

*Required fields are shown with yellow backgrounds and asterisks.*

Filing by ISE Mercury, LLC  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

|                                     |   |                                     |                                      |                                      |                          |
|-------------------------------------|---|-------------------------------------|--------------------------------------|--------------------------------------|--------------------------|
| Initial *                           | Amendment *   | Withdrawal                          | Section 19(b)(2) *                   | Section 19(b)(3)(A) *                | Section 19(b)(3)(B) *    |
| <input checked="" type="checkbox"/> | <input type="checkbox"/>  | <input type="checkbox"/>            | <input checked="" type="checkbox"/>  | <input type="checkbox"/>             | <input type="checkbox"/> |
|                                     |   |                                     | Rule                                 |                                      |                          |
| Pilot <input type="checkbox"/>      | 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 type="checkbox"/> 19b-4(f)(6) |                          |

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| 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 \*).

Proposal to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC and (2) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange

**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 * | <input type="text" value="Angela"/>                              | Last Name * | <input type="text" value="Dunn"/> |
| Title *      | <input type="text" value="Principal Associate General Counsel"/> |             |                                   |
| E-mail *     | <input type="text" value="Angela.Dunn@nasdaq.com"/>              |             |                                   |
| Telephone *  | <input type="text" value="(215) 496-5692"/>                      | Fax         | <input type="text"/>              |

**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 | <input type="text" value="12/09/2016"/>                   | Executive Vice President and General Counsel          |
| By   | <input type="text" value="Edward S. Knight"/><br>(Name *) | <input type="text" value="edward.knight@nasdaq.com"/> |

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 EFFF 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 the Proposed Rule Change

(a) ISE Mercury, LLC (“ISE Mercury” or the “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC (“NES”) from certain affiliated exchanges, as described in detail below, by establishing procedures designed to prevent potential informational advantages resulting from the affiliation with NES; and (2) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange.

A notice of the proposed rule change for publication in the Federal Register is at Exhibit 1 and the text of the amended Exchange Rule is at Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange on November 10, 2016. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Angela Saccomandi Dunn  
Principal Associate General Counsel  
Nasdaq, Inc.  
215-496-5692.

Adrian Griffiths  
Assistant General Counsel  
International Securities Exchange, LLC  
212-897-8176

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

a. Purpose

The purpose of the filing is to permit ISE Mercury to receive inbound orders in options routed through Nasdaq Execution Services, LLC ("NES") from certain affiliated exchanges, as described herein and establish procedures designed to prevent potential informational advantages resulting from the affiliation between ISE Mercury and NES. The Exchange requests an exemption herein to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange. Separately, the Exchange is also filing to permit ISE Mercury to route outbound orders through NES either directly or indirectly through a third party routing broker-dealer<sup>3</sup> to other market centers and add a rule regarding the cancellation of orders and the maintenance of a NES error account.<sup>4</sup>

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<sup>3</sup> The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings.

<sup>4</sup> The ability to route orders to other exchanges using either the Exchange's affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings. See ISE-2016-27 (not published) which amends ISE Chapter 19, Rules 1901, 1903, 1904 and 190. The ISE rule changes impact ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook.

**Restriction on Affiliation**

NES is a broker-dealer owned and operated by Nasdaq, Inc. NES is affiliated with International Securities Exchange, LLC (“ISE”), ISE Gemini, ISE Mercury LLC,<sup>5</sup> NASDAQ PHLX LLC (“Phlx”), The NASDAQ Options Market LLC (“NOM”) and NASDAQ BX, Inc. (“BX”). For purposes of this filing the term “Affiliated Entities” shall refer to ISE, ISE Gemini, Phlx, NOM and BX (collectively “Affiliated Entities”). Currently, NES is a member of Phlx, NOM and BX (collectively “Nasdaq Exchanges”) and provides all options routing functions for Phlx, NOM and BX.<sup>6</sup>

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (“Nasdaq”) Rule 2160 (Restrictions on Affiliation)<sup>7</sup> and BX Rule 2140 (Restrictions on Affiliation) currently prohibit the Nasdaq Exchanges or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, a Nasdaq Exchange member or an affiliate of a Nasdaq Exchange member in the absence of an effective filing under 19(b) of the Act. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange’s self-regulatory obligations and its commercial interests.<sup>8</sup>

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<sup>5</sup> ISE, ISE Gemini and ISE Mercury are collectively referred to as “ISE Exchanges.”

