

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83558; File No. SR-IEX-2018-06)

June 29, 2018

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Establish a New Optional Listing Category on the Exchange, “LTSE Listings on IEX”

I. Introduction

On March 15, 2018, Investors Exchange LLC (the “Exchange” or “IEX”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish a new optional listing category on the Exchange, referred to as the “LTSE Listings on IEX” or “LTSE Listings.” The proposed rule change was published for comment in the Federal Register on April 2, 2018.³ The Commission received 23 comment letters on the proposed rule change.⁴ On April 26, 2018, the Commission received a response letter from the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 82948 (March 27, 2018), 83 FR 14074 (“Notice”).

⁴ See letters to Brent J. Fields, Secretary, Commission, from Tony Davis, CEO, Inherent Group, dated April 19, 2018 (“Inherent Group Letter”); Morgan Housel, Partner, The Collaborative Fund, dated April 20, 2018 (“Collaborative Fund Letter”); Chris Brummer, Professor of Law, Faculty Director, Institute of International Economic Law, Georgetown University Law Center, dated April 22, 2018 (“Brummer Letter”); Dick Costolo, dated April 23, 2018 (“Costolo Letter”); James Anderson, Partner and Head of Global Equities, Baillie Gifford & Co, dated April 23, 2018 (“Baillie Gifford Letter”); Marcie Frost, Chief Executive Officer, California Public Employees’ Retirement System Investment Office, dated April 23, 2018 (“CalPERS Letter”); Evan Williams, Co-Founder and James Joaquin, Co-Founder & Managing Director, Obvious Ventures, dated April 23, 2018 (“Obvious Ventures Letter”); Douglas K. Chia, Executive Director, Governance Center, The Conference Board, Inc., dated April 23, 2018 (“Conference Board Letter”); Steve Case, Chairman and CEO, Revolution, dated April 23, 2018 (“Revolution Letter”); Marc

Exchange.⁵ On June 27, 2018, the Exchange submitted Amendment No. 1 to the proposed rule change.⁶ The Commission is publishing this notice to solicit comments on Amendment No. 1

Andreessen, Cofounder and General Partner, Andreessen Horowitz, dated April 23, 2018 (“Andreessen Horowitz Letter”); John Buhl, dated April 23, 2018 (“Buhl Letter”); Sam Altman, President, Y Combinator, dated April 23, 2018 (“Y Combinator Letter”); Andrew Mason, CEO, Descript, dated April 23, 2018 (“Descript Letter”); Judith Samuelson, Vice President, Founder & Director, The Business & Society Program, and Alastair Fitzpayne, Executive Director, The Future of Work Initiative, The Aspen Institute, dated April 23, 2018 (“Aspen Institute Letter”); Brian Singerman, Partner, Founders Fund, dated April 23, 2018 (“Founders Fund Letter”); David Brown and David Cohen, Founders and Co-CEOs, Techstars, dated April 23, 2018 (“Techstars Letter”); Tony Hsieh, Founder, Downtown Project, dated April 23, 2018 (“Downtown Project Letter”); Aaron Bertinetti, SVP, Research & Engagement, Glass, Lewis & Co., LLC, dated April 23, 2018 (“Glass, Lewis Letter”); Jeff Weiner, CEO, LinkedIn, dated April 23, 2018 (“LinkedIn Letter”); Chris Concannon, President and COO, Cboe Global Markets, Inc. (“Cboe Letter”); Reid Hoffman, Partner, Greylock Partners, dated April 23, 2018 (“Greylock Partners Letter”); Aneesh Chopra, President, CareJourney, dated April 23, 2018 (“CareJourney Letter”); and Alexis Ohanian, General Partner/Cofounder, and Garry Tan, Managing Partner/Cofounder, Initialized Capital, dated April 23, 2018 (“Initialized Capital Letter”). All comments received by the Commission on the proposed rule change are available at: <https://www.sec.gov/comments/sr-iex-2018-06/iex201806.htm>.

⁵ See letter to Brent J. Fields, Secretary, Commission, from Claudia Crowley, Chief Regulatory Officer, Investors Exchange LLC, dated April 26, 2018 (“IEX Response Letter”). The Exchange’s response letter is available at: <https://www.sec.gov/comments/sr-iex-2018-06/iex201806-3520149-162294.pdf>.

⁶ In Amendment No. 1, the Exchange proposes to amend: (1) proposed Rule 14A.001(a) to clarify that an LTSE Listings Issuer must qualify for listing under Chapter 14 of the IEX Rules and the LTSE Listings Rules, except as otherwise provided in the LTSE Listings Rules; (2) proposed Rule 14A.200(c)(2) to specify that when a company lists on LTSE Listings, in addition to the requirement that the company must not have any security listed for trading on the Exchange or any other national securities exchange, the company also must be listing in connection with its initial public offering; (3) proposed Rule 14A.210 to indicate that when the LTSE Listings Issuer is dually-listed on the Exchange and on another national securities exchange that is the Primary Listing Market and that requires a minimum number of market makers, IEX Rules 14.310 and 14.320 requiring a minimum number of market makers for IEX listed companies would not apply; and (4) proposed Rule 14A.413 by adding paragraph (c) to require an LTSE Listings Issuer to post prominently on its website a plain English explanatory statement regarding shareholders’ rights under the long-term voting provisions included in its governance documents, including how the shareholder’s voting power may increase over time and the administrative steps the shareholder must take to allow the shares’ voting

from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background of the Proposed Rule Change

The Exchange proposes to adopt rules to create a new optional listing category on the Exchange for common equity securities, referred to as the “LTSE Listings on IEX” or “LTSE Listings.” According to the Exchange, the new optional listing category would provide a differentiated choice for issuers and investors that prefer listing standards that are expressly designed to promote long-term value creation.⁷ Specifically, the Exchange believes that LTSE Listings would promote the interests of companies that seek to focus on long-term value creation, as well as to respond to the transparency and governance concerns of long-term focused investors.⁸

The Exchange believes that the proposed LTSE Listings Rules could encourage greater participation in the public markets by companies and potentially increase the number of companies willing to undertake an initial public offering (“IPO”).⁹ According to the Exchange, the total number of listed companies in the United States and the number of IPOs have declined in the past few decades, and the Exchange states that many academics, market participants, and

power to increase over time. To promote the transparency of its proposed amendment, when IEX filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 as a comment letter to the file, which the Commission posted on its website and placed in the public comment file for SR-IEX-2018-06 (available at <https://www.sec.gov/comments/sr-iex-2018-06/iex201806.htm>).

⁷ See Notice, supra note 3, at 14074.

⁸ See id. at 14077.

⁹ See id. at 14076-77.

other commenters believe that these declines are the result of short-term pressures placed on public companies.¹⁰

III. Description of the Proposed Rule Change, as Modified by Amendment No. 1

The proposed rules for LTSE Listings would be located in new Chapter 14A of the Exchange's rules ("LTSE Listings Rules" or "Rules"). Companies choosing to list on the Exchange ("LTSE Listings Issuers") could elect to be subject to the LTSE Listings Rules, and such companies also would be subject to the listing and applicable requirements set forth in current Chapter 14 of the IEX Rulebook ("IEX Rules") for IEX listed companies, except as those rules may be modified by the LTSE Listings Rules.¹¹

The LTSE Listings Rules would include the following features: (i) rules relating to the board of directors and committee requirements; (ii) rules requiring supplemental long-term disclosures; (iii) rules requiring long-term alignment of executive compensation; (iv) rules requiring a long-term shareholder voting structure; and (v) certain other rules that the Exchange believes would encourage LTSE Listings Issuers to focus on long-term value creation.¹² In addition, the Exchange is proposing rules that would clarify the application of certain existing Exchange rules to LTSE Listings Issuers.¹³ The Exchange would limit the availability of LTSE Listings to companies seeking to list on LTSE Listings concurrently with their IPO (whether listing on LTSE Listings only or dually listing on LTSE Listings and another national securities

¹⁰ See id. at 14075-76.

¹¹ See Notice, supra note 3, at 14074-75; see also proposed Rules 14A.001(a) and 14A.200, and Amendment No. 1, supra note 6.

¹² See Notice, supra note 3, at 14077.

¹³ Id.

exchange)¹⁴ and would not permit issuers already listed on another national securities exchange to transfer to LTSE Listings.¹⁵ LTSE Listings Issuers may list only common equity securities on LTSE Listings.¹⁶

A. The Exchange's Arrangement with LTSE Holdings, Inc.

The Exchange notes that the LTSE Listings Rules initially were developed by LTSE Holdings, Inc. (together, with its affiliates, "LTSE"), and that the Exchange has entered into an arrangement with LTSE to authorize the Exchange to make the LTSE Listings Rules available to interested companies as a listing category of the Exchange.¹⁷ The Exchange states that, although the LTSE Listings Rules were developed by LTSE, the Exchange would retain full self-regulatory responsibility for determining initial and continuing compliance with the Exchange's listing standards, including for those companies that elect to be subject to the LTSE Listings Rules.¹⁸

The Exchange further states that it would retain, as its agents, a small number of staff that also are employed by LTSE ("LTSE Listings Agents") solely to provide IEX with expertise in interpreting the LTSE Listings Rules and assistance in conducting the LTSE Listings business,

¹⁴ See Amendment No. 1, supra note 6.

¹⁵ See Notice, supra note 3, at 14075; see also proposed Rule 14A.200(c)(2). In connection with an initial public offering on the Exchange, the proposed LTSE Listings Rules would permit the dual-listing of companies seeking to list concurrently on LTSE Listings and another national securities exchange. See infra Section III.F.2. and proposed Rule 14A.210.

¹⁶ See proposed Rule 14A.001(b).

¹⁷ See Notice, supra note 3, at 14074. The Exchange states that it understands that LTSE anticipates separately registering a subsidiary as a national securities exchange in the future. See id.

¹⁸ See id. at 14077.

and that the Exchange would not receive regulatory services from LTSE itself.¹⁹ Specifically, the Exchange notes that the LTSE Listings Agents would provide certain advisory, marketing, public communications, and sales services to IEX in connection with LTSE Listings.²⁰ The Exchange, however, represents that the LTSE Listings Agents would be subject to the Exchange's oversight and regulatory authority as the responsible self-regulatory organization.²¹ The Exchange states that it has an arrangement with the LTSE Listings Agents that includes restrictions designed to protect the Exchange's responsibilities as a self-regulatory organization and the confidentiality of its books and records.²² Separately, the Exchange states that it would

¹⁹ See id. The Exchange represents that the LTSE Listing Agents' involvement would not extend to other matters within the Exchange's jurisdiction and that IEX would retain full self-regulatory responsibility for determining initial and continuing compliance with the Exchange's listing standards, including for those companies that elect to be subject to the LTSE Listings Rules. See id.

²⁰ See id. at 14077 n.34. The Exchange states that, for example, LTSE Listings Agents would evaluate issuers seeking to list on the Exchange under the LTSE Listings Rules and would assist in monitoring LTSE Listings Issuers for compliance with the LTSE Listings Rules. See id.

²¹ See id. at 14077. The Exchange notes that, at all times, LTSE Listings Agents would be subject to the satisfaction and the oversight of the Exchange's Chief Regulatory Officer, with all actions proposed by LTSE Listings Agents subject to the Exchange's regulatory authority. See id. at 14077 n.34. The Exchange represents that, notwithstanding the services provided by the LTSE Listings Agents to the Exchange, all actions taken by the Exchange ultimately would be based on the Exchange's determination that the action is appropriate and consistent with the Act, the Commission's rules thereunder, and the Exchange's rules. See id.

