

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77556; File No. SR-ISE Mercury-2016-08)

April 7, 2016

Self-Regulatory Organizations; ISE Mercury; Notice of Filing of Proposed Rule Change to Limit Mandatory Participation in Scheduled Functional and Performance Testing Under Regulation SCI to Only Those Primary Market Makers That Meet Specified Criteria

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 31, 2016, ISE Mercury, LLC (the "Exchange" or "ISE Mercury") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Rule 803, Obligations of Market Makers, to limit mandatory participation in scheduled functional and performance testing, under Regulation Systems Compliance and Integrity ("Regulation SCI"),<sup>3</sup> to those Primary Market Makers ("PMMs") that contribute a meaningful percentage of the Exchange's overall volume, measured on a quarterly or monthly basis. The Exchange proposes to also consider other factors in determining the PMMs that will be required to participate in scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans (collectively "DR Plans"), including average daily volume traded on the Exchange measured on

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

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

<sup>3</sup> See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) ("SCI Adopting Release").

a quarterly or monthly basis, or PMMs that collectively account for a certain percentage of market share on the Exchange or within a specific product. In addition, the Exchange proposes to publish the criteria to be used by the Exchange to determine which PMMs will be required to participate in such testing, and notify those PMMs that are required to participate based on such criteria. 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these 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

On November 19, 2014, the Securities and Exchange Commission unanimously voted to adopt Regulation SCI, which is a set of rules designed to strengthen the technology infrastructure of the U.S. securities markets.<sup>4</sup> Specifically, the rules are designed to reduce the occurrence of systems issues, improve resiliency when systems problems do occur, and enhance the Commission's oversight and enforcement of securities market technology infrastructure.<sup>5</sup>

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<sup>4</sup> Id.

<sup>5</sup> Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Regulation SCI at <https://www.sec.gov/divisions/marketreg/regulation-sci-faq.shtml>.

Regulation SCI applies to “SCI entities,” a term which includes SROs such as ISE Mercury. Regulation SCI requires SCI entities to, among other things, 1) establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability; 2) mandate participation by designated members in scheduled testing of the operation of their business continuity and disaster recovery plans, including backup systems, and to coordinate such testing on an industry- or sector-wide basis with other SCI entities; 3) take corrective action with respect to “SCI events” (such as systems disruptions, systems compliance issues, and systems intrusions), and to notify the Commission of such events; 4) disseminate information about certain SCI events to affected members and, for certain “major” SCI events, to all members; and 5) review their systems by objective, qualified personnel at least annually, to submit quarterly reports regarding completed, ongoing, and planned material changes to their SCI systems to the Commission, and to maintain certain books and records.<sup>6</sup>

In accordance with Rule 1004 of Regulation SCI, the Exchange adopted Rules 803 and 1903 to designate all PMMs<sup>7</sup> and Linkage Handlers,<sup>8</sup> as the minimum necessary for the maintenance of a fair and orderly market should the Exchange’s DR Plans be activated.<sup>9</sup> The

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<sup>6</sup> Id.

<sup>7</sup> A PMM posts two-sided continuous quotations in all of the options classes to which it is appointed and undertakes special responsibilities for maintaining fair and orderly markets. PMM memberships are represented by PMM Trading Rights. The options classes trading on ISE Mercury are divided into groups or “bins”, each with one PMM. One PMM member may, however, represent more than one bin.

<sup>8</sup> A Linkage Handler is a broker that is unaffiliated with the Exchange with which the Exchange has contracted with to provide routing services, by routing certain orders, to other exchanges as agent in connection with the Options Order Protection and Locked/Crossed Market Plan. See .03 to Supplementary Material to Rule 1901.

