

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79527; File No. SR-IEX-2016-19)

December 12, 2016

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Require Listed Companies to Publicly Disclose Compensation or Other Payments by Third Parties to Any Nominee for Director or Sitting Director in Connection with Their Candidacy for or Service On the Companies' Board of Directors.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that on December 5, 2016, the Investors Exchange LLC ("IEX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 ("Act"),⁴ and Rule 19b-4 thereunder,⁵ Investors Exchange LLC ("IEX" or "Exchange") is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies' Board of Directors. The Exchange has designated this proposal as non-

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(b)(1).

⁵ 17 CFR 240.19b-4.

controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.⁶

The text of the proposed rule change is available at the Exchange's website at www.iextrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

On June 17, 2016 the Commission granted IEX's application for registration as a national securities exchange under Section 6 of the Act including approval of rules applicable to the qualification, listing and delisting of companies on the Exchange. The Exchange plans to begin a listing program in 2017 and is proposing additional rules applicable to companies listing on the Exchange in this proposed rule change.

IEX rules require listed companies to make public disclosure in several areas. For example, a listed company is required to publicly disclose material information that would reasonably be expected to affect the value of its securities or influence investors' decisions as

⁶ 17 CFR 240.19b-4(f)(6)(iii).

well as when non-independent directors serve on a committee that generally requires only independent directors, such as for a controlled company or under exceptional and limited circumstances.⁷ A listed company is also required to file required periodic reports with the Commission.⁸ A principal purpose of these disclosure requirements is to protect investors and ensure these investors have necessary information to make informed investment and voting decisions.

However, based on press reports and information from market participants, IEX understands there is one area where investors may not have complete or timely information. This is when third parties compensate directors in connection with their candidacy for and/or service on company Board of Directors. This third-party compensation, which may not be publicly disclosed, arises when a shareholder privately offers to compensate nominee directors in connection with those nominees' candidacy or service as directors. These arrangements vary but may include compensating directors based on achieving benchmarks such as an increase in share price over a fixed term.⁹

IEX believes these undisclosed compensation arrangements potentially raise several concerns, including that they may lead to conflicts of interest among directors and call into question the directors' ability to satisfy their fiduciary duties. These arrangements may also tend to promote a focus on short-term results at the expense of long-term value creation. IEX believes that enhancing transparency around third-party board compensation would help address these concerns and would benefit investors by making available information potentially relevant

⁷ See Rules 14.207(b)(1), 14.407(c)(2), 14.405(c)(2)(B), 14.405(d)(2)(B) and 14.405(e)(3).

⁸ See Rule 14.207(c).

⁹ See, discussion generally in Securities Exchange Act Release No. 78223 (July 1, 2016), 81 FR 44400 (July 7, 2016) (Order Granting Approval of SR-NASDAQ-2016-13).

to investment and voting decisions. IEX further believes that the proposed disclosure would not create meaningful burdens on directors or those making these payments nor on the companies required to make the disclosure.¹⁰

Accordingly, IEX is proposing to adopt Rule 14.207(b)(3) to require listed companies to publicly disclose on or through the companies' website or proxy statement or information statement for any shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, in Form 10-K or Form 20-F),¹¹ the material terms of all agreements and arrangements between any director or nominee and any person or entity other than the company (the "Third Party") relating to compensation or other payment in connection with that person's candidacy or service as a director.^{12, 13} A company may make this disclosure through its website by hyperlinking to another website, which must be continuously accessible. If that website subsequently becomes inaccessible or that hyperlink inoperable, the company must promptly restore it or make other disclosure in accordance with this proposed rule.

Consistent with other exemptions afforded certain types of companies, the Exchange is also proposing to amend Rule 14.407(a)(3) to provide that a foreign private issuer may follow home country practice in lieu of the requirements of the proposed rule. A Foreign Private Issuer may follow its home country practice in lieu of the requirements of Rule 14.207(b)(3) by

¹⁰ See, note 9.

¹¹ This disclosure method is consistent with the method under Rule 14.405(d)(2)(B) for disclosure of the appointment of a non-independent compensation committee member under exceptional and limited circumstances.

¹² The proposal is intended to apply to agreements and arrangements whether or not the right to nominate a director legally belongs to a third party. See Supplementary Material .07 to Rule 14.405 (Independent Director Oversight of Director Nominations).