<sup>6</sup> See Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

<sup>7</sup> NOM is a facility of Nasdaq.

<sup>8</sup> Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05); 71419 (January 28, 2014), 79 FR 6247

NES was permitted by the Commission to perform similar functions for the Nasdaq Exchanges by permitting NES to become a member of those three markets, respectively.<sup>9</sup>

Similarly, NES would be prohibited from becoming an ISE Mercury member pursuant to ISE Mercury Rule 309, titled “Limitation on Affiliation between the Exchange and Members,” without Commission approval. Specifically, a Member or non-member owner may not become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated such as the Affiliated Entities. This rule change requests permission from the Commission to allow NES, an affiliate of ISE Mercury to become a Member of ISE

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(February 3, 2014) (SR-NASDAQ-2014-007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR-BX-2014-003).

<sup>9</sup> See Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR-Phlx-2009-32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR-Phlx-2009-32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2010)(SR-Phlx-2010-36)(notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05)(notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. See also Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR-BX-2011-003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR-BX-2011-007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR-BX-2014-004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing). See also Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011)(SR-NASDAQ-2011-142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014)(SR-NASDAQ-2014-008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

Mercury for the purpose of performing certain functions, including, but not limited to receiving inbound orders from one of the Affiliated Entities.

In order for NES to be a Member of ISE Mercury, the Exchange proposes to permit the acceptance of inbound orders that NES routes in its capacity as a facility of the Affiliated Exchanges<sup>10</sup> subject to certain limitations and conditions as follows:

- First, ISE Mercury shall maintain a Regulatory Services Agreement (“RSA”) with FINRA, as well as an agreement pursuant to Rule 17d–2 under the Act (“17d–2 Agreement”).<sup>11</sup> Pursuant to the RSA and the 17d–2 Agreement, FINRA will be allocated regulatory responsibilities to review NES’s compliance with certain Exchange rules.<sup>12</sup> Pursuant to the RSA, however, ISE Mercury retains ultimate responsibility for enforcing its rules with respect to NES.

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<sup>10</sup> The Exchange notes that it is separately filing rule changes to permit NES to be a Member of ISE and ISE Mercury for the purpose of performing certain routing and other functions, including, but not limited to receiving inbound orders from other entities that are affiliated with NES such as the Affiliated Entities. See SR-ISE-2016-27 and SR-ISEMercury-2016-22 (both not published).

<sup>11</sup> 17 CFR 240.17d-2. FINRA will review NES’ compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3-1(a)(1)(ii) and operate pursuant to SEC Rule 15c3-3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

<sup>12</sup> NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

- Second, FINRA will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.<sup>13</sup>
- Third, FINRA will provide a report to the Exchange's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, ISE Mercury has in place Rule 309. The Exchange proposes to adopt a new paragraph (b) to Rule 309 to state that Nasdaq, Inc., as the holding company owning ISE Mercury and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to ISE Mercury's system, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange

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<sup>13</sup> Both FINRA and ISE Mercury collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Nasdaq Exchanges) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.



Members, in connection with the provision of inbound order routing to the Exchange.<sup>14</sup>

The Exchange also proposes to add the letter “(a)” in front of the existing paragraph in Rule 309.

### **Inbound Routing**

ISE Mercury Rule 309 is being amended to add rule language similar to Phlx Rule 985(c)(2). This new rule text provides that Nasdaq, Inc. which owns NES and ISE Mercury, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to Exchange members in connection with the provision of inbound routing to the Exchange.

By meeting the above conditions, ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury’s regulatory responsibilities, respectively, with NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury.

The Exchange has approval from Financial Regulatory Authority (“FINRA”)<sup>15</sup> and The Options Clearing Corporation (“OCC”)<sup>16</sup> for NES to perform these functions.

