

Required fields are shown with yellow backgrounds and asterisks.

Filing by Investors' Exchange LLC
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action * <input type="checkbox"/>		Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
	Section 3C(b)(2) * <input type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed rule change to modify the listing requirements contained in Rule 14.412 to change the definition of market value for purposes of the shareholder approval rules and eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Claudia Last Name * Crowley
 Title * Chief Regulatory Officer
 E-mail * claudia.crowley@iextrading.com
 Telephone * (646) 343-2041 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title *)

Date 03/26/2019 Chief Regulatory Officer
 By Claudia Crowley claudia.crowley@iextrading.com
 (Name *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² Investors Exchange LLC (“IEX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to modify the listing requirements contained in IEX Rule 14.412(d) to change the definition of market value for purposes of the shareholder approval rules and to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.³

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6)(iii).

respect to the proposed rule change are complete.

The persons on the Exchange staff prepared to respond to questions and comments on the proposed rule change are:

Claudia Crowley
Chief Regulatory Officer
Investors Exchange LLC
646-343-2041

Sophia Lee
General Counsel
Investors Exchange LLC
646-343-2040

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

a. Purpose

IEX Rule 14.412(d) requires shareholder approval for security issuances for less than the greater of book or market value (other than in the context of a public offering) if either (a) an issuance equals 20% or more of the outstanding common stock or outstanding voting power or (b) a smaller issuance coupled with sales by officers, directors or substantial shareholders meets or exceeds the 20% threshold. IEX Rule 14.002(a)(21) defines "market value" as the consolidated closing bid price (multiplied by the measure to be valued). As described more fully below, IEX proposes to amend Rule 14.412(d) to change the definition of market value for purposes of the shareholder approval rules and to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. This proposed amendment is substantially similar to an amendment NASDAQ recently made to its own shareholder approval requirements.⁴

I. Definition of Market Value

⁴ See Exchange Act Release No. 34-84287 (September 26, 2018) (SR-NASDAQ-2018-008); 83 FR 49599 (October 2, 2018).

IEX Rule 14.412(d) requires an IEX-listed company to obtain shareholder approval when issuing common stock or securities convertible into or exercisable for common stock, which alone or together with sales by officers, directors or Substantial Shareholders of the Company,⁵ equals 20% or more of the common shares or 20% or more of the voting power outstanding at a price less than the greater of the book value or market value of that stock. Rule 14.002(a)(21) defines “market value” as the consolidated closing bid price (multiplied by the measure to be valued).

The Exchange believes that the consolidated closing bid price may not be transparent to companies and investors and does not always reflect an actual price at which a security has traded. The Exchange also believes that, generally speaking, the price of an executed trade is viewed as a more reliable indicator of value than a bid quotation, and the more shares executed, the more reliable the price is considered. Further, it is the Exchange’s understanding that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.⁶ Accordingly, IEX proposes to modify the measure of market value for purposes of Rule 14.412(d) from the consolidated closing bid price to the lower of: (i) the closing price (as reflected on iextrading.com) immediately preceding the signing of a binding agreement; or (ii) the average closing price of the common stock (as reflected on iextrading.com) for the five trading days immediately preceding the signing of a binding agreement.

⁵ See IEX Rule 14.412(e)(3).

⁶ See, e.g., Exchange Act Release No. 84287 (September 26, 2018) (SR-NASDAQ-2018-008); 83 FR 49599 (October 2, 2018) at 49601 and Exchange Act Release No. 84821 (December 14, 2018) (SR-NYSE-2018-54); 83 FR 65378 (December 20, 2018) at 65380.

In addition, the ability of an IEX-listed company to issue securities in a private placement without shareholder approval will continue to be limited by other important IEX rules.⁷ For example, any discounted issuance of stock to a company's officers, directors, employees, or consultants would require shareholder approval under the Exchange's equity compensation rules.⁸ In addition, shareholder approval would be required if the issuance resulted in a change of control and for the acquisition of stock or assets of another company, including where an issuance increases voting power or common shares by 5% or more and an officer or director or substantial security holder has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.⁹

A. Closing Price

The closing price reported on iextrading.com is the IEX Official Closing Price.¹⁰ In the case of an IEX-listed security, the IEX Official Closing Price is the price of the Closing Auction.¹¹ The IEX closing auction is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day

⁷ See, e.g., IEX Rule 14.412(a), (b) and (c). If shareholder approval is not required under IEX Rule 14.412(d) it could still be required under one of the other shareholder approval provisions of IEX Rule 14.412 since these provisions apply independently of each other.

⁸ See IEX Rule 14.412(c).

⁹ See IEX Rule 14.412(a) and (b).

¹⁰ See IEX Rules 1.160(v) and 11.350(d)(2)(B).

¹¹ In the event that there is no Closing Auction, the IEX Official Closing Price will be the price of the Final Last Sale Eligible Trade. See IEX Rule 11.350(d)(2)(B). See also, IEX Rule 11.350(a)(7) which defines "Final Last Sale Eligible Trade".

that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. IEX believes its closing auction is a valuable pricing tool for issuers, traders, and investors alike. For these reasons, IEX believes that the closing price reported on iextrading.com is a better reflection of the market price of a security than the closing bid price. This proposal is consistent with the approach of other exchanges.¹²

Further, IEX believes it is appropriate to codify in Rule 14.412(d) that iextrading.com is the appropriate source for closing price information in view of the variety of available market data sources.¹³

B. Five-day Average Price

As noted above, the Exchange understands that in structuring transactions involving the issuance of securities of a listed company, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price on a single day. However, there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above the current market price, thus making it difficult

¹² See Nasdaq Rule 5635(d)(1) and Section 312.04(i) of the New York Stock Exchange Listed Company Manual, each of which utilize the closing price for purposes of determining market value for purposes of comparable shareholder approval requirements.

