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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-79995; File Nos. SR-ISEGemini-2016-16; SR-ISEMercury-2016-22)

February 9, 2017

Self-Regulatory Organizations; ISE Gemini, LLC; ISE Mercury, LLC; Order Granting Approval of Proposed Rule Changes, as Modified by Amendment Nos. 1 and 2 Thereto, To Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of Each Exchange To Perform Certain Routing and Other Functions

I. Introduction

On December 9, 2016, ISE Gemini, LLC (“ISE Gemini”) and ISE Mercury, LLC (“ISE Mercury,” and each of ISE Gemini and ISE Mercury an “Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> proposed rule changes related to the routing of orders, cancellation of orders, and handling of error positions. The proposed rule changes would also permit Nasdaq Execution Services, LLC (“NES”) to become an affiliated Member<sup>3</sup> of each Exchange to perform certain routing and other functions. On December 20, 2016, each Exchange filed Amendment No. 1 to its respective proposed rule change, which amended and replaced each original filing in its entirety. Also on December 20, 2016, each Exchange filed Amendment No. 2 to its respective proposed rule change.<sup>4</sup> The proposed rule

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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> A “Member” is an organization that has been approved to exercise certain trading rights on the Exchange. See ISE Gemini Rule 100(a)(23); ISE Mercury Rule 100(a)(23).

<sup>4</sup> Each Amendment No. 2 amended the description of one of the inbound routing conditions that would apply. Specifically, each Exchange modified the third condition to specify that the report that FINRA will provide 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 NES as a participant that has potentially violated Commission or Exchange rules.

changes, each as modified by Amendment Nos. 1 and 2, were published for comment in the Federal Register on December 29, 2016.<sup>5</sup> The Commission received no comments on the proposed rule changes. This order grants approval of the proposed rule changes, each as modified by the respective Amendment Nos. 1 and 2.

## II. Background

On June 21, 2016, the Commission approved a proposed rule change relating to a corporate transaction in which Nasdaq, Inc. would become the ultimate parent of International Securities Exchange, LLC (“ISE”), ISE Gemini, and ISE Mercury (collectively, the “ISE Exchanges”).<sup>6</sup> The transaction closed on June 30, 2016.<sup>7</sup> Nasdaq, Inc. is the ultimate parent of NASDAQ BX, Inc. (“BX”), The NASDAQ Stock Market LLC (“Nasdaq”), and NASDAQ PHLX LLC (“Phlx” and, together with Nasdaq and BX, the “Nasdaq Exchanges”).<sup>8</sup> Nasdaq, Inc. is also the ultimate parent of NES,<sup>9</sup> a broker-dealer that is a member, and affiliate, of each of

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<sup>5</sup> See Securities Exchange Act Release Nos. 79664 (December 22, 2016), 81 FR 96136 (“ISE Gemini Notice”); 79663 (December 22, 2016), 81 FR 96089 (“ISE Mercury Notice”).

<sup>6</sup> See Securities Exchange Act Release No. 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR-ISE-2016-11; SR-ISE Gemini-2016-05; SR-ISE Mercury-2016-10) (order approving Nasdaq, Inc.’s acquisition of ISE, ISE Gemini, and ISE Mercury) (“Nasdaq Acquisition Order”).

<sup>7</sup> See <http://ir.nasdaq.com/releasedetail.cfm?releaseid=977785> (Nasdaq press release announcing completion of its acquisition).

<sup>8</sup> See Nasdaq Acquisition Order, supra note 6, at 41611.

<sup>9</sup> See Securities Exchange Act Release No. 69233 (March 25, 2013), 78 FR 19352 (March 29, 2013) (SR-NASDAQ-2013-028) (order approving a proposed rule change to make permanent a pilot program to permit Nasdaq to accept inbound orders routed by NES from the BX Equities market and PSX) at 19352 n.6 and accompanying text (“BX Equity Routing Approval”). See also ISE Gemini Notice, supra note 5, at 96137; ISE Mercury Notice, supra note 5, at 96089.

the Nasdaq Exchanges.<sup>10</sup> As a result of this transaction, the ISE Exchanges and the Nasdaq Exchanges became affiliates,<sup>11</sup> and NES became an affiliate of the ISE Exchanges.<sup>12</sup>

As described in more detail below, ISE Gemini and ISE Mercury have now proposed rule changes (1) to permit each respective Exchange to receive inbound orders in options routed through NES from the Affiliated Exchanges, pursuant to certain limitations and conditions; and (2) to permit NES to become a Member of each Exchange to perform certain routing and other functions.

