

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79624; File No. SR-ISEMercury-2016-24)

December 20, 2016

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to amend ISE Mercury Rule 803 at Supplementary Material .02 in Connection with Business Continuity and Disaster Recovery Plans

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 12, 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 amend ISE Mercury Rule 803 at Supplementary Material .02 in connection with business continuity and disaster recovery plans (“BC/DR Plans”) testing requirements for certain Members in connection with Regulation Systems Compliance and Integrity (“Regulation SCI”).³

The text of the proposed rule change is available on the Exchange’s Website at www.ise.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) (“SCI Adopting Release”).

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 Exchange proposes to amend ISE Mercury Rule 803 at Supplementary Material .02 to conform the current rule text regarding BC/DR Plans testing requirements with that of NASDAQ PHLX LLC (“Phlx”) Rule 926,⁴ The NASDAQ Stock Market LLC (“Nasdaq”) Rule 1170⁵ and NASDAQ BX, Inc. (“BX”) Rule 1170.⁶

Background

As adopted by the Commission, Regulation SCI applies to certain self-regulatory organizations (including the Exchange), alternative trading systems (“ATs”), plan processors, and exempt clearing agencies (collectively, “SCI entities”), and requires these SCI entities to comply with requirements with respect to the automated systems central to the performance of

⁴ Phlx Rule 926 is titled “The Exchange's Business Continuity and Disaster Recovery Plan Testing Requirements for Member Organizations and PSX Participants Pursuant to Regulation SCI.”

⁵ Nasdaq Rule 1170 is titled “Nasdaq’s Business Continuity and Disaster Recovery Plan Testing Requirements for Members and Options Participants Pursuant to Regulation SCI.”

⁶ BX Rule 1170 is titled “The Exchange's Business Continuity and Disaster Recovery Plan Testing Requirements for Members and Options Participants Pursuant to Regulation SCI.”

their regulated activities. Among the requirements of Regulation SCI is Rule 1001(a)(2)(v), which requires the Exchange and other SCI entities to maintain “[b]usiness continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.”⁷ The Exchange has put extensive time and resources toward planning for system failures and already maintains robust BC/DR Plans consistent with the Rule.

With respect to an SCI entity’s BC/DR Plans, including its backup systems, paragraph (a) of Rule 1004 of Regulation SCI requires each SCI entity to: “[e]stablish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.”⁸ Paragraph (b) of Rule 1004 of Regulation SCI further requires each SCI entity to “[d]esignate members or participants pursuant to the standards established in paragraph (a) of [Rule 1004] and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be less than once every 12 months.”⁹

Proposal

As set forth below, in connection with Regulation SCI, the Exchange is proposing to amend ISE Mercury Rule 803 at Supplementary Material .02 to conform with Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170. Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170 are

⁷ 17 CFR 242.1001(a)(2)(v).

⁸ 17 CFR 242.1004(a).

⁹ 17 CFR 242.1004(b).

similar to ISE Mercury Rule 803 at Supplementary Material.02, which incorporates the requirements of Rule 1004 of Regulation SCI as part of the Exchange's rules, and sets forth the notice, selection criteria and obligations of Members with respect to BC/DR Plans testing.

The Exchange proposes to adopt rule text from Phlx Rule 926(a), Nasdaq Rule 1170(a) and BX Rule 1170(a), which will set forth the Exchange's obligations with respect to the selection of Members for testing. Specifically, the proposed rule will require the Exchange to "[e]stablish standards for the designation of those Members that the Exchange reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans." The proposed rule further provides that "[s]uch standards may include volume-based and/or market share-based criteria, and may be adjusted from time to time by the Exchange." Lastly, the proposed rule will require the Exchange to provide public notice of the standards that it adopts.

The Exchange is proposing to revise Rule 803 at Supplementary Material .02, which will set forth the obligations of the Exchange and its Members with respect to testing, similar to Phlx Rule 926(b), Nasdaq Rule 1170(b) and BX Rule 1170(b). Specifically, the proposed rule will require the Exchange to "designate Members pursuant to the standards established in paragraph (a) of this rule and require participation by such designated Members in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the Exchange, provided that such frequency shall not be less than once every 12 months." Moreover, the proposed rule will require the Exchange to provide at least 6 months prior notice to Members that are designated for mandatory testing. Lastly, the proposed rule will provide notice that participation in testing is a condition of membership for Members that are designated for testing.

Today, ISE Mercury's Rule similarly sets forth the Exchange's obligations with respect to the selection of Members for testing. Like the proposed rule change, these standards for the designation of those Members must be reasonably determined by the Exchange, when taken as a whole, to have the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans. ISE Mercury's Rule requires the Exchange to provide public notice of the standards that it adopts. Further, ISE Mercury's Rule requires Primary Market Makers ("PMMs") to participate in scheduled functional and performance testing of the operation of such plans with a frequency of not less than once every 12 months. These standards remain substantially the same under the proposed rule change.