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<sup>14</sup> Similarly, Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx, or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b). See Phlx Rule 985(b)(1)(B). Phlx filed a rule proposal and received approval based on meeting the four conditions specified above to protect the independence of the Exchange's regulatory responsibility with respect to NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

The Exchange notes that it is also separately filing rule changes for each of the Nasdaq Exchanges to permit NES to route orders from ISE Mercury to the Nasdaq Exchanges.<sup>17</sup>

### **Outbound Routing**

ISE has rules in place in Chapter 19 related to routing orders, which rules impact routing on ISE Mercury because those rules are cross-referenced. Today, ISE Mercury utilizes Linkage Handlers<sup>18</sup> to route orders. These Linkage Handlers are unaffiliated with ISE Mercury. The Exchange proposes to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE Mercury.<sup>19</sup> With the proposal, regardless of whether a third-party routing broker is utilized, all options routing will go through NES, however the Exchange could determine to direct NES to route orders to certain exchanges through a routing broker rather than routing an order directly. In those cases, orders are submitted to the third-party routing broker through NES, and the third-party routing broker routes the orders to the routing

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<sup>15</sup> The Membership Agreement as between NES and FINRA, dated January 15, 2014, provides that NES may “[e]ngage in the following types of business: Route orders in equities and options to the appropriate market center for execution in accordance with member order and requirements.”

<sup>16</sup> On December 5, 2013 OCC provided NES membership approval.

<sup>17</sup> See SR-NASDAQ-2016-169, SR-Phlx-2016-120 and SR-BX-2016-068 (not published).

<sup>18</sup> A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in Rule 1903, by routing ISO(s) to other exchange(s) as agent on behalf of Public Customer and Non-Customer Orders according to the requirements of Rule 1901 (prohibition on trade-throughs) and Rule 1902 (prohibition on locked and crossed markets). See Supplementary Material .03 to ISE Rule 1901.

<sup>19</sup> See SR-ISE-2016-27 (not published).

destination in its name.<sup>20</sup> Specifically, within that proposal ISE proposes to amend Rule 1903 to adopt new language similar to Phlx Rule 1080(m).<sup>21</sup> The Exchange also proposed to amend Rule 1904 to replace the rule text with rule text similar to Phlx Rule 1080(m)(v).<sup>22</sup> Rule 1901 is being amended to remove references to Linkage Handlers along with other references in Rules 1903.<sup>23</sup> Finally Rule 190 concerning error accounts is being deleted within that proposal.<sup>24</sup>

The Exchange also proposes to amend Rule 705 to remove the rule text in Rule 705(d)(4) which provided an exception to the limits on compensation for Linkage Handlers. NES is replacing the Linkage Handlers for purposes of routing options orders from the ISE Exchanges. Today, Phlx does not have a similar provision and ISE is removing it from this rule.

### **Implementation**

The Exchange notes that with respect to the Rules in Chapter 19, Rules 1901, 1903, 1904 and 1905, these rules impact not only the ISE market but also ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook. ISE Mercury will be implemented in Q3 2017 on a symbol by symbol basis. The Exchange will add notations in the ISE Mercury Rulebook to cross reference the amended rule text and make clear the implementation date.

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<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>25</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>26</sup> in particular, in that it is designed 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, because the proposed rule change will allow the Exchange to receive inbound orders from an affiliate, NES, acting in its capacity as a facility of the Exchange, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

Further, the Exchange notes that its proposal is designed 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 because ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, respectively, with NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

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<sup>25</sup> 15 U.S.C. 78f(b).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

The proposal should remove impediments to and perfect the mechanism of a free and open market and a national market system by providing customer order protection and by facilitating trading at away exchanges so customer orders trade at the best market price. The proposal should also protect investors and the public interest by fostering compliance with the Options Order Protection and Locked/Crossed Market Plan. In addition, the Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because of the specific protections pertaining to the routing broker, in light of the potential conflict of interest where the member routing broker could have access to information regarding other members' orders or the routing of those orders. These protections include the Exchange's control over all routing logic as well as the confidentiality of routing information.<sup>27</sup>

The Exchange believes that its proposal related to the cancellation of orders and error account is consistent with the Act because NES's or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market.<sup>28</sup> Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets.<sup>29</sup> Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the

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<sup>27</sup> See proposed Rule 1903(e).

<sup>28</sup> See SR-ISE-2016-27 (not published).

<sup>29</sup> Id.

proposed amendments to Rule 1904 would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange.<sup>30</sup> Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process.<sup>31</sup> The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members.<sup>32</sup> The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.<sup>33</sup>

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Receiving orders through NES does not raise any issues of intra-market competition because it involves inbound routing from an affiliated exchange. This proposal provides that Nasdaq, which owns NES and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange. Utilizing NES as the routing broker does not create any undue burden on inter-market competition because NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal does not result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate. Further, the proposal does not raise issues of intra-market competition, because the Exchange's decision to route through a particular routing broker would impact all participants equally.