ISE Gemini and ISE Mercury's respective rulebooks incorporate by reference Chapter 19 of ISE's rulebook, which contains rules relating to the routing of orders, cancellation of orders, and handling of certain error positions.<sup>13</sup> ISE submitted a related proposed rule change to: (1) route outbound orders in options listed and open for trading on ISE's system to away markets through NES, either directly or through a third-party routing broker-dealer; (2) adopt rules regarding the cancellation of orders and the handling of certain error positions, including

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<sup>10</sup> See Securities Exchange Act Release Nos. 79661 (December 22, 2016), 81 FR 96100 (December 29, 2016) (SR-BX-2016-068) at 96100; 79662 (December 22, 2016), 81 FR 96087 (December 29, 2016) (SR-NASDAQ-2016-169) at 96087; and 79660 (December 22, 2016), 81 FR 96060 (December 29, 2016) (SR-Phlx-2016-120) at 96061. See also ISE Gemini Notice, supra note 5, at 96137; ISE Mercury Notice, supra note 5, at 96089.

<sup>11</sup> See Nasdaq Acquisition Order, supra note 6, at 41611 n.8. The Nasdaq Exchanges, together with ISE, ISE Gemini (with respect to ISE Mercury), and ISE Mercury (with respect to ISE Gemini), are referred to herein as the "Affiliated Exchanges."

<sup>12</sup> See generally ISE Gemini Notice, supra note 5, at 96137 (discussing that NES is a broker-dealer owned and operated by Nasdaq, Inc. and affiliated with ISE Gemini and the Affiliated Exchanges); ISE Mercury Notice, supra note 5, at 96089 (discussing that NES is a broker-dealer owned and operated by Nasdaq, Inc. and affiliated with ISE Mercury and the Affiliated Exchanges).

<sup>13</sup> See ISE Gemini Rules, Chapter 19 (incorporating by reference rules in ISE Rules, Chapter 19); ISE Mercury Rules, Chapter 19 (incorporating by reference rules in ISE Rules, Chapter 19).

maintenance by NES of an error account; and (3) make related conforming changes.<sup>14</sup> These ISE rules, which the Commission is also approving today, concerning the outbound routing of orders, cancellation of orders, and handling of error accounts, will be incorporated by reference into ISE Gemini and ISE Mercury's rules,<sup>15</sup> and are similar to rules of Phlx,<sup>16</sup> as well as the other Nasdaq Exchanges.<sup>17</sup> Finally, ISE Gemini and ISE Mercury requested that the Commission approve their proposals to permit NES to become a Member of each respective Exchange, as required by ISE Gemini Rule 309 and ISE Mercury Rule 309 because of NES's affiliation with the Exchanges,<sup>18</sup> to perform certain functions relating to routing orders inbound from the Affiliated Exchanges, the outbound routing of orders to away markets, cancellation of orders, and the maintenance of an error account.

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<sup>14</sup> See Securities Exchange Act Release No. 79665 (December 22, 2016), 81 FR 96092 (December 29, 2016) ("ISE Notice") (notice of filing that proposes, among other things, to amend ISE Rules 1903, 1904, and 1905, and make conforming changes to ISE Rule 1901). The Commission is also today approving this proposed rule change. See Securities Exchange Act Release No. 79994 (February 9, 2017) ("ISE Exchange Routing Order").

<sup>15</sup> Consistent with the proposals by ISE Gemini and ISE Mercury described herein, the ISE rules that the Commission is approving today also (1) permit ISE to receive inbound orders in options routed through NES from the Affiliated Exchanges, pursuant to certain limitations and conditions; and (2) permit NES to become a Member of ISE to perform certain routing and other functions. See ISE Notice, supra note 14, at 96093-94; ISE Exchange Routing Order, supra note 14.