¹³ The closing price in each IEX-listed security is published on iextrading.com in near real time and is available without registration or a fee. IEX does not currently intend to charge a fee for access to closing price information or otherwise restrict availability of this information. In the event that IEX subsequently determines to do so, it will file a proposed rule change under Section 19(b) of the Act with respect to such change and address any impact to compliance with Rule 14.412(d) thereto.

for companies to close transactions because investors could buy shares in the market at a price below the five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to the closing price. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, IEX believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under other exchanges' listing rules,¹⁴ such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of possible unfavorable price movements borne by both the issuer and the purchaser of the securities during the time between when the agreement is executed and the closing of the transaction. However, the Exchange believes that concerns regarding the use of solely a five-day average price are valid, and as such, proposes to amend Rule 14.412(d) to define market value as the lower of the closing price immediately preceding the signing of the binding agreement or the five-day average of the closing price as the measure of market value for purposes of the shareholder approval rules. Thus, an issuance would not require an approval by the company's shareholders, so long as it is at a price that is greater than the lower of those measures.¹⁵ To improve the readability of the rule, IEX proposes to define this new concept as the "Minimum Price" and eliminate references to book value and market value

¹⁴ See e.g., Nasdaq Rule 5635 and Section 312.03 of the NYSE Listed Company Manual.

¹⁵ Issuances below Market Value to officers, directors, employees, or consultants are, and will continue to be, subject to the requirements of Rule 14.412(c). IEX will continue to use the definition of Market Value in Rule 14.002(a)(21), which provides that Market Value means the consolidated closing bid price multiplied by the measure to be valued, for purposes of Rule 14.412(c) as well as other IEX listing rules that include a Market Value component.

from Rule 14.412(d).

II. Book Value

Consistent with the proposed use of the Minimum Price to determine whether shareholder approval is required for an issuance of securities under Rule 14.412, IEX proposes to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, the Exchange does not believe it is an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. IEX understands that when the market price is below the book value, the book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. In these circumstances, the Exchange believes that companies are precluded based on purely accounting reasons from quickly raising capital on terms that are at or above the market price. Further, the Exchange is not aware that shareholders of listed companies consider book value to be a material factor when they are asked to vote to approve a proposed transaction.

III. Other Changes

To improve the readability of Rule 14.412(d) IEX proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in Supplementary Material .03, involving the sale, issuance or potential issuance by the Company of

common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 14.412(d)(1) and (d)(2) and makes no substantive change but for the change to the pricing tests, as described above, such that shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Rule 14.412(d).

IEX also proposes to amend the title of Rule 14.412(d) and the preamble to Rule 14.412 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Rule 14.412(d) and the preamble to the language in the rule text and that of Supplementary Material .03, which provides the definition of a public offering. Of course, private placements would continue to be considered “transactions other than public offerings.”

Finally, IEX proposes to amend Supplementary Material .03 and .04, which describe how IEX applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term “20% Issuance.”

b. Statutory Basis

IEX believes that the proposed rule change is consistent with Section 6(b)¹⁶ of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁷ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(5).

just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Definition of Market Value

The proposed rule change will modify the minimum price at which a 20% Issuance would not need shareholder approval from the closing bid price to the lower of: (i) the closing price (as reflected on iextrading.com) immediately preceding the signing of a binding agreement; or (ii) the average closing price of the common stock (as reflected on iextrading.com) for the five trading days immediately preceding the signing of the binding agreement.

IEX believes that allowing issuers to price transactions at the closing price (as reflected on iextrading.com) rather than closing consolidated bid price will perfect the mechanism of a free and open market, and protect investors and the public interest because the closing price will represent an actual sale at the most liquid time of the day, which generally occurs at the same or greater price than the bid price.¹⁸ As discussed in the Purpose section, the closing price is generally derived from the IEX closing auction, which is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction,

¹⁸ Sales typically take place between the bid and ask prices.

including the potential price and size of the closing auction. IEX thus believes its closing auction is a valuable pricing tool for issuers, traders, and investors alike. For these reasons, IEX believes that the closing price reported on iextrading.com is a better reflection of the market price of a security than the closing bid price, for purposes of determining whether a 20% Issuance requires shareholder approval, and is thus consistent with perfecting the mechanism of a free and open market, and protection of investors and the public interest.

Allowing share issuances to be priced at the five-day average of the closing price will further align IEX's requirements with how many transactions are structured, such as transactions where Rule 14.412(d) is not implicated because the issuance is for less than 20% of the common stock and the parties rely on the five-day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five-day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Maintaining the allowable average at just a five-day period also protects investors by ensuring the period is not too long, such that it would result in the price being distorted by ordinary past market movements and other outdated events. In a market that rises each day of the period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. Further, IEX understands that when selecting the appropriate price for a transaction, company officers and directors also have to consider their state law structural safeguards, including fiduciary

responsibilities, intended to protect shareholder interests.

In addition, because prices could be displayed from numerous data sources on different web sites, to provide certainty about the appropriate price, IEX proposes to codify within the rule that iextrading.com is the appropriate source of the closing price information, which is available in near real time and without registration or fee. Because the closing bid price is not included in many public data feeds, this requirement will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because it will improve the transparency of the rule and provide additional certainty to all market participants about the appropriate price to be used in determining if shareholder approval is required.

Additionally, IEX believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. In the Exchange's view, this flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of the Rule 14.412(d).