¹³ If the Company provides disclosure in a proxy or information statement, including to satisfy the SEC's proxy disclosure requirements, sufficient to comply with this rule, its obligation to satisfy this rule is fulfilled regardless of the reason for which such disclosure was made.

utilizing the process described in Rule 14.407(a)(3), including but not limited to the requirement to submit to IEX a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws.

Companies listed at the time this proposed rule becomes effective or initially listed thereafter must disclose all agreements and arrangements in accordance with this proposed rule by no later than the date on which the Company files or furnishes a proxy or information statement subject to Regulation 14A or 14C under the Act in connection with the Company's next shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, no later than when the Company files next Form 10-K or Form 20-F). Thereafter, a listed company must make this disclosure at least annually until the earlier of the resignation of the director or one year following the termination of the agreement or arrangement.¹⁴ The proposed rule does not separately require the initial disclosure of newly entered into agreements or arrangements, provided that disclosure is made pursuant to this rule for the next shareholder meeting at which directors are elected.

If a Company discovers an agreement or arrangement that should have been disclosed pursuant to subparagraph (A) of the proposed rule but was not, the Company must promptly make the required disclosure in accordance with this proposed rule.¹⁵ In addition, for agreements and arrangements not required to be disclosed in accordance with subparagraph (A)(ii) of the proposed rule, such as employment with a third party that existed prior to the nominee's candidacy and is otherwise disclosed, but where the director or nominee's remuneration is

¹⁴ A Company posting the requisite disclosure on or through its website must make it publicly available no later than the date on which the Company files a proxy or information statement in connection with a shareholders' meeting at which directors are elected (or, if they do not file proxy or information statements, no later than when the Company files its next Form 10-K or Form 20-F).

¹⁵ See infra discussion on remedial disclosure.

thereafter materially increased specifically in connection with such person's candidacy or service as a director of the company, only the difference between the new and previous level of compensation or other payment obligation need be disclosed.

The terms "compensation" and "other payment" as used in this proposed rule are intended to be construed broadly and apply to agreements and arrangements that provide for non-cash compensation and other payment obligations, such as health insurance premiums or indemnification, made in connection with a person's candidacy or service as a director. Further, at a minimum, the disclosure should identify the parties to and the material terms of the agreement or arrangement relating to compensation.

In recognition of circumstances that do not raise the concerns noted above or where such disclosure may be duplicative, the proposed rule would not apply to agreements and arrangements that existed before the nominee's candidacy and the nominee's relationship with the Third Party has been otherwise publicly disclosed, for example, pursuant to Items 402(a)(2) of Regulation S-K or in a director's biographical summary included in periodic reports filed with the Commission. An example of an agreement or arrangement falling under this exception is a director or a nominee for director being employed by a private equity or venture capital firm, or a fund established by such firm, where employees are expected to and routinely serve on the boards of the fund's portfolio companies and their remuneration is not materially affected by such service. If such a director a [sic] nominee's remuneration is materially increased in connection with such person's candidacy or service as a director of the company, only the difference between the new and previous level of compensation needs to be disclosed under the proposed rule.

Additionally, the proposed rule would not apply to agreements and arrangements that relate only to reimbursement of expenses incurred in connection with candidacy as a director, whether or not such reimbursement arrangement has been publicly disclosed. Further, Commission Rule 14a-12(c) subjects persons soliciting proxies in opposition to companies' proxy solicitation to certain disclosure requirements of Schedule 14A of the Act. The proposed rule relieves the company from the disclosure requirements of the proposed Rule 14.207(b)(3)(A) where an agreement or arrangement for a director or a nominee has been disclosed under Item 5(b) of Schedule 14A of the Act in the current fiscal year. However, such an agreement or arrangement is subject to the continuous disclosure requirements of the proposed Rule 14.207(b)(3)(B) on an annual basis. Similarly, a Company that provides disclosure in the current fiscal year pursuant to the requirement in Item 5.02(d)(2) of Form 8-K requiring "a brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director" – would not have to make a separate disclosure under the proposed Rule 14.207(b)(3)(A). Such disclosure under Commission rules, however, shall not relieve a company of its ongoing obligation under the proposed Rule 14.207(b)(3)(B) to make annual disclosure.