<sup>9</sup> On January 8, 2016, ISE Mercury submitted Amendment No. 2 to the Form 1 Application, which included an amended Rule 803 to comply with the requirements of

Exchange also mandated participation by designated members in scheduled functional and performance testing of the operation of such DR Plans.<sup>10</sup>

The Exchange has reevaluated its designation of all PMMs as the minimum necessary for the maintenance of a fair and orderly market should the Exchange's DR Plans be activated and now believes that designating all PMMs is more than the minimum necessary to maintain a fair and orderly market should its DR Plans be activated. The Exchange proposes to revise Rule 803 and limit mandatory participation in scheduled functional and performance testing, under Regulation SCI and ISE Mercury Rule 803, to those PMMs that contribute a meaningful percentage of the Exchange's overall volume, measured on a quarterly or monthly basis. The Exchange proposes to consider other factors in determining which PMMs will be required to participate in scheduled functional and performance testing, including average daily volume traded on the Exchange measured on a quarterly or monthly basis, or PMMs that collectively account for a certain percentage of market share on the Exchange or within a specific product. The Exchange represents that it will publish the criteria<sup>11</sup> to be used by the Exchange to determine which PMMs will be required to participate in such testing, and notify those PMMs that are required to participate based on such criteria.

The Exchange notes that it encourages all PMMs to connect to the Exchange's backup systems and to participate in testing of such systems. However, in revising the requirements in

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Regulation SCI. ISE Mercury's amended Rule 803 followed the rule filings by ISE Mercury's affiliated exchanges, International Securities Exchange, LLC and ISE Gemini, LLC, which amended Rule 803 to comply with the requirements of Regulation SCI. See Exchange Act Release No. 76334 (November 3, 2015) 80 FR 69258 (November 9, 2015) (SR-ISE-2015-35) and Exchange Act Release No. 76332 (November 3, 2015), 80 FR 69266 (November 9, 2015) (SR-ISE Gemini-2015-23).

<sup>10</sup> Id.

<sup>11</sup> This criteria will be published by the Exchange, in a regulatory information circular, no later than the effective date of this rule filing.

proposed Rule 803, the rule will subject only those PMMs to mandatory testing that the Exchange believes are, taken as a whole, the minimum necessary to maintain fair and orderly markets. The Exchange believes that designating PMMs to participate in mandatory testing because they, for example, account for a significant portion of the Exchange's overall volume or collectively account for a certain percentage of market share on the Exchange is a reasonable means to ensure the maintenance of a fair and orderly market on the Exchange should its DR Plans be activated.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>12</sup> In particular, the proposal is consistent with Section 6(b)(5) of the Act,<sup>13</sup> because it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes the proposed rule revision is consistent with the Exchange Act because it complies with Regulation SCI's requirements. ISE Mercury's proposed rule designates only those PMMs it determines are necessary for the maintenance of a fair and orderly market if the Exchange's DR Plans are activated. Additionally, the proposal will ensure that the PMMs necessary to ensure the maintenance of a fair and orderly market are properly designated consistent with Rule 1004 of Regulation SCI. Specifically, as proposed, the Exchange will adopt clear and objective criteria with respect to the designation of PMMs that are required

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<sup>12</sup> 15 U.S.C. 78f(b).

to participate in the testing of the Exchange’s DR Plans, as well as appropriate notification regarding such designation. As set forth in the SCI Adopting Release, “SROs have the authority, and legal responsibility, under Section 6 of the Exchange Act, to adopt and enforce rules (including rules to comply with Regulation SCI’s requirements relating to [business continuity and disaster recovery] testing) applicable to their members or participants that are designed to, among other things, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.”<sup>14</sup> The Exchange believes that this proposal is consistent with such authority and legal responsibility.

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

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act because ISE Mercury is implementing the requirements of Regulation SCI.

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

The Exchange has neither solicited nor received written comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by

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<sup>13</sup> 15 U.S.C. 78f(b)(5).

its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup> The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change, or such shorter time as designated by the Commission, as required by Rule 19b-4(f)(6).

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

#### IV. Solicitation of Comments

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

##### 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 No. SR-ISE Mercury-2016-08 on the subject line.

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<sup>14</sup> See SCI Adopting Release, supra note 4 at 72350.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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-ISE Mercury-2016-08. 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 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 such 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-ISE Mercury-2016-08 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Robert W. Errett  
Deputy Secretary

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