Book Value

IEX also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Rule 14.412(d). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as an inappropriate

measure of the current value of a stock. IEX also understands that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Because the Exchange believes that book value is not an appropriate measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing the investor protections of Rule 14.412(d).

Other Changes

To improve the readability of Rule 14.412(d), IEX proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in Supplementary Material .03 to Rule 14.412(d), involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 14.412(d)(1) and (d)(2) but makes no substantive change to the meaning of the rule. Under the proposed rule, but for the separate change to the pricing test, shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Rule 14.412(d). IEX believes that the improved

readability of the rule will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

IEX also believes that amending the title of Rule 14.412(d) and the preamble to Rule 14.412 to replace references to “private placements” to “transactions other than public offerings” to conform to the language in the rule text and Supplementary Material .03 to Rule 14.412(d), which provides the definition of a public offering, will perfect the mechanism of a free and open market by making the rule easier to understand and apply. Finally, IEX believes that amending Supplementary Material .03 and .04 to Rule 14.412, which describe how IEX applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term “20% Issuance” will perfect the mechanism of a free and open market by eliminating confusion caused by references to a measure that is no longer applicable and by making the rule easier to understand and apply.

The Exchange also notes that the proposed rule change is substantially identical to existing Nasdaq rules that were approved by the Commission.¹⁹ The Exchange believes that the same factors and analysis that led to the Commission’s approval of the comparable Nasdaq rule change are applicable to IEX’s proposed rule change. Consequently, the Exchange does not believe that the proposed rule change raises any new or novel issues.

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

IEX does not believe that the proposed rule change will result in any burden on

¹⁹ See supra note 4.

competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to promote consistent and fair regulation, rather than for any competitive purpose. The proposed rule change would revise requirements that could burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. With respect to intramarket competition, all listed companies would be affected in the same manner by these changes. With respect to intermarket competition, the Exchange does not believe that the proposed change will result in a burden on competition since other listing exchanges have comparable rules and listed companies have a choice of where to list. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

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

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A) of the Act²⁰ and paragraph (f)(6) of Rule 19b-4 thereunder.²¹ The Exchange asserts that the proposed rule change: (1) will not significantly affect the protection of investors or the public interest, (2) will not impose any significant burden on competition, (3) and will not become operative for 30 days from the date on which it was filed, or such

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6).

shorter time as the Commission may designate if consistent with the protection of investors and the public interest. In addition, the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing.²²

The Exchange believes that the proposed rule change meets the criteria of subparagraph (f)(6) of Rule 19b-4²³ because it would not significantly affect the protection of investors or the public interest. To the contrary, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest. In this regard, the Exchange believes that the use of the closing price as reflected on iextrading.com, rather than bid price, to determine market value for purposes of when shareholder approval is required would not significantly affect the protection of investors or the public interest because: (i) it is determined at the most liquid time of day, reflecting actual transactions and is therefore less prone to potential manipulation than bid prices; and (ii) is disseminated in a way that provides transparency to investors in calculating market value for purposes of such rule. Further, the Exchange believes that the use of the five-day average closing price as an alternative to determine market value would not significantly affect the protection of investors and the public interest because it is more difficult to manipulate a closing price over several days than a single day. Additionally, the Exchange believes that the proposal to eliminate the requirement for shareholder approval of 20% Issuances at a price that is less than book value but above market value

²² 17 CFR 240.19b-4(f)(6)(iii).

²³ 17 CFR 240.19b-4(f)(6).

would not significantly affect the protection of investors and the public interest because market value (as determined pursuant to the proposal) is a more appropriate indicator of whether a transaction is dilutive than book value for purposes of IEX shareholder approval rule since book value is disclosed in quarterly and annual reports of listed companies and is just one point of financial data already incorporated into the market value of a security. In approving a Nasdaq rule change to revise Nasdaq Rule 5635 in a substantially identical manner, the Commission noted some of these factors, as discussed above.²⁴ In addition, and as the Commission noted in approving the Nasdaq rule change, the New York Stock Exchange, Inc. (“NYSE”) uses closing prices for determining whether shareholder approval is needed for certain stock issuances.²⁵

Additionally, as discussed in the Purpose section and as the Commission noted in approving the Nasdaq rule change to amend Nasdaq Rule 5635 in a substantially identical manner, the ability of an IEX-listed company to issue securities in a private placement without shareholder approval will continue to be limited by other important IEX rules.²⁶ For example, any discounted issuance of stock to a company’s officers, directors, employees, or consultants would require shareholder approval under the Exchange’s equity compensation rules.²⁷ In addition, shareholder approval would be required if the issuance resulted in a change of control and for the acquisition of stock or assets of another company, including where an issuance increases voting power or common shares

²⁴ See supra note 4.

²⁵ See supra note 4, 83 FR 49599 at 49602 & n.59.

²⁶ See, e.g., IEX Rule 14.412(a), (b) and (c). If shareholder approval is not required under IEX Rule 14.412(d) it could still be required under one of the other shareholder approval provisions of IEX Rule 14.412 since these provisions apply independently of each other.

²⁷ See IEX Rule 14.412(c).

by 5% or more and an officer or director or substantial security holder has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.²⁸

Finally, the Exchange believes that the proposed rule change would not impose a burden on competition, as discussed in the Statement on Burden on Competition section. As described therein, the proposed rule change would revise requirements that could burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes, other listing exchanges have comparable rules, and listed companies have a choice of where to list.

Moreover, the proposed rule change is substantially identical to existing Nasdaq rules, as described in the Purpose and Statutory Basis sections, and as such, the Exchange does not believe the proposal raises any new or novel issues not already considered by the Commission.