²² See id. at 14077 n.34. According to the Exchange, each LTSE Listings Agent would be considered to be an agent of the Exchange in connection with the performance of services under the Exchange's arrangement with LTSE, pursuant to Article XI, Section 4 of the Exchange's Amended and Restated Operating Agreement. Among other things, the Exchange represents that, pursuant to the Exchange's arrangement with LTSE, the Exchange would not share confidential regulatory information with LTSE (other than with LTSE regulatory personnel that are LTSE Listings Agents and that do not have direct involvement in LTSE's commercial operations). In addition, the Exchange represents that LTSE has agreed that each LTSE Listings Agent would be required to consent in writing to the application to such agent of the following provisions, which are

permit LTSE to use and redistribute written marketing, public communications, and sales materials concerning the LTSE Listings business, subject to the Exchange’s consent.²³

B. Board of Directors and Committee Requirements

As more fully described below, the LTSE Listings Rules would create new requirements for the boards of directors and board committees of LTSE Listings Issuers, which are intended to align the boards with the objectives of the LTSE Listings Rules. The LTSE Listings Rules would require each LTSE Listings Issuer to establish board committees dedicated to overseeing the issuer’s strategies for creating and sustaining long-term growth and for selecting or recommending qualified director nominees. The LTSE Listings Rules also would impose additional obligations on audit committees and compensation committees with the aim of increasing oversight and transparency.²⁴

1. Long-Term Strategy and Product Committee

Proposed Rule 14A.405(c)(1) would require that each LTSE Listings Issuer’s board of directors maintain a committee specifically dedicated to overseeing the LTSE Listings Issuer’s strategic plans for long-term growth, the Long Term Strategy and Product Committee (“LTSP

consistent with Article VII of the Bylaws of IEX Group, Inc.: non-interference with, and due regard for, the Exchange’s self-regulatory function; confidentiality of the Exchange’s books and records pertaining to its self-regulatory function; maintenance of books and records related to services under the Exchange’s arrangement with LTSE and services provided to the Exchange by LTSE Listings Agents at a location within the United States; compliance with the federal securities laws and the rules and regulations promulgated thereunder and cooperation with the SEC in respect of the SEC’s oversight responsibilities regarding the Exchange and the self-regulatory functions and responsibilities of the Exchange; and consent to jurisdiction of the United States federal courts, the SEC, and the Exchange for purposes of any suit, action, or proceeding arising out of or relating to services provided to the Exchange and the Exchange’s arrangement with LTSE. See id.

²³ See id.

²⁴ See id.

Committee”). The LTSP Committee must include a minimum of three members of the board, a majority of whom must be independent directors.²⁵ The LTSP Committee cannot assume any roles or responsibilities that are required to be undertaken by the LTSE Listings Issuer’s board committees comprised solely of independent directors.²⁶

Pursuant to proposed Rule 14A.405(c)(3)(A), each LTSE Listings Issuer must certify that it has adopted a formal written LTSP Committee charter and that the LTSP Committee would review and reassess the adequacy of the formal written charter on an annual basis. The charter must specify, among other things, the scope of the LTSP Committee’s responsibilities, and how it would carry out those responsibilities, including structure, processes, and membership requirements, and that the LTSP Committee must report regularly to the board of directors.²⁷

2. Nominating/Corporate Governance Committee

Pursuant to proposed Rule 14A.405(d)(1), the director nominees of an LTSE Listings Issuer must be either selected, or recommended for the board’s selection, by a nominating/corporate governance committee that is comprised solely of independent directors. Director nominees of an LTSE Listings Issuer may not be selected, or recommended for the board’s selection, by the independent directors constituting a majority of the board’s independent directors, as provided in IEX Rule 14.405(e)(1)(A), subject to an exception for exceptional and

²⁵ See proposed Rule 14A.405(c)(4).

²⁶ See proposed Rule 14A.405(c)(1).

²⁷ See proposed Rule 14A.405(c)(3)(B)(i)-(v). Proposed Rule 14A.405(c)(3)(C) would require that the LTSP Committee’s charter be made available on or through the LTSE Listings Issuer’s website.

limited circumstances.²⁸ Independent Director oversight of director nominations would not apply in cases where the right to nominate a director legally belongs to a third party.²⁹

Proposed Rule 14A.405(d)(6)(A) would require that each LTSE Listings Issuer adopt a formal written nominating/corporate governance committee charter and to review and reassess the adequacy of the formal written charter on an annual basis. Among other things, the charter would need to specify the scope of the nominating/corporate governance committee's responsibilities, and how the committee would carry out those responsibilities, including structure, processes, and membership requirements. The charter also would be required to specify that the nominating/corporate governance committee must report regularly to the board of directors.³⁰

3. Audit Committee and Compensation Committees

Proposed Rule 14A.405 imposes requirements on the audit committee and compensation committee in addition to the requirements imposed by current IEX Rules 14.405(c) and 14.405(d), respectively. Under proposed Rules 14A.405(a)(1) and 14A.405(b)(2)(A)(i), an

²⁸ If the nominating/corporate governance committee is comprised of at least three members, one director, who is not an "Independent Director" as defined in IEX Rule 14.405(a)(2) and is not currently an Executive Officer or employee or a Family Member of an Executive Officer, may be appointed to the nominating/corporate governance committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the LTSE Listings Issuer and its shareholders. See proposed Rule 14A.405(d)(2). An LTSE Listings Issuer that relies on this exception must disclose the nature of the relationship and the reasons for the determination, as well as provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on this exception. See id. In addition, a member appointed under this exception may not serve longer than two years. See id.

²⁹ See proposed Rule 14A.405(d)(3).

³⁰ This charter must be made available on or through the LTSE Listings Issuer's website. See proposed Rule 14A.405(d)(6)(B).

LTSE Listings Issuer’s audit committee and compensation committee charters must specify that the committees must report regularly to the board of directors. In addition, the compensation committee charter must specify that the compensation committee must adopt executive compensation guidelines in accordance with proposed Rule 14A.405(b)(3) (Executive Compensation Guidelines).³¹ An LTSE Listings Issuer would be required to make both the audit committee charter and compensation committee charter available on or through its website.³²

4. Committee Delegations and Third-Party Nominations

The proposed rules would allow the responsibilities of certain committees to be delegated to other committees. Specifically, the proposed rules would permit the board of directors to allocate the responsibilities of the LTSP Committee, the nominating/corporate governance committee, and compensation committee to committees of their own denomination, provided that, in each case the committee with the allocated committee responsibilities must satisfy the same compositional requirements of the original committee and must be subject to a formal written charter that satisfies the same committee charter requirements of the original committee.³³ Furthermore, if any function of the LTSP Committee, the nominating/corporate governance committee, or compensation committee has been delegated to another committee, the charter of the committee receiving such delegation must also be made available on or through the LTSE Listings Issuer’s website.³⁴

³¹ See proposed Rule 14A.405(b)(2)(A)(ii). Proposed Rule 14A.405(b)(4) clarifies that “Smaller Reporting Companies,” as defined in Rule 12b-2 under the Act, 17 CFR 240.12b-2, are not exempt from these additional compensation committee requirements.

³² See proposed Rules 14A.405(a)(2) and 14A.405(b)(2)(B).

³³ See proposed Rules 14A.405(c)(2), 14A.405(d)(5), and 14A.405(b)(2)(B).

³⁴ See proposed Rules 14A.405(c)(3)(C), 14A.405(d)(6)(B), and 14A.405(b)(2)(B).

Under the proposal, the charters of each committee of LTSE Listings Issuers also would be permitted to address the authority of the committee to delegate its responsibilities to subcommittees of the committee, provided that any such subcommittee must meet the applicable committee composition requirements with respect to independence.³⁵ However, this LTSE Listings Rule would not apply in cases where the right to nominate a director legally belongs to a third party, because the right to nominate directors in such a case does not reside with the LTSE Listings Issuer.³⁶

5. Corporate Governance Guidelines

Proposed Rule 14A.409 would require each LTSE Listings Issuer to adopt and disclose certain corporate governance guidelines that address director qualification standards, director responsibilities, director access to management, director compensation, director orientation and continuing education, management succession, and annual performance evaluations of the board.³⁷ Among other things, these corporate governance guidelines must specify that no less than 40% of director compensation must be paid in stock-based compensation tied to long-term periods.³⁸ In addition, LTSE Listings Issuers must adopt director stock ownership guidelines,

³⁵ See Supplementary Material .01 to proposed Rule 14A.405, which would apply to LTSE Listings Issuers in lieu of existing Supplementary Material .08 to IEX Rule 14.405 (Independent Director Oversight of Director Nominations).

³⁶ See proposed Rule 14A.405, Supplementary Material .01.

³⁷ An LTSE Listings Issuer would be required to make its corporate governance guidelines available on or through its website. See proposed Rule 14A.409(b).

³⁸ See proposed Rule 14A.409(a)(4). An LTSE Listings Issuer would be required to disclose in its corporate governance guidelines what it considers to be “long-term” for this purpose. See *id.*

which must include minimum ownership requirements that can be met over the length of board service.³⁹

C. Long-Term Strategy and Other Disclosure Requirements

The Exchange notes that, in addition to and separate from all disclosures required under applicable securities laws, the Commission’s rules, and the Exchange’s other rules, proposed Rule 14A.207 would require LTSE Listings Issuers to provide certain supplemental disclosures (“LTSP Disclosures”).⁴⁰ The LTSP Disclosures would be made publicly available pursuant to a supplement to the LTSE Listings Issuer’s Annual Report (“Annual Report Supplement”) that must be distributed to shareholders along with, and in the same manner as, the LTSE Listings Issuer’s Annual Report.⁴¹ In addition, LTSE Listings Issuers must make the Annual Report Supplement available on or through the LTSE Listings Issuer’s website.⁴² The LTSP Disclosures also must be reviewed and approved by the LTSP Committee on at least an annual basis.⁴³

³⁹ See id.

⁴⁰ See Notice, supra note 3, at 14080. Proposed Rule 14A.207(a) specifies that nothing in the rule shall affect the obligation of an LTSE Listings Issuer to comply with applicable securities laws. In addition, proposed Rule 14A.207(b) states that all disclosures must comply with applicable securities laws, including rules and regulations pertaining to the use and reconciliation of non-GAAP financial measures and any securities law obligations regarding updating or correcting prior public statements or disclosures.

⁴¹ See proposed Rule 14A.207(b). Proposed Rule 14A.002(a)(1) states that “Annual Report” means “consistent with IEX Rule 14.207(d), the annual report made available to Shareholders containing audited financial statements of the LTSE Listings Issuer and its subsidiaries (which, for example, may be on Form 10-K, 20-F, 40-F or N-CSR) within a reasonable period of time following the filing of the annual report with the Commission.”

⁴² See id. In addition, “[e]ach LTSE Listings Issuer must include a statement in its Annual Report that the LTSP Disclosures are available in the Annual Report Supplement and provide the website address,” as well as “notify IEX Regulation once its Annual Report Supplement has been made publicly available on its website.” Id.

