# [***81 FR 74842***](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5M1P-PT50-006W-84Y8-00000-00&context=)

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Notices

**Reporter**

81 FR 74842 \*

***Federal Register* > *2016* > *October* > *Thursday, October 27, 2016* > *Notices* > *SECURITIES AND EXCHANGE COMMISSION (SEC)***

**Title:** **Self-Regulatory Organizations; NYSE MKT LLC; Order Disapproving a Proposed Rule Change To Modify the NYSE Amex Options Fee Schedule With Respect to Fees, Rebates, and Credits for Transactions in the Customer Best Execution Auction**

**Agency**

SECURITIES AND EXCHANGE COMMISSION (SEC)

**Identifier:** **[Release No. 34-79135; File No. SR-NYSEMKT-2016-45]**

**Text**

October 21, 2016.

**I. Introduction**

On April 11, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"), n1 and Rule 19b-4 thereunder, n2 a proposed rule change (File No. SR-NYSEMKT-2016-45) to modify the **[\*74843]** NYSE Amex Options Fee Schedule with respect to fees, rebates, and credits relating to the Exchange's Customer Best Execution Auction ("CUBE Auction"), n3 and to increase credits available under the Exchange's Amex Customer Engagement Program ("ACE Program"). n4 The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act. n5 Notice of filing of the proposed rule change was published in the **Federal Register** on April 26, 2016. n6 On June 9, 2016, the Commission temporarily suspended the Exchange's proposal and simultaneously instituted proceedings to determine whether to approve or disapprove the proposed rule change. n7 The Commission thereafter received ten comment letters on the proposal, one of which was from the Exchange. n8 This order disapproves the proposed rule change.

n1 [*15 U.S.C. 78s(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=).

n2 [*17 CFR 240.19b-4*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5NBM-FN20-008G-Y15M-00000-00&context=).

n3 The CUBE Auction is a mechanism in which an Exchange ATP Holder submits an agency order on behalf of a customer for price improvement, paired with a contra-side order guaranteeing execution of the agency order at or better than the National Best Bid or Offer ("NBBO") depending on the circumstances. The contra-side order could be for the account of the ATP Holder that initiated the CUBE Auction ("Initiating Participant"), or an order solicited from another participant. The agency order is exposed for a random period of time between 500 and 750 milliseconds in which other ATP Holders submit ***competing*** interest at the same price as the initial price or better ("RFR Responses"). The Initiating Participant is guaranteed at least 40% of any remainder of the order (after public customers and better-priced RFR Responses) at the final price for the CUBE order. *See* NYSE MKT Rule 971.1NY.

n4 Under the ACE Program, credits are available to ATP Holders that bring customer orders to the Exchange based on the percentage (by tier) of national industry customer volume those customer orders comprise. *See* NYSE Amex Options Fee Schedule Section I.E.

n5 [*15 U.S.C. 78s(b)(3)(A)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=).

n6 *See* Securities Exchange Act Release No. 77658 (April 20, 2016), [*81 FR 24674*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5JMG-9140-006W-84YP-00000-00&context=) ("Notice").

n7 *See* Securities Exchange Act Release No. 78029, [*81 FR 39089*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5K14-XWT0-006W-8035-00000-00&context=) (June 15, 2016) ("Order Instituting Proceedings").

n8 *See* Letters to Brent J. Fields, Secretary, Commission, from John C. Nagel, Managing Director and Sr. Deputy General Counsel, Citadel LLC, dated July 6, 2016 ("Citadel Letter"); Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange, dated July 8, 2016 ("NYSE MKT Letter"); Eric Chern, Chief Executive Officer, CTC Trading Group, L.L.C., dated July 28, 2016 ("CTC Letter"); Sebastiaan Koeling, Chief Executive Officer, Optiver US LLC, dated August 3, 2016 ("Optiver Letter"); Gerald D. O'Connell, Susquehanna International Group, Andrew Stevens, IMC Financial Markets LLC, Edward Haravon, Spot Trading, Kurt Eckert, Wolverine Trading and Peter Schwarz, Integral Derivatives, dated August 5, 2016 ("Options Market Maker Firms Letter"); John Kinahan, Chief Executive Officer, Group One Trading, L.P., dated August 8, 2016 ("Group One Letter"); Joanna Mallers, Secretary, FIA Principal Traders Group, dated August 10, 2016 ("FIA PTG Letter"); John Russell, Chairman of the Board and James Toes, President and CEO, Security Traders Association, dated August 29, 2016 ("STA Letter"); and John A. McCarthy, General Counsel, KCG Holdings, Inc., dated September 16, 2016 ("KCG Letter"); and Letter to Robert W. Errett, Deputy Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association, dated July 12, 2016 ("SIFMA Letter").