Accordingly, the Exchange believes that the proposed rule change is noncontroversial and satisfies the requirements of Rule 19b-4(f)(6).²⁹

8. Proposed Rule Change Based on the Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule change is based on recent amendments made by Nasdaq to Nasdaq Rule 5635, its comparable shareholder approval requirements.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and

²⁸ See IEX Rule 14.412(a) and (b).

²⁹ 17 CFR 240.19b-4(f)(6).

Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of the Proposed Rule Change for Publication in the
Federal Register.

Exhibit 5 – Text of Proposed Rule Change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34 -); File No. SR-IEX-2019-03)

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Listing Requirements Contained in Rule 14.412 to Change the Definition of Market Value for Purposes of the Shareholder Approval Rules and Eliminate the Requirement for Shareholder Approval of Issuances at a Price Less Than Book Value but Greater than Market Value.

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

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

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),⁴ and Rule 19b-4 thereunder,⁵ IEX is filing with the Commission a proposed rule change to modify the listing requirements contained in IEX Rule 14.412(d) to change the definition of market value for purposes of the shareholder approval rules and to eliminate the requirement for shareholder approval of issuances at a price less than

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(b)(1).

⁵ 17 CFR 240.19b-4.

book value but greater than market value. The Exchange has designated this proposal as non-controversial and provided the Commission with the notice required by Rule 19b-4(f)(6)(iii) under the Act.⁶The text of the proposed rule change is available at the Exchange's website at www.iextrading.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

IEX Rule 14.412(d) requires shareholder approval for security issuances for less than the greater of book or market value (other than in the context of a public offering) if either (a) an issuance equals 20% or more of the outstanding common stock or outstanding voting power or (b) a smaller issuance coupled with sales by officers, directors or substantial shareholders meets or exceeds the 20% threshold. IEX Rule 14.002(a)(21) defines "market value" as the consolidated closing bid price (multiplied by the measure to be valued). As described more fully below, IEX proposes to amend Rule 14.412(d) to change the definition of market value for purposes of the shareholder

⁶ 17 CFR 240.19b-4(f)(6)(iii).

approval rules and to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. This proposed amendment is substantially similar to an amendment NASDAQ recently made to its own shareholder approval requirements.⁷

I. Definition of Market Value

IEX Rule 14.412(d) requires an IEX-listed company to obtain shareholder approval when issuing common stock or securities convertible into or exercisable for common stock, which alone or together with sales by officers, directors or Substantial Shareholders of the Company,⁸ equals 20% or more of the common shares or 20% or more of the voting power outstanding at a price less than the greater of the book value or market value of that stock. Rule 14.002(a)(21) defines “market value” as the consolidated closing bid price (multiplied by the measure to be valued).

The Exchange believes that the consolidated closing bid price may not be transparent to companies and investors and does not always reflect an actual price at which a security has traded. The Exchange also believes that, generally speaking, the price of an executed trade is viewed as a more reliable indicator of value than a bid quotation, and the more shares executed, the more reliable the price is considered. Further, it is the Exchange’s understanding that in structuring transactions, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price.⁹ Accordingly, IEX

⁷ See Exchange Act Release No. 34–84287 (September 26, 2018) (SR-NASDAQ-2018-008); 83 FR 49599 (October 2, 2018).

⁸ See IEX Rule 14.412(e)(3).

⁹ See, e.g., Exchange Act Release No. 84287 (September 26, 2018) (SR-NASDAQ-2018-008); 83 FR 49599 (October 2, 2018) at 49601 and Exchange Act Release No. 84821 (December 14, 2018) (SR-NYSE-2018-54); 83 FR 65378 (December 20, 2018) at 65380.

proposes to modify the measure of market value for purposes of Rule 14.412(d) from the consolidated closing bid price to the lower of: (i) the closing price (as reflected on iextrading.com) immediately preceding the signing of a binding agreement; or (ii) the average closing price of the common stock (as reflected on iextrading.com) for the five trading days immediately preceding the signing of a binding agreement.

In addition, the ability of an IEX-listed company to issue securities in a private placement without shareholder approval will continue to be limited by other important IEX rules.¹⁰ For example, any discounted issuance of stock to a company's officers, directors, employees, or consultants would require shareholder approval under the Exchange's equity compensation rules.¹¹ In addition, shareholder approval would be required if the issuance resulted in a change of control and for the acquisition of stock or assets of another company, including where an issuance increases voting power or common shares by 5% or more and an officer or director or substantial security holder has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.¹²

A. Closing Price

The closing price reported on iextrading.com is the IEX Official Closing Price.¹³ In the case of an IEX-listed security, the IEX Official Closing Price is the price of the

¹⁰ See, e.g., IEX Rule 14.412(a), (b) and (c). If shareholder approval is not required under IEX Rule 14.412(d) it could still be required under one of the other shareholder approval provisions of IEX Rule 14.412 since these provisions apply independently of each other.

¹¹ See IEX Rule 14.412(c).

¹² See IEX Rule 14.412(a) and (b).

¹³ See IEX Rules 1.160(v) and 11.350(d)(2)(B).

Closing Auction.¹⁴ The IEX closing auction is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction promotes accurate closing prices by offering specialized orders available only during the closing auction and integrating those orders with regular orders submitted during the trading day that are still available at the close. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. IEX believes its closing auction is a valuable pricing tool for issuers, traders, and investors alike. For these reasons, IEX believes that the closing price reported on iextrading.com is a better reflection of the market price of a security than the closing bid price. This proposal is consistent with the approach of other exchanges.¹⁵

Further, IEX believes it is appropriate to codify in Rule 14.412(d) that iextrading.com is the appropriate source for closing price information in view of the variety of available market data sources.¹⁶

B. Five-day Average Price

As noted above, the Exchange understands that in structuring transactions

¹⁴ In the event that there is no Closing Auction, the IEX Official Closing Price will be the price of the Final Last Sale Eligible Trade. See IEX Rule 11.350(d)(2)(B). See also, IEX Rule 11.350(a)(7) which defines “Final Last Sale Eligible Trade”.

