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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-93883; File No. SR-IEX-2021-14]

Self-Regulatory Organizations; Investors Exchange LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule for Market Data Fees

December 30, 2021.

I. Introduction

On November 1, 2021, Investors Exchange LLC ("IEX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to modify its Fee Schedule to establish fees, as of January 3, 2022, for the receipt and distribution of proprietary market data feeds. The proposed rule change was published for comment in the Federal Register on November 17, 2021.[3] Pursuant to Section 19(b)(3)(C) of the Act,[4] the Commission is hereby temporarily suspending File No. SR-IEX-2021-14 and instituting proceedings to determine whether to approve or disapprove File No. SR-IEX-2021-14.

II. Description of the Proposed Rule Change

IEX offers two real-time proprietary market data feeds, "TOPS"[5] and "DEEP"[6]

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 93557 (November 10, 2021), 86 FR 64268 (November 17, 2021).

4 15 U.S.C. 78s(b)(3)(C).

5 TOPS is an uncompressed data feed that offers aggregated top of book quotations for all displayed orders resting on the IEX Order Book and last sale information for executions on the Exchange. See Notice, supra note 3, at 64269. According to the Exchange, the data available through TOPS is also available through the securities information processor feed. See id.

6 DEEP is an uncompressed data feed that provides aggregated depth of book quotations for all displayed orders resting on the IEX Order Book at each price level and last sale information for executions on the Exchange. See Notice, supra note 3, at 64269.

(collectively, "IEX Data" or the "market data feeds").[7] DEEP includes all resting displayed liquidity on the Exchange aggregated by price level and it therefore includes the top of book quotes contained in TOPS, as well as less aggressively priced displayed quotes. IEX has not previously imposed fees to access or redistribute its market data feeds.[8]

The Exchange proposes to modify its Fee Schedule to assess fees on Data Subscribers[9] that access IEX Data in real-time.[10] As discussed below, IEX would not itself provide or impose a fee for time-delayed IEX Data.[11] The Exchange proposes to implement these fees on January 3, 2022.

Specifically, IEX proposes to assess Data Subscribers $2,500 per month for its "Real-Time" DEEP feed and $500 per month for its "Real-Time" TOPS feed. The Exchange proposes to define "Real-Time" as "IEX market data that is accessed, used, or distributed less than fifteen (15) milliseconds after it was made available by the Exchange."[12]

Further, the Exchange proposes to assess a $500 per month "Distribution Fee" to each Data Subscriber that redistributes IEX Data in Real-Time to an external, non-affiliated third-party.[13] For Data Subscribers that redistribute IEX Data to others, IEX would not charge them a Distribution Fee if: (1) they only redistribute the IEX Data in Real-Time to internal, affiliated

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7 See Notice, supra note 3, at 64269.

8 See id.

9 The Exchange proposes to define the term "Data Subscriber" as "any natural person or entity that receives Real-Time IEX market data either directly from the Exchange or from another Data Subscriber." See Notice, supra note 3, at 64274. IEX will require Data Subscribers to enter into a Data Subscriber Agreement with IEX in order to receive Real-Time IEX Data. See id. at 64270, n.23.

10 See Notice, supra note 3, at 64269.

11 See Notice, supra note 3, at 64270, n.22.

12 See Notice, supra note 3, at 64274. IEX will consider "market data that is accessed, used, or distributed at least fifteen (15) milliseconds after it was made available by the Exchange" as "Delayed" IEX Data. See id. IEX only provides Real-Time IEX Data and will not itself delay the dissemination of IEX Data to Data Subscribers. See Notice, supra note 3, at 64269, n.22.

13 See Notice, supra note 3, at 64269.

parties; or (2) they delay distribution of the data by at least fifteen milliseconds before redistributing it.

For recipients of IEX Data, IEX would not consider them a "Data Subscriber" and would not charge them the TOPS or DEEP fees if they only (1) receive IEX Data subject to a delay of at least a fifteen milliseconds[14] or (2) receive Real-Time IEX Data internally from an affiliate.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[15] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[16] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization ("SRO") 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. As described below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

In support of its proposed market data fees, the Exchange states "its belief that the fees each equities exchange charges for its proprietary market data are not subject to competitive forces"[17] and therefore has proposed fees that it believes are "fair and reasonable as a form of cost recovery plus the possibility of a reasonable return for IEX's aggregate costs of offering IEX Data to its Data Subscribers."[18] With respect to its proposed cost-based fees, IEX provides a summary of its annual market data infrastructure costs ($2,483,644 for 2021), with a

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14 See Notice, supra note 3, at 64270. The Exchange notes that a recipient of Delayed IEX Data may be subject to fees imposed by the redistributor of the Delayed IEX Data pursuant to the contract between the recipient of the Delayed IEX Data and the third-party provider of such market data. See id. at 64270, n.24.

