT/CompanyGuide/mkt-company-guide/](http://wallstreet.cch.com/MKTtools/PlatformViewer.asp?SelectedNode=chp_1_1_1&manual=/MKT/CompanyGuide/mkt-company-guide/); and NYSE Listed Company Manual at 902.02, available at [http://nysemanual.nyse.com/LCMTtools/bookmark.asp?id=sx-ruling-nyse-policymanual\\_902.02&manual=/lcm/sections/lcm-sections/](http://nysemanual.nyse.com/LCMTtools/bookmark.asp?id=sx-ruling-nyse-policymanual_902.02&manual=/lcm/sections/lcm-sections/). See also supra notes 40-44 and accompanying text, which discusses the overall costs of state securities registration. See also Proskauer Rose LLP, 2016 IPO Study, at 52, available at <http://www.proskauer.com/files/uploads/Proskauer-2016-IPO-Study.pdf>, which examined

deciding (i) whether to list on a Named or Designated Market; and (ii) which Named or Designated market to list on. Listing exchanges also impose listing standards on issuers, which can include corporate governance standards as well as quantitative requirements such as minimum income, market capitalization, and operating history requirements. While an exchange’s listing standards may prevent potential issuers who do not meet those standards from listing on the exchange, the stringency of an exchange’s listing standards may provide a valuable signal to investors about the quality of issuers that are able to list, which may improve the issuers’ access to capital.<sup>49</sup>

### 3. Competitive Landscape

Because securities listed on the Named or Designated Markets are Covered Securities, being a Named Market or achieving status as a Designated Market permits exchanges to compete to provide listing services to issuers of Covered Securities.<sup>50</sup> Because Covered Securities are exempt from state securities registration laws, issuers of Covered Securities are not subject to costs from state securities registration laws and the costs associated with complying with state securities registration laws are lower for broker-dealers that transact on behalf of their customers in Covered Securities.

Furthermore, as described below in Section VI.A.3.b, evidence that the listing status and listing designation (i.e., whether a security is a Covered Security and where it is listed) of

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258 IPOs from 2013 to 2015 and found that the average total IPO expense, excluding underwriting fees, was \$4.15 million.

<sup>49</sup> See infra Section VI.A.3, for further discussion of listing standards and signaling to investors.

<sup>50</sup> The Commission views the term “listing exchange” as equivalent to the term “Named or Designated Market,” for purposes of this release.

securities are related to where and how the securities trade leads the Commission to believe that the proposed rule could also impact the market for trading services. In this section, we discuss competition between Named and Designated Markets for listings, as well as competition between Named and Designated Markets and other trading platforms for trading services.

a) Competition for Listings

Listing exchanges compete with each other on many dimensions for listing securities, including, but not limited to, listing fees, listing standards, and listing services. When issuers choose which listing exchange to list on, issuers compare the listing fees and the costs of compliance with listing standards against the quality of listing services across listing exchanges. Although issuers may incur costs to meet an exchange's listing standards, high listing standards may also yield benefits as they may serve as a positive signal to investors of an issuer's ability to satisfy high qualitative and quantitative listing requirements. Investors may interpret the reputation of listing exchanges and their listing standards as a credible signal of the quality of listed security, and the reputation of an exchange is one of the factors that issuers consider when choosing which listing exchange to list on.<sup>51</sup>

Currently, there are three Named Markets under Section 18(b)(1)(A) of the Securities Act: NYSE, NYSE American, and Nasdaq/NGM. In addition, there are currently six Designated Markets: (i) Tier I of the NYSE Arca, Inc.; (ii) Tier I of the NASDAQ OMX PHLX LLC; (iii) CBOE; (iv) options listed on ISE; (v) The Nasdaq Capital Market; and (vi) Tier I and Tier II of

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<sup>51</sup> See, e.g., Thomas J. Chemmanur & Paolo Fulghieri, Competition and Cooperation Among Exchanges: A Theory of Cross-listing and Endogenous Listing Standards, 82 J. Fin. Econ. 455-89 (2006), available at <http://www.sciencedirect.com/science/article/pii/S0304405X06001139>.

BATS. As of June 2, 2017, NYSE listed 3,172, Nasdaq listed 3,183, NYSE Arca listed 1,529, NYSE American listed 359, and BATS listed 176.<sup>52</sup>

While the number of equities listed on an exchange may be informative about the general size of exchanges, the market shares for recent equity issue listings may provide a better picture of the nature of competition between exchanges and the size of the new listings market. In Table 2, we show the number of new equity issue listings from 2008 to 2016.<sup>53</sup>

Table 2: New Equity Listings in Named and Designated Markets, 2008-2016

	NYSE	Nasdaq	NYSE American	NYSE ARCA	BATS
2008	68	142	53	68	0
2009	76	115	33	20	0
2010	141	156	31	12	0
2011	130	132	34	14	0
2012	148	135	19	9	17
2013	178	201	26	13	6
2014	178	278	23	12	5
2015	101	220	15	13	31
2016	81	163	5	12	85

As shown in Table 2, two listing exchanges – NYSE and Nasdaq – captured 71% of all new equity listings on Named and Designated Markets in 2016, which is evidence of a highly

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<sup>52</sup> These estimates of listed equities include equity securities reported to a securities information processor, and do not include options or corporate debt securities. The estimates also include multiple securities from the same issuer, which means the total number of securities may differ from the total number of issuers potentially affected by this rulemaking. Listing information is from the master files of the daily trade and quotation data (“TAQ Data”).