<sup>16</sup> See ISE Gemini Notice, supra note 5, at 96138; ISE Mercury Notice, supra note 5, at 96090-91. See also Phlx Rules 985(c)(2), 1080(m)(ii), (iii), and (v).

<sup>17</sup> See Nasdaq Rule 2160(c) and Nasdaq Options Rules, Chapter VI, Section 11(d)-(g); and BX Rule 2140(c) and BX Options Rules, Chapter VI, Section 11(d)-(g).

<sup>18</sup> See ISE Gemini Notice, supra note 5, at 96137; ISE Mercury Notice, supra note 5, at 96090.

### III. Discussion and Commission Findings

After careful review, the Commission finds, as discussed in more detail below, that the proposed rule changes, as modified by Amendment Nos. 1 and 2, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>19</sup> In particular, the Commission finds that the proposed rule changes, as modified by Amendment Nos. 1 and 2, are consistent with Section 6(b)(1) of the Act,<sup>20</sup> which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purpose of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. Further, the Commission finds that the proposed rule changes, as modified by Amendment Nos. 1 and 2, are consistent with Section 6(b)(5) of the Act,<sup>21</sup> which requires, among other things, that the rules of a national securities exchange be 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, and 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. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

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<sup>19</sup> In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78f(b)(1).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

A. Restriction on Affiliation

As noted above, ISE Gemini and ISE Mercury proposed that NES be permitted to become a Member of each respective Exchange to perform certain routing and other functions, as described in more detail below.<sup>22</sup> Absent Commission approval, ISE Gemini Rule 309 and ISE Mercury Rule 309 would prohibit NES from becoming a Member of either Exchange because of its affiliation with each Exchange and its affiliation with affiliates of each Exchange. Specifically, pursuant to ISE Gemini Rule 309, without prior Commission approval, a Member of the Exchange “shall not be or become an affiliate of the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated.”<sup>23</sup> ISE Mercury Rule 309 contains the same restriction.<sup>24</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest and the potential for unfair competitive advantage.<sup>25</sup> Although the Commission continues to be concerned about potential

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<sup>22</sup> See ISE Gemini Notice, supra note 5, at 96137; ISE Mercury Notice, supra note 5, at 96090. See also infra Sections III.B-C.

<sup>23</sup> See ISE Gemini Rule 309. See also ISE Gemini Notice, supra note 5, at 96137.

<sup>24</sup> See ISE Mercury Rule 309. See also ISE Mercury Notice, supra note 5, at 96090.

<sup>25</sup> See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq’s proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2008-85) (order approving the purchase by ISE Holdings of an ownership interest in Direct Edge Holdings LLC); 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of

unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act, as discussed in more detail below, to permit NES, an affiliate of each Exchange, to be a Member of each Exchange to perform each of the proposed functions, subject to the proposed limitations and conditions. The Commission also believes that the proposed limitations and conditions will mitigate its concerns about potential conflicts of interest and unfair competitive advantage,<sup>26</sup> and that each Exchange's proposed rules are designed to ensure that NES cannot use any information advantage it may have because of its affiliation with each Exchange.<sup>27</sup>

B. Inbound Routing

As discussed above, NES is currently a member of each Nasdaq Exchange. NES also operates as a facility of each of Nasdaq, Phlx, and BX that provides outbound options routing from

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BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGX Exchange, Inc. and EDGA Exchange, Inc.); and 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order granting the exchange registration of BATS-Y Exchange, Inc.).

<sup>26</sup> See infra note 39 and accompanying text.