⁴³ Id. The LTSP Committee must determine whether to recommend to the board of

1. Long-Term Growth Strategy

Proposed Rule 14A.207(c)(1) would require each LTSE Listings Issuer to disclose its “Long-Term Growth Strategy.” Long-Term Growth Strategy is defined as “the strategy, as determined by management and the board of directors and approved by the LTSP Committee, that is focused on achieving long-term growth.”⁴⁴ The Exchange states that this proposed requirement is designed to increase transparency for shareholders on the strategic goals of the company’s managers and provide for greater alignment and accountability between a company’s long-term vision and investor expectations. An LTSE Listings Issuer must include how it defines “long-term” for purposes of its Long-Term Growth Strategy, including a discussion of how it made this determination.⁴⁵

Proposed Rule 14A.207(c) outlines other required aspects of the Long-Term Growth Strategy disclosure. This disclosure must include a discussion of the LTSE Listings Issuer’s “Leading Indicators,”⁴⁶ as well as key milestones that the LTSE Listings Issuer aims to achieve with respect to the Leading Indicators.⁴⁷ The LTSE Listings Issuer also must report on the

directors that the LTSP Disclosures be included in the Annual Report Supplement, and any board and committee approvals should be reflected in board resolutions as appropriate. See id.

⁴⁴ See proposed Rule 14A.002(a)(11).

⁴⁵ See proposed Rule 14A.207(c)(1)(A).

⁴⁶ Proposed Rule 14A.002(a)(10) defines “Leading Indicators” as “quantitative metrics (financial or non-financial) that an LTSE Listings Issuer’s management uses to help forecast revenue, profit or other common after-the-event measures of long-term success. These current and predictive metrics [would be] used by management to focus on day-to-day results as they work towards achieving the LTSE Listings Issuer’s Long-Term Growth Strategy, and provide useful information for timely decision-making in the shorter term.”

⁴⁷ See proposed Rule 14A.207(c)(1)(B).

progress that the LTSE Listings Issuer has made in achieving these key milestones.⁴⁸ In addition, the Long-Term Growth Strategy must include details relating to different businesses of the LTSE Listings Issuer if the information is material to the overall strategy.⁴⁹ Lastly, LTSE Listings Issuers must include a discussion of any changes to the LTSE Listings Issuer’s Long-Term Growth Strategy, Leading Indicators, and/or key milestones since the publication of the LTSE Listings Issuer’s previous Long-Term Growth Strategy.⁵⁰

Proposed Rule 14A.207(c)(3) would provide an exception from the requirement to disclose aspects of an LTSE Listings Issuer’s Long-Term Growth Strategy. Specifically, if the LTSE Listings Issuer’s LTSP Committee makes a determination that disclosure of any aspect of the LTSE Listings Issuer’s Long-Term Growth Strategy would be “reasonably likely to result in material harm” to the LTSE Listing Issuer’s competitive position, the LTSE Listings Issuer could exclude such information from its LTSP Disclosures. A process for making this determination would be required to be disclosed in the issuer’s LTSP Committee Charter pursuant to proposed Rule 14A.405(c)(3)(B)(iv) and any such determination must be documented by the LTSP Committee and be made in accordance with its fiduciary duties.⁵¹ In addition, the LTSE Listings Issuer must disclose in its LTSP Disclosures that it is withholding certain aspects of its Long-Term Growth Strategy as a result of competitive concerns.⁵² Upon the time that any withheld information is no longer competitively sensitive, the LTSE Listings Issuer would be required to

⁴⁸ See id.

⁴⁹ See proposed Rule 14A.207(c)(2).

⁵⁰ See proposed Rule 14A.207(c)(1)(C).

⁵¹ See Notice, supra note 3, at 14081.

⁵² See proposed Rule 14A.207(c)(3).

disclose that information in its LTSP Disclosures, even though this information may no longer be relevant to its current Long-Term Growth Strategy.⁵³

2. Other Supplemental Disclosure Requirements

In addition to the Long-Term Growth Strategy disclosure, proposed Rule 14A.207 would require issuers to make disclosures relating to buybacks, human capital investment, and research and development, as described below:

Buybacks: Each LTSE Issuer must disclose its EPS Net of Buybacks, defined as the quotient calculated by dividing (i) net income (as reported in the LTSE Listings Issuer’s financial statements in its most recent Annual Report) by (ii) the sum of outstanding shares and shares that were subject to a Buyback during the prior fiscal year.⁵⁴

Human Capital Investment: Each LTSE Listings Issuer must disclose the extent to which the LTSE Listings Issuer’s selling, general, and administrative expenses (as reported in the LTSE Listings Issuer’s most recent Annual Report) consisted of “Human Capital Investment.”⁵⁵

⁵³ Id.

⁵⁴ See proposed Rules 14A.002(a)(6) and 14A.207(d). Pursuant to proposed Rule 14A.002(a)(3), “Buybacks” means issuer repurchases that are required to be disclosed pursuant to Item 703 of Regulation S-K.

⁵⁵ See proposed Rules 14A.002(a)(7) and 14A.207(e). Proposed Rule 14A.207(e) defines “Human Capital Investment” as the aggregate amount an LTSE Listings Issuer spends on formal training of workers in new skills to improve job performance, including, among other things, amounts spent on fees or expenses related to personnel hired or retained to train employees, training materials, tuition assistance, and continuing education or similar programs. Each LTSE Listings Issuer must also disclose the amount spent on Human Capital Investment per full-time equivalent employee. Id.

Research and Development: Each LTSE Listings Issuer must disclose the amount of research and development spending that is short-term focused and the amount of such spending that is long-term focused.⁵⁶

3. Timing for Supplemental Disclosures

Proposed Rule 14A.207(g) describes when these supplemental disclosures must be made. An LTSE Listings Issuer must disclose its Long-Term Growth Strategy on its website no later than at the time of its initial listing, and it must remain on the LTSE Listings Issuer’s website until the LTSE Listings Issuer is required to make the disclosure annually in its Annual Report Supplement.⁵⁷ After initial listing, an LTSE Listings Issuer must make the disclosures relating to buybacks, human capital investment, and research and development publicly available on its website by the earlier of when the LTSE Listings Issuer files its Form 10-K or distributes its Annual Report Supplement.⁵⁸ Thereafter, the LTSE Listings Issuer must make this disclosure annually in its Annual Report Supplement, as set forth in proposed Rule 14A.207(b).⁵⁹

D. Executive Compensation Requirements

Proposed Rule 14A.405(b)(3) requires an LTSE Listings Issuer’s compensation committee to adopt a set of executive compensation guidelines applicable to Executive Officers,⁶⁰ which the Exchange states are designed to link executive compensation to the long-

⁵⁶ See proposed Rule 14A.207(f). Each LTSE Listings Issuer must also disclose how it defines “short-term” and “long-term” for these purposes and how it determined such definitions. Id.

⁵⁷ See proposed Rule 14A.207(g)(1). The initial disclosure must be made in compliance with the rules and regulations relating to the dissemination of free writing prospectuses, if applicable. Id.

⁵⁸ See proposed Rule 14A.207(g)(2).

⁵⁹ See id.

⁶⁰ IEX Rule 14.405(a)(1) defines “Executive Officer” as persons meeting the definition of

term value of the LTSE Listings Issuer. These guidelines must include general principles for determining the form and amount of Executive Officer compensation, and for reviewing those principles, as appropriate. Specifically, the compensation committee must ensure that the time periods and performance metrics used to determine Incentive-Based Compensation⁶¹ for Executive Officers are consistent with the LTSE Listings Issuer’s Long-Term Growth Strategy, and may consult with the LTSP Committee in assessing whether such time periods and performance metrics are consistent with the LTSE Listings Issuer’s Long-Term Growth Strategy.⁶²

Proposed Rule 14A.405(b)(3)(B) imposes additional requirements related to the compensation of Executive Officers. An LTSE Listings Issuer may not provide Executive Officers with any Incentive-Based Compensation that is tied to a financial or performance metric that is measured over a time period of less than one year or grant any time-based equity compensation that has any portion that vests in less than a year from the grant date (or from the hire date, in the case of new hire grants).⁶³ In addition, equity compensation awarded to Executive Officers must be subject to a period of vesting over at least five years.⁶⁴

“officer” in Rule 16a-1(f) under the Act, 17 CFR 240.16a-1(f).

⁶¹ Proposed Rule 14A.002(a)(8) defines “Incentive-Based Compensation” as any variable compensation, fees, or benefits that serve as an incentive or reward for performance.

⁶² See proposed Rule 14A.405(b)(3)(A)(i). In addition, the LTSE Listings Issuer must disclose in its proxy statement, or Annual Report Supplement if no proxy statement is filed, whether or not the compensation committee has determined that such time periods and performance metrics are consistent with the LTSE Listings Issuer’s Long-Term Growth Strategy. See id.

⁶³ See proposed Rule 14A.405(b)(3)(B)(i).

⁶⁴ See proposed Rule 14A.405(b)(3)(B)(ii). The vesting scheduling must reflect the long-term focus of the equity grant and could allow for accelerated vesting only upon the death of the Executive Officer or the occurrence of a disability that renders the Executive Officer permanently unable to remain employed at the LTSE Listings Issuer in any

The proposed LTSE Listings Rules provide for two exceptions to the executive compensation requirements discussed above. First, the compensation committee may provide alternative time periods for incentive and equity compensation if there is a “business necessity,” and the LTSE Listings Issuer discloses and explains such business necessity.⁶⁵ Second, any executive compensation that is subject to an existing written agreement entered into at least one year prior to the initial listing of an LTSE Listings Issuer on the Exchange need not comply with the requirements, but usage of this exemption must be disclosed in the Annual Report Supplement.⁶⁶

E. Long-Term Shareholder Voting Structure

According to the Exchange, it is consistent with the focus of the LTSE Listings category to provide a differentiated choice for issuers and investors that prefer listing standards that are explicitly designed to promote long-term value creation.⁶⁷ Thus, the Exchange proposes Rule 14A.413(b) to require that LTSE Listings Issuers maintain certain voting rights provisions in their corporate organizational documents that would provide shareholders with the ability,

capacity. Id. The compensation committee must determine appropriate Vesting Periods and amounts, as well as holding periods, for equity compensation awarded to Executive Officers that apply following an Executive Officer’s retirement or resignation. See proposed Rule 14A.405(b)(3)(B)(iv).

⁶⁵ See proposed Rule 14A.405(b)(3)(B)(iii). However, the amount of equity awards granted in the aggregate that vests before the first anniversary of the grant date, or that does not meet the minimum five-year vesting schedule, cannot exceed 5% of the total number of shares authorized for grant in any fiscal year. See id.

⁶⁶ See proposed Rule 14A.405(b)(3)(C). Proposed Rule 14A.405(b)(4) clarifies that “Smaller Reporting Companies,” as defined in Rule 12b-2 under the Act, 17 CFR 240.12b-2, are not exempt from the executive compensation guidelines described in proposed Rule 14A.405(b)(3).

⁶⁷ See Notice, supra note 3, at 14083.

according to the shareholder's option, to accrue additional voting power over time.⁶⁸ LTSE Listings Issuers would be required to comply with the obligations set forth in IEX Rule 14.413 and in proposed Rule 14A.413, both of which relate to voting rights. Under proposed Rule 14A.413, LTSE Listings Issuers would be required to include certain voting rights provisions in their corporate organizational documents that provide shareholders the ability to accrue additional voting power over time.⁶⁹ Under proposed Rule 14A.413(b)(2), all securities listed on LTSE Listings, including securities issued by Foreign Private Issuers,⁷⁰ must be eligible for a Direct Registration Program ("DRP") operated by a clearing agency registered under Section 17A of the Act.⁷¹

Voting power would accrue only to shareholders who are beneficial owners; register such shares in their name as "record holders" on the books of the LTSE Listings Issuer (including through the use of a DRP); and continue to hold such shares as record holders over a period of time.⁷² Shares held in "street name," that is, shares registered on the books of an issuer's transfer agent in the name of a nominee selected by the Depository Trust Company, would not accrue additional voting power over time.⁷³

⁶⁸ Id.