<sup>53</sup> The listings data for NYSE, Nasdaq, NYSE American, and NYSE Arca were taken from Compustat Merged © 2016 Center for Research in Securities Prices (“CRSP”), The University of Chicago Booth School of Business. As CRSP does not have BATS listings data, BATS listings are from TAQ Data. See supra note 52.

concentrated listing market.<sup>54</sup> In addition, when BATS entered the market in 2012, it gained only 17 new listings, which was 5.2% of all new equity listings of 2012, which suggests that the number of issuers that remain unlisted but would list with an entrant is likely to be small.<sup>55</sup>

A highly concentrated market may be the result of barriers to entry, which limit competition, and can include economies of scale, reputation, legal barriers to entry, and network externalities. Listing exchanges may exhibit economies of scale because an exchange with a large number of listings can spread the fixed costs of listing equities over a greater number of issuers. The larger these fixed costs are, the greater will be the scale economies of larger listing exchanges. Entrant exchanges can also face barriers to entry related to reputation. Exchanges that enter the market may not be able to quickly establish a strong reputation for high quality listings, which may adversely affect their ability to compete with incumbent exchanges. This lack of reputation may discourage both investors and issuers from transacting or listing on an entrant exchange, which may reinforce an entrant exchange's lack of reputation.

Legal barriers to entry could also apply because exchanges are self-regulatory organizations overseen by the Commission. The governing statute and regulations establish legal barriers of entry for an entity becoming an exchange as well as for an exchange becoming a Designated Market. As discussed, the fact that an exchange must be designated by the

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<sup>54</sup> The Herfindahl-Hirschman Index (HHI) measure for listing exchanges is 0.321, calculated as the sum of squared market shares, or  $(2,552/7,217)^2 + (2,863/7,217)^2 + (1,377/7,217)^2 + (339/7,217)^2 + (86/7,217)^2 = 0.321$ . See Campbell McConnell, Stanley Brue & Sean Flynn, *Microeconomics: Principles, Problems, & Policies* 218, 219, 225, 226 (2014). An HHI close to 0 indicates low concentration while an HHI of 1 indicates total concentration or monopoly.

<sup>55</sup> See *infra* Section VI.B.2, for further discussion about how this may affect currently unlisted issuers.

Commission to become a Designated Market, which enables such an exchange to effectively compete for the listing business of Covered Securities, imposes legal barriers to entry.

In addition, the market for listing exhibits positive network externalities: issuers may prefer to be listed on exchanges where other similar issuers are listed because of increased visibility. This indicates that, all else being equal, large exchanges (in terms of listings) may tend to be favored over smaller ones.

Issuers also may face switching costs associated with moving their listing from one exchange to another. These switching costs would not only include the fixed costs associated with a listing on an new exchange such as the exchange's application fee, and the legal and accounting expenses associated with ensuring that the issuer satisfies the listing standards of the new exchange, but would also include the costs associated with communicating with investors, including about the move to the new exchange. Thus, an issuer that is considering moving from one exchange would compare the relatively lower annual listing fee of their current exchange with the relatively high costs of moving its listing to a new exchange, which places the new exchange at a disadvantage and creates a barrier to entry for a potential entrant. Even if an entrant exchange prices its listing fees and services competitively compared to the incumbent exchanges for new issuers, the switching costs for issuers that are already listed may prevent the entrant from gaining market share.

Table 3 shows estimates of the probability that an issuer would change its listing market in a given year, based on issuer switching behavior for equities over the period 2008 to 2016. As an example, during this period, if an equity security was listed on NYSE, there was a 99.33% chance that it would still be listed on NYSE the following year and a 0.04% chance it would be listed on AMEX the following year, a 0.34% chance it would be listed on Nasdaq the following

year, and a 0.08% chance it would be listed on ARCA the following year. More generally, equities listed on NYSE and Nasdaq had a greater than 99% chance of remaining listed on that exchange the following year, which suggests that issuers were unlikely to switch their listings away from the two exchanges with the highest market shares.

Table 3: Conditional Probability of Transition for Listings, 2008-2016.<sup>56</sup>

<u>Original Exchange</u>	<u>Status in the Following Year</u>					
	NYSE	NYSE American	Nasdaq	NYSE ARCA	BATS	Not Trading <sup>57</sup>
NYSE	99.33%	0.04%	0.34%	0.08%	0.00%	0.20%
NYSE Amer.	1.80%	93.47%	2.80%	1.39%	0.00%	0.54%
Nasdaq	0.38%	0.07%	99.11%	0.01%	0.00%	0.42%
NYSE ARCA	1.50%	0.47%	1.13%	90.81%	0.00%	6.10%
BATS	0.00%	0.00%	0.00%	0.00%	94.40%	5.60%

b) Competition for Trading Services

Trading in Covered Securities is segmented from trading in securities that are not covered (“OTC trading”). In addition to trading on Named or Designated Markets, Covered Securities can also trade on 12 other registered national securities exchanges or off-exchange either on 35 alternative trading systems (“ATs”) or by broker-dealers who internalize orders. The market to trade Covered Securities on Named and Designated Markets as well as other trading platforms is

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<sup>56</sup> The listings data for NYSE, Nasdaq, NYSE American, and NYSE Arca were taken from CRSP. BATS listings are from TAQ Data. See *supra* note 52.