With respect to the proposal to establish error accounts, the Exchange's proposal does not result in a burden on competition among exchanges because NES' or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market for all impacted members. The proposals regarding assumption of error positions and to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.<sup>34</sup>

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

No written comments were either solicited or received.

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<sup>34</sup> See SR-ISE-2016-27 (not published).

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)

Not applicable.

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

The Exchange's request for approval to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange is similar to Phlx Rule 985(c). The proposal to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE is also similar to Phlx Rule 1080(m).

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 Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
5. Text of the proposed rule change.



**EXHIBIT 1**

## SECURITIES AND EXCHANGE COMMISSION

(Release No. \_\_\_\_\_ ; File No. SR-ISEMercury-2016-22)

December \_\_, 2016

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing of Proposed Rule Change to Route through Nasdaq Execution Services, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 9, 2016, ISE Mercury, LLC (“ISE Mercury” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. 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

The Exchange proposes to (1) permit the Exchange to receive inbound orders in options routed through Nasdaq Execution Services, LLC (“NES”) from certain affiliated exchanges, as described in detail below, by establishing procedures designed to prevent potential informational advantages resulting from the affiliation with NES; and (2) grant the Exchange an exemption to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at [www.ise.com](http://www.ise.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange 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 statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the filing is to permit ISE Mercury to receive inbound orders in options routed through Nasdaq Execution Services, LLC ("NES") from certain affiliated exchanges, as described herein and establish procedures designed to prevent potential informational advantages resulting from the affiliation between ISE Mercury and NES. The Exchange requests an exemption herein to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform certain routing and other functions on behalf of the Exchange. Separately, the Exchange is also filing to permit ISE Mercury to route outbound orders through NES either directly or indirectly through a

third party routing broker-dealer<sup>3</sup> to other market centers and add a rule regarding the cancellation of orders and the maintenance of a NES error account.<sup>4</sup>

### **Restriction on Affiliation**

NES is a broker-dealer owned and operated by Nasdaq, Inc. NES is affiliated with International Securities Exchange, LLC (“ISE”), ISE Gemini, ISE Mercury LLC,<sup>5</sup> NASDAQ PHLX LLC (“Phlx”), The NASDAQ Options Market LLC (“NOM”) and NASDAQ BX, Inc. (“BX”). For purposes of this filing the term “Affiliated Entities” shall refer to ISE, ISE Gemini, Phlx, NOM and BX (collectively “Affiliated Entities”). Currently, NES is a member of Phlx, NOM and BX (collectively “Nasdaq Exchanges”) and provides all options routing functions for Phlx, NOM and BX.<sup>6</sup>

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (“Nasdaq”) Rule 2160 (Restrictions on Affiliation)<sup>7</sup> and BX Rule 2140 (Restrictions on Affiliation) currently prohibit the Nasdaq Exchanges or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an

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<sup>3</sup> The ability to route orders to other exchanges using either the Exchange’s affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings.

<sup>4</sup> The ability to route orders to other exchanges using either the Exchange’s affiliated broker-dealer (NES) or a third party unaffiliated broker-dealer, which the Exchange may choose to use, is for efficiency and potential cost savings. See ISE-2016-27 (not published) which amends ISE Chapter 19, Rules 1901, 1903, 1904 and 190. The ISE rule changes impact ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook.

<sup>5</sup> ISE, ISE Gemini and ISE Mercury are collectively referred to as “ISE Exchanges.”

<sup>6</sup> See Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

<sup>7</sup> NOM is a facility of Nasdaq.

ownership interest in, or engaging in a business venture with, a Nasdaq Exchange member or an affiliate of a Nasdaq Exchange member in the absence of an effective filing under 19(b) of the Act. Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of interest between an exchange's self-regulatory obligations and its commercial interests.<sup>8</sup> NES was permitted by the Commission to perform similar functions for the Nasdaq Exchanges by permitting NES to become a member of those three markets, respectively.<sup>9</sup>

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<sup>8</sup> Securities Exchange Act Release Nos. 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05); 71419 (January 28, 2014), 79 FR 6247 (February 3, 2014) (SR-NASDAQ-2014-007); and 714121 (January 28, 2014), 79 FR 6264 (February 3, 2014) (SR-BX-2014-003).