15 15 U.S.C. 78s(b)(3)(C).

16 15 U.S.C. 78s(b)(1).

17 See Notice, supra note 3, at 64274.

18 See Notice, supra note 3, at 64274.

breakdown of selected line-item costs including direct costs, enhancement initiative costs, and personnel costs.[19] IEX states that its proposed fees are reasonable under the Act because they are "based both on the relative costs to IEX to generate TOPS and DEEP, as well as IEX's objective to make TOPS broadly available to a range of market participants including long-term investors."[20] IEX further asserts that its proposed fees "are reasonable because they are designed to generate annual revenue of approximately $3.1 million (reflecting a 25% markup over costs),"[21] though IEX acknowledges a potential markup from "break even" or even below aggregate costs to an aggregate markup of 95%, depending on the number of paying subscribers it ultimately will have.[22] IEX further states that it "is only charging Data Subscribers who use IEX Data in real time" and argues that its proposed fees "are significantly less than the fees charged by competing equities exchanges" and that its fee proposal "will not impose onerous audit requirements on Data Subscribers."[23]

When an Exchange files a proposed rule change with the Commission, including fee filings, it is required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[24] The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."[25]

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19 See Notice, supra note 3, at 64271.

20 See Notice, supra note 3, at 64274-75.

21 See Notice, supra note 3, at 64275.

22 See Notice, supra note 3, at 64273.

23 See Notice, supra note 3, at 64275.

24 See 17 CFR 240.19b-4 (General Instructions for Form 19b-4 – Information to be Included in the Complete Form – Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

25 See id.

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), requires, among other things, that the rules of an exchange: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[26] (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[27] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[28]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposed fees are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; are designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[29]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[30]

IV. Proceedings to Determine Whether to Approve or Disapprove SR-IEX-2021-14 and

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26 15 U.S.C. 78f(b)(4).

27 15 U.S.C. 78f(b)(5).

28 15 U.S.C. 78f(b)(8).

29 See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

30 For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Grounds for Disapproval Under Consideration

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[31] and 19(b)(2)(B)[32] of the Act to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[33] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),[34] 6(b)(5),[35] and 6(b)(8)[36] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires

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31 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

32 15 U.S.C. 78s(b)(2)(B).

33 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

34 15 U.S.C. 78f(b)(4).

35 15 U.S.C. 78f(b)(5).

36 15 U.S.C. 78f(b)(8).

that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposal and asks commenters to submit data where appropriate to support their views:

1. Cost Allocation. IEX states it "does not believe that exchange market data fees are constrained by competitive market forces,"[37] and that "each exchange has a natural monopoly over its own market data."[38] Consequently, for market data fee filings, IEX believes that exchanges "should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements" and that "each exchange should demonstrate that these fees bear a reasonable relationship to its costs and reasonable business needs and that it is not taking unfair advantage of its unique position as the sole provider of its own proprietary market data."[39] In proposing its fees, IEX says it used a "cost-plus model" and "sought to determine such fees in a transparent way in relation to its own aggregate costs of

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37 Notice, supra note 3 at 64272.

38 Notice, supra note 3 at 64269.

39 Notice, supra note 3 at 64269.

providing the related service…."[40] IEX says it used a "conservative methodology (i.e., that strictly considers only those costs that are most clearly directly related to the production and distribution of IEX Data) to estimate such costs, as well as the relative costs of compiling the TOPS and DEEP feeds. . ."[41] and also considered its "objective to make TOPS broadly available to a range of market participants including long-term investors."[42] IEX summarizes its cost components according to (1) direct costs (servers, infrastructure, monitoring), (2) enhancement initiative costs (new functionality and capacity), and (3) personnel.[43] IEX asserts that direct costs are those that are specifically dedicated to IEX Data and that physical assets and software are valued at cost and depreciated over three years.[44] For direct costs, IEX notes that "servers included were limited to those specifically dedicated to IEX Data" and that "[a]ll physical assets and software, which also includes assets used for testing and monitoring of market data infrastructure, were valued at cost, and depreciated over three years."[45] Do commenters believe IEX has provided sufficient detail about the specific direct costs it has assigned to market data to justify its proposal? For enhancement initiative costs, IEX asserts that, though they are one-time costs, it expects to incur "annual enhancement costs on an ongoing basis" that "will be similar" to what it incurred in 2021.[46] Do commenters believe enhancement costs are sufficiently clear and defined? Further, do commenters expect costs (enhancement costs as well as all other costs) incurred in 2021 to be generally representative of an

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40 Notice, supra note 3 at 64269-70.