¹⁵ See Nasdaq Rule 5635(d)(1) and Section 312.04(i) of the New York Stock Exchange Listed Company Manual, each of which utilize the closing price for purposes of determining market value for purposes of comparable shareholder approval requirements.

¹⁶ The closing price in each IEX-listed security is published on iextrading.com in near real time and is available without registration or a fee. IEX does not currently intend to charge a fee for access to closing price information or otherwise restrict availability of this information. In the event that IEX subsequently determines to do so, it will file a proposed rule change under Section 19(b) of the Act with respect to such change and address any impact to compliance with Rule 14.412(d) thereto.

involving the issuance of securities of a listed company, investors and companies often rely on an average price over a prescribed period of time for pricing issuances because it can smooth out unusual fluctuations in price on a single day. However, there are potential negative consequences to using a five-day average as the sole measure of whether shareholder approval is required. For example, in a declining market, the five-day average price will always be above the current market price, thus making it difficult for companies to close transactions because investors could buy shares in the market at a price below the five-day average price. Conversely, in a rising market, the five-day average price will appear to be a discount to the closing price. In addition, if material news is announced during the five-day period, the average could be a worse reflection of the market value than the closing price after the news is disclosed. Nonetheless, IEX believes that these risks are already accepted in the market, as evidenced by the use of an average price in transactions that do not require shareholder approval under other exchanges' listing rules,¹⁷ such as where less than 20% of the outstanding shares are issuable in the transaction, notwithstanding the risk of possible unfavorable price movements borne by both the issuer and the purchaser of the securities during the time between when the agreement is executed and the closing of the transaction. However, the Exchange believes that concerns regarding the use of solely a five-day average price are valid, and as such, proposes to amend Rule 14.412(d) to define market value as the lower of the closing price immediately preceding the signing of the binding agreement or the five-day average of the closing price as the measure of market value for purposes of the shareholder approval rules. Thus, an issuance would not require an approval by the

¹⁷ See e.g., Nasdaq Rule 5635 and Section 312.03 of the NYSE Listed Company Manual.

company's shareholders, so long as it is at a price that is greater than the lower of those measures.¹⁸ To improve the readability of the rule, IEX proposes to define this new concept as the "Minimum Price" and eliminate references to book value and market value from Rule 14.412(d).

II. Book Value

Consistent with the proposed use of the Minimum Price to determine whether shareholder approval is required for an issuance of securities under Rule 14.412, IEX proposes to eliminate the requirement for shareholder approval of issuances at a price less than book value but greater than market value. Book value is an accounting measure and its calculation is based on the historic cost of assets, not their current value. As such, the Exchange does not believe it is an appropriate measure of whether a transaction is dilutive or should otherwise require shareholder approval. IEX understands that when the market price is below the book value, the book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies temporarily traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. In these circumstances, the Exchange believes that companies are precluded based on purely accounting reasons from quickly raising capital on terms that are at or above the market price. Further, the Exchange is not aware that shareholders of listed

¹⁸ Issuances below Market Value to officers, directors, employees, or consultants are, and will continue to be, subject to the requirements of Rule 14.412(c). IEX will continue to use the definition of Market Value in Rule 14.002(a)(21), which provides that Market Value means the consolidated closing bid price multiplied by the measure to be valued, for purposes of Rule 14.412(c) as well as other IEX listing rules that include a Market Value component.

companies consider book value to be a material factor when they are asked to vote to approve a proposed transaction.

III. Other Changes

To improve the readability of Rule 14.412(d) IEX proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in Supplementary Material .03, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the situations described in existing Rule 14.412(d)(1) and (d)(2) and makes no substantive change but for the change to the pricing tests, as described above, such that shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Rule 14.412(d).

IEX also proposes to amend the title of Rule 14.412(d) and the preamble to Rule 14.412 to replace references to “private placements” to “transactions other than public offerings” to conform the language in the title of Rule 14.412(d) and the preamble to the language in the rule text and that of Supplementary Material .03, which provides the definition of a public offering. Of course, private placements would continue to be considered “transactions other than public offerings.”

Finally, IEX proposes to amend Supplementary Material .03 and .04, which describe how IEX applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term “20% Issuance.”

2. Statutory Basis

IEX believes that the proposed rule change is consistent with Section 6(b)¹⁹ of the Act in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁰ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Definition of Market Value

The proposed rule change will modify the minimum price at which a 20% Issuance would not need shareholder approval from the closing bid price to the lower of: (i) the closing price (as reflected on iextrading.com) immediately preceding the signing of a binding agreement; or (ii) the average closing price of the common stock (as reflected on iextrading.com) for the five trading days immediately preceding the signing of the binding agreement.

IEX believes that allowing issuers to price transactions at the closing price (as reflected on iextrading.com) rather than closing consolidated bid price will perfect the mechanism of a free and open market, and protect investors and the public interest because the closing price will represent an actual sale at the most liquid time of the day, which generally occurs at the same or greater price than the bid price.²¹ As discussed in the Purpose section, the closing price is generally derived from the IEX closing auction,

¹⁹ 15 U.S.C. 78f.

²⁰ 15 U.S.C. 78f(b)(5).