<sup>9</sup> See Securities Exchange Act Release Nos. 59721 (April 7, 2009), 74 FR 17245 (April 14, 2009) (SR-Phlx-2009-32); 59779 (April 16, 2009) 74 FR 18600 (April 23, 2009) (SR-Phlx-2009-32, Amendment No. 1) notice of filing of proposed rule change relating to enhanced electronic trading platform for options); 61667 (March 5, 2010), 75 FR 11964 (March 12, 2010)(SR-Phlx-2010-36)(notice of filing and immediate effectiveness of proposed rule changes to establish procedures to prevent information advantages resulting from the affiliation between Phlx and NES); and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05)(notice of filing and immediate effectiveness of proposed rule change to inbound routing of options orders). Nasdaq Options Services was the affiliated broker-dealer prior to a rule change to utilize NES, another affiliated broker-dealer of Nasdaq. See also Securities Exchange Act Release Nos. 63769 (January 25, 2011), 76 FR 5423 (January 31, 2011) (SR-BX-2011-003); 63859 (February 7, 2011), 76 FR 8391 (February 14, 2011) (SR-BX-2011-007) (notice of filing of proposed rule change relating to permanent approval of the BX and NES inbound routing relationship); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014)(SR-BX-2014-004)(notice of filing and immediate effectiveness of proposed rule change to inbound routing). See also Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011)(SR-NASDAQ-2011-142); 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014)(SR-NASDAQ-2014-008)(notice of filing and immediate effectiveness of proposed rule change to inbound routing).

Similarly, NES would be prohibited from becoming an ISE Mercury member pursuant to ISE Mercury Rule 309, titled “Limitation on Affiliation between the Exchange and Members,” without Commission approval. Specifically, a Member or non-member owner may not become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated such as the Affiliated Entities. This rule change requests permission from the Commission to allow NES, an affiliate of ISE Mercury to become a Member of ISE Mercury for the purpose of performing certain functions, including, but not limited to receiving inbound orders from one of the Affiliated Entities.

In order for NES to be a Member of ISE Mercury, the Exchange proposes to permit the acceptance of inbound orders that NES routes in its capacity as a facility of the Affiliated Exchanges<sup>10</sup> subject to certain limitations and conditions as follows:

- First, ISE Mercury shall maintain a Regulatory Services Agreement (“RSA”) with FINRA, as well as an agreement pursuant to Rule 17d-2 under the Act (“17d-2 Agreement”).<sup>11</sup> Pursuant to the RSA and the 17d-2 Agreement, FINRA will be allocated regulatory responsibilities to

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<sup>10</sup> The Exchange notes that it is separately filing rule changes to permit NES to be a Member of ISE and ISE Mercury for the purpose of performing certain routing and other functions, including, but not limited to receiving inbound orders from other entities that are affiliated with NES such as the Affiliated Entities. See SR-ISE-2016-27 and SR-ISEMercury-2016-22 (both not published).

<sup>11</sup> 17 CFR 240.17d-2. FINRA will review NES’ compliance for certain common rules. The RSA with FINRA specifies the types of business activities that NES may undertake and it also indicates the obligations to which NES is subject under the RSA. Among other things, NES must maintain a certain amount of net capital pursuant to SEC Rule 15c3-1(a)(1)(ii) and operate pursuant to SEC Rule 15c3-3(k)(2)(ii). NES is permitted to route orders in options to the appropriate market center for execution in accordance with member order and requirements.

review NES's compliance with certain Exchange rules.<sup>12</sup> Pursuant to the RSA, however, ISE Mercury retains ultimate responsibility for enforcing its rules with respect to NES.

- Second, FINRA will monitor NES for compliance with the Exchange's trading rules, and will collect and maintain certain related information.<sup>13</sup>
- Third, FINRA will provide a report to the Exchange's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) quantifies all alerts (of which FINRA is aware) that identify NES as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission or Exchange rules.
- Fourth, ISE Mercury has in place Rule 309. The Exchange proposes to adopt a new paragraph (b) to Rule 309 to state that Nasdaq, Inc., as the holding company owning ISE Mercury and NES, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to ISE Mercury's system, obtained as a result of its affiliation with the Exchange, until such

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<sup>12</sup> NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

<sup>13</sup> Both FINRA and ISE Mercury collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Nasdaq Exchanges) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

information is available generally to similarly situated Exchange Members, in connection with the provision of inbound order routing to the Exchange.<sup>14</sup>

The Exchange also proposes to add the letter “(a)” in front of the existing paragraph in Rule 309.