<sup>57</sup> For the exchanges in the CRSP data (NYSE, NYSE American, Nasdaq, and NYSE Arca), this category (Not Trading) includes listings that were halted, suspended, not trading, or whose listing status was not known in the following year. For the exchange from the TAQ data (BATS), this column includes listings that were not in the TAQ master file in the following year.

more liquid than OTC trading of securities that are not Covered Securities due to, among other things, the search costs associated with finding buyers and sellers in OTC markets.<sup>58</sup>

Covered Securities can trade on exchanges and other markets that do not “list” the security. This flexibility allows trading platforms to compete with each other by offering better trading services or innovative trading mechanisms to attract order flow for securities, even if they do not list such securities. The order flow from these securities, through the application of transaction fees, can generate revenue for an exchange. Exchanges also receive revenue from the sale of SIP data, determined, in part, from an exchange’s share of transaction volume.<sup>59</sup> Listing exchanges currently enjoy a larger trading market share in their listed securities.<sup>60</sup>

Despite the historical advantages listing exchanges enjoy in the market for trading services, the success of listing exchanges when competing for equity issue listings by offering better trading services or innovative trading mechanisms has declined over the past decade.<sup>61</sup>

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<sup>58</sup> See, e.g., Ulf Brüggemann, Aditya Kaul, Christian Leuz & Ingrid M. Werner, The Twilight Zone: OTC Regulatory Regimes and Market Quality, (Nat’l Bureau of Econ. Research, Working Paper No. 19358, 2013), available at <https://ideas.repec.org/p/nbr/nberwo/19358.html>.

<sup>59</sup> See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3600-01 (January 21, 2010) (Concept Release on Equity Market Structure) (Commission concept release discussing the revenues and expenses from data fees at that point in time).

<sup>60</sup> For the purposes of this rulemaking, staff examined TAQ Data for the time period of November through December 2014. Staff observed that exchanges tend to enjoy more than 15% higher market share in the securities they list compared to the securities they do not list, on average, and they tend to enjoy about 20% higher market share in the securities they list compared to the market share of others’ trading in those securities, on average.

<sup>61</sup> See James Angel, Lawrence Harris & Chester Spatt, Equity Trading in the 21st Century: An Update (2013), available at <http://www.q-group.org/wp-content/uploads/2014/01/Equity-Trading-in-the-21st-Century-An-Update-FINAL1.pdf>.

During this time, the increase in fragmentation in the market for trading services resulted in a significant shift in the market share of trading volume in Covered Securities across trading venues. For example, the two exchanges historically with the highest trading volume, NYSE and Nasdaq, have each experienced a sharp decline in market share of trading volume in securities they list. The market share of the NYSE in NYSE-listed stocks fell from approximately 80% in 2005 to 20% in 2013; for Nasdaq-listed stocks, Nasdaq's market share of Nasdaq-listed stocks fell by approximately half, from 50% in 2005 to 25% in 2013.<sup>62</sup>

The competition for trading services is not limited to exchanges. Over the past decade, greater trading volume has been executed on other venues, including ATSS. Since the third quarter of 2009, the number of ATSS that trade NMS stocks has increased from 32 to 34, while the share of trading volume of Covered Securities that trade on ATSS has increased from 7.9% to 13.0%.<sup>63</sup> This suggests that the importance of ATSS for trading services has increased relative to Named and Designated Markets, and that the listing exchange of a security may be less important in determining the location of trading activity.

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<sup>62</sup> See id. at 20-21.

<sup>63</sup> See 17 CFR 242.600(b)(47) (definition of NMS Stock) (“NMS stock means any NMS security other than an option.”) and 17 CFR 242.600(46) (definition of NMS security) (“NMS security means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.”). The estimates of ATSS that trade NMS stocks and ATS trade volume share was developed using weekly summaries of trade volume collected from ATSS pursuant to FINRA Rule 4552. See also Securities Exchange Act Release No. 76474 (November 18, 2015), 80 FR 80998, 81109 (December 28, 2015) (Regulation of NMS Stock Alternative Trading Systems). The estimates in this release were done in the same manner as in the cited release. See also OTC (ATS & Non-ATS) Transparency, FINRA, <http://www.finra.org/Industry/Compliance/MarketTransparency/ATS/>.

B. Impact on Efficiency, Competition, and Capital Formation

Securities Act Section 2(b)<sup>64</sup> requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

1. Efficiency

By listing on IEX, security issuers that otherwise would have not listed their securities on a Named or Designated Market would be able to avoid the duplicative costs of securities registration in multiple jurisdictions and thus reduce the impediments to listing on exchanges, which in turn can improve market efficiency. To the extent that the proposed amendment results in increased listing activity, then it may improve the allocative efficiency of securities markets by allowing investors to better diversify financial risks by investing in newly-listed securities.

