

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79663; File No. SR-ISEMercury-2016-22)

December 22, 2016

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Permit Nasdaq Execution Services, LLC to become an Affiliated Member of the Exchange to Perform Certain Routing and Other Functions

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 9, 2016, ISE Mercury, LLC (“ISE Mercury” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change. On December 20, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the Form 19b-4, and Exhibit 1 thereto, in their entirety. On December 20, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.³ The proposed rule change, as modified by Amendment Nos. 1 and 2, is 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, as modified by Amendment Nos. 1 and 2, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 2 amended the description of one of the inbound routing conditions that would apply. Specifically, the Exchange modified the third condition to specify that the report that FINRA will provided to the Exchange’s chief regulatory officer on a quarterly basis will quantify all alerts, of which the Exchange or FINRA (rather than solely FINRA) are aware, that identify Nasdaq Execution Services, LLC as a participant that has potentially violated Commission or Exchange rules.

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 an [sic] other functions on behalf of the Exchange.

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 the 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 approval to permit NES, an affiliate of the Exchange, to become a Member of the Exchange in order to perform inbound routing on behalf of the Exchange. The Exchange is also filing to permit ISE Gemini [sic] to route outbound orders through NES either directly or indirectly through a third

party routing broker-dealer⁴ to other market centers and perform other functions regarding the cancellation of orders and the maintenance of a NES error account.⁵

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,⁶ 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.⁷

Today, Phlx Rule 985 (Affiliation and Ownership Restrictions), The NASDAQ Stock Market LLC (“Nasdaq”) Rule 2160 (Restrictions on Affiliation)⁸ 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

⁴ 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.

⁵ 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 1905. The ISE rule changes impact ISE Mercury because Chapter 19 is incorporated by reference into the ISE Mercury Rulebook.

⁶ ISE, ISE Gemini and ISE Mercury are collectively referred to as “ISE Exchanges.”

⁷ See Phlx Rule 1080(m) and Nasdaq and BX Rules at Chapter VI, Section 11.

⁸ NOM is a facility of Nasdaq.

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.⁹ NES performs similar functions for the Nasdaq Exchanges and is a member of those three markets respectively.¹⁰

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 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

⁹ 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).

¹⁰ 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 Exchanges¹¹ 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”).¹² Pursuant to the RSA and the 17d–2 Agreement, FINRA will be allocated regulatory responsibilities to review NES’s compliance with certain Exchange rules.¹³ 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.¹⁴

¹¹ The Exchange notes that ISE and ISE Gemini are separately filing rule changes to permit NES to be a Member of ISE and ISE Mercury [sic] 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 [sic] (both not published).

¹² 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.

¹³ NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

¹⁴ Pursuant to the RSA, both FINRA and ISE Mercury shall collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of the Affiliated Entities) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA shall retain these

- 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 the Exchange or 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 [sic] 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 Members, in connection with the provision of inbound order routing to the Exchange.¹⁵

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

Inbound Routing

records in an easily accessible manner in order to facilitate any potential review conducted by the Commission’s Office of Compliance Inspections and Examinations.

¹⁵ 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.

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 conditions described above under Restrictions on Affiliation, ISE Mercury will have set up mechanisms that protect the independence of ISE Mercury's regulatory responsibilities, with respect to 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")¹⁶ and The Options Clearing Corporation ("OCC")¹⁷ for NES to perform these functions.

The Exchange notes that the Nasdaq Exchanges are separately filing rule changes to permit NES to route orders inbound from ISE Mercury to the Nasdaq Exchanges.¹⁸

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 incorporated by reference. Today, ISE Mercury utilizes

¹⁶ 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."

¹⁷ On December 5, 2013 OCC provided NES membership approval.

¹⁸ See SR-NASDAQ-2016-169, SR-Phlx-2016-120 and SR-BX-2016-068 (not published).

Linkage Handlers¹⁹ 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.²⁰ 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 destination in its name.²¹ Specifically, within that proposal ISE proposes to amend Rule 1903 to adopt new language similar to Phlx Rule 1080(m).²²

ISE also proposed to amend Rule 1904 to replace the rule text with rule text similar to Phlx Rule 1080(m)(v) to provide general authority for ISE or NES to cancel orders in order to maintain fair and orderly markets when technical system issues are occurring, and set forth the manner in which error positions may be handled by the ISE or NES.²³

¹⁹ 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.

²⁰ See SR-ISE-2016-27 (not published). This proposed rule change proposes to replace Linkage Handlers with NES for the purpose of outbound routing and to establish rules for the cancellation or [sic] orders and maintenance of an error account.

²¹ Id.

²² Id.

²³ Id.

Rule 1901 is being amended to remove references to Linkage Handlers along with other references in Rules 1903.²⁴ Finally Rule 1905 concerning error accounts is being deleted within that proposal.²⁵

The Exchange is proposing that NES be permitted to perform the same functions pursuant to the same conditions with respect to the outbound routing of orders, cancellation or orders, and the handling of error positions as set forth in the ISE proposal.

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.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁷ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect

²⁴ Id.

²⁵ Id.

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(5).

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 each Affiliated Entity through NES, acting in its capacity as a facility of the respective Affiliated Entity, 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, with respect to 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.

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.²⁸

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.²⁹ 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.³⁰ 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.³¹ Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process.³² The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members.³³ The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to

²⁸ See proposed Rule 1903(e).

²⁹ See SR-ISE-2016-27 (not published).

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

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.³⁴

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 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

³⁴

Id.

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 [sic] to liquidation of those positions ensures certainty for all impacted market participants. The proposal does not discriminate among Members.³⁵

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, as modified by Amendment Nos. 1 and 2, is consistent with the Act. Comments may be submitted by any of the following methods:

³⁵ See SR-ISE-2016-27 (not published).

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-2016-22 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 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 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-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.³⁶

Eduardo A. Aleman
Assistant Secretary

³⁶ 17 CFR 200.30-3(a)(12).