### **Inbound Routing**

ISE Mercury Rule 309 is being amended to add rule language similar to Phlx Rule 985(c)(2). This new rule text provides that Nasdaq, Inc. which owns NES and ISE Mercury, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to Exchange members in connection with the provision of inbound routing to the Exchange.

By meeting the above conditions, ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, respectively, with NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury.

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<sup>14</sup> Similarly, Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx, or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b). See Phlx Rule 985(b)(1)(B). Phlx filed a rule proposal and received approval based on meeting the four conditions specified above to protect the independence of the Exchange's regulatory responsibility with respect to NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.

The Exchange has approval from Financial Regulatory Authority (“FINRA”)<sup>15</sup> and The Options Clearing Corporation (“OCC”)<sup>16</sup> for NES to perform these functions.

The Exchange notes that it is also separately filing rule changes for each of the Nasdaq Exchanges to permit NES to route orders from ISE Mercury to the Nasdaq Exchanges.<sup>17</sup>

### **Outbound Routing**

ISE has rules in place in Chapter 19 related to routing orders, which rules impact routing on ISE Mercury because those rules are cross-referenced. Today, ISE Mercury utilizes Linkage Handlers<sup>18</sup> to route orders. These Linkage Handlers are unaffiliated with ISE Mercury. The Exchange proposes to have NES route, either directly to other options exchanges or indirectly through third-party routing brokers on behalf of ISE Mercury.<sup>19</sup> With the proposal, regardless of whether a third-party routing broker is utilized, all options routing will go through NES, however the Exchange could determine to direct NES to route orders to certain exchanges through a routing broker rather than routing an

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<sup>15</sup> The Membership Agreement as between NES and FINRA, dated January 15, 2014, provides that NES may “[e]ngage in the following types of business: Route orders in equities and options to the appropriate market center for execution in accordance with member order and requirements.”

<sup>16</sup> On December 5, 2013 OCC provided NES membership approval.

<sup>17</sup> See SR-NASDAQ-2016-169, SR-Phlx-2016-120 and SR-BX-2016-068 (not published).

<sup>18</sup> A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in Rule 1903, by routing ISO(s) to other exchange(s) as agent on behalf of Public Customer and Non-Customer Orders according to the requirements of Rule 1901 (prohibition on trade-throughs) and Rule 1902 (prohibition on locked and crossed markets). See Supplementary Material .03 to ISE Rule 1901.

<sup>19</sup> See SR-ISE-2016-27 (not published).



order directly. In those cases, orders are submitted to the third-party routing broker through NES, and the third-party routing broker routes the orders to the routing destination in its name.<sup>20</sup> Specifically, within that proposal ISE proposes to amend Rule 1903 to adopt new language similar to Phlx Rule 1080(m).<sup>21</sup> The Exchange also proposed to amend Rule 1904 to replace the rule text with rule text similar to Phlx Rule 1080(m)(v).<sup>22</sup> Rule 1901 is being amended to remove references to Linkage Handlers along with other references in Rules 1903.<sup>23</sup> Finally Rule 190 concerning error accounts is being deleted within that proposal.<sup>24</sup>

The Exchange also proposes to amend Rule 705 to remove the rule text in Rule 705(d)(4) which provided an exception to the limits on compensation for Linkage Handlers. NES is replacing the Linkage Handlers for purposes of routing options orders from the ISE Exchanges. Today, Phlx does not have a similar provision and ISE is removing it from this rule.

### **Implementation**

The Exchange notes that with respect to the Rules in Chapter 19, Rules 1901, 1903, 1904 and 1905, these rules impact not only the ISE market but also ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook. ISE Mercury will be implemented in Q3 2017 on a symbol by symbol basis. The Exchange

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<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

will add notations in the ISE Mercury Rulebook to cross reference the amended rule text and make clear the implementation date.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>25</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>26</sup> in particular, in that it is designed 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, because the proposed rule change will allow the Exchange to receive inbound orders from an affiliate, NES, acting in its capacity as a facility of the Exchange, in a manner consistent with prior approvals and established protections. The Exchange believes that these conditions establish mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to NES, as well as ensure that NES cannot use any information it may have because of its affiliation with the Exchange to its advantage.