Today, ISE Mercury's Rule requires that at least 3 months prior to a scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans, the Exchange publishes the criteria to be used by the Exchange to determine which PMMs will be required to participate in such testing, and notifies those PMMs that are required to participate based on such criteria. The Phlx, Nasdaq and BX rules require at least 6 months prior notice to Members that are designated for mandatory testing. This change would expand the notice period. Also, ISE Mercury has specific provisions for PMMs with respect to selection for testing. Today, ISE Mercury provides that PMMs that have been determined by the Exchange to contribute a meaningful percentage of the Exchange's overall volume, measured on a quarterly or monthly basis, will be required to participate in scheduled functional and performance testing. The Exchange may also consider other factors in determining the PMMs that 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 who collectively account for a certain percentage of market share on the Exchange. The proposed rule text does

not require a different treatment for PMMs as compared to other market participants. Today, Phlx, Nasdaq and BX select market participants based on volume and/or market share, regardless of market making activity. The proposed rule text would not specifically mandate PMMs however, given the importance of market makers on the Exchange and the volume they traditionally trade, they are likely to be required to participate in business continuity and disaster recovery plans under the proposed rule change as they are today.

The Exchange would continue to encourage all Members to connect to the Exchange's backup systems and to participate in testing of such systems;¹⁰ however, certain Members will be obligated to participate in BC/DR Plans testing. In adopting the rule text of Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170, the Exchange will require mandatory participation in BC/DR Plans testing by those Members that the Exchange reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans on the Exchange. The Exchange believes that using overall participation on its markets (by volume and/or market share) as a measure to select Members for mandatory participation in BC/DR Plans testing is a reasonable means by which it can determine which Members are necessary for the maintenance of fair and orderly markets in the event of the activation of such plans. For each BC/DR Plans test cycle, the Exchange will select the top five Members on the Exchange based on the Exchange's measure of overall participation. The

¹⁰ In this regard, the Exchange will allow any Member to participate in the testing of the Exchange's BC/DR Plans, which is consistent with the BC/DR Plans. See SCI Adopting Release, supra note 3 at 72350. The Exchange will provide instructions on how a Member must inform the Exchange of its interest in participating in an upcoming BC/DR Plans test via the announcement of the test date. A Member must provide the Exchange notice of its interest to participate at least a week prior to the test date and must have the appropriate connection for testing in place.

Exchange notes that when considering volume, it will exclude contracts traded on PrecISE®.¹¹ The Exchange has provided notice of the initial selection criteria and measurement period to its Members.¹² All notices concerning BC/DR Plans testing will be posted on the Exchange's website.

The Exchange is proposing to initially select Members with the highest levels of trading volume on the Exchange over four calendar months ("Measurement Period") as mandatory testing for Members [sic].¹³ Specifically, the Measurement Period will be the four calendar months of trading immediately prior to the Exchange's announcement of the next BC/DR Plans test date. The Measurement Period will always begin at a point after the Exchange announces the criteria to be used in the next BC/DR Plans test. By way of example, if on October 6, 2017 the Exchange announced the BC/DR Plans test selection criteria and on March 2, 2018 the Exchange announced a BC/DR Plans test date of September 8, 2018, the Measurement Period used to select Member subject to mandatory testing would be November 2017 through February 2018. Members not obligated to participate that wish to participate in this test must inform the Exchange no later than September 1, 2018, based on the aforementioned timeline.¹⁴

The proposed rule change is intended to provide consistency across the six options exchanges operated by Nasdaq, Inc. in regard to the standards established for the designation of Members that are required to participate in the Exchange's business continuity and disaster recovery testing. In turn, participants that are Members on multiple exchanges operated by

¹¹ PrecISE is [sic] front-end order and execution management system for trading options and stock-option combinations.

¹² See ISE Mercury Circular 2016-16.

¹³ The Exchange may change the total number of Members selected from time to time.

¹⁴ See supra note 10.

Nasdaq, Inc. will be provided greater uniformity and ease of testing with the establishment of consistent standards across the multiple Nasdaq exchanges.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal will ensure that the Members necessary to ensure the maintenance of fair and orderly markets are properly designated consistent with Rule 1004 of Regulation SCI. Specifically, the proposal will adopt clear and objective criteria with respect to the designation of Members that are required to participate in the testing of the Exchange's BC/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 BC/DR 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

¹⁵ 15 U.S.C. 78f.

¹⁶ 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest.”¹⁷ The Exchange believes that this proposal is consistent with such authority and legal responsibility.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the proposal is not a competitive proposal but rather is necessary for the Exchange’s compliance with Regulation SCI.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days 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)(iii) of the Act¹⁸ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action,

¹⁷ See SCI Adopting Release, supra note 3 at 72350.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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. Please include File Number SR-ISEMercury-2016-24 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.

All submissions should refer to File Number SR-ISEMercury-2016-24. 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; 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-2016-24 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.²⁰

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Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).