⁶⁹ See proposed Rule 14A.413(b).

⁷⁰ Pursuant to IEX Rule 14.002(a)(15), the term "Foreign Private Issuer" as used in the Exchange's rules has the same meaning as in Rule 3b-4 under the Act, 17 CFR 240.3b-4.

⁷¹ 15 U.S.C. 78q-1. See also proposed Rules 14A.200(c)(1) and 14A.208.

⁷² See proposed Rule 14A.413(b)(2). For these purposes, record owners of shares listed on LTSE Listings include those shareholders holding a physical paper certificate of such shares and shareholders holding shares through a DRP. See proposed Rule 14A.413(b)(3).

⁷³ See Notice, supra note 3, at 14084.

As of the date of the company's initial listing on LTSE Listings, each holder of equity securities listed on LTSE Listings must be entitled to an equal number of votes per share (the "Initial Voting Power") on a per class basis.⁷⁴ For each full calendar month following the date of the LTSE Listings Issuer's listing on the Exchange during which a shareholder maintains continuous record ownership of shares, the voting power of such shares for so long as they are held of record by such shareholder would be required to increase by at least one twelfth (1/12th) over the shares' Initial Voting Power on the last business day of the month, up to an amount that is ten times their Initial Voting Power.⁷⁵ If, at any time, a shareholder transfers shares out of record ownership, then on the date of such transfer, such shares would revert to entitling the shareholder to the Initial Voting Power of such shares.⁷⁶

In addition, although the requirements of proposed Rule 14A.413(b) could be viewed as similar to time-phased voting plans, the Exchange believes that proposed Rule 14A.413(b) is consistent with IEX Rule 14.413, which is the Exchange's Voting Rights Policy.⁷⁷ IEX Rule 14.413 bars a company already listed on the Exchange from undertaking any of the prohibited

⁷⁴ See proposed Rule 14A.413(b)(1).

⁷⁵ See proposed Rule 14A.413(b)(3). Pursuant to proposed Rule 14A.413, Supplementary Material .01(b), an LTSE Listings Issuer would be permitted to provide that the voting rights of shareholders holding in record name increase at a rate greater than one twelfth (1/12th) per month, provided that the voting power of such shares may not increase to a level that exceeds ten times their Initial Voting Power.

⁷⁶ Proposed Rule 14A.413(b)(4). Proposed Rule 14A.413(b)(5) requires that, prior to listing securities on LTSE Listings, a prospective LTSE Listings Issuer must obtain from its transfer agent a certification confirming that the transfer agent has software or other systems or processes available to the LTSE Listings Issuer that would enable the transfer agent and LTSE Listings Issuer to determine, as of a particular record date, the LTSE Listings Issuer's shareholder's voting rights calculated in accordance with proposed Rule 14A.413(b) (Long-Term Voting).

⁷⁷ See IEX Rule 14.413.

corporate actions specified therein, including the adoption of time-phased voting plans.⁷⁸ The Exchange notes that, because LTSE Listings Issuers would be required as a pre-condition to listing on LTSE Listings to have in place a voting rights structure as of the date of its initial listing that complies with proposed Rule 14A.413(b), no new corporate action that disparately reduces voting rights would be permitted to be taken subsequent to the LTSE Listings Issuer's listing on the Exchange.⁷⁹

The proposed LTSE Listings Rules also contain various provisions relating to the determination of record ownership for purposes of accreting voting power:

Accreting Voting and the Exchange's Voting Rights Policy: The proposed rules describe how to determine what is considered "super-voting" stock for purposes of IEX Rule 14.413, which provides that voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Act cannot be disparately reduced or restricted through any corporate action or issuance.⁸⁰ Proposed Rule 14A.413, Supplementary Material .01(f) would prohibit an issuer from disparately reducing or restricting the voting rights of existing shareholders by issuing a new class of super-voting stock.⁸¹ For purposes of LTSE Listings, a

⁷⁸ See id. Proposed Rule 14A.413, Supplementary Material .01(a) states that, so long as not inconsistent with IEX Rule 14.413, an LTSE Listings Issuer could (i) maintain multiple classes of securities, including shares that have voting power per share in excess of the Initial Voting Power of the securities listed on the Exchange, and/or (ii) establish or maintain classes of shares not listed on the Exchange that do not comply with proposed Rule 14A.413(b).

⁷⁹ See Notice, supra note 3, at 14085-86.

⁸⁰ See IEX Rule 14.413. IEX Rule 14.413 notes that examples of such corporate action or issuance include, but are not limited to, the adoption of time-phased voting plans, the adopting of capped voting rights, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer. Id.

⁸¹ See proposed Rule 14A.413, Supplementary Material .01(f).

class of securities shall be considered super-voting stock if (i) the Initial Voting Power of such class of securities exceeds the Initial Voting Power of any of the LTSE Listings Issuer's existing classes of common stock listed on LTSE Listings or (ii) the rate at which the voting power of such class may increase over time is greater than the corresponding rate for any of the LTSE Listings Issuer's existing classes of common stock listed on LTSE Listings.⁸²

Potential Evasion of Loss of Long-Term Voting Power: An LTSE Listings Issuer may provide in its governance documents that if its board of directors adopts a resolution reasonably determining that, notwithstanding technical compliance with the provisions of the LTSE Listings Issuer's governance documents relating to the increasing voting power of long-term shareholders and continuity of record ownership, there has in fact been a change in beneficial ownership with respect to shares held of record that would evade the purposes of this LTSE Listings Rule 14A.413(b), such shares may be treated as being entitled only to their Initial Voting Power.⁸³

Technical Changes in Ownership: An LTSE Listings Issuer may adopt a process by which a shareholder may demonstrate that, notwithstanding a technical change in record ownership, a change in beneficial ownership has not occurred.⁸⁴

⁸² See id.

⁸³ See proposed Rule 14A.413, Supplementary Material .01(c). Any LTSE Listings Issuer that provides in its governance documents that the board of directors may make such a determination must also adopt in its governance documents a process for any shareholders directly affected by such determination to challenge such determination. This process must provide the affected shareholders with an opportunity to present additional information demonstrating that a change of beneficial ownership has not occurred. See id.

⁸⁴ See proposed Rule 14A.413, Supplementary Material .01(d). The proposed rule further states that an example of this could be where a shareholder changes its legal name, or where ownership of shares by an individual is re-titled to reflect joint ownership with a spouse. See id.

Shareholders Holding Through Custodians: In the case of a shareholder that holds its shares in an LTSE Listings Issuer through a custodian consistent with applicable regulatory requirements, an LTSE Listings Issuer may recognize such shareholder as a holder of record solely for purposes of proposed Rule 14A.413(b), so long as the custodian becomes the shareholder of record in a manner that indicates the name of the ultimate beneficial owner.⁸⁵

F. Proposed Rules Concerning the Application of Certain Existing Exchange Rules

Certain of the proposed LTSE Listings Rules clarify the application of existing Exchange listings rules to LTSE Listings Issuers, as described further below.

1. General Procedures for Initial and Continued Listing on LTSE Listings

A company seeking the initial listing of one or more classes of securities on LTSE Listings must comply with the requirements and procedures set forth in the IEX Rule Series 14.200, as well as the supplemental requirements set forth in proposed Rule 14A.200.⁸⁶ The Exchange must first determine that a company is eligible for listing under the LTSE Listings Rules and meets the Exchange's other listing criteria before it would provide a clearance letter, as defined in IEX Rule 14.201.⁸⁷ After receiving a clearance letter pursuant to IEX Rule 14.201, a company choosing to list as an LTSE Listings Issuer must file an original listing application.⁸⁸ To apply for listing on LTSE Listings, a company must execute a Listing Agreement and a

⁸⁵ See proposed Rule 14A.413, Supplementary Material .01(e). The proposed rule further states that an example could be if Investment Fund ABC maintains custody of its assets through Bank XYZ, Investment Fund ABC may be recognized as the record holder of the shares of an LTSE-Listed company solely for purposes of this rule if Bank XYZ registers the shares on the books of the LTSE-Listed Issuer as being owned by "Bank XYZ, as custodian for Investment Fund ABC." See id.

⁸⁶ See proposed Rule 14A.200 and Amendment No. 1, supra note 6.

⁸⁷ See proposed Rule 14A.200(a).

⁸⁸ See proposed Rule 14A.200(b).

Listing Application on the forms designated by the Exchange for an LTSE Listings Issuer, which would provide the information required by Section 12(b) of the Act.⁸⁹ At the time of listing, the company may not already have any security listed for trading on the Exchange or any other national securities exchange and the company must be listing on LTSE Listings in connection with its initial public offering.⁹⁰

2. Dually-Listed Securities

The Exchange proposes to permit LTSE Listings Issuers to list a class of securities that, in connection with its IPO, has been approved for listing on another national securities exchange.⁹¹ The Exchange would make an independent determination of whether any such companies satisfy all applicable listing requirements and shall require companies to enter into a dual-listing agreement with the Exchange.⁹² In the event that an issuer chooses to dually list on both LTSE Listings and another national securities exchange in connection with its IPO, the Exchange would expect such other national securities exchange to be the LTSE Listings Issuer's "Primary Listing Market."⁹³ The Exchange states that when an LTSE Listings Issuer is dually-listed on another national securities exchange, the initial trading of such issuer's securities on the Exchange would not occur until after the completion of the opening auction for such securities on the first day of listing on the "Primary Listing Market."⁹⁴ The Exchange further states that it

⁸⁹ 15 U.S.C.781(b). See also proposed Rule 14A.200(b).

⁹⁰ See proposed Rule 14A.200(c)(2) and Amendment No. 1, supra note 6.

⁹¹ See proposed Rule 14A.210(a).

⁹² See proposed Rule 14A.210, Supplementary Material .01.

⁹³ See Notice, supra note 3, at 14087.

⁹⁴ See id. at 14087 n.74. "Primary Listing Market" is defined in proposed Rule 14A.002(a)(14) as having the same meaning as that term is defined in the Nasdaq Unlisted Trading Privileges national market system plan and consistent with the use of

would monitor the dually-listed LTSE Listings Issuer for compliance with all applicable IEX Rules on an ongoing basis, as it would for any other LTSE Listings Issuer.⁹⁵ Proposed Supplementary Material .01 to Rule 14A.210 would clarify the application of certain IEX Rules, such as rules governing trading halts, for dually-listed LTSE Listings Issuers.

Proposed Rule 14A.435 would require LTSE Listings Issuers to certify, at or before the time of listing, that all applicable listing criteria have been satisfied, as set forth in IEX Rule 14.202(b).⁹⁶ In addition, the Chief Executive Officer of each LTSE Listings Issuer must annually certify to the Exchange that: (i) the LTSE Listings Issuer is in compliance with the proposed Rule Series 14A.400, qualifying the certification to the extent necessary, and (ii) the LTSE Listings Issuer has designated an employee responsible for ensuring that the voting power of the LTSE Listings Issuer's securities is determined in accordance with proposed Rule 14A.413(b) (Long-Term Voting).⁹⁷

the term "listing market" in the Consolidated Quotation Service and Consolidated Tape Association national market system plans.