Further, the Exchange notes that its proposal is designed 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 because ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, respectively, with NES, as well as demonstrate that NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book

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<sup>25</sup> 15 U.S.C. 78f(b).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal should remove impediments to and perfect the mechanism of a free and open market and a national market system by providing customer order protection and by facilitating trading at away exchanges so customer orders trade at the best market price. The proposal should also protect investors and the public interest by fostering compliance with the Options Order Protection and Locked/Crossed Market Plan. In addition, the Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, because of the specific protections pertaining to the routing broker, in light of the potential conflict of interest where the member routing broker could have access to information regarding other members' orders or the routing of those orders. These protections include the Exchange's control over all routing logic as well as the confidentiality of routing information.<sup>27</sup>

The Exchange believes that its proposal related to the cancellation of orders and error account is consistent with the Act because NES's or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market.<sup>28</sup> Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets.<sup>29</sup>

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<sup>27</sup> See proposed Rule 1903(e).

<sup>28</sup> See SR-ISE-2016-27 (not published).

<sup>29</sup> Id.

Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 1904 would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange.<sup>30</sup> Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process.<sup>31</sup> The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members.<sup>32</sup> The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.<sup>33</sup>

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Receiving orders through NES does not raise any issues of intra-market competition because it involves inbound routing from an affiliated exchange. This proposal provides that Nasdaq, which owns NES and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members and member organizations in connection with the provision of inbound routing to the Exchange. Utilizing NES as the routing broker does not create any undue burden on inter-market competition because NES cannot use any information advantage it may have because of its affiliation with ISE Mercury. The Exchange will not be granting any preferential access to information from the Exchange's Order Book to NES. As an affiliated routing broker, NES would not be treated differently than any other unaffiliated routing broker.

The proposal does not result in a burden on competition among exchanges, because there are many competing options exchanges that provide routing services, including through an affiliate. Further, the proposal does not raise issues of intra-market competition, because the Exchange's decision to route through a particular routing broker would impact all participants equally.

With respect to the proposal to establish error accounts, the Exchange's proposal does not result in a burden on competition among exchanges because NES' or the Exchange's ability to cancel orders during a technical or systems issue and to maintain an error account facilitates the smooth and efficient operations of the market for all impacted members. The proposals regarding assumption of error positions and to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.<sup>34</sup>

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<sup>34</sup> See SR-ISE-2016-27 (not published).

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

No written comments were either solicited or received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISEMercury-2016-22 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-ISEMercury-2016-22. 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 Web site

<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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-ISEMercury-2016-22 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.<sup>35</sup>

Robert W. Errett  
Deputy Secretary

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<sup>35</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

*New text is underlined; deleted text is in brackets.*

**ISE MERCURY, LLC  
RULES**

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**CHAPTER 3  
Membership**

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**Rule 309. Limitation on Affiliation between the Exchange and Members**

(a) Without prior SEC approval, the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated shall not, directly or indirectly through one or more intermediaries, acquire or maintain an ownership interest in a Member. In addition, a Member shall not be or become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated. In addition, no Member or person associated with a Member shall be the beneficial owner, directly or indirectly, of greater than twenty percent (20%) of the (i) then-outstanding voting Limited Liability Company Interest of the Exchange, or (ii) then-outstanding voting securities of Nasdaq, Inc. Nothing in this Rule shall prohibit any Member from being or becoming an affiliate of the Exchange, or any facility of the Exchange, or an affiliate of any affiliate of the Exchange or any facility of the Exchange solely by reason of any officer, director or partner of such Member being or becoming an Exchange Director (as defined in the Constitution) pursuant to the Constitution. For purposes of this rule, any calculation of the voting Limited Liability Company Interest of the Exchange or the voting securities of Nasdaq, Inc. outstanding at any particular time shall be made in accordance with the last sentence of SEC Rule 13d-3(d)(1)(i)(D). The term “beneficially owned”, including all derivative or similar words, shall have the meaning set forth in the Amended and Restated Certificate of Incorporation of Nasdaq, Inc.

(b) Nasdaq, Inc., which owns NASDAQ Execution Services, LLC and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange’s systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members in connection with the provision of inbound routing to the Exchange.



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**CHAPTER 7**  
**Doing Business On The Exchange**

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**Rule 705. Limitation of Liability**

(a)– (c) No change.

(d) Notwithstanding paragraph (a) above, and subject to the express limits set forth below, the Exchange may compensate Members for losses resulting directly from the malfunction of the Exchange's physical equipment, devices and/or programming.

(1) – (3) No change.

[(4) The limits on compensation in this Rule 705(d) shall not apply to Members to the extent that such Members are acting as Linkage Handlers, as defined in Supplementary Material .03 to Rule 1901.]

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