However, these two impacts may be mitigated by the extent to which issuers' abilities to list on a Named or Designated Market are constrained by other factors, such as their ability to satisfy listing standards and the attendant costs from doing so. For example, issuers may face increased disclosure costs associated with becoming an SEC reporting company if they are not already an SEC reporting company because issuers must be an SEC reporting company to list on a national securities exchange.<sup>65</sup> Moreover, issuers that are able to meet the listing standards of IEX are likely to be able to meet the listing standards of other Named or Designated Markets, so the entry of IEX would not necessarily increase the pool of securities eligible for listing. As a

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<sup>64</sup> See 15 U.S.C. 77b(b).

<sup>65</sup> See 15 U.S.C. 78(l)(b).

result, the Commission preliminarily believes that the number of issuers that would list on IEX, where, in the absence of the proposed amendment, would not have listed at all, is likely to be small.<sup>66</sup>

## 2. Capital Formation

As noted in Section VI.A, a reason issuers list on a Named or Designated Market is improved access to capital. Listing on a Named or Designated Market may improve access to capital, which can promote capital formation, in several ways. First, listing on a Named or Designated Market may credibly signal to investors that a firm is of higher quality because firms that list on these exchanges must meet certain minimum standards for governance and disclosure set by listing on these exchanges. Like listed issuers on the Named and Designated Markets, IEX's listed issuers might benefit from the signal of quality that comes from listing on a Named or Designated Market compared to issuers that do not list. The reputational benefits that come from listing on a Named or Designated Market may make investors more willing to invest in such issuers, which may improve the issuers' access to capital, and promote capital formation.

Second, listing on a Named or Designated Market may provide additional liquidity for equities relative to OTC trading, due in part to potential frictions to liquidity imposed by OTC search costs.<sup>67</sup> If investors demand a liquidity risk premium,<sup>68</sup> the enhanced liquidity could facilitate capital formation by reducing the size of the premium that issuers would otherwise

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<sup>66</sup> See supra Section VI.A.3.a, for further discussion.

<sup>67</sup> See Darrell Duffie, Nicolae Garleanu & Lasse Heje Pedersen, Over-the-Counter Markets, 73 *Econometrica* 1815 (2005).

<sup>68</sup> Liquidity risk premia are the extra returns that investors demand because of the risks associated with investing in illiquid assets.

incur when issuing new securities. Additionally, listing on a Named or Designated Market may promote access to capital by reducing the costs associated with broker-dealers ensuring their compliance with state securities laws in multiple jurisdictions, which would be borne by broker-dealers and potentially shared with investors, thus attracting broker-dealers and investors to transact in securities that list on a Named or Designated Market.<sup>69</sup> Investors in securities that list on IEX as a result of the proposed amendment would have easier access to invest in those securities and to further diversify their investment portfolios, which may promote capital formation by improving allocative efficiency.<sup>70</sup>

Whether IEX entering the listing market promotes capital formation depends on the extent to which issuers previously unable or unwilling to list on a Named or Designated Market subsequently do so. Some issuers may, as a result of improved services and/or decreased fees stemming from the increased competition between listing exchanges, be induced to list on an exchange where, in the absence of the proposed amendment, they would not have. If so, then the entrance of IEX could provide issuers with lower cost access to capital.

### 3. Competition

The proposed amendment to Rule 146(b) would likely increase competition among the Named and Designated Markets that compete to list securities. By determining that IEX has “substantially similar” listing standards to the Named and other Designated Markets, the proposed amendment permits IEX to compete with other Named and Designated Markets to list securities that are exempt from state registration requirements. This would reduce the costs

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<sup>69</sup> See supra Section VI.A.1.

<sup>70</sup> See, e.g., John Heaton & Deborah J. Lucas, Evaluating the Effects of Incomplete Markets on Risk Sharing and Asset Pricing, 104 J. Pol. Econ. 443 (1996).

associated with complying with state securities laws in multiple jurisdictions that are borne by broker-dealers and such a reduction would potentially be shared with customers. As mentioned earlier, the Named and Designated Markets compete with each other on many dimensions, including listing standards, listing fees, and listing services. Besides permitting IEX to compete to list securities as a Designated Market, IEX's entry as a listing market might also provide incumbent listing markets with incentives to change how they compete with each other.<sup>71</sup>

Generally, there are two ways that increased competition can affect how listing markets compete with each other. The first involves how the Named or Designated Markets compete to provide better services and value for listing issuers. For example, listing markets could reduce fees, improve services, or reduce compliance burdens associated with their listing standards.<sup>72</sup> If an additional entrant competes by providing better listing and monitoring services or lower costs for issuers, incumbent listing exchanges may decide to follow suit.

The Named and Designated Markets also may compete to provide better services by increasing their level of specialization with respect to securities listings. As noted below, as in the case of BATS, some Named and Designated Markets may develop reputations for specializing in specific types of issues by catering to specific types of issuers. An increase in competitive pressures may cause the Named and Designated Markets to more closely cater to

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<sup>71</sup> See, e.g., Thierry Foucault & Christine A. Parlour, Competition for Listing, 35 *Rand J. Econ.* 329 (2004) (describing how, in equilibrium, competing exchanges obtain positive expected profits by offering different execution costs and different listing fees). See also supra note 61 and accompanying text.