⁹⁵ See *id.* at 14087 n.73. In addition, proposed Rule 14A.210(b) imposes notification requirements on a dually-listed LTSE Listings Issuer if its securities have fallen below the continued listing requirements of LTSE Listings or the other market. Proposed Rule 14A.210(c) also provides that, for an LTSE Listings Issuer with a dually-listed security, if IEX is not the Primary Listing Market and the Primary Listing Market requires a minimum number of market makers, the minimum market maker requirements of IEX Rules 14.310 and 14.320 that require a company listed on the Exchange to maintain a particular minimum number of registered and active Market Makers would not be applicable to the LTSE Listings Issuer's dually-listed security. See Amendment No. 1, *supra* note 6.

⁹⁶ Proposed Rule 14A.401(b) provides that LTSE Listings Issuers may request from IEX a written interpretation of the LTSE Listings Rules, and a response to such request generally would be provided within one week following receipt by IEX Regulation of all information necessary to respond to the request.

⁹⁷ See proposed Rule 14A.435(b). In addition, an LTSE Listings Issuer must provide the Exchange with prompt notification after an Executive Officer of the LTSE Listings Issuer becomes aware of any noncompliance by the LTSE Listings Issuer with the requirements

LTSE Listings Issuers would not be required to pay the fees described in IEX Rule Series 14.600.⁹⁸ The Exchange represents that it intends to file a separate proposed rule change that would address listing fees applicable to LTSE Listings Issuers.⁹⁹

3. Shareholder Approval Calculation

Proposed Rule 14A.412 describes the circumstances in which an Exchange-listed company is required to obtain shareholder approval prior to the issuance of securities in connection with certain transactions. Under IEX Rule 14.412, an Exchange-listed company is required to obtain shareholder approval in connection with: (1) the acquisition of the stock or assets of another company; (2) a change of control; (3) equity-based compensation of officers, directors, employees, or consultants; and (4) private placements.¹⁰⁰ Among the potential triggers that would require shareholder approval, shareholder approval is required if the common stock being issued “has or will have upon issuance voting power equal to or in excess of 20% of the voting power outstanding before the issuance.”¹⁰¹ In light of the potential increased future voting power of new shares to be issued, the Exchange believes that it is appropriate in calculating the shareholder approval threshold to require that LTSE Listings Issuers assign a greater level of voting power to the newly issued shares than the Initial Voting Power of those shares, on the presumption that the ultimate voting power of those shares would increase over

of the proposed Rule Series 14A.400. See proposed Rule 14A.410.

⁹⁸ See proposed Rule 14A.200(c)(3).

⁹⁹ See Notice, supra note 3, at 14092.

¹⁰⁰ See id. at 14090.

¹⁰¹ See id.; see also IEX Rule 14.412(a)(1)(A).

time.¹⁰² Proposed Rule 14A.412 would implement a special calculation to determine whether or not the issuance of new shares by an LTSE Listings Issuer would surpass the 20% threshold.

Under current IEX Rule 14.412, determining whether an issuance equals or exceeds this shareholder approval threshold is generally calculated by multiplying the number of shares to be issued by the voting power of such shares and dividing this number by the voting power of the shares outstanding before the issuance.¹⁰³ However, because the shares of LTSE Listings Issuers would have accruing voting power, the Exchange is proposing Rule 14A.412 to provide a different means of calculating the numerator and denominator that would be applied to LTSE Listings Issuers.¹⁰⁴

Pursuant to proposed Rule 14A.412(a)(1), for LTSE Listings Issuers that have been listed on LTSE Listings for at least five years, the numerator of the shareholder approval calculation would be the number of shares to be issued multiplied by the product of the Initial Voting Power of such shares and the Long-Term Voting Factor.¹⁰⁵ For LTSE Listings Issuers that have been listed on LTSE Listings for fewer than five years, the numerator would be the greater of (i) the number of shares to be issued multiplied by the product of the Initial Voting Power of such shares and the Long-Term Voting Factor and (ii) the number of shares to be issued multiplied by twice the Initial Voting Power of such shares.¹⁰⁶

¹⁰² See Notice, supra note 3, at 14090.

¹⁰³ See id. This general formula is subject to certain exceptions. See IEX Rule 14.412.

¹⁰⁴ See Notice, supra note 3, at 14090-91.

¹⁰⁵ See id. at 14091. Proposed Rule 14A.412(c)(1) defines “Long-Term Voting Factor” as the quotient calculated by dividing (i) the voting power outstanding as of the Shareholder Approval Calculation Date by (ii) the number of shares outstanding as of the Shareholder Approval Calculation Date multiplied by the Initial Voting Power of those outstanding shares.

¹⁰⁶ See proposed Rule 14A.412(a)(2).

Instead of applying the existing rule for determining the denominator of the calculation—the voting power of shares outstanding at issuance as described in IEX Rule 14.412(e)(2)—proposed Rule 14A.412(b) states that the following provision shall apply, “[v]oting power outstanding refers to the aggregate number of votes which may be cast by holders of those shares outstanding which entitle the holders thereof to vote generally on all matters submitted to the company’s shareholders for a vote, as of the Shareholder Approval Calculation Date.”¹⁰⁷ All other provisions of IEX Rule 14.412 would continue to apply.¹⁰⁸

The Exchange believes that the provisions of proposed Rule 14A.412 for calculating when shareholder approval would be required in connection with certain transactions would be a reasonable and balanced approach, while taking into account the potential increased future voting power of new shares to be issued.¹⁰⁹

4. Change of Control Transactions and Reverse Mergers

The proposed LTSE Listings Rules set forth procedures for change of control transactions, which would operate in conjunction with existing IEX Rule 14.102(a). Proposed Rule 14A.102(a)(1) would require an LTSE Listings Issuer to apply for initial listing in connection with a transaction whereby the LTSE Listings Issuer combines with, or into, an entity that is not listed on LTSE Listings, resulting in a change of control of the LTSE Listings Issuer and potentially allowing the non-LTSE Listings entity to obtain a listing on LTSE Listings.¹¹⁰

¹⁰⁷ Proposed 14A.412(c)(2) defines “Shareholder Approval Calculation Date” as the date on which an LTSE Listings Issuer enters into a binding agreement to conduct a transaction that may require shareholder approval under IEX Rule 14.412 (Shareholder Approval).

¹⁰⁸ See Notice, supra note 3, at 14092.

¹⁰⁹ See id.

¹¹⁰ “The Exchange shall consider the factors enumerated in IEX Rule 14.102(a) for determining whether a change of control has occurred.” See proposed Rule

Proposed Rule 14A.102(a)(2) describes the impact of a change of control transaction on the proposed long-term voting provisions of LTSE Listings and voting power of such shares.¹¹¹

Proposed Rule 14A.102(b) states that an entity formed by a Reverse Merger¹¹² would not be eligible to apply for initial listing on LTSE Listings.

5. Exemptions from Certain Corporate Governance Requirements

Proposed Rule 14A.407 modifies the exemptions from certain governance requirements for LTSE Listings Issuers.

Applicability of Exemptions to Corporate Governance Requirements: Proposed Rule 14A.407(a) would provide that an LTSE Listings Issuer may not rely on the exemptions set forth in IEX Rule 14.407(a) with respect to the requirements of Chapter 14A.¹¹³ Proposed Rule 14A.407(a) clarifies that a Foreign Private Issuer who meets the requirements of Chapter 14A,

14A.102(a)(1). Any combined entity applying for initial listing must agree to comply with all applicable requirements of Chapter 14A, including requirements relating to long-term voting set forth in proposed Rule 14A.413, to apply to list as permitted by proposed Rule 14A.102. See id.

¹¹¹ If an initial listing following a change of control meets applicable listing requirements and the LTSE Listings Issuer is the surviving entity following the business combination, any shares of the LTSE Listings Issuer that have accrued additional voting power pursuant to proposed Rule 14A.413(b) prior to the business combination would retain such additional voting power following the business combination. See proposed Rule 14A.102(a)(2). Conversely, if the non-LTSE Listings Issuer is the surviving entity or a new entity is formed following the business combination, all shares of the class or classes of securities to be listed on LTSE Listings would have voting power equal to their Initial Voting Power at the time of such listing. See id.

¹¹² A “Reverse Merger” is generally defined as “any transaction whereby an operating company becomes an Exchange Act reporting company by combining, either directly or indirectly, with a shell company which is an Exchange Act reporting company, whether through a reverse merger, exchange offer, or otherwise.” See IEX Rule 14.002(a)(27).

¹¹³ See Notice, supra note 3, at 14089. IEX Rule 14.407(a) provides exemptions to certain of the Exchange’s corporate governance requirements for asset-backed issuers and other passive issuers, cooperatives, Foreign Private Issuers, limited partnerships and management investment companies.

including the requirement to distribute an Annual Report Supplement, may list on LTSE Listings.

Phase-in of Compliance With LTSP Committee Composition Requirements: In addition to the phase-in schedules provided in existing IEX Rule 14.407(b),¹¹⁴ an LTSE Listings Issuer that is listing in connection with its IPO or that is emerging from bankruptcy would be permitted to phase-in its compliance with the LTSP Committee composition requirements.¹¹⁵

Controlled Companies: Proposed Rule 14A.407(c)(1) states that an LTSE Listings Issuer that is a Controlled Company¹¹⁶ would be exempt from the additional compensation committee requirements of proposed Rule 14A.405(b) and the nominating/corporate governance committee requirements of proposed Rule 14A.405(d).¹¹⁷

G. Other Requirements for LTSE Listings Issuers

Earnings Guidance: Proposed Rule 14A.420 prohibits LTSE Listings Issuers from providing Earnings Guidance more frequently than annually, unless such disclosure would be

¹¹⁴ IEX Rule 14.407(b) allows a company listed on the Exchange to phase-in its compliance with certain Exchange rules over a period of time in certain situations, for example, for a company emerging from bankruptcy. See id.

¹¹⁵ See proposed Rule 14A.407(b). Specifically, that LTSE Listings Issuer would be permitted to phase in its compliance with the committee composition requirements set forth in proposed Rule 14A.405(c)(4) as follows: (1) at least one member of the LTSP Committee must be an Independent Director at the time of listing, and (2) a majority of the members of the LTSP Committee must be Independent Directors within 90 days of listing. See id.

¹¹⁶ The term “Controlled Company” is defined in IEX Rule 14.407(c)(1) as an Exchange-listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.

¹¹⁷ However, Controlled Companies would not be exempt from the executive compensation requirements of proposed Rule 14A.405(b)(3). See proposed Rule 14A.407(c)(1). If a Controlled Company does not have a compensation committee, the Independent Directors on the LTSP Committee, or the Independent Directors of the board, would be responsible for compliance with the executive compensation requirements. See proposed Rule 14A.407(c)(2).

required by IEX Rule 14.207(b)(1) (Disclosure of Material Information), other applicable law or to make the previously issued Earnings Guidance not misleading.¹¹⁸

Long-Term Stakeholder Policies: Proposed Rule 14A.425 requires LTSE Listings Issuers to develop and publish: (i) a policy regarding the LTSE Listings Issuer’s impact on the environment and community; and (ii) a policy explaining the LTSE Listings Issuer’s approach to diversity throughout the LTSE Listings Issuer.¹¹⁹ The LTSE Listings Issuer must review the policies required by proposed Rule 14A.425 at least annually and make such policies available on or through its website.