41 Notice, supra note 3 at 64270.

42 Notice, supra note 3 at 64274-75.

43 Notice, supra note 3 at 64270-71.

44 Notice, supra note 3 at 64271.

45 Notice, supra note 3 at 64271.

46 Notice, supra note 3 at 64270, n.31.

exchange's expected costs going forward (to the extent commenters consider 2021 to be an atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along with estimates costs? For personnel costs, IEX "calculated an allocation of employee time for employees whose functions include providing and maintaining IEX Data and/or the proprietary market data feeds used to transmit IEX Data, and used a blended rate of compensation reflecting salary, stock and bonus compensation, bonuses, benefits, payroll taxes, and 401(k) matching contributions."[47] IEX estimates 6.15 FTEs who "work in support of compiling and disseminating IEX Data,"[48] but does not identify the department and job title of all employees it counted as "work[ing] in support of compiling and disseminating IEX Data" nor does it explain the methodology it used to determine how much of an employee's time is devoted to that specific activity (e.g., are finance, legal, HR, administrative personnel included in this estimate and what portion of their time did IEX count towards market data costs and why?). Further, IEX uses a "blended compensation rate… to determine the personnel costs associated with compiling and disseminating IEX Data,"[49] which includes salary, stock compensation, annual cash bonus, benefits, payroll taxes, and 401(k) matching contributions.[50] Do commenters believe those are appropriate criteria? In particular, would it be appropriate to include stock compensation and annual cash bonuses in a blended compensation rate for purposes of assessing market data costs if those items are based on an exchange's overall profitability or performance and not the individual employee's performance (and thus not directly attributable to market data)? Across

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47 Notice, supra note 3 at 64271.

48 Notice, supra note 3 at 64271, n.33.

49 Notice, supra note 3 at 64271, n.33.

50 See, e.g., Cost Study at 3.

all of these costs, what are commenters' views on whether the Exchange has provided sufficient detail on the elements that go into its market data costs, including how it allocated and attributed shared costs to market data expenses, to permit an independent review of its costs and meaningfully assess the reasonableness of purported cost-based fees and the corresponding profit margin thereon?

2. TOPS versus DEEP. IEX states that its proposed market data fee structure is "designed to make real time access to IEX's top of book widely available to a broad base of market participants" and, to accomplish that goal, IEX "proposes to allocate its cost plus structure so that TOPS is materially more affordable than DEEP." IEX notes that "because it contains multiple price levels, DEEP requires more processing (and related costs) for IEX to generate than TOPS."[51] As proposed, DEEP ($2,500) is five times more expensive than TOPS ($500). However, IEX does not assert in its filing that DEEP is five times more costly for it to produce than TOPS, nor does IEX present its separate costs to produce DEEP and TOPS individually. Rather, IEX appears to be subsidizing TOPS, though it has not presented a cost-based explanation for how it is doing so or explained the extent to which it is subsidizing TOPS through the proposed fees for DEEP or some other source of revenue. Do commenters believe that the price difference between TOPS and DEEP is consistent with IEX's assertions that it set the level of its proposed fees "in relation to its own aggregate costs of providing the related service…"[52] and according to the "relative costs of compiling the TOPS and DEEP feeds?"[53] Do commenters believe that IEX should provide more detail about the types of market participants that subscribe to TOPS and DEEP in order to assess, among other things, IEX's statement that "fees also do not

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51 Notice, supra note 3 at 64270.

52 Notice, supra note 3 at 64269.

53 Notice, supra note 3 at 64270.

depend on any distinctions between Members, customers, broker-dealers, or any other entity, because they are solely determined by the individual Data Subscriber's business needs?"[54]

3. Subscribers. IEX acknowledges that imposing a fee on the proprietary market data it previously offered for free may cause some of its current market data subscribers to terminate or modify their current subscriptions.[55] Specifically, IEX says it "currently has 70 Data Subscribers who it believes are individuals and expects that most, if not all, of the individual Data Subscribers will terminate their subscriptions for IEX Data" once IEX charges for Real-Time data (though "if they choose to continue to receive IEX Data, [they] can opt to receive Delayed IEX Data from a third-party vendor or through HIST").[56] IEX says (without providing supporting numbers) that the "remaining, non-individual, Data Subscribers are made up of approximately one-third IEX Members, one-third professional market participants that are not IEX Members (e.g., hedge funds and broker-dealers), and one-third data vendors" and "[b]ased on IEX's general understanding of many of its current Data Subscribers' business models, IEX projects at least half of the data vendors will retain all of their existing subscriptions for IEX Data while the others may cancel their real-time data subscriptions, and also anticipates that several Members and non-Members will cancel their real-time data subscriptions for either TOPS, DEEP, or both."[57] IEX did not offer any further explanation of its basis for these projections. For example, how many non-individual Data Subscribers does IEX have that subscribe to each of TOPS, DEEP, or TOPS and DEEP, and on what basis does IEX estimate they will alter their

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54 Notice, supra note 3 at 64275.