<sup>72</sup> See infra note 74 (discussing the Exchange Act filing requirements necessary for any revision to exchange listing standards and noting that such listing standards and changes to such listing standards are subject to the requirements of the Exchange Act and the rules and regulations thereunder).

specific types of issuers. Specialization may reduce the cost of providing listing services or may promote innovation in the provision of listing services. To the extent that specialization improves the services provided to issuers or reduces the costs of these services, this competitive response may improve the efficiency of the market for listing services.

The second way that increased competition can affect how the Named and Designated Markets compete with each other is through their role as intermediaries. The Named and Designated Markets serve as information and reputation intermediaries partly through their listing standards. Because issuers cannot perfectly signal their quality, the reputation of a Named or Designated Market for strict listing standards may be informative to an investor and serve as a signal of the quality of an issuer.<sup>73</sup> Issuers that are able to meet the listing standards of a Named or Designated Market can signal their ability to do so by listing on them. However, because complying with these listing standards may be costly for issuers, issuers weigh the benefits of higher quality signaling through stronger listing standards against the costs of compliance with these standards. The Named and Designated Markets thus balance the competitive incentives to cater to two different groups of market participants – issuers and investors.

Because the Named and Designated Markets serve as information and reputation intermediaries between issuers and investors, the impact of increased competition on listing

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<sup>73</sup> See Stewart C. Myers & Nicholas S. Majluf, Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have, 13 J. Fin. Econ. 187 (1984), available at <http://www.sciencedirect.com/science/article/pii/0304405X84900230>, for a discussion of the role of asymmetric information in corporate finance. See also Nathalie Dierkens, Information Asymmetry and Equity Issues, 26 J. Fin. & Quantitative Analysis 181 (1991), available at [www.jstor.org/stable/2331264](http://www.jstor.org/stable/2331264), for empirical evidence of asymmetric information in the equity issue process.

standards is ambiguous. The Named and Designated Markets may respond to increased competition by increasing listing standards to provide additional signaling and attract investors. Alternatively, the Named and Designated Markets could instead respond to increased competition by decreasing listing standards to attract additional listings. The intermediaries' opposing incentives to cater to these two groups of market participants make predicting the impact of competition on listing standards difficult.

The Named and Designated Markets' ability to lower standards would be constrained by the fact that (1) any proposed listing standards or proposed changes to existing listing standards must be filed with the Commission pursuant to Section 19(b) of the Exchange Act and must meet statutory and rule requirements to become effective,<sup>74</sup> and (2) an exchange with lower listing standards that are not substantially similar to those of a Named Market may lose its status as a Designated Market.<sup>75</sup> The requirement that the listing standards of a Designated Market be substantially similar to those of a Named Market means that the listing standards of the Named Markets serve as a lower bound for the extent to which competition may drive down listing standards for the other exchanges.

Despite the potential for increased competition, some of the features of the market for listings that inhibit competition, as discussed above, may also mitigate the effects of IEX's entry on competition. Specifically, some of the barriers to entry discussed in the baseline – economies of scale and network externalities – may make it difficult for IEX to effectively compete with

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<sup>74</sup> Any revision to exchange listing standards must be filed in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder and is subject to the requirements of the Exchange Act and the rules and regulations thereunder. See 15 U.S.C. 78s(b) and 17 CFR 240.19b-4.

<sup>75</sup> See 17 CFR 230.146(b)(2).

incumbent exchanges for listings.<sup>76</sup> For example, if a new entrant does not attract enough initial listings, the fixed cost of operations may make it difficult to keep its listing fees competitive. In addition, new entrants may not have established a sufficient reputation as a listing exchange to credibly certify the quality of its new issues. Thus, the structure of the market for listings may mitigate some of the potential effects of increased competition between Named and Designated Markets.

The latest example of an entrant into the market for listings is BATS BZX, which became a Designated Market in 2012.<sup>77</sup> Table 2 in Section VI.A.3.a shows that the number of new listings on BATS decreased each year until 2015, but has increased more recently. While the growth in new listings by BATS may be indicative of the barriers to entry that entrants such as IEX face, circumstances specific to BATS may have impacted its ability during that period to attract listings.<sup>78</sup>

Table 3 in Section VI.A.3.a shows that almost none of the new listings on BATS arrived as transfers from another exchange, but were instead the first listing for each issuer that listed on BATS. This evidence is consistent with the argument that switching costs may also have had an impact on BATS' ability to gain market share, and may be a factor that also shapes IEX's entry. Moreover, the vast majority of BATS-listed securities are exchange-traded products. This is

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<sup>76</sup> See supra Section VI.A.

<sup>77</sup> See Securities Act Release No. 9295 (January 20, 2012), 77 FR 3590 (January 25, 2012).