Website Requirements: Several of the proposed LTSE Listings rules require LTSE Listings Issuers to make certain disclosures or documents publicly available on the LTSE Listings Issuer’s website, and proposed Rule 14A.430 would explicitly require LTSE Listings Issuers to have and maintain a public available website.¹²⁰ In addition, proposed Rule 14A.413 would require each LTSE Listings Issuer to prepare and maintain an explanatory statement that must be written in plain English and posted prominently on the LTSE Listings Issuer’s website and that must explain how a shareholder’s voting power in the LTSE Listings Issuer’s securities may increase over time, and explain the particular conditions that must be satisfied and the

¹¹⁸ Pursuant to proposed Rule 14A.002(a)(5), “Earnings Guidance” means any public disclosure made to Shareholders containing a projection of the LTSE Listings Issuer’s revenues, income (including income loss), or earnings (including earnings loss) per share. Any Earnings Guidance, including updates and supplementary disclosure related to Earnings Guidance, must also comply with the disclosure and notification requirements of IEX Rule 14.207(b)(1). See proposed Rule 14A.420(b).

¹¹⁹ See Notice, supra note 3, at 14086.

¹²⁰ For documents available on or through an LTSE Listings Issuer’s website, such website must be accessible from the United States, must clearly indicate in the English language the location of such documents on the website and such documents must be available in a printable version in the English language. See proposed Rule 14A.430.

administrative steps that the shareholder must take to hold shares in a manner that would allow such voting power to increase over time.¹²¹

H. Failure to Meet LTSE Listings Standards

Pursuant to IEX Rule 14.500(a), a failure to meet the listing standards set forth in the LTSE Listings Rules would be treated as a failure to meet the listing standards set forth in Chapter 14 of the IEX Rules, for purposes of the IEX Rule Series 14.500. As a result, the procedures for the independent review, suspension, and delisting of companies that fail to satisfy one or more standards for continued listing would apply to any LTSE Listings Issuer that fails to comply with listing standards in the LTSE Listings Rules as well as in Chapter 14 of the IEX Rules.

Proposed Rule 14A.500(b) would provide that a failure to satisfy one or more of the LTSE Listings Rules would be treated as a deficiency for which a company may submit a plan to regain compliance in accordance with IEX Rule 14.501(d)(2). Absent an extension, such a plan must be provided within 45 calendar days of IEX Staff's notification of deficiency in accordance with IEX Rule 14.501(d)(2)(C) (Timeline for Submission of Compliance Plans).

Proposed Rule 14A.500 would permit an issuer to remain listed on the Exchange as a standard IEX listed company should the LTSE Listings Issuer become subject to delisting for failure to satisfy one or more LTSE Listings Rules, but remains in compliance with all other applicable listing rules of the Exchange.

¹²¹ See Amendment No. 1, supra note 6.

IV. Summary of Comments and IEX's Response Letter

As noted above, the Commission received twenty-three comment letters regarding the proposed rule change¹²² and one response letter from the Exchange.¹²³ All commenters expressed their support for the proposed rule change, although two commenters indicated that they generally preferred single class voting structures.¹²⁴ Several commenters suggested that IEX's proposed rule change may encourage additional companies to pursue an initial public offering with an increased focus on long-term objectives.¹²⁵ Many commenters expressed a related view that the current market structure disproportionately encourages short-term outlooks.¹²⁶ One commenter suggested that the proposal would encourage additional new listings by increasing competition and providing an alternative model in the exchange market for listings.¹²⁷ Another commenter commended IEX more broadly for its proposal's innovation in areas such as increasing transparency in reporting and disclosure of long-term strategy, aligning

¹²² See supra note 4.

¹²³ See supra note 5.

¹²⁴ See Inherent Group Letter and Glass, Lewis Letter.

¹²⁵ See Collaborative Fund Letter at 1; Costolo Letter; Case Letter; Conference Board Letter at 2; Andreessen Horowitz Letter; Obvious Ventures Letter; Founders Fund Letter; Descript Letter; LinkedIn Letter; Y Combinator Letter at 1-2; Techstars Letter at 1; Downtown Project Letter; CareJourney Letter; Brummer Letter at 3. See also Greylock Partners Letter (expressing support for “a new option that aims to build an ecosystem that enables opportunity and connects long-term visionaries from all sides of the economy”). Two commenters supporting the proposal discussed the benefits of a new exchange designed to promote long-term objectives. See Collaborative Fund Letter at 1; Baillie Gifford Letter at 1-2. The Commission notes that IEX's proposed rule change would simply provide an additional listings tier on IEX, and that IEX is not proposing an application for registration as a separate national securities exchange.

¹²⁶ See, e.g., Inherent Group Letter at 1; Buhl Letter; Conference Board Letter at 1-2; Andreessen Horowitz Letter; Obvious Ventures Letter; Greylock Partners Letter; Aspen Institute Letter; Descript Letter; LinkedIn Letter; Techstars Letter at 1; Downtown Project Letter; CareJourney Letter; Revolution Letter.

¹²⁷ See Cboe Letter at 1.

board incentives with the interests of long-term shareholders, aligning executive compensation with long-term performance, and recognizing environmental, social, and governance priorities.¹²⁸ Yet another commenter remarked that founders today feel the need to grow large in the private markets in order to sustain and protect their cultures, thinking, and values when they enter the public markets.¹²⁹

Five commenters specifically supported providing longer-tenured investors in a company with greater input in corporate governance.¹³⁰ In addition to the proposed long-term voting system, two of these commenters also highlighted the benefits of the additional disclosure requirements that are focused on long-term growth.¹³¹ Three commenters stated that the proposed listing standards would increase transparency to investors, such as with respect to long-term goals, metrics, and performance, and would help align executive compensation with these long-term measures.¹³² One of these commenters suggested that IEX's proposal to require a board committee focused on long-term growth strategies and the disclosure of such strategies could better encourage long-term relationships between issuers and their shareholders through the increased transparency that the proposal would promote.¹³³ This commenter also highlighted the proposal's required disclosure of human capital expenses and short-term vs. long-term research and development spending as features that could provide valuable insight into how issuers are effectively investing in their long-term growth and thereby mitigate concerns about

¹²⁸ See Glass, Lewis Letter at 1-2.

¹²⁹ See Initialized Capital Letter.

¹³⁰ See Revolution Letter; Inherent Group Letter at 1; CareJourney Letter; Brummer Letter at 4-5; CalPERS Letter at 2.

¹³¹ See CalPERS Letter at 2; Brummer Letter at 3-4.

¹³² See Inherent Group Letter at 1; Andreessen Horowitz Letter; Brummer Letter at 3-4.

¹³³ See Brummer Letter at 4.

short-term fluctuations in earnings.¹³⁴ This commenter further noted that the proposed executive compensation requirements would better tie management’s incentives to the listed company’s disclosed long-term growth strategy.¹³⁵

One commenter, while generally supporting IEX’s proposal, expressed concern about the proposed increasing voting rights that are based on the length of time that the shares are held.¹³⁶ This commenter noted that dual-class voting structures “are generally not in the best interests of common shareholders; this includes any equity structures providing unequal voting rights, regardless of the number of share classes issued.”¹³⁷ This commenter acknowledged, however, that the long-term shareholder voting feature of the IEX proposal may be preferable to some investors compared to other existing unequal voting structures.¹³⁸ Another commenter, while not expressing a concern specific to IEX’s proposal, noted that it “generally prefer[s] single-class share structures,” but “support[s] mechanisms that reward long-term shareholders with a greater say in corporate governance issues than short-term shareholders.”¹³⁹ This commenter cautioned that any such mechanisms “must maintain management accountability, preserve adequate liquidity in the public markets, and balance the interests of small and large—and short-term and long-term—shareholders.”¹⁴⁰

134 See id.

135 See id.

136 See Glass, Lewis Letter at 2.

137 See id.

138 See id.

139 See Inherent Group Letter at 1.

140 See id.

In its response to the commenters, IEX stated that its proposed long-term voting provisions differ from existing dual-class and uneven voting structures because its proposed voting structure treats all common shareholders equally in their ability to gain additional voting power based on the length of time that their shares are held.¹⁴¹ According to the Exchange, this proposed structure is designed to more directly align voting rights with long-term engagement with the issuer.¹⁴² The Exchange further noted that the proposed voting structure should not be mandated for any issuer but is an important alternative that would be available to issuers that elect to list on the proposed new IEX listings tier.¹⁴³

V. Discussion and Commission Findings

After careful review and consideration of the comments received, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴⁴ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act.¹⁴⁵ Section 6(b)(5) of the Act¹⁴⁶ requires, among other things, that the rules of a national securities exchange be 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in

¹⁴¹ See IEX Response Letter at 1.

¹⁴² See id. at 1-2.

¹⁴³ See id. at 2.

¹⁴⁴ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴⁵ 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(5).

¹⁴⁶ 15 U.S.C. 78f(b)(5).

securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

As noted above, the Commission received 23 comment letters on the proposed rule change, as well as a response letter from the Exchange. The commenters generally expressed support for the Exchange's proposal, although two commenters indicated that they preferred single-class voting structures, but acknowledged that they otherwise supported the aim of the Exchange's proposal to favor long-term shareholder value.¹⁴⁷

The Exchange proposes to adopt listing rules for a new tier of listings on its market, LTSE Listings. The Exchange states that it believes that companies should be able to maintain a public listing on an exchange that provides a differentiated choice for issuers and investors that prefer listing standards that the Exchange explicitly has designed with the aim of promoting long-term value creation. Although companies today could list on the Exchange and voluntarily choose to focus on long-term value creation, the Exchange believes that providing a listing category with listing rules that the Exchange has designed to address some of the concerns regarding "short-termism" could encourage greater participation in the public markets by long-term focused companies and investors

In support of its proposal, the Exchange notes that many academics, commentators, market participants, and others have expressed concerns regarding "short termism" and the potential impact on issuers when some investors' focus on short-term results. The Exchange points to data indicating that the average number of IPOs per year from 2001 through 2016 was

¹⁴⁷ See Section IV., *supra*.

approximately one-third of the average number of IPOs between 1998 and 2000, and that the number of listed companies fell by nearly 50% from 1996 through 2016.

An analysis of IPO data,¹⁴⁸ prepared by the Commission's Division of Economic Research and Analysis, similarly points to a decline in the number of IPOs and public companies compared to the nineties. For example, the number of IPOs declined by approximately 77% from 1997 to 2017, while the average number of IPOs per year declined by approximately 73% from 1990-1998 to 2001-2017.¹⁴⁹ The number of listed companies decreased by approximately 45% from 1997 to 2017 and the average number of listed companies decreased by approximately 34% from 1990-1998 to 2001-2017.¹⁵⁰

Academic studies have similarly demonstrated a decline in the number of U.S. IPOs and listed companies in recent years and have cited various potential reasons for this decline, including a high cost of going public and being a reporting company,¹⁵¹ the advantages of being

¹⁴⁸ See Ritter, J., Initial Public Offerings: Updated Statistics, January 2018, https://site.warrington.ufl.edu/ritter/files/2018/01/IPOs2017Statistics_January17_2018.pdf (retrieved Jun. 20, 2018). The sample excludes IPOs with offers prices below \$5, ADRs, units, closed-end funds, REITs, natural resource limited partnerships, small best efforts offers, banks and thrifts, and stocks not listed on Amex, NYSE, and NASDAQ.

