



September 22, 2016

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Petition to Amend Rule 146(b)

Dear Mr. Fields:

Investors' Exchange LLC ("IEX" or the "Exchange") hereby petitions the U.S. Securities and Exchange Commission ("Commission") to amend Rule 146(b) under Section 18(b)(1)(B) of the Securities Act of 1933, as amended ("Securities Act") to designate securities listed on IEX as covered securities for purposes of Section 18 of the Securities Act.<sup>1</sup>

#### **BACKGROUND**

On October 11, 1996, the National Securities Markets Improvement Act of 1996 ("NSMIA") was signed into law. Among other changes made to the federal securities laws, NSMIA amended Section 18 of the Securities Act to provide for exclusive federal registration of securities listed (or authorized for listing) on the New York Stock Exchange ("NYSE"), listed (or authorized for listing) on the American Stock Exchange, now known as NYSE MKT ("NYSE MKT"), quoted (or authorized for quoting) on the National Market System of the Nasdaq Stock Market, now known as Nasdaq Global Markets ("NGM") (collectively, the "Named Markets"), or listed (or authorized for listing) on any other national securities exchange designated by the Commission to have "substantially similar" listing standards to those markets. More specifically, Section 18(a) provides that "no law, rule, regulation, or order, or other administrative action of any State ... requiring, or with respect to, registration or qualification of securities ... shall directly or indirectly apply to a security that -- (A) is a covered security ...." Covered securities are defined in Section 18(b)(1) to include those securities specified above.

Since 1998, the Commission has exercised its discretionary authority to designate in Rule 146(b) as covered securities, for the purposes of Section 18 of the Securities Act, the securities listed on: (i) Tier 1 of NYSE Arca, Inc.; (ii) Tier 1 of the Philadelphia Stock Exchange, now known as Nasdaq OMX PHLX; (iii) the Chicago Board Options Exchange, Incorporated, (iv) options listed on the International Securities Exchange, LLC; (v) the Nasdaq Capital Market ("NCM"), and (vi) Tier I

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<sup>1</sup> In connection with its Form 1 application to become a registered national securities exchange, IEX has filed a proposal to adopt rules applicable to the qualification, listing and delisting of companies on IEX. See Securities and Exchange Act Release 75925 (September 15, 2015), 80 FR 57261 (September 22, 2015).

and Tier II of BATS Exchange, Inc. (all of which, together with the Named Markets, are hereafter referred to as the “Designated Markets”).

## **SUMMARY**

IEX believes that the listing standards applicable to securities listed on IEX are substantially similar,<sup>2</sup> within the meaning of Section 18(b) and Rule 146, to the listing standards applicable to the Named Markets. In particular, as further detailed below, the IEX listing standards have generally been modeled on those of NGM, which maintains standards that are themselves higher than those of NCM and NYSE, both Designated Markets. Further, the IEX quantitative standards for initial listing of primary equity securities are substantially identical to those of the Nasdaq Global Select Market (“NGSM”), which in turn are more restrictive than those applicable to other NGM securities. Further, the NGM and NGSM standards are more restrictive in various respects than those that apply to certain other Designated Markets. As a result, the IEX listing standards will meet or exceed in all respects the standards that the Commission has previously found to satisfy the “substantially similar” requirement. Moreover, the designation of IEX-listed securities as “covered securities” would be fully consistent with and would advance the Commission’s mandate under Section 11A of the Securities Exchange Act of 1934 (the “Exchange Act”) to “assure...fair competition...among exchange markets.”<sup>3</sup>

## **DESCRIPTION OF IEX LISTING STANDARDS**

Chapter 14 of the IEX Rulebook prescribes general listing requirements as well as initial and maintenance listing standards for primary equity securities,<sup>4</sup> rights and warrants, preferred stock and secondary classes of common stock. In addition, Chapter 16 of the IEX Rulebook concerns the listing of various other types of securities, including portfolio depositary receipts, index fund shares, securities linked to the performance of indexes and commodities (including currencies), futures-linked securities, certain derivative securities, alpha index-linked securities, paired class shares, certain equity-linked debt securities, trust issued receipts, index warrants, commodity-related securities, managed fund shares, and derivative securities traded under unlisted-trading privileges (collectively, “Other Securities”). In each case, unless otherwise specified below, the standards are substantively identical to the requirements for securities listed on NGM or, in the case of listing requirements for primary equity securities, securities listed on NGSM.