55 See Notice, supra note 3 at 64273 (discussing IEX's projections regarding how fees are likely to impact IEX market data subscriptions).

56 Notice, supra note 3 at 64273.

57 See id.

current subscriptions? Has IEX received any verbal or written indication of such subscribers' likely intent? Do commenters believe IEX has provided sufficient information regarding its current market data subscriber base as well as sufficient information to support its projections regarding what types of current subscribers (i.e., individuals, vendors, members, and non-members) may terminate or modify their current subscriptions and why? Do commenters believe that additional detail on estimated subscribers to TOPS, DEEP, or TOPS and DEEP is necessary and useful to assess the Exchange's estimated profit margin on market data?

4. Profit Margin Range. IEX states that its proposed fee structure is "designed to recoup its costs and limit any revenue in excess of cost to an amount that represents no more than what IEX believes is a reasonable rate of return over such costs."[58] Depending on how many paying subscribers IEX will have once the fees take effect, IEX projects that the proposed market data fees will generate revenue of up to 95% above cost, though it has targeted and projects a 25% return over costs based on its estimate of subscribers.[59] IEX attributes the wide range to its inability to know beforehand who will subscribe to TOPS or DEEP (or both or neither). If IEX is incorrect and all people that currently obtain IEX Data (for free) keep that data and pay the fee, IEX estimates it could generate revenue of 95% above cost. On the other hand, IEX also acknowledges that "revenues could range from 'break even' (or even below aggregate costs)" if its projections are incorrect.[60] However, IEX does not specify the circumstances under which it would receive zero or negative profit margins or the likelihood of that occurring. Further, IEX does not specifically explain why it believes that profit margins of up to 95% are appropriate nor does it provide an

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58 Notice, supra note 3 at 64271.

59 Notice, supra note 3 at 64273.

60 Notice, supra note 3 at 64273.

argument to support a finding that fees within that range would be reasonable under the Act. Do commenters find IEX's projected range to be appropriately narrow for a cost-based fee filing, or should IEX provide a more detailed and precise estimate in order to facilitate consideration of whether the proposed fees are reasonable and equitably allocated? Do commenters believe that the top-end of the range (95%) would constitute a reasonable rate of return over cost for proprietary market data?

5. Reasonable Rate of Return. IEX believes that a 95% return "is unlikely" and "is targeting a return of 25% over its costs"[61] because "market participants that do not need real-time data will have the option to receive Delayed IEX Data (at a minimal delay of only 15 milliseconds) in lieu of real-time data, without paying a fee to IEX."[62] IEX states that its proposed fees are reasonable because, among other things, "IEX is only charging Data Subscribers who use IEX Data in real time" and the fees "are significantly less than the fees charged by competing equities exchanges...."[63] If IEX's subscriber estimates are correct, do commenters agree with IEX that its targeted 25% profit margin would constitute a reasonable rate of return over cost for proprietary market data? If not, what would commenters consider to be a reasonable rate of return for proprietary market data fees? The rate of return is dependent on the accuracy of the cost allocations which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. What are commenters' views regarding what factors should be considered in determining what constitutes a reasonable rate of return for proprietary market data fees?

6. Periodic Reevaluation. IEX represented that "[i]f the revenue IEX receives from the proposed fees materially deviates from IEX's projections described herein, IEX will

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61 Notice, supra note 3 at 64271.

62 Notice, supra note 3 at 64272.

63 Notice, supra note 3 at 64275.

assess whether it is appropriate to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly."[64] In light of the impact that the number of subscribers has on market data profit margins (because market data costs do not necessarily linearly change as the number of subscribers increase or decrease), what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based proprietary market data fees to ensure that they stay in line with their stated profitability target and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new market data fee change is implemented should an exchange assess whether its subscriber estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a proprietary market data fee becomes operative?

7. Real-Time. IEX is only proposing to assess fees for market data that is made available in "Real-Time." The Exchange is proposing to define "Real-Time" market data as IEX market data that is accessed, used, or distributed less than fifteen milliseconds after it was made available by the Exchange. IEX states that it "sought informal feedback from Members and other Data Subscribers" and, "[b]ased upon that informal feedback, IEX believes that most, if not all, non-electronic trading desks would be able to continue to use IEX Data if it was received subject to at least a fifteen-millisecond delay."[65] What are commenters' views on this threshold and whether this definition accurately reflects and correlates to IEX's assertion that "it is

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64 Notice, supra note 3 at 64271, n.44.