In recognition that a company, despite reasonable efforts, may not be able to identify all such agreements and arrangements, the proposed rule provides that a company shall not be deficient with the proposed disclosure requirements if it has undertaken reasonable efforts to identify all such agreements and arrangements, including by asking each director or nominee in a manner designed to allow timely disclosure, and upon discovery of a non-disclosed arrangement, promptly makes the required disclosure by filing a Form 8-K or 6-K, where required by Commission rules, or by issuing a press release. However, such remedial disclosure, regardless

of its timing, does not satisfy the ongoing annual disclosure requirements under subparagraph (B).

In cases where a company is considered deficient, the company must provide a plan to regain compliance. Consistent with deficiencies from most other rules that allow a company to submit a plan to regain compliance,¹⁶ IEX proposes to allow companies deficient under the proposed rule 45 calendar days to submit a plan sufficient to satisfy IEX staff that the company has adopted processes and procedures designed to identify and disclose relevant agreements and arrangements in the future. If the company does not do so, it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Rule 14.502.

2. Statutory Basis

IEX believes that the proposed rule change is consistent with Section 6(b)¹⁷ of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁸ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposal accomplishes these objectives by enhancing transparency around third

¹⁶ Pursuant to Rule 14.501(c)(2)(A), a company is provided 45 days to submit a plan to regain compliance with Rules 14.408(c) (Quorum), 14.411 (Review of Related Party Transactions), 14.412 (Shareholder Approval), 14.207(c)(3) (Auditor Registration), 14.208(a) (Direct Registration Program), 14.406 (Code of Conduct), 14.407(a)(4)(E) (Quorum of Limited Partnerships), 14.407(a)(4)(G) (Related Party Transactions of Limited Partnerships), and 14.413 (Voting Rights). A company is generally provided 60 days to submit a plan to regain compliance with the requirements to timely file periodic reports contained in Rule 14.207(c)(1).

¹⁷ 15 U.S.C. 78f.

¹⁸ 15 U.S.C. 78f(b)(5).

party compensation and payments made in connection with board service. The Exchange believes such disclosure has several benefits: it would provide information to investors to help them make meaningful investing and voting decisions. It would also address potential concerns that undisclosed third party compensation arrangements may lead to conflicts of interest among directors and call into question their ability to satisfy fiduciary duties.

The Exchange believes that it is consistent with the protection of investors and the public interest, and not unfairly discriminatory, to permit foreign private issuers to comply with home country practice in lieu of the requirements of the proposed rule. This approach is consistent with an existing structure for foreign private issuers whereby such companies may follow home country practice in lieu of certain listing rules, subject to an established process which includes disclosure obligations and submission to IEX of a written statement from an independent counsel in such Company's home country certifying that the Company's practices are not prohibited by the home country's laws.

Further, the Exchange notes that a substantially identical proposed rule change by the Nasdaq Stock Market LLC ("Nasdaq") was recently approved by the Commission, pursuant to which the Commission found that the Nasdaq proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁹ In particular, the Commission found that the Nasdaq proposed rule change is "consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general,

¹⁹ See Securities Exchange Act Release No. 78223 (July 1, 2016), 81 FR 44400 (July 7, 2016).

to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.” Accordingly, the Exchange believes that the same considerations apply to this proposed rule change since the proposed changes are substantially identical to the Nasdaq rules.

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

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule to require listed companies to disclose third party compensation and payments in connection with board service is intended to provide meaningful information to investors and to address potential concerns with undisclosed compensation arrangements without creating unnecessary burdens on directors or those making the payments.

Further, the proposed rule change is intended to promote transparency and protect investors. To the extent that a competitor marketplace believes that the proposed rule change places it at a competitive disadvantage, it of course may file with the Commission a proposed rule change to adopt the same or similar rule.

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

Written comments were neither solicited nor received.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act²⁰ and Rule 19b-4(f)(6) thereunder.²¹ Because the proposed rule change does not: (i)

²⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

²¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange’s intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business

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

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²² of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-IEX-2016-19 on the subject line.

days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²²

15 U.S.C. 78s(b)(2)(B).

Paper comments:

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

All submissions should refer to File No. SR-IEEX-2016-19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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. All submissions should refer to File No. SR-IEX-2016-19, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Eduardo A. Aleman
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).