## **INITIAL REQUIREMENTS**

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<sup>2</sup> The Commission has interpreted the term “substantially similar” to require listing standards at least as comprehensive as those of the Named Markets, and has noted that differences in language or approach do not necessarily lead to a determination that the listing standards of a petitioner are not substantially similar to those of a Named Market. See Securities Act Release No. 9295, 77 FR 3590 (January 25, 2012).

<sup>3</sup> 15 U.S.C. 78k-1(a)(1)(c)(ii).

<sup>4</sup> IEX Rule 14.310.

*Primary Equity Securities*

NGSM and IEX have the same quantitative initial listing requirements pertaining to the public float, distribution of shares, and trading volume. Both markets require a minimum bid price of at least \$4 per share, and a minimum of 1,250,000 publicly held shares. Further, both markets require at least (i) 450 round lot shareholders, or (ii) 2,200 shareholders, or (iii) at least 550 total shareholders, and an average monthly trading volume over the prior 12 months of at least 1,100,000 shares per month.<sup>5</sup> Further, both markets require a market value of publicly-held shares of: (i) \$110 million; or (ii) at least \$100 million with stockholders' equity of at least \$110 million; or (iii) at least \$45 million in the case of a company listing in connection with an initial public offering, or a company that is affiliated with or a spin off from another company listed on the market.<sup>6</sup>

Both markets have the same alternative standards relating to income, revenues and cash flows, and market capitalization: Specifically, the rules of both markets require that a company must meet one of four sets of requirements:

- (1) (i) Income from continuing operations before income taxes of at least \$11 million over the prior three fiscal years, (ii) positive cash flows in each of the last three fiscal years, and (iii) at least \$2.2 million in income from continuing operations before income taxes in each of the two most recent fiscal years; or
- (2) (i) Total cash flows of at least \$27.5 million over the prior three fiscal years, (ii) positive cash flows in each of the prior three fiscal years, and (iii) average market capitalization of at least \$550 million over the prior 12 months and total revenue of at least \$110 million in the previous fiscal year; or
- (3) (i) average market capitalization of at least \$850 million over the prior 12 months, and (ii) total revenue of at least \$90 million in the previous fiscal year, or
- (4) (i) market capitalization of at least \$160 million, (ii) total assets of at least \$80 million, and (iii) stockholders' equity of at least \$55 million.<sup>7</sup>

Both markets require, for initial listing, that a company have at least four registered and active market makers, except that they permit three market makers if the company meets one of two alternative standards relating to income, stockholders' equity, and market capitalization.<sup>8</sup>

As is the case for primary equity securities, NGSM and IEX have the same quantitative initial listing standards for rights and warrants, preferred stock, and secondary classes of common stock.<sup>9</sup>

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<sup>5</sup> Compare Nasdaq Rule 5315 to IEX Rule 14.310.

<sup>6</sup> Compare Nasdaq Rule 5315(f)(2) to IEX Rule 14.310(a)(4).

<sup>7</sup> Compare Nasdaq Rule 5315(f)(3) to IEX Rule 14.310(b).

<sup>8</sup> Compare Nasdaq Rule 5315(e)(3) to IEX Rule 14.310(c).

<sup>9</sup> Nasdaq Rule 5320 specifies that if the primary equity security of a company is listed on NGSM, other classes of common or preferred stock, warrants and units that qualify for listing on NGM may also be listed on NGSM.

### *Rights and Warrants*

Both NGM and IEX set the same standards for listing of rights and warrants: (i) at least 450,000 rights or warrants issued; (ii) the underlying security must be listed on the NGM (IEX) or be a Covered Security, as defined<sup>10</sup>; (iii) there must be at least three registered and active market makers; and (iv) in the case of warrants, there must be at least 400 round lot holders (except for the initial firm commitment underwritten public offering for such warrants).<sup>11</sup>

### *Preferred Stock and Secondary Classes of Common Stock*

Both NGM and IEX require that when the primary equity security of an issuer is listed on the respective exchange or is a Covered Security, the preferred stock or secondary classes of common stock must meet the following requirements: (i) at least 200,000 publicly-held shares; (ii) market value of publicly-held shares of at least \$4 million; (iii) a minimum bid price of at least \$4 per share; (iv) at least 100 round lot holders; and (v) at least three registered and active market makers.<sup>12</sup>