<sup>27</sup> See infra note 40 and accompanying text. The Commission also notes that the functions to be performed by NES for ISE Gemini and ISE Mercury, as well as the related limitations and conditions, are consistent with those previously approved by the Commission for other exchanges. See, e.g., Securities Exchange Act Release Nos. 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (SR-BX-2012-030) (order approving rules relating to the establishment of the BX options market, including the use of an affiliated member for outbound and inbound routing of options orders) at 39280-82; and 67280 (June 27, 2012), 77 FR 39552 (July 3, 2012) (SR-BX-2012-034) (order approving a proposed rule change with respect to the authority of the BX or NES to cancel orders when a technical or systems issue occurs and the operation of an error account); BX Equity Routing Approval, supra note 9. In addition, the Commission is approving today ISE's proposal to allow NES to become a member of ISE to perform equivalent functions, subject to the same limitations and conditions. See ISE Exchange Routing Order, supra note 14.

each to other market centers, subject to certain conditions.<sup>28</sup> The Commission is approving today ISE's proposal that NES operate as a facility of ISE that provides outbound options routing to other market centers, subject to similar conditions.<sup>29</sup> The operation of NES as a facility of each of the Affiliated Exchanges providing outbound routing services will be subject to oversight by ISE, Nasdaq, BX, and Phlx, respectively, as well as Commission oversight. Each of the Affiliated Exchanges will be responsible for ensuring that NES's outbound options routing services are operated consistent with Section 6 of the Act and with the respective Affiliated Exchange's rules. In addition, the Affiliated Exchanges must each file with the Commission rule changes and fees relating to their outbound options routing services provided by NES.

Recognizing that the Commission previously 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 interest, ISE Gemini and ISE Mercury proposed the following limitations and conditions to permit each Exchange to accept inbound options orders that NES routes in its capacity as a facility of the Affiliated Exchanges:<sup>30</sup>

- First, each Exchange and the Financial Industry Regulatory Authority ("FINRA") will maintain a Regulatory Services Agreement ("RSA"), as well as an agreement pursuant to

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<sup>28</sup> See Phlx Rule 1080(m)(ii) and (iii); Nasdaq Options Rules, Chapter VI, Section 11(d)-(f); BX Options Rules, Chapter VI, Section 11(d)-(f). The Commission notes that these conditions are consistent with the conditions the Commission is approving today for ISE Gemini and ISE Mercury's operation of NES as a facility of each Exchange for outbound options routing to other market centers. See infra Section III.C.

<sup>29</sup> See ISE Exchange Routing Order, supra note 14.

<sup>30</sup> See ISE Gemini Notice, supra note 5, at 96137-38; ISE Mercury Notice, supra note 5, at 96090.

Rule 17d-2 under the Act (“17d-2 Agreement”).<sup>31</sup> Pursuant to the RSA and the 17d-2 Agreement, FINRA will be allocated regulatory responsibilities to review NES’s compliance with certain Exchange rules.<sup>32</sup> Pursuant to the RSA, however, each Exchange retains ultimate responsibility for enforcing its rules with respect to NES.

- Second, FINRA will monitor NES for compliance with each of the Exchange’s trading rules, and will collect and maintain certain related information.<sup>33</sup>
- Third, FINRA will provide a report to each 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 the respective Exchange’s, rules, and (ii) lists all investigations that identify NES as a participant that has potentially violated Commission, or the respective Exchange’s, rules.
- Fourth, ISE Gemini and ISE Mercury proposed to amend ISE Gemini Rule 309 and ISE Mercury Rule 309, respectively, to add ISE Gemini Rule 309(b) and ISE Mercury Rule 309(b), which will provide that Nasdaq, Inc., as the holding company owning both the Exchange and NES, shall establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its

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<sup>31</sup> 17 CFR 240.17d-2.

<sup>32</sup> NES is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

<sup>33</sup> Pursuant to the RSA, both FINRA and the respective Exchange will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of each of the Affiliated Exchanges routing orders to the Exchange) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The respective Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission’s Office of Compliance Inspections and Examinations. See ISE Gemini Notice, supra note 5, at 96137 n.14 and accompanying text; ISE Mercury Notice, supra note 5, at 96090 n.14 and accompanying text.

system, based on non-public information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members, in connection with the provision of inbound routing to the Exchange.<sup>34</sup>