²¹ Sales typically take place between the bid and ask prices.

which is designed to gather the maximum liquidity available for execution at the close of trading, and to maximize the number of shares executed at a single price at the close of the trading day. The closing auction is made highly transparent to all investors through the widespread dissemination of stock-by-stock information about the closing auction, including the potential price and size of the closing auction. IEX thus believes its closing auction is a valuable pricing tool for issuers, traders, and investors alike. For these reasons, IEX believes that the closing price reported on iextrading.com is a better reflection of the market price of a security than the closing bid price, for purposes of determining whether a 20% Issuance requires shareholder approval, and is thus consistent with perfecting the mechanism of a free and open market, and protection of investors and the public interest.

Allowing share issuances to be priced at the five-day average of the closing price will further align IEX's requirements with how many transactions are structured, such as transactions where Rule 14.412(d) is not implicated because the issuance is for less than 20% of the common stock and the parties rely on the five-day average for pricing to smooth out unusual fluctuations in price. In so doing, the proposed rule change will perfect the mechanism of a free and open market. Further, allowing a five-day average price continues to protect investors and the public interest because it will allow companies and investors to price transactions in a manner designed to eliminate aberrant pricing resulting from unusual transactions on the day of a transaction. Maintaining the allowable average at just a five-day period also protects investors by ensuring the period is not too long, such that it would result in the price being distorted by ordinary past market movements and other outdated events. In a market that rises each day of the

period, the five-day average will be less than the price at the end of the period, but would still be higher than the price at the start of such period. Further, IEX understands that when selecting the appropriate price for a transaction, company officers and directors also have to consider their state law structural safeguards, including fiduciary responsibilities, intended to protect shareholder interests.

In addition, because prices could be displayed from numerous data sources on different web sites, to provide certainty about the appropriate price, IEX proposes to codify within the rule that iextrading.com is the appropriate source of the closing price information, which is available in near real time and without registration or fee. Because the closing bid price is not included in many public data feeds, this requirement will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market because it will improve the transparency of the rule and provide additional certainty to all market participants about the appropriate price to be used in determining if shareholder approval is required.

Additionally, IEX believes that where two alternative measures of value exist that both reasonably approximate the value of listed securities, defining the Minimum Price as the lower of those values allows issuers the flexibility to use either measure because they can also sell securities at a price greater than the Minimum Price without needing shareholder approval. In the Exchange's view, this flexibility, and the certainty that a transaction can be structured at either value in a manner that will not require shareholder approval, further perfects the mechanism of a free and open market without diminishing the existing investor protections of the Rule 14.412(d).

Book Value

IEX also believes that eliminating the requirement for shareholder approval of issuances at a price less than book value but greater than market value does not diminish the existing investor protections of Rule 14.412(d). Book value is primarily an accounting measure calculated based on historic cost and is generally perceived as an inappropriate measure of the current value of a stock. IEX also understands that the existing book value test can appear arbitrary and have a disproportionate impact on companies in certain industries and at certain times. For example, during the financial crisis in 2008 and 2009, many banks and finance-related companies traded below book value. Similarly, companies that make large investments in infrastructure may trade below the accounting carrying value of those assets. Because the Exchange believes that book value is not an appropriate measure of the current value of a stock, the elimination of the requirement for shareholder approval of issuances at a price less than book value but greater than market value will remove an impediment to, and perfect the mechanism of, a free and open market, which currently unfairly burdens companies in certain industries, without meaningfully diminishing the investor protections of Rule 14.412(d).

Other Changes

To improve the readability of Rule 14.412(d), IEX proposes to define “20% Issuance” as “a transaction, other than a public offering as defined in Supplementary Material .03 to Rule 14.412(d), involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance.” This definition combines the

situations described in existing Rule 14.412(d)(1) and (d)(2) but makes no substantive change to the meaning of the rule. Under the proposed rule, but for the separate change to the pricing test, shareholder approval would be required under the same circumstances for a 20% Issuance as under existing Rule 14.412(d). IEX believes that the improved readability of the rule will perfect the mechanism of a free and open market by making the rule easier to understand and apply.

IEX also believes that amending the title of Rule 14.412(d) and the preamble to Rule 14.412 to replace references to “private placements” to “transactions other than public offerings” to conform to the language in the rule text and Supplementary Material .03 to Rule 14.412(d), which provides the definition of a public offering, will perfect the mechanism of a free and open market by making the rule easier to understand and apply. Finally, IEX believes that amending Supplementary Material .03 and .04 to Rule 14.412, which describe how IEX applies the shareholder approval requirements, to conform references to book and market value with the new definition of Minimum Price, as described above, and to utilize the newly defined term “20% Issuance” will perfect the mechanism of a free and open market by eliminating confusion caused by references to a measure that is no longer applicable and by making the rule easier to understand and apply.

The Exchange also notes that the proposed rule change is substantially identical to existing Nasdaq rules that were approved by the Commission.²² The Exchange believes that the same factors and analysis that led to the Commission’s approval of the comparable Nasdaq rule change are applicable to IEX’s proposed rule change.

²² See supra note 7.

Consequently, the Exchange does not believe that the proposed rule change raises any new or novel issues.

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

IEX does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to promote consistent and fair regulation, rather than for any competitive purpose. The proposed rule change would revise requirements that could burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. With respect to intramarket competition, all listed companies would be affected in the same manner by these changes. With respect to intermarket competition, the Exchange does not believe that the proposed change will result in a burden on competition since other listing exchanges have comparable rules and listed companies have a choice of where to list. As such, these changes are neither intended to, nor expected to, impose any burden on competition.

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

Written comments were neither solicited nor received.