### **MAINTENANCE REQUIREMENTS**

As is the case with initial listing standards, NGM and IEX have virtually identical quantitative maintenance requirements.<sup>13</sup> For continued listing of a primary equity security, the security must maintain a minimum bid price of \$1 per share and at least 400 total holders. Both markets also require that issuers meet at least one of three alternative standards – equity, market value, or total assets/total revenue. The equity standards for both markets requires that stockholders' equity be at least \$10 million, that there be at least 750,000 publicly-held shares with a market value of at least \$5 million, and that there be at least two registered and active market makers. The market value standards of both exchanges require that the market value of listed securities be at least \$50 million, that there be at least 1.1 million publicly-held shares with a market value of at least \$15 million, and that there be at least four registered and active market makers. The total assets/revenue standards are also the same, requiring that there be total assets and total revenue of at least \$50 million each for the most recently completed fiscal year or two of the three most recently completed fiscal years, at least 1,100,000 publicly-held shares with market value of at least \$15 million, and at least four registered and active market makers.<sup>14</sup>

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<sup>10</sup> Covered Security is defined by reference to Section 18(b) of the Securities Act. Nasdaq Rule 5001 and IEX Rule 14.001.

<sup>11</sup> Compare Nasdaq Rule 5410 to IEX Rule 14.311.

<sup>12</sup> Compare Nasdaq Rule 5415 to IEX Rule 14.315.

<sup>13</sup> Once a security is listed on the NGSM, it is subject to the general maintenance requirements that apply to all NGM securities. See Nasdaq Rule 5305(e).

<sup>14</sup> Compare Nasdaq Rule 5450 to IEX Rule 14.320.

Further, both markets have the same continued listing requirements for rights and warrants,<sup>15</sup> and for preferred stock and secondary classes of common stock.<sup>16</sup>

#### **LISTING STANDARDS FOR OTHER SECURITIES**

The IEX listing standards, maintenance, and other requirements for Other Securities, as defined above, are virtually identical to the corollary requirements for NGM.<sup>17</sup> Accordingly, IEX believes there are no differences in the way that Other Securities may be considered for an initial listing or maintained on NGM and IEX that have any bearing on whether the listing standards of the two markets are “substantially similar.”

#### **QUALITATIVE REQUIREMENTS**

In addition to IEX having virtually identical quantitative listing criteria to those of NGSM and NGM, as described above, Nasdaq and IEX rules also contain qualitative requirements that are very similar and in most cases virtually identical, except as otherwise indicated below. First, both Nasdaq and IEX rules use very similar and in some cases identical language to describe their broad discretionary authority over the initial and continued listing of securities on their respective markets.<sup>18</sup> However, unlike Nasdaq, IEX does not permit the listing of securities of an issuer whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specified period of time.<sup>19</sup>

Further, IEX maintains the same general procedures and prerequisites for initial and continued listing, including the requirements for the application and qualifications process for issuers and the prerequisites for applying to list on IEX, as does Nasdaq.<sup>20</sup> A point of distinction from Nasdaq rules is that IEX provides for a mandatory free, confidential pre-application eligibility review by the Exchange to determine whether it meets IEX’s listing criteria, in order to promote efficiency in the application process. Issuers that have cleared this review may then file an original listing application under Rule 14.202. In this respect, IEX follows in all material respects the procedures of NYSE MKT, another Named Market.<sup>21</sup> However, in contrast to NYSE MKT, issuers that do not clear the IEX pre-application eligibility review would receive notification thereof from the Exchange within six months of receipt of all necessary information. Issuers that do not clear the pre-application eligibility review or receive a timely response from the Exchange on a pre-application eligibility review, would have appeal rights pursuant the IEX Rule Series 9.500.

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<sup>15</sup> Compare Nasdaq Rule 5455 to IEX Rule 14.330.

<sup>16</sup> Compare Nasdaq Rule 5460 to IEX Rule 14.340.

<sup>17</sup> Compare Nasdaq Rules 5701-5745 to IEX Rule Chapter 16 (Rules 16.101-16.160). Note that the IEX rules, unlike the Nasdaq rules, do not presently provide for the listing of currency warrants or exchange-traded managed fund shares (“NextShares”). See Nasdaq Rules 5711(k) and 5745.

<sup>18</sup> Compare Nasdaq Rule 5101 to IEX Rule 14.101.