The Commission finds that ISE Gemini and ISE Mercury's proposed rule changes to permit each Exchange to accept inbound options orders routed by NES from its Affiliated Exchanges, including the related change to ISE Gemini Rule 309 and ISE Mercury Rule 309, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that the proposed rule changes are consistent with Section 6(b)(1) of the Act,<sup>35</sup> and Section 6(b)(5) of the Act.<sup>36</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest and the potential for unfair competitive advantage.<sup>37</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NES, in its capacity as a facility of each of the Affiliated Exchanges, to route options orders inbound to ISE Gemini and ISE Mercury, subject to the limitations and conditions described

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<sup>34</sup> See proposed ISE Gemini Rule 309(b); proposed ISE Mercury Rule 309(b). ISE Gemini and ISE Mercury each proposed to designate existing ISE Gemini Rule 309 and ISE Mercury Rule 309, respectively, as subparagraph (a). See proposed ISE Gemini Rule 309(a); proposed ISE Mercury Rule 309(a).

<sup>35</sup> 15 U.S.C. 78f(b)(1). See also supra note 20 and accompanying text.

<sup>36</sup> 15 U.S.C. 78f(b)(5). See also supra note 21 and accompanying text.

<sup>37</sup> See supra note 25 and accompanying text.

above.<sup>38</sup>

The Commission believes that these limitations and conditions will mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO's oversight of NES,<sup>39</sup> combined with a non-affiliated SRO's monitoring of NES's compliance with each of the respective Exchange's rules and quarterly reporting to the respective Exchange, will help to protect the independence of ISE Gemini and ISE Mercury's regulatory responsibilities with respect to NES. The Commission also believes that proposed ISE Gemini Rule 309(b) and proposed ISE Mercury Rule 309(b) are designed to ensure that NES cannot use any information advantage it may have because of its affiliation with ISE Gemini or ISE Mercury.<sup>40</sup>

C. Outbound Routing, Cancellation of Orders, and Error Accounts

As discussed above, the Commission is today approving a proposed rule change by ISE that will amend certain provisions in Chapter 19 of ISE's rulebook, which is incorporated by reference to, and will therefore also become, the rules of ISE Gemini and ISE Mercury.<sup>41</sup> Specifically, these new rules incorporated by reference will (1) permit ISE Gemini and ISE Mercury to route outbound orders in options listed and open for trading on their respective systems to away markets through NES, either directly or through a third-party routing broker-

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<sup>38</sup> The Commission notes that these limitations and conditions are consistent with those previously approved by the Commission for other exchanges. See, e.g., Securities Exchange Act Release Nos. 67256, supra note 27, at 39281-82; and 69299 (March 25, 2013), 78 FR 19337 (March 29, 2013) (SR-Phlx-2013-15) (order approving a proposed rule change to make permanent a pilot program to permit PSX to accept inbound orders routed by NES from BX); and BX Equity Routing Approval, supra note 9.

<sup>39</sup> This oversight will be accomplished through the 17d-2 Agreement between FINRA and each Exchange and the RSA.

<sup>40</sup> See supra note 34 and accompanying text.

<sup>41</sup> See supra notes 13-15 and accompanying text.

dealer; and (2) govern cancellation of orders by the Exchange or NES as either deems necessary to maintain a fair and orderly market if a technical or systems issue occurs at the Exchange, NES, or a routing destination, and the maintenance of an error account by NES for the purpose of addressing error positions that result from a technical or systems issue at the Exchange, NES, a routing destination, or an unaffiliated third-party routing broker-dealer that affects one or more orders.<sup>42</sup> The Commission found these rules, which will also become rules of ISE Gemini and ISE Mercury, to be consistent with the Act.<sup>43</sup>

ISE Gemini and ISE Mercury each proposed that NES be permitted to perform the same functions pursuant to the same conditions with respect to the outbound routing of orders, cancellation of orders, and the handling of error positions as set forth in the ISE proposal.<sup>44</sup> As discussed in the ISE Exchange Routing Order, the Commission believes that the proposed rules and procedures regarding the Exchanges' use of NES to route orders to away markets, cancellation of orders, and handling of error positions, which will also apply to ISE Gemini and ISE Mercury's use of NES, are consistent with the Act, for the reasons, and pursuant to the protections and considerations, discussed in such order.<sup>45</sup>

In addition, the Exchanges propose to make a related, conforming rule change to ISE Gemini Rule 705 and ISE Mercury Rule 705, respectively, which do not incorporate by reference ISE's rules. Currently, pursuant to ISE rules incorporated by reference, ISE Gemini and ISE

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<sup>42</sup> See supra note 14 and accompanying text.