<sup>78</sup> As BATS noted in its registration statement filed with the Commission on December 15, 2015, “[O]n March 23, 2012, we experienced a serious technical failure on BZX, forcing us to cancel our planned IPO. . . . These technical failures damaged our reputation and resulted in increased regulatory scrutiny of the event by the SEC and other governmental authorities.”

consistent with the idea that despite barriers to entry, BATS was able to enter by competing for one segment of the market and specializing in listing exchange-traded products.

### C. Analysis of Benefits and Costs

If the Commission amends Rule 146(b) to include IEX, then securities listed, or authorized for listing, on IEX would be eligible to be designated as Covered Securities under Rule 146(b)(1) under the Securities Act, which, as described above, are exempt from state law registration requirements.<sup>79</sup> In this section, we discuss the benefits and costs of the proposed amendment, which stem from its two major effects: i) the exemption from Blue Sky laws provided to any issuers that would not list in the absence of the proposed amendment; and ii) the entry of IEX into the market for listings as a Designated Market.

As noted above, the Commission is unable to quantify all of the economic effects of the proposed amendment because it lacks the information necessary to provide reasonable estimates. The Commission seeks comment on any information on these factors or information that would help it directly quantify the economic effects of the rule.

#### 1. Benefits of the Proposed Amendment

The proposed amendment could provide benefits, flowing from the exemption from Blue Sky laws, to currently unlisted issuers that do not currently list on an existing Named or

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<sup>79</sup> Rule 146 and Section 18 have no effect on Federal registration requirements, which are addressed by Section 5 of the Exchange Act. See 15 U.S.C. 78e. Section 18 of the Securities Act states that no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a covered security. See 15 U.S.C. 77r(a)(1)(A).

Designated Market but would choose to list on IEX.<sup>80</sup> Specifically, the proposed amendment permits these issuers of Covered Securities that list on IEX to avoid the potentially duplicative costs of complying with multiple state securities regulations. As mentioned previously, these duplicative costs could include both a fixed cost of registration and ongoing compliance costs. An unlisted issuer needs to register in each of the jurisdictions it wants to transact in, so if the proposed amendments increase the number of issuers that list, such issuers save these costs. To the extent that IEX attracts previously unlisted issuers, IEX may benefit as a result of revenue from listing fees, trading fees, and data fees associated with the new issuers. In addition, absent the proposed amendment, the heterogeneity in state securities regulations generates ongoing costs for broker-dealers and investors transacting in multiple jurisdictions.<sup>81</sup> However, the overall magnitude of these benefits depends on the number of currently unlisted issuers that choose to list on IEX as a result of the proposed amendment, and the Commission preliminarily believes this number is likely to be small because any unlisted issuer able to meet the listing standards of IEX is likely to be able to meet the listing standards of the other Named and Designated Markets.<sup>82</sup>

More generally, by making IEX a Designated Market, the proposed amendment would benefit IEX by allowing it to compete in the listing market for Covered Securities on a more

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<sup>80</sup> Data to estimate the number of such issuers does not exist, but the Commission preliminarily believes that the numbers of such issuers is likely to be small, as any issuers that can meet the listing standards of IEX are likely to be able to meet the listing standards of the incumbent Named or Designated Markets.

<sup>81</sup> See supra Sections VI.A.1 and VI.B.1.

<sup>82</sup> See Table 2, supra Section VI.A.3.a, and accompanying text.

level playing field with similarly situated national securities exchanges.<sup>83</sup> Specifically, being able to list Covered Securities would allow IEX to more effectively compete with the incumbent Named and Designated Markets that also are able to offer Covered Securities status. This would also benefit issuers that choose to list securities on a Named or Designated Market by providing them with another alternative venue on which to list. Furthermore, adding IEX as an entrant into this market would increase the number of competitors in the market for listings. To the extent that the existing Named and Designated Markets respond to this increased competition by reducing listing fees or improving listing services, as discussed above, currently listed issuers and their investors may benefit from the improved quality of listing services, reduced listing fees or reduced compliance costs. In addition, to the extent that the entry of IEX increases the specialization of incumbent Named and Designated Markets, issuers may benefit from listing services that are more tailored to their needs.

Although the direct effect of the proposed amendment may reduce the costs associated with registering in multiple jurisdictions, the Commission notes that issuers already have other Named and Designated Markets as options to list, and are likely to be able to meet the listing standards of these other markets if they would be able to list on IEX. IEX's entry into the market for listings may have a larger impact on issuers by increasing the amount of competition between Named and Designated Markets, rather than through the direct provision of Covered Securities status provided to securities that list on IEX. An increased amount of competition between

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<sup>83</sup> The Commission acknowledges that this benefit to IEX may come at the expense of the existing Named and Designated Markets, who may lose a portion of their current share to a new entrant. See infra Section VI.D.

Named and Designated Markets may improve listing services, reduce listing fees, and issuer specialization, which may benefit issuers.<sup>84</sup>

Last, issuers that choose to list on a Named or Designated Market because of IEX's entry may impact the trading of those issuers' securities on markets that are not Named or Designated Markets. As noted in the baseline, securities that list on a Named or Designated Market may also trade on exchanges that are not Named or Designated Markets, which may bring them additional revenue from trades.<sup>85</sup> Exchanges that are not Named or Designated Markets may thus benefit from the entry of IEX into the market for listings, even if these exchanges do not directly compete with IEX or the Named or Designated Markets for listings business.