<sup>19</sup> See Nasdaq Rule IM-5101-2.

<sup>20</sup> Compare Nasdaq Rule 5205 to IEX Rule 14.202.

<sup>21</sup> Compare NYSE MKT Company Guide Sec. 201 to IEX Rule 14.201.

IEX also has virtually identical requirements as Nasdaq with respect to the obligations of issuers listed on the Exchange to provide information, make public disclosures, file and distribute various reports, and inform the Exchange of certain corporate events.<sup>22</sup>

IEX has the same corporate governance requirements for issuers as does Nasdaq, including the same requirements with regard to an issuer's board of directors, committees, code of conduct, shareholder meetings, review of related party transactions, and shareholder approvals.<sup>23</sup> IEX also has virtually identical provisions with regard to available exemptions from the corporate governance requirements.<sup>24</sup> Furthermore, IEX requires each listed company to establish and maintain an internal audit function to provide company management and the audit committee with ongoing assessments of the company's risk management process and system of internal control. This enhanced internal control requirement is similar to NYSE Listed Company Manual Section 303A.07(c). There is no comparable Nasdaq provision.<sup>25</sup>

Finally, IEX has very similar rules and procedures as Nasdaq for the independent review, suspension, and delisting of issuers that fail to satisfy one or more standards for continued listing and are thus deficient with respect to the listing standards.<sup>26</sup> Differences in the two sets of rules largely reflect differences in the appeals structure for companies seeking to contest a delisting determination, but IEX does not believe these differences are material for purposes of this petition. More specifically, the Nasdaq process provides that a listed company may appeal a staff delisting determination to a hearing panel, and also provides an appeal process of a hearing panel decision to the Nasdaq Listing and Hearing Review Council, as well as discretionary calls for review by the Nasdaq Listing and Hearing Review Council and Nasdaq board of directors.<sup>27</sup> The IEX process, on the other hand, provides that a listed company may appeal a staff delisting determination to the Listings Review Committee of the Exchange board of directors.<sup>28</sup> The IEX believes that its appeals process is consistent with the Exchange Act and Rule 12d2-2 thereunder.

## **FEES**

IEX will file, pursuant to Section 19 of the Exchange Act and Rule 19b-4 thereunder, a proposed rule change to adopt listing fees. IEX anticipates that its listing fees, as proposed, will be lower

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<sup>22</sup> Compare Nasdaq Rule 5250 to IEX Rule 14.207.

<sup>23</sup> Compare the Nasdaq 5600 rule series with the IEX 14.400 rule series.

<sup>24</sup> Compare Nasdaq Rule 5615 to IEX Rule 14.407.

<sup>25</sup> IEX believes that an internal audit function is a best practice generally and facilitates compliance with Section 404 of the Sarbanes-Oxley Act of 2002.

<sup>26</sup> Compare Nasdaq Rules 5801-5840 to IEX Rule 14.500. IEX and Nasdaq also have comparable rules relating to the listing of shares of an affiliate. Such rules generally require a quarterly report to the Commission detailing the exchange's monitoring of the affiliate's compliance with listing requirements and trading activity and requiring engagement of an independent accounting firm. Compare Nasdaq Rule 4370 to IEX Rule 14.205.

<sup>27</sup> See Nasdaq Rules 5815, 5820 and 5825.

<sup>28</sup> See IEX Rule 14.502.



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than those of the NYSE and Nasdaq and similar to those of BATS and NYSE MKT. As a new entrant to the exchange listing market, IEX expects to adopt listing fees that will be low enough to help us address the competitive challenges of entering the market.

#### **CONCLUSION**

As described above, IEX maintains quantitative listing criteria that in all respects meet, and in many respects exceed, standards that apply to Covered Securities and that the Commission has previously approved for Designated Markets. Further IEX maintains qualitative listing standards that are virtually identical to those of Nasdaq. Accordingly, IEX believes that the approval of its petition is fully justified and will serve to promote competition in exchange listings, as mandated by Section 11A of the Exchange Act. Based on the foregoing, it is appropriate for the Commission to amend Rule 146(b) to designate securities listed on IEX as Covered Securities for the purpose of Section 18 of the Securities Act.

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Please contact the undersigned at 646-343-2040 if you have any questions.

Sincerely,



Sophia Lee  
General Counsel

cc: Richard R. Holley III, Assistant Director, Division of Trading and Markets