

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 type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
			Rule		
Pilot	Extension of Time Period for Commission Action *	Date Expires *	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

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) *	Section 806(e)(2) *
<input type="checkbox"/>	<input type="checkbox"/>
	Section 3C(b)(2) *
	<input type="checkbox"/>

Exhibit 2 Sent As Paper Document	Exhibit 3 Sent As Paper Document
<input type="checkbox"/>	<input type="checkbox"/>

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to amend ISE Mercury Rule 803 at Supplementary Material .02 in connection with business continuity and disaster recovery plans.

**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 * Angela	Last Name * Dunn
Title * AVP - Principal Associate General Counsel	
E-mail * angela.dunn@nasdaq.com	
Telephone * (215) 496-5692	Fax

**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 12/12/2016	Executive Vice President and General Counsel
By Edward S. Knight	<div style="border: 1px solid black; width: 100%; height: 20px;"></div>
(Name *)	

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 “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 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”).<sup>3</sup>

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 senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”) on August 15, 2016. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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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”).

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

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

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

a. 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,<sup>4</sup> The NASDAQ Stock Market LLC (“Nasdaq”) Rule 1170<sup>5</sup> and NASDAQ BX, Inc. (“BX”) Rule 1170.<sup>6</sup>

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 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

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<sup>4</sup> 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.”

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

<sup>6</sup> 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.”

“[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.”<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup>

### 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

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<sup>7</sup> 17 CFR 242.1001(a)(2)(v).

<sup>8</sup> 17 CFR 242.1004(a).

<sup>9</sup> 17 CFR 242.1004(b).

Rule 926, Nasdaq Rule 1170 and BX Rule 1170. Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170 are 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;<sup>10</sup> 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

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<sup>10</sup> 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.



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 Exchange notes that when considering volume, it will exclude contracts traded on PrecISE®.<sup>11</sup> The Exchange has provided notice of the initial selection criteria and measurement period to its Members.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>11</sup> PrecISE is front-end order and execution management system for trading options and stock-option combinations.

<sup>12</sup> See ISE Mercury Circular 2016-16.

<sup>13</sup> The Exchange may change the total number of Members selected from time to time.

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.<sup>14</sup>

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

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>16</sup> 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

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<sup>14</sup> See supra note 10.

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> 15 U.S.C. 78f(b)(5).

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

4. 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.

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>17</sup> See SCI Adopting Release, supra note 3 at 72350.

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)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)<sup>18</sup> of the Act and Rule 19b-4(f)(6)<sup>19</sup> thereunder, in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq, Inc. acquired ISE Mercury in 2016. Nasdaq believes that its method for implementing BC/DR Plans testing requirements should be conformed across all its markets. Similar filings will be also be drafted and filed for The International Securities Exchange, LLC and ISE Gemini, LLC. Market participants that are Members on multiple exchanges operated by Nasdaq, Inc. will be provided greater uniformity and ease of testing with the establishment of consistent standards across the multiple Nasdaq exchanges.

Furthermore, 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.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b-4(f)(6)(iii), however, permits

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii) so that it may amend its rules to conform its process regarding BC/DR Plans testing requirements with Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170 and provide the 6 month notification to participants for testing. As noted above, Nasdaq believes that its method for implementing BC/DR Plans testing requirements should be conformed across all its markets. Similar filings will be also be drafted and filed for The International Securities Exchange, LLC and ISE Gemini, LLC. Market participants that are Members on multiple exchanges operated by Nasdaq, Inc. will be provided greater uniformity and ease of testing with the establishment of consistent standards across the multiple Nasdaq exchanges.

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

This rule is similar to Phlx Rule 926, Nasdaq Rule 1170 and BX Rule 1170.

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 for publication in the Federal Register.

5. Applicable portion of the rule text.

**EXHIBIT 1**

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

December \_\_, 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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”).<sup>3</sup>

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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”).

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 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,<sup>4</sup> The NASDAQ Stock Market LLC ("Nasdaq") Rule 1170<sup>5</sup> and NASDAQ BX, Inc. ("BX") Rule 1170.<sup>6</sup>

Background

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<sup>4</sup> 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."

<sup>5</sup> Nasdaq Rule 1170 is titled "Nasdaq's Business Continuity and Disaster Recovery Plan Testing Requirements for Members and Options Participants Pursuant to Regulation SCI."

<sup>6</sup> 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."

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 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.”<sup>7</sup> 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.”<sup>8</sup> 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

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<sup>7</sup> 17 CFR 242.1001(a)(2)(v).

<sup>8</sup> 17 CFR 242.1004(a).



specified by the SCI entity, provided that such frequency shall not be less than once every 12 months.”<sup>9</sup>

### 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 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

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<sup>9</sup> 17 CFR 242.1004(b).

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;<sup>10</sup> however,

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<sup>10</sup> 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

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 Exchange notes that when considering volume, it will exclude contracts traded on PrecISE®.<sup>11</sup> The Exchange has provided notice of the initial selection criteria and measurement period to its Members.<sup>12</sup> 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

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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.

<sup>11</sup> PrecISE is front-end order and execution management system for trading options and stock-option combinations.

<sup>12</sup> See ISE Mercury Circular 2016-16.

mandatory testing for Members.<sup>13</sup> 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.<sup>14</sup>

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 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,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>16</sup> in

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<sup>13</sup> The Exchange may change the total number of Members selected from time to time.

<sup>14</sup> See supra note 10.

<sup>15</sup> 15 U.S.C. 78f.

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

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<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> See SCI Adopting Release, supra note 3 at 72350.

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 Act<sup>18</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>19</sup>

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

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 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 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 Number SR-ISEMercury-2016-24 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-2016-24. 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 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-2016-24 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.<sup>20</sup>

Robert W. Errett  
Deputy Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).

**ISE MERCURY, LLC  
RULES**

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**Chapter 8 Market Makers**

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**Rule 803. Obligations of Market Makers**

(a) - (d) No change.

***Supplementary Material To Rule 803***

.01 No change

.02 With respect to the Exchange's business continuity and disaster recovery plans, including its backup systems, the Exchange shall:

(a) Establish 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. Such standards may include volume-based and/or market share-based criteria, and may be adjusted from time to time by the Exchange. The Exchange will provide public notice of the standards.

(b) 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. The Exchange will provide at least 6 months prior notice to Members that are designated for mandatory testing, and participation of such Members is a condition of membership.

[Rule 1004 of Regulation SCI under the Exchange Act requires the establishment of standards for the designation of those Members the Exchange reasonably determines are, taken as a whole, the minimum necessary for the maintenance of a fair and orderly market should the Exchange's business continuity and disaster recovery plans be activated. Rule 1004 also requires the Exchange to designate Members pursuant to those standards 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. Therefore, in accordance with Rule 1004, Primary Market Makers that meet the factors established by the Exchange in accordance with subsection (a), below, have been designated by the Exchange as necessary for the maintenance of a fair and orderly market should the Exchange's business continuity and disaster recovery plans be activated. As the result of such designation, these Primary Market Makers are required to

participate in scheduled functional and performance testing of such plans at least once every 12 months.

(a) Primary Market Makers 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 Primary Market Makers 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 Primary Market Makers who collectively account for a certain percentage of market share on the Exchange.

(b) At least three (3) months prior to a scheduled functional and performance testing of the Exchange's business continuity and disaster recovery plans, the Exchange will publish the criteria to be used by the Exchange to determine which Primary Market Makers will be required to participate in such testing, and notify those Primary Market Makers that are required to participate based on such criteria.]

.03 No change

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