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

The Exchange has designated this rule filing as non-controversial under Section 19(b)(3)(A)²³ of the Act and Rule 19b-4(f)(6)²⁴ thereunder. Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f)(6).

from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.

The Exchange believes that the proposed rule change meets the criteria of subparagraph (f)(6) of Rule 19b-4²⁵ because it would not significantly affect the protection of investors or the public interest. To the contrary, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest. In this regard, the Exchange believes that the use of the closing price as reflected on iextrading.com, rather than bid price, to determine market value for purposes of when shareholder approval is required would not significantly affect the protection of investors or the public interest because: (i) it is determined at the most liquid time of day, reflecting actual transactions and is therefore less prone to potential manipulation than bid prices; and (ii) is disseminated in a way that provides transparency to investors in calculating market value for purposes of such rule. Further, the Exchange believes that the use of the five-day average closing price as an alternative to determine market value would not significantly affect the protection of investors and the public interest because it is more difficult to manipulate a closing price over several days than a single day. Additionally, the Exchange believes that the proposal to eliminate the requirement for shareholder approval of 20% Issuances at a price that is less than book value but above market value would not significantly affect the protection of investors and the public interest because market value (as determined pursuant to the proposal) is a more appropriate indicator of whether a transaction is dilutive than book value for purposes of IEX shareholder

²⁵ 17 CFR 240.19b-4(f)(6).

approval rule since book value is disclosed in quarterly and annual reports of listed companies and is just one point of financial data already incorporated into the market value of a security. In approving a Nasdaq rule change to revise Nasdaq Rule 5635 in a substantially identical manner, the Commission noted some of these factors, as discussed above.²⁶ In addition, and as the Commission noted in approving the Nasdaq rule change, the New York Stock Exchange, Inc. (“NYSE”) uses closing prices for determining whether shareholder approval is needed for certain stock issuances.²⁷

Additionally, as discussed in the Purpose section and as the Commission noted in approving the Nasdaq rule change to amend Nasdaq Rule 5635 in a substantially identical manner, the ability of an IEX-listed company to issue securities in a private placement without shareholder approval will continue to be limited by other important IEX rules.²⁸ For example, any discounted issuance of stock to a company’s officers, directors, employees, or consultants would require shareholder approval under the Exchange’s equity compensation rules.²⁹ In addition, shareholder approval would be required if the issuance resulted in a change of control and for the acquisition of stock or assets of another company, including where an issuance increases voting power or common shares by 5% or more and an officer or director or substantial security holder has a 5% direct or indirect interest (or collectively 10%) in the company or assets to be acquired.³⁰

Finally, the Exchange believes that the proposed rule change would not impose a burden on competition, as discussed in the Statement on Burden on Competition section.

²⁶ See supra note 7.

²⁷ See supra note 7, 83 FR 49599 at 49602 & n.59.

²⁸ See, e.g., IEX Rule 14.412(a), (b) and (c). If shareholder approval is not required under IEX Rule 14.412(d) it could still be required under one of the other shareholder approval provisions of IEX Rule 14.412 since these provisions apply independently of each other.

²⁹ See IEX Rule 14.412(c).

³⁰ See IEX Rule 14.412(a) and (b).

As described therein, the proposed rule change would revise requirements that could burden issuers by unnecessarily limiting the circumstances where they can sell securities without shareholder approval. All listed companies would be affected in the same manner by these changes, other listing exchanges have comparable rules, and listed companies have a choice of where to list.

Moreover, the proposed rule change is substantially identical to existing Nasdaq rules, as described in the Purpose and Statutory Basis sections, and as such, the Exchange does not believe the proposal raises any new or novel issues not already considered by the Commission.

Accordingly, the Exchange believes that the proposed rule change is noncontroversial and satisfies the requirements of Rule 19b-4(f)(6).³¹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)³² of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

³¹ 17 CFR 240.19b-4(f)(6).

³² 15 U.S.C. 78s(b)(2)(B).

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-IEX-2019-03 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-IEX-2019-03. This file number should be included in the subject line if email 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 Section, 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 will also be available for inspection and copying at the IEX's principal office and on its Internet website at www.iextrading.com. 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-2019-03 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

³³ 17 CFR 200.30-3(a)(12).

Exhibit 5 – Text of Proposed Rule Change

Proposed new language is underlined; proposed deletions are in brackets.

Rule 14.412. Shareholder Approval

This IEX Rule sets forth the circumstances under which shareholder approval is required prior to an issuance of securities 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] transactions other than public offerings. General provisions relating to shareholder approval are set forth in IEX Rule 14.412(e), and the financial viability exception to the shareholder approval requirement is set forth in IEX Rule 14.412(f). Exchange-listed Companies and their representatives are encouraged to use the interpretative letter process described in IEX Rule 14.401(c).

(a) – (c) No change.

••• *Supplementary Material* •••

.01 Shareholder Approval for Stock Option Plans or Other Equity Compensation Arrangements

No change.

(d) [Private Placements]Transactions other than Public Offerings

[Shareholder approval is required prior to the issuance of securities in connection with a transaction other than a public offering involving:

- (1) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of common stock or 20% or more of the voting power outstanding before the issuance; or
- (2) the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock.]

(1) For purposes of Rule 14.412(d):

(A) “Minimum Price” means a price that is the lower of: (i) the closing price (as reflected on iextrading.com) immediately preceding the signing of a binding agreement; or (ii) the average closing price of the common stock (as reflected on iextrading.com) for the five trading days immediately preceding the signing of a binding agreement.

(B) “20% Issuance” means a transaction, other than a public offering as defined in Supplementary Material .03, involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.