## 2. Costs of the Proposed Amendment

The Commission notes that the overall magnitude of costs associated with the loss of state oversight depends on the number of unlisted issuers that choose to list as a result of the proposed amendment, and the Commission preliminarily believes this number is likely to be small, if any, for the reasons noted above.<sup>86</sup> For unlisted issuers that choose to list on IEX as a result of the proposed amendment, listing on IEX may entail costs from a loss of state oversight and compliance costs arising from new reporting obligations from IEX's listing standards. However, we note that these issuers would only choose to list on IEX and bear these costs if they decided that the benefits of listing on IEX justified the costs.

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<sup>84</sup> See supra Section VI.B.3.

<sup>85</sup> See supra Section VI.A.1.

<sup>86</sup> See Table 2, supra Section VI.A.3.a, and accompanying text.

The Commission preliminarily believes that any costs to investors from a loss of state oversight for such issuers would be mitigated by federal regulations and oversight of IEX and the other Named and Designated Markets and the requirement to meet their respective listing standards. Indeed, Congress, in Section 18, has already determined that federal regulation is sufficient for those issuers that meet the high listing standards of a Named/Designated Market. Furthermore, the Commission preliminarily believes that other regulatory protections (e.g., market surveillance, investigation and enforcement) already imposed on previously unlisted issuers who choose to list on IEX will mitigate these potential costs.

Issuers who currently list on an existing Named or Designated Market that would switch to IEX would not experience potential costs from a loss of state oversight or compliance costs arising from new reporting obligations. However, any previously listed issuers that decide to change their listing from a Named or Designated Market to IEX would incur costs to switch their listing.<sup>87</sup> Still, the issuers could choose whether or not to incur this cost and likely would do so only if the benefits of switching their listing exceed their switching costs.

#### D. Other Effects of the Proposed Amendment

Some of the effects of the proposed amendments to IEX, incumbent Named and Designated Markets, and issuers involve transfers from one party to another. For example, the listing fees collected by IEX from previously-listed issuers may accompany a related loss of the listing fees collected by other Named or Designated Markets. Issuers that list on Named and Designated Markets may also enjoy savings from listing fee reductions as a result of increased

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<sup>87</sup> See supra Section VI.A.3.a, for a discussion of the sources of switching costs.

listing exchange competition, which would also accompany a loss of listing fees collected by Named or Designated Markets.

Additionally, as a result of changes to competition in the market for listings, the volume of trade in trading venues may shift, to the advantage of some venues and to the detriment of others. Changes to the Named or Designated Markets' shares of the market for listings may affect the distribution of trading volumes across Named and Designated Markets, as well as other trading venues. Commission staff estimates that an exchange captures an average of about 20% higher share of volume in the securities listed by that exchange compared to the market share of other exchanges trading the same securities.<sup>88</sup> This result suggests that changes to listings driven by increased competition may alter the market share of trades distributed across each venue, even if the number of listed securities does not change, by about 20% of the volume in such securities. Any shifts in the market share of trading could result in gains and losses in transaction fees collected and the share of data fees split between exchanges. Although these gains and losses are relevant potential economic effects of the proposed amendment, the Commission preliminarily does not consider these transfers to be a benefit or cost of the proposed amendment, but rather a consequence of increased competition between listings.<sup>89</sup>

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<sup>88</sup> See supra note 60. Using TAQ data, Commission staff estimates that listing exchanges have around 28.8% of the dollar volume in the securities they list compared to other exchanges' average of about 3.3% of the dollar volume. Staff observed that each listing exchange enjoys a higher market share of dollar volume in its listed securities than any other exchange trading the listing exchange's listed securities. Staff also observed that these differences were not only economically large, but that they were also statistically significant.

<sup>89</sup> In light of the relevant statutory language and in the context of this particular proposed rulemaking, we do not believe there are reasonable alternatives to this proposal to designate securities listed on IEX as covered securities.

E. Request for Comment

The Commission seeks comment and supporting information as to the costs and benefits associated with this rule amendment, including identification and assessments of any costs and benefits not discussed in this analysis, and the effects on efficiency, capital formation and competition. We solicit comments on the usefulness of the rule amendment to investors, reporting persons, registrants, and the marketplace at large. We encourage commentators to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits, as well as any costs and benefits not already defined. We also request qualitative feedback on the nature of the benefits and costs described above. Additionally, we request comment on the extent of any costs that may be attributable to any loss of protections that currently are afforded by the state registration process, such as any merit-based requirements imposed by states on issuers. In particular, the Commission seeks comment on the following:

1. Has the Commission accurately described the baseline for the economic analysis? What are the typical costs of registering securities in multiple states? In how many states do issuers that qualify or are close to qualifying to list register? What are the typical attorney fees and other costs for registering securities in multiple states?
2. Has the Commission accurately described the competitive landscape for the market for listing Covered Securities? Has the Commission accurately described the competitive landscape for the market for trading services?
3. Does the proposing release discuss all relevant markets and forms of competition? If not, which additional markets or forms of competition could the proposal impact and what is the current competitive landscape in those markets?