<sup>43</sup> See ISE Exchange Routing Order, supra note 14.

<sup>44</sup> See ISE Gemini Notice, supra note 5, at 96138; ISE Mercury Notice, supra note 5, at 96091.

<sup>45</sup> See ISE Exchange Routing Order, supra note 14, at Section III.B and III.D. The proposal by ISE being approved today also makes other conforming changes to rules incorporated by reference. See ISE Exchange Routing Order, supra note 14.

Mercury utilize Linkage Handlers<sup>46</sup> unaffiliated with the Exchange to route outbound orders.<sup>47</sup>

Pursuant to the proposed rule change by ISE, as applied to the Exchanges, ISE Gemini and ISE Mercury will no longer utilize unaffiliated Linkage Handlers to route outbound orders and instead, NES will route orders to other options exchanges, either directly, or indirectly through unaffiliated third-party routing broker-dealers, on behalf of ISE Gemini and ISE Mercury.<sup>48</sup>

Accordingly, ISE Gemini and ISE Mercury have proposed to remove ISE Gemini Rule 705(d)(4) and ISE Mercury Rule 705(d)(4), respectively, which provide an exception to the limits on compensation in ISE Gemini Rule 705(d) and ISE Mercury Rule 705(d) for Members to the extent such Members are acting as Linkage Handlers.<sup>49</sup> ISE Gemini and ISE Mercury explained that Phlx does not have a similar provision and ISE is also removing this provision from its comparable rule.<sup>50</sup> The Commission believes that this minor, conforming revision is consistent with the Act.

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<sup>46</sup> A “Linkage Handler” is a broker that is unaffiliated with the Exchange with which the Exchange has contracted to provide Routing Services, as that term is defined in ISE Rule 1903, by routing ISO(s) to other exchange(s) as an 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 ISE Rule 1901, Supplementary Material .03. ISE Gemini Rules 100(a)(28) and (39), and ISE Mercury Rules 100(a)(28) and (39), define “Non-Customer Order” and “Public Customer Order,” respectively.

<sup>47</sup> See ISE Rule 1903(a).

<sup>48</sup> See ISE Exchange Routing Order, supra note 14.

<sup>49</sup> See proposed ISE Gemini Rule 705(d); proposed ISE Mercury Rule 705(d).

<sup>50</sup> See ISE Gemini Notice, supra note 5, at 96138; ISE Mercury Notice, supra note 5, at 96091. See also ISE Notice, supra note 14, at 96095 (noting that, unlike NES, Linkage Handlers are not affiliated with ISE and ISE does not believe that such an exception to compensation limits is necessary for NES).

#### IV. Implementation of Proposed Rule Change

ISE Gemini and ISE Mercury stated that they intend to begin implementation of the proposed rule changes in the first quarter of 2017 and third quarter of 2017, respectively, and that the migration will be on a symbol-by-symbol basis.<sup>51</sup> The Commission expects that the Exchanges will issue alerts to Members to announce the relevant migration date for specific symbols. ISE Gemini and ISE Mercury represented that they will add notations in each rulebook to cross-reference the amended rule text and clarify the respective implementation dates.<sup>52</sup>

#### III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>53</sup> that the proposed rule changes (SR-ISEGemini-2016-16; SR-ISEMercury-2016-22), each as modified by their respective Amendment Nos. 1 and 2, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>54</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>51</sup> See ISE Gemini Notice, supra note 5, at 96138; ISE Mercury Notice, supra note 5, at 96091.

<sup>52</sup> See ISE Gemini Notice, supra note 5, at 96138; ISE Mercury Notice, supra note 5, at 96091.

<sup>53</sup> 15 U.S.C. 78s(b)(2).

<sup>54</sup> 17 CFR 200.30-3(a)(12).