(2) Shareholder approval is required prior to a 20% Issuance at a price that is less than the Minimum Price.

••• Supplementary Material •••

.02 Interpretative Material Regarding the Use of Share Caps to Comply with Rule 14.412

No change.

.03 Definition of a Public Offering

IEX Rule 14.412(d) provides that shareholder approval is required for [the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock]a 20% Issuance at a price that is less than the Minimum Price. Under this IEX Rule, however, shareholder approval is not required for a “public offering.”

Companies are encouraged to consult with IEX Regulation in order to determine if a particular offering is a “public offering” for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Securities and Exchange Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Securities and Exchange Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public

offering for purposes of the shareholder approval rules. However, the Exchange staff will not treat an offering as a “public offering” for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a “public offering” for purposes of these rules, IEX Regulation will consider all relevant factors, including but not limited to:

- (a) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the Company);
- (b) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);
- (c) the extent of the offering’s distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the Company and those investors);
- (d) the offering price (including the extent of any discount to the market price of the securities offered); and
- (e) the extent to which the Company controls the offering and its distribution.

(e) – (f) No change.

••• Supplementary Material •••

.04 Interpretive Material Regarding Future Priced Securities and Other Securities with Variable Conversion Terms

Summary

No change.

How the Rules Apply

Shareholder Approval

IEX Rule 14.412(d) [provides, in part:] requires shareholder approval prior to a 20% Issuance at a price that is less than the Minimum Price. [Each Company shall require shareholder approval prior to the issuance of securities in connection with a transaction other than a public offering involving the sale, issuance or potential issuance by the issuer of

common stock (or securities convertible into or exercisable for common stock) at a price less than the greater of book or market value which together with sales by officers, directors or Substantial Shareholders of the Company equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance.]

(The Exchange may make exceptions to this requirement when the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise and reliance by the Company on this exception is expressly approved by the Audit Committee or a comparable body of the Board of Directors.)

When the Exchange staff is unable to determine the number of shares to be issued in a transaction, it looks to the maximum potential issuance of shares to determine whether there will be an issuance of 20 percent or more of the common stock outstanding. In the case of Future Priced Securities, the actual conversion price is dependent on the market price at the time of conversion and so the number of shares that will be issued is uncertain until the conversion occurs. Accordingly, staff will look to the maximum potential issuance of common shares at the time the Future Priced Security is issued. Typically, with a Future Priced Security, the maximum potential issuance will exceed 20 percent of the common stock outstanding because the Future Priced Security could, potentially, be converted into common stock based on a share price of one cent per share, or less. Further, for purposes of this calculation, the lowest possible conversion price is below the [book or market value]Minimum Price of the stock for purposes of Rule 14.412(d) at the time of issuance of the Future Priced Security. Therefore, shareholder approval must be obtained prior to the issuance of the Future Priced Security. Companies should also be cautioned that obtaining shareholder ratification of the transaction after the issuance of a Future Priced Security does not satisfy the shareholder approval requirements.

Some Future Priced Securities may contain features to obviate the need for shareholder approval by: (1) placing a cap on the number of shares that can be issued upon conversion, such that the holders of the Future Priced Security cannot, without prior shareholder approval, convert the security into 20% or more of the common stock or voting power outstanding before the issuance of the Future Priced Security (See Supplementary Material .02 to IEX Rule 14.412, Interpretative Material Regarding the Use of Share Caps to Comply with IEX Rule 14.412), or (2) placing a floor on the conversion price, such that the conversion price will always be at least as high as the [greater of book or market value of the common stock]Minimum Price prior to the issuance of the Future Priced Securities. Even when a Future Priced Security contains these features, however, shareholder approval is still

required under IEX Rule 14.412(b) if the issuance will result in a change of control. Additionally, discounted issuances of common stock to officers, directors, employees or consultants require shareholder approval pursuant to IEX Rule 14.412(c).

Voting Rights

IEX Rule 14.413 provides:

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.

Supplementary Material .01 to IEX Rule 14.413 also provides rules relating to voting rights of the Exchange Companies.

Under the voting rights rules, a Company cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities. The voting rights rules are typically implicated when the holders of the Future Priced Security are entitled to vote on an as-converted basis or when the holders of the Future Priced Security are entitled to representation on the Board of Directors. The percentage of the overall vote attributable to the Future Priced Security holders and the Future Priced Security holders' representation on the board of directors must not exceed their relative contribution to the Company based on the [Company's overall book or market value]Minimum Price at the time of the issuance of the Future Priced Security. Staff will consider whether a voting rights violation exists by comparing the Future Priced Security holders' voting rights to their relative contribution to the Company based on the [Company's overall book or market value]Minimum Price at the time of the issuance of the Future Priced Security. If the voting power or the board percentage exceeds that percentage interest, a violation exists because a new class of securities has been created that votes at a higher rate than an already existing class. Future Priced Securities that vote on an as-converted basis also raise voting rights concerns because of the possibility that, due to a decline in the price of the underlying common stock, the Future Priced Security holder will have voting rights disproportionate to its investment in the Company.

It is important to note that compliance with the shareholder approval rules prior to the issuance of a Future Priced Security does not affect whether the transaction is in violation of the voting rights rule. Furthermore, Shareholders can not otherwise agree to permit a voting rights violation by the Company. Because a violation of the voting rights requirement can

result in delisting of the Company's securities from the Exchange, careful attention must be given to this issue to prevent a violation of the rule.

The Bid Price Requirement

No change.

Listing of Additional Shares

No change.

Public Interest Concerns

No change.

Business Combinations with non-IEX Entities Resulting in a Change of Control

No change.