65 Notice, supra note 3 at 64273.

the very demand for real-time, low latency data that drives much of the costs associated with creating and distributing" such data?[66] Do commenters agree with IEX's statement that "most, if not all, non-electronic trading desks would be able to continue to use IEX Data if it was received subject to at least a fifteen-millisecond delay," and that (conversely) electronic trading desks that need IEX Data for trading purposes require the data to have less than a 15 millisecond delay?[67] Similarly, do commenters agree with IEX's statement that a fifteen-millisecond delay is "a time frame that is usable for most trading purposes" (i.e., does usefulness to "non-electronic trading desks" cover "most trading purposes"), while the fifteen-minute delay offered by other exchanges "makes the data stale for any subscribers using the data to make trading decisions"?[68]

8. Distribution Fee. IEX proposes a $500 redistribution fee because "[e]nabling redistribution in real time adds to IEX's administrative expenses related to the need to identify and track the recipients of IEX Data."[69] IEX does not, however, provide any estimate of such administrative expenses, nor does it mention its targeted profit margin on the proposed Distribution Fee. IEX also justifies the proposed Distribution Fee by noting that "if it allowed Data Subscribers to redistribute IEX Data in real time without any additional fees, it could enable Data Subscribers to circumvent IEX's fees for providing IEX Data, which would conflict with IEX's objective to recover its costs of producing IEX Data."[70] IEX does not explain how the proposed Distribution Fee would discourage Data Subscribers from circumventing the TOPS and/or DEEP fees. What are commenters' views on the adequacy of the information

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66 Notice, supra note 3 at 64270.

67 Notice, supra note 3 at 64273.

68 Notice, supra note 3 at 64275.

69 Notice, supra note 3 at 64270.

70 Notice, supra note 3 at 64270.

IEX provides regarding its proposed Distribution Fee?

9. Delayed IEX Data. IEX does not propose to itself directly offer Delayed IEX Data, nor does it propose to charge persons that access, receive, or distribute Delayed IEX Data from third parties. IEX states that its proposal will continue "to allow market participants to access IEX Data free of charge if they can wait at least fifteen milliseconds to receive it"[71] but acknowledges that "[d]istributors of Delayed IEX Data may charge a fee for the data, but that fee is not payable to IEX."[72] What do commenters think will be the end costs to consumers of Delayed IEX Data? While IEX itself will not charge for Delayed IEX Data, do commenters think there is sufficient competition among data vendors such that market participants will have access to Delayed IEX Data for a reasonable fee?

10. Sharing with Affiliates. In an example discussing the other exchanges that charge for proprietary market data, IEX explains that "the aggregate monthly cost for those 11 equity exchanges [to obtain IEX Data] would be $3,000 per exchange family."[73] That statement, however, appears to be inconsistent with the rule text and the proposed definition of Data Subscriber. Specifically, IEX's proposed rule text defines "Data Subscriber" as "any natural person or entity that receives Real-Time IEX market data either directly from the Exchange or from another Data Subscriber."[74] Further, it states that each Data Subscriber "must enter into a Data Subscriber Agreement with IEX in order to receive Real-Time IEX market data"[75] as well as pay the applicable fee. Yet, IEX's example of affiliated exchanges states that an exchange family would only be assessed $3,000 in fees (i.e., $2,500 for DEEP and $500 for TOPS), despite

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71 Notice, supra note 3 at 64275.

72 Notice, supra note 3 at 64276, n.75.

73 Notice, supra note 3 at 64272.

74 Notice, supra note 3 at 64274.

75 See id.

the fact that each exchange within a family would independently meet the proposed definition of Data Subscriber. IEX's filing appears incomplete with respect to how the proposed fees would apply in the case of internal sharing of TOPS and/or DEEP with an affiliate.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."[76] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[77] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[78] Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[79]

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, any potential comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns and issues identified above, as well as

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76 Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

77 See id.

78 See id.

79 See Susquehanna Int'l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[80]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-IEX-2021-14 on the subject line.

Paper comments:

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

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80 Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

All submissions should refer to File Number SR-IEX-2021-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number IEX-2021-14 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[81] that File No. SR-IEX-2021-14 be, and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[82]

Eduardo A. Aleman,

Deputy Secretary.

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81 15 U.S.C. 78s(b)(3)(C).

82 17 CFR 200.30-3(a)(57) and (58).