¹⁴⁹ Id. Peak technology bubble years (1999 and 2000) are excluded. If 2008 and 2009 are excluded, the decrease in the average number of IPOs per year from 1990-1998 to 2001-2017 is estimated to be approximately 70%.

The decline is smaller but still considerable when an earlier time period is used for comparison. The average number of IPOs per year decreased by approximately 47% from 1980-1989 to 2001-2017 (approximately 42%, excluding 2008-2009).

¹⁵⁰ The estimate is based on Staff calculations based on World Bank's World Development Indicators data on the number of domestic listed companies in the US (retrieved April 23, 2018). The average number of listed companies is estimated to have decreased by approximately 23% from 1980-1989 to 2001-2017.

¹⁵¹ See, e.g., Engel, E., Hayes, R., Wang, X., 2007, The Sarbanes-Oxley Act and Firms' Going-Private Decisions, *Journal of Accounting and Economics* 44(1-2), 116-145; Kamar, E., Karaca-Mandic, P., Talley, E., 2009, Going-Private Decisions and the

acquired by a larger firm,¹⁵² and the expanding role of private markets.¹⁵³ Other studies generally note the cyclical nature of offering activity.¹⁵⁴

Other observers have offered various reasons for the IPO decline, including high costs of an IPO and of being a public company¹⁵⁵ and the attractiveness of private placements and of being acquired.¹⁵⁶

Sarbanes-Oxley Act of 2002: A Cross-Country Analysis, *Journal of Law, Economics, & Organization* 25(1), 107–133; Bova, F., Minutti-Meza, M., Richardson, G., Vyas, D., 2014, The Impact of SOX on the Exit Strategies of Private Firms, *Contemporary Accounting Research* 31(3), 818-850.

¹⁵² See, e.g., Gao, X., Ritter, J., Zhu, Z., 2013, Where have all the IPOs gone? *Journal of Financial and Quantitative Analysis* 48(6), 1663–1692.

¹⁵³ See, e.g., Ewens, M., Farre-Mensa, J., 2018, The deregulation of the private equity markets and the decline in IPOs, Working paper, https://ssrn.com/abstract_id=3017610 (retrieved Jun. 20, 2018); Doidge, C., Kahle, K., Karolyi, A., Stulz, R., 2018, Eclipse of the Public Corporation or Eclipse of the Public Markets? *Journal of Applied Corporate Finance* 30(1), 8–16.

¹⁵⁴ See, e.g., Lowry, M., 2003, Why does IPO volume fluctuate so much? *Journal of Financial Economics* 67(1), 3–40; Alti, A., 2005, IPO Market Timing, *Review of Financial Studies* 18(3), 1105–1138; Yung, C., Colak, G., Wang, W., 2008, Cycles in the IPO market, *Journal of Financial Economics* 89(1), 192–208.

¹⁵⁵ See, e.g., IPO taskforce, *Rebuilding the IPO On-Ramp: Putting Emerging Companies and the Job Market Back on the Road to Growth*, October 20, 2011, https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf (retrieved Jun. 27, 2018); Committee on Capital Markets Regulation, *U.S. Public Markets are Stagnating*, April 2017, <http://www.capmktsreg.org/wp-content/uploads/2017/06/US-Public-Equity-Markets-are-Stagnating.pdf> (retrieved Jun. 27, 2018). Besides ongoing costs of periodic reporting, observers have pointed to other considerations, such as the costs of the IPO, disclosure requirements, audits, litigation, investor relations, shareholder activism, etc.

¹⁵⁶ See, e.g., Eule, A., *Are Unicorns Killing the 2016 IPO Market?* June 4, 2016, *Barron's*, <http://www.barrons.com/articles/are-unicorns-killing-the-2016-ipo-market-1465018470> (retrieved Jun. 27, 2018); Zanki, T., *4 Reasons Cos. Are Staying Private Longer*, March 14, 2017, *Law360*, New York, <https://www.law360.com/articles/901768?scroll=1> (retrieved Jun. 27, 2018); Hutchinson, J., *Why Are More Companies Staying Private?* February 15, 2017, <https://www.sec.gov/info/smallbus/acsec/hutchinson-goodwin-presentation-acsec-021517.pdf> (retrieved Jun. 27, 2018). See also Notice, *supra* note 3, at

Issuers that list on the LTSE Listings tier would be subject to the listing standards in proposed Chapter 14A of IEX's rules, as well as Chapter 14 of IEX's rules relating to its standard listing tier. Significant features of proposed Chapter 14A, which are discussed in more detail below, pertain to: (1) the opportunity for shareholders to receive accreting voting rights; (2) an alternative calculation for determining shareholder approval requirements; (3) additional corporate governance and other requirements for LTSE Listings Issuers; and (4) provisions pertaining to dually-listed securities.

A. Mandatory Accreting Voting Rights

A key feature of the Exchange's proposal is the requirement that companies electing to list their common equity securities on the Exchange's LTSE Listings tier must comply with the voting rights requirements set forth in proposed Rule 14A.413 with respect to those listed securities. In the Exchange's view, the proposed voting rights structure is designed to more directly align shareholders' voting rights with long-term issuer engagement.¹⁵⁷ Specifically, proposed Rule 14A.413(b) would require an LTSE Listings Issuer to establish an Initial Voting Power¹⁵⁸ associated with its listed securities, and that Initial Voting Power would be required to increase at a rate of at least 1/12th per month for each eligible shareholder¹⁵⁹ that owns the issuer's shares continuously as of the date that the shareholder appears as the record owner on the LTSE Listings Issuer's books or through DRP. Under Rule 14A.413(b), the voting power of

14075 n.10.

¹⁵⁷ See supra notes 67-68 and accompanying text.

¹⁵⁸ See supra note 74 and accompanying text.

¹⁵⁹ Only shareholders of an LTSE Listings Issuer who register such shares in their name as record holders on the books of the LTSE Listings Issuer, including through the use of a DRP, would be eligible for these accreting voting rights. See supra note 72 and accompanying text.

the shares would be required to accrete up to an amount that is ten times their Initial Voting Power. However, if at any time, the shareholder ceases to hold the LTSE Listing Issuer's shares in record form or transfers those shares out of record ownership (whether for purposes of sale or otherwise), then on the date of such transfer the increased voting power of the shares would revert to their Initial Voting Power. The Exchange states that the voting rights provisions are designed to align with the long-term focus of the LTSE Listings category by providing long-term investors in an LTSE Listings Issuer with a greater role in corporate governance than short-term shareholders.¹⁶⁰

Although the commenters generally supported the Exchange's proposal, two commenters expressed a concern about the proposed voting rights structure.¹⁶¹ Specifically, one commenter noted a concern that dual-class voting structures generally are not in the best interests of shareholders, and that skewing the alignment of ownership and voting rights presents agency risks.¹⁶² The other commenter stated that mechanisms that reward long-term shareholders with a greater say in corporate governance nonetheless should balance the interests of small and large, and short-term and long-term, shareholders.¹⁶³ The Exchange responded by noting that its proposal differs from existing dual-class and uneven voting structures because its proposed voting structure would treat the LTSE Listings Issuer's common shareholders equally in their ability to gain additional voting power based on their ownership tenure.¹⁶⁴ The Exchange further

¹⁶⁰ See Notice, supra note 3, at 14083. The Exchange believes that long-term investors in a public company are more likely than short-term shareholders to exercise their voting rights in a manner that prioritizes long-term growth over short-term results. See id.

¹⁶¹ See Inherent Group Letter and Glass, Lewis Letter at 2.

¹⁶² See Glass, Lewis Letter at 2.

¹⁶³ See Inherent Group Letter.

¹⁶⁴ See IEX Response Letter at 1.

noted that its proposed voting structure would provide an alternative available to issuers that elect to list on the proposed LTSE Listings tier.¹⁶⁵ In its proposal, the Exchange also stated that because LTSE Listings Issuers would be required, as a pre-condition to listing on LTSE Listings, to already have in place a voting rights structure as of the date of its initial listing that complies with LTSE Listings Rule 14A.413(b), no new corporate action that disparately reduces voting rights would be taken subsequent to listing on the Exchange.¹⁶⁶

Section 6(b)(5) of the Exchange Act requires that an exchange's rules be designed to promote just and equitable principles of trade and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers and, in general, to protect investors and the public interest. The proposed voting rights structure rule would require an LTSE Listings Issuer to differentiate in the allocation of voting rights based on the manner in which its shareholders hold their shares (whether in DRP or record name or whether in street name) and for the length of time that they hold their shares. The proposed voting rights rule is intended to allow shareholders of an LTSE Listings Issuer to increase the voting power of their shares as long as they continue to hold such shares as record holders on the books of the LTSE Listings Issuer, including through DRP. The proposal does not make any other distinction in voting rights among the LTSE Listings Issuer's shareholders, and any shareholders that continuously hold their shares in record form would be eligible to increase their voting power up to the maximum allowable voting power consistent with proposed Rule 14A.413(b). LTSE Listings Issuers also would be required to comply with IEX's existing voting rights policy, which provides that the voting rights of existing shareholders of listed stock cannot be disparately reduced or restricted

¹⁶⁵ See id. at 2.

¹⁶⁶ See supra note 79 and accompanying text.

through any corporate action or issuance, including, but not limited to, the adoption of time-phased voting plans, the adoption of capped voting rights plans, the issuance of super-voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.¹⁶⁷ To address the restrictions in this voting rights policy, the proposal prohibits an LTSE Listings Issuer from issuing additional classes of common stock that exceeds the Initial Voting Power of any of the LTSE Listings Issuer's existing classes of common stock listed on LTSE Listings. In addition, the proposal prohibits issuances where the rate at which the voting power of such class may increase over time at a rate greater than the corresponding rate for any of the LTSE Listings Issuer's existing classes of common stock listed on LTSE Listings.¹⁶⁸

The Commission also notes that, pursuant to proposed Rule 14A.200(c)(2), at the time that a company initially lists on the LTSE Listings tier, that company may not have any securities listed for trading on IEX or any other national securities exchange, and that a company would be permitted to list on LTSE Listings only in connection with its initial public offering.¹⁶⁹ The proposal also would require an LTSE Listings Issuer to prepare and maintain an explanatory statement, written in plain-English, and posted prominently on its website, which provides information regarding the rights of shareholders under the issuer's long-term voting provisions, including, at a minimum, explanations of how a shareholder's voting power may increase over time, the particular conditions that must be satisfied in order for such additional voting power to increase, and the administrative steps that a shareholder must take to hold shares in a manner that

¹⁶⁷ See IEX Rule 14.413.

¹⁶⁸ See supra note 81 and accompanying text; proposed Rule 14A.413, Supplementary Material .01(f).

¹⁶⁹ See Amendment No. 1, supra note 6.

will allow their voting power to increase over time.¹⁷⁰ In light of the foregoing, the Commission finds that the Exchange's voting rights proposal is consistent with Section 6(b)(5) of the Act.