4. Has the Commission accurately identified all market participants that would be affected by the proposed amendments to Rule 146? Which market participants do commenters believe would be affected by the proposed amendments but have not been included in the analysis?
5. Has the Commission accurately identified the potential impacts on efficiency, competition, and capital formation?
6. Has the Commission accurately identified and explained the costs and benefits of the proposed amendments to Rule 146?
  - a. Has the Commission accurately described the benefits to issuers and investors that would choose to list on IEX should IEX become a Designated Market?
  - b. Has the Commission accurately described the benefits to investors, IEX and other Designated Markets as a result of IEX becoming a Designated Market?
  - c. Has the Commission accurately described the costs to investors in securities of issuers that will choose to list on IEX should IEX become a Designated Market?
  - d. Has the Commission accurately described the costs to issuers of securities that will choose to list on IEX should IEX become a Designated Market?
  - e. Has the Commission accurately described the costs to IEX and other Designated Markets as a result of IEX becoming a Designated Market?
7. Are there benefits or costs that could be quantified or otherwise monetized? The Commission encourages commenters to provide specific estimates or data.

8. In light of the relevant statutory language and in the context of this particular proposed rulemaking, are there reasonable alternatives to this proposal to designate securities listed on IEX as covered securities?

## **VII. Regulatory Flexibility Act Certification**

Section 603(a) of the Regulatory Flexibility Act<sup>90</sup> requires the Commission to undertake an initial regulatory flexibility analysis of the proposed amendment to Rule 146 on small entities, unless the Commission certifies that the proposed amendment, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>91</sup> For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, an issuer is a small business if its “total assets on the last day of its most recent fiscal year were \$5 million or less.”<sup>92</sup> In addition, an exchange is a small entity if it is an exchange that is exempt from the reporting requirements of Rule 601 under Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.<sup>93</sup>

The Commission preliminarily believes that the proposal to amend Rule 146(b) would not affect a substantial number of small entities because IEX is not a small entity. Further, to list its securities on IEX, an issuer’s aggregate market value of publicly held shares would be required to be at least \$5 million. If an entity’s market value of publicly held shares were at least \$5 million, it is reasonable to believe that its assets generally would be worth more than \$5 million. Therefore, an entity seeking to list securities on IEX pursuant to IEX’s listing standards

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<sup>90</sup> 5 U.S.C. 603(a).

<sup>91</sup> 5 U.S.C. 605(b).

<sup>92</sup> 17 CFR 230.157. See also 17 CFR 240.0-10(a).

<sup>93</sup> 17 CFR 240.0-10(e).

generally would have assets with a market value of more than \$5 million and thus would not be a small entity.

Accordingly, the Commission hereby certifies, pursuant to Section 605(b) of the Regulatory Flexibility Act,<sup>94</sup> that amending Rule 146(b) as proposed would not have a significant economic impact on a substantial number of small entities. The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed amendment to Rule 146(b) could have an effect that has not been considered. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

### **VIII. Small Business Regulatory Enforcement Fairness Act of 1996**

For purposes of the Small Business Enforcement Fairness Act of 1996, a rule is “major” if it results or is likely to result in:

- (i) an annual effect on the economy of \$100 million or more;
- (ii) a major increase in costs or prices for consumers or individual industries; or
- (iii) significant adverse effects on competition, investment, or innovation.<sup>95</sup>

The Commission requests comment regarding the potential impact of the proposed amendment on the economy on an annual basis. Commenters should provide empirical data to support their views to the extent possible.

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<sup>94</sup> 5 U.S.C. 605(b).

<sup>95</sup> Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

**IX. Statutory Authority and Text of the Proposed Rule**

The Commission is proposing an amendment to Rule 146 pursuant to the Securities Act of 1933,<sup>96</sup> particularly Sections 18(b)(1)(B) and 19(a).<sup>97</sup>

**List of Subjects in 17 CFR Part 230**

Securities.

For the reasons set forth in the preamble, the Commission proposes to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

**PART 230 – GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

\* \* \* \* \*

2. Amend §230.146 by revising paragraphs (b)(1) and (b)(2) to read as follows:

**§ 230.146 Rules under section 18 of the Act.**

\* \* \* \* \*

(b) \* \* \*

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing

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<sup>96</sup> 15 U.S.C. 77a et seq.

<sup>97</sup> 15 U.S.C. 77r(b)(1)(B) and 77s(a).

standards that are substantially similar to those of the New York Stock Exchange (“NYSE”), the NYSE American LLC (“NYSE American”), or the National Market System of the Nasdaq Stock Market (“Nasdaq/NGM”), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the NASDAQ PHLX LLC;
- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on Nasdaq ISE, LLC;
- (v) The Nasdaq Capital Market;
- (vi) Tier I and Tier II of Bats BZX Exchange, Inc.; and
- (vii) Investors Exchange LLC.

(2) The designation of securities in paragraphs (b)(1)(i) through (vii) of this section as covered securities is conditioned on such exchanges’ listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE American, or Nasdaq/NGM.

By the Commission.

Dated: July 14, 2017.

**Brent J. Fields,**  
*Secretary.*

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