B. Alternative Calculation for Requiring Shareholder Approval

The Exchange proposes a modified shareholder approval calculation formula for LTSE Listings Issuers to be used for determining when shareholder approval is required for additional issuances of securities. While the calculation for shareholder approval ordinarily would be based on the legal maximum potential voting power of the shares to be issued (which in the case of the proposed rules would multiply the Initial Voting Power by ten), the Exchange asserts that this approach would not be appropriate because it believes that it would be extremely unlikely that all shares of a new issuance would be held in record name by the same shareholder uninterrupted for a period of 10 years.¹⁷¹ The Exchange also states that it would be even more unlikely for all shares of a new issuance to accrue votes up to the maximum amount while the shares outstanding remain static and do not accrue any additional voting rights. The Exchange therefore argues that requiring issuers to make these particular assumptions would result in LTSE Listings Issuers having to obtain shareholder approval for transactions that would not be materially dilutive to existing shareholders. The Exchange further contends that imposing the burden of obtaining shareholder approval (including the monetary costs, as well as the time involved and uncertainty of outcome) would not be justified for transactions that, in the Exchange's view, are unlikely to be materially dilutive to the voting power of existing shareholders.¹⁷²

¹⁷⁰ See id.

¹⁷¹ See Notice, supra note 3, at 14090. Under the proposal, transferring shares out of record form or transferring ownership to another person would revert the voting rights associated with the shares to their Initial Voting Power.

¹⁷² See id. at 14090-91.

The Exchange notes that, because shareholders may or may not elect to hold their shares in record ownership, and may hold them in such manner for varying lengths of time, it is not possible to determine with precision how many shares issued in any transaction would accumulate additional voting power or the extent of voting power that those shares eventually would attain.¹⁷³ The Exchange proposes two alternative means for calculating the maximum potential voting power of the new shares: (i) for issuers that have been listed on LTSE Listings for at least five years, this value would be the number of shares to be issued multiplied by both the Initial Voting Power and Long-Term Voting Factor,¹⁷⁴ and (ii) for issuers that have been listed on LTSE Listings for fewer than five years, this value would be the greater of (x) the number of shares to be issued multiplied by both the Initial Voting Power and Long-Term Voting Factor or (y) the number of shares to be issued multiplied by the Initial Voting Power, multiplied by two.

The Exchange states that the Long-Term Voting Factor is intended to estimate the extent of the increase in voting power that the new shares to be issued are likely to obtain based on the percentage of increased voting power that existing issued shares have already obtained. The Exchange also believes that, for companies that have been listed for a shorter period of time, a minimum multiple of two is appropriate because the actual Long-Term Voting Factor that these companies would have experienced is likely to be lower than that of longer-listed companies and may not be representative of the longer-term growth in voting power that the new shares may ultimately attain.¹⁷⁵

¹⁷³ See id. at 14090.

¹⁷⁴ See supra note 105 and accompanying text, for a description of the Long-Term Voting Factor.

¹⁷⁵ See Notice, supra note 3, at 14091.

The Commission notes that the rationale for the Exchange’s proposed modification to the shareholder approval calculation is based on the unique features of the proposed voting rights structure. The traditional shareholder approval calculation assumes that the maximum voting rights of any newly issued shares definitely would be reached. However, because of the way the Exchange’s proposal would work (i.e., with the voting rights reverting to their Initial Voting Power upon any trade, and accreting voting rights available only for record holders), it is difficult to predict what the maximum voting rights of the newly-issued shares would be. While the proposed formula for modifying the calculation of the maximum potential voting power of the newly-issued shares may appear reasonable, it is difficult to assess whether it is in fact appropriate because there is no available data on the behavior of securities subject to the proposed voting structure. The Commission notes that the Exchange has represented that, if approved, it would periodically assess whether a five year cut-off for applying a minimum Long-Term Voting Factor and the minimum Long-Term Voting Factor of two continue to be appropriate, or whether either element should be modified based on the Exchange’s experience with LTSE Listings Issuers. For example, the Exchange would consider when the rate of growth of the voting power of an LTSE Listings Issuer’s shares typically becomes relatively stable and at what level.¹⁷⁶ The Commission believes that that these representations by the Exchange are important for ensuring that the calculation for shareholder approval is appropriately established for LTSE Listings Issuers and that the requirement for shareholder approval for required transactions remains robust. In addition, the Commission notes that LTSE Listings Issuers would have to comply with all the other provisions of the shareholder approval rules that require a shareholder vote. For example, an issuance that results in a change of control would need to

¹⁷⁶ See id. at 14091 n.87.

have shareholder approval irrespective of whether the issuance exceeded the 20% provision as calculated under the LTSE Listings rules.

For the foregoing reasons, the Commission finds that the Exchange's proposal with regard to the proposed shareholder approval calculation is consistent with the Act, particularly Section 6(b)(5) thereunder. The Commission notes, however, that in the case of an LTSE Listings Issuer whose securities are dually-listed under proposed Rule 14A.210, such issuers would be required to comply with the stricter listing standard for calculating the requirement for shareholder approval, which could be the rule of the other listing exchange.

C. Additional Corporate Governance and Other Requirements

The Exchange's proposal contains a number of additional corporate governance requirements for LTSE Listings issuers, which would be in addition to or in lieu of the corporate governance requirements contained in Chapter 14 of IEX's rules. The proposed new requirements for boards of directors and board committees are designed to align the board with the objectives of the LTSE Listings rules.¹⁷⁷ The proposal would require the boards of an LTSE Listings issuer to establish an LTSP Committee, which would be dedicated to overseeing the issuer's strategies for creating and sustaining long-term growth, and a nominating/corporate governance committee. The proposal also would require committees, including the audit and compensation committees, to report to the board and to make their charters available on the issuer's website, and would retain the composition and transparency requirements of those committees, if their functions were transferred to another committee. LTSE Listings Issuers would be required to provide more transparency about their operations, and in particular their long-term goals, strategies, and performance, in the form of additional disclosures, *i.e.*, the LTSP

¹⁷⁷ See *id.* at 14077.

Disclosures, in an Annual Report Supplement. The proposal also would require LTSE Listings Issuers to adopt corporate governance guidelines and executive compensation guidelines, which would impose certain requirements and restrictions on executive compensation that the Exchange believes are measures intended to capture the long-term performance of the issuer.

These additional corporate governance requirements were supported by the commenters. Commenters particularly supported the proposed increased transparency for investors and the proposed requirements that the Exchange has designed with the intent of aligning executive compensation with long-term measures of the issuer's performance. The Commission finds that the proposed additional corporate governance requirements are consistent with the Act, particularly Section 6(b)(5) thereunder.

D. Dual Listings

The Exchange proposes to allow an LTSE Listings Issuer to list a class of securities that, in connection with its IPO, has been approved for listing on another national securities exchange. The Exchange would make an independent determination of whether such issuer satisfies all the applicable listing requirements of the Exchange and would require such issuer to enter into a dual-listing agreement with the Exchange. The Exchange would expect the other national securities exchange to be the LTSE Listings Issuer's primary listing market. The proposed rules would require prompt notification by the LTSE Listings Issuer if it falls below the listing standards of the other exchange (and vice versa), and also would honor the trade halt authority of Primary Listing Market, as designated under the CQ and CTA Plans or the UTP Plan.

The Commission finds that the proposal to allow dual-listings of securities listed on LTSE Listings, which would allow such dual-listings to occur in connection with the initial public offering of those securities, is consistent with the Exchange Act. The Commission notes that dually-listed securities of LTSE Listings issuers would need to satisfy the listing standards

of both exchanges in order to maintain both listings, and could not rely on satisfying one exchange's listing standards to maintain its listing on the other exchange. The Commission also notes that in instances where one exchange has a higher or more stringent requirement than the other exchange, the issuer would be required to comply with the higher or more stringent requirement. For example, as noted above, if an LTSE Listings Issuer's security is also listed on another exchange and that other exchange has a more stringent requirement for applying its shareholder approval calculation requirement, the more stringent requirement of the other exchange would be applied to the LTSE Listings issuer. Similarly, if the other exchange has a lower requirement or no requirement with respect to a corporate governance requirement imposed by the Exchange for an LTSE Listings Issuer, such as the LTSP Disclosures requirement, the LTSE Listings Issuer would have to comply with the higher standard imposed by the Exchange.

In light of the foregoing, the Commission finds that the Exchange's proposal to adopt rules relating to supplemental listing standards for LTSE Listings Issuers is consistent with the Act, particularly Section 6(b)(5) thereunder. The Commission believes that the proposed rules are appropriate in that they aim to provide issuers that believe the LTSE Listings standards to be better aligned with their objectives, and potentially with the governance preferences of their shareholders, with the option to comply with certain additional listing requirements, which in turn would provide shareholders with the opportunity to increase their voting power in the issuer's listed securities.

VI. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-IEX-2018-06 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-IEX-2018-06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-IEX-2018-06, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the Federal Register. As discussed above, Amendment No. 1 revises the proposal to: (1) clarify in proposed Rule 14A.001(a) that an LTSE Listings Issuer must qualify for listing under Chapter 14 of the IEX Rules and the LTSE Listings Rules, except as otherwise provided in the LTSE Listings Rules; (2) specify in proposed Rule 14A.200(c)(2) that when a company lists on LTSE Listings, in addition to the requirement that the company must not have any security listed for trading on the Exchange or any other national securities exchange, the company also must be listing in connection with its initial public offering; (3) add paragraph (c) to proposed Rule 14A.210 to provide that if dually-listed securities are listed on another national securities exchange that is the primary listing market and requires a minimum number of market makers, the minimum market maker requirements of IEX Rules 14.310 and 14.320 would not be applicable to such dually-listed securities; and (4) add paragraph (c) to proposed Rule 14A.413 to require each LTSE Listings Issuer to prepare and maintain an explanatory statement that must be written in plain English, made publicly available, and posted prominently on its website and that must describe how the voting power of the issuer's securities may increase over time, and the conditions and administrative steps necessary for such voting power to increase.

With respect to not applying the minimum market maker requirements of IEX Rules 14.310 and 14.320 when another national securities exchange is the Primary Listing Market for

the LTSE Listing Issuer's dually-listed securities, the Exchange notes that such requirements are not necessary if the Primary Listing Market imposes minimum market maker requirements.

With respect to requiring each LTSE Listings Issuer to make an explanatory statement publicly available and posted prominently on the issuer's website explaining the long-term voting provisions, the Exchange believes that the new rule language would help ensure that an LTSE Listings Issuer's shareholders would be able to easily obtain necessary information about the LTSE Listings Issuer's long-term voting structure and how such shareholders, if they so choose, may accrue additional voting power over time. With respect to the amendments to proposed Rules 14A.001(a) and 14A.200(c)(2), the Exchange notes that these are simply conforming and clarifying changes to the proposed rule text.

The Commission believes that Amendment No. 1 would help increase transparency by providing clear and easily accessible information to shareholders and potential shareholders regarding an LTSE Listings Issuer's long-term voting structure and regarding how they can accrue additional voting power over time. The Commission also believes that it is appropriate for the Exchange to not apply the minimum market maker requirements of IEX Rules 14.310 and 14.320 when another national securities exchange is the Primary Listing Market for the LTSE Listings Issuer's dually-listed securities. The Commission believes that Amendment No. 1 does not raise any new or novel regulatory issues, and provides additional transparency to investors, further facilitating the Commission's ability to make the findings set forth above to approve the Exchange's proposed rule change. For these reasons, the Commission finds good cause,

pursuant to Section 19(b)(2) of the Act,¹⁷⁸ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VIII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁷⁹ that the proposed rule change (SR-IEX-2018-06), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸⁰

Eduardo A. Aleman
Assistant Secretary

¹⁷⁸ 15 U.S.C. 78s(b)(2).

¹⁷⁹ Id.

¹⁸⁰ 17 CFR 200.30-3(a)(12).