**II. Description of the Proposed Rule Change**

The Exchange's proposal amended certain fees, rebates, and credits relating to executions through its CUBE Auction. First, the proposal increased the fees assessed by the Exchange for RFR Responses (*i.e.,* orders and quotes submitted during a CUBE Auction that are executed against the agency order). n9 Specifically, the Exchange increased RFR Response fees for Non-Customers (including market makers) from $ 0.12 to $ 0.70 for classes subject to the Penny Pilot n10 ("Penny classes") and from $ 0.12 to $ 1.05 for classes not subject to the Penny Pilot ("Non-Penny classes").

n9 *See supra* note 3 and NYSE Amex Options Fee Schedule, Section I.G.

n10 *See* Commentary .02 to NYSE MKT Rule 960NY. *See also* Securities Exchange Act Release No. 75281 (June 24, 2015), [*80 FR 37338*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5GB8-YCK0-006W-83JX-00000-00&context=) (June 30, 2015) (SR-NYSEMKT-2015-43) (extending the Penny Pilot through June 30, 2016).

Further, the proposal increased a rebate available to Initiating Participants in CUBE Auctions (*i.e.,* ATP Holders that initiate such auctions) n11 under the Exchange's ACE Program. Specifically, the proposal increased the rebate paid to Initiating Participants that meet certain tiers of the ACE Program from $ 0.05 to $ 0.18 (the "ACE Initiating Participant Rebate") for each of the first 5,000 Customer contracts of an agency order executed in a CUBE Auction. n12

n11 *See supra* note 3.

n12 *See* NYSE Amex Options Fee Schedule, Section I.G.

Finally, the proposal increased the credit paid by the Exchange to Initiating Participants (the "break-up credit") for each contract in the contra-side order that is paired with the agency order that does not trade with the agency order because it is replaced in the auction. Prior to the proposal, the credit granted was $ 0.05 per contract in all classes. The proposal raised it to $ 0.35 for Penny classes and $ 0.70 for Non-Penny classes. n13

n13 *See id.* In addition to its proposed changes to CUBE Auction fees and credits, the Exchange's proposal also increased certain credits available through its ACE Program with respect to non-CUBE transactions. *See* Notice, *supra* note 6, at 24674-75. *See also* NYSE Amex Options Fee Schedule, Section I.E.

The amended fees resulted in a proposed difference between the fees charged to an Initiating Participant and those charged to Non-Customer auction responders that would be a minimum of $ 0.65 in Penny classes and $ 1.00 in Non-Penny classes. n14 Taking into consideration that the ACE rebate available to an Initiating Participant submitting the agency order into the CUBE Auction was increased to $ 0.18, this proposed fee differential could be as high as $ 0.83 per executed contract for Penny classes, and $ 1.18 per contract for Non-Penny classes. n15

n14 *See* Order Instituting Proceedings, *supra* note 7, at 39090 n.20.

n15 *See id.* at 39091.

In its filing, the Exchange stated that the changes to the CUBE Auction transaction fees are reasonable, equitable and not unfairly discriminatory "because they apply equally to all ATP Holders that choose to participate in the CUBE, and access to the Exchange is offered on terms that are not unfairly discriminatory." n16 The Exchange also took the position, with regard specifically to the ACE Initiating Participant Credit, that the change is reasonable, equitable, and not unfairly discriminatory because it is "designed to attract more volume and liquidity to the Exchange generally, and to CUBE Auctions specifically," which, according to the Exchange, "would benefit all market participants . . . through increased opportunities to trade at potentially improved prices as well as enhancing price discovery." n17 The Exchange stated that its proposal is reasonable because it is similar to the fee and credit structures previously applied to the CUBE Auction and to fees charged for similar auctions on other exchanges. n18 The Exchange further stated that the proposal "would improve the Exchange's overall ***competitiveness*** and strengthen its market quality for all market participants." n19 Finally, the Exchange stated that it did not believe the proposal would impose any unnecessary or inappropriate burden on ***competition*** because it is "pro-***competitive***" and "designed to incent increases in the number of CUBE Auctions brought to the Exchange," thereby "benefit[ting] all Exchange participants through increased opportunities to trade as well as enhancing price discovery." n20

n16 *See* Notice, *supra* note 6, at 24675.

n17 *See id.* at 24675-76.

n18 *See id.* at 24675 & n.10.

n19 *See id.* at 24676. The Exchange stated that the CUBE fee and credit adjustments established by the instant proposal are consistent with the fees and credits that were in place for the same items in its Fee Schedule prior to February 2016. *See id.* at 24675 n.6.

n20 *See id.* at 24676. The Exchange also noted that it operates in a highly-***competitive*** market. *See id.* **[\*74844]**

**III. Order Instituting Proceedings and Comments Received**

In the Order Instituting Proceedings, the Commission stated that it would further assess whether the proposal satisfies the statutory provisions that require exchange rules to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; n21 (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; n22 and (3) not impose any burden on ***competition*** not necessary or appropriate in furtherance of the purposes of the Act. n23

n21 [*15 U.S.C. 78f(b)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

n22 [*15 U.S.C. 78f(b)(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

n23 [*15 U.S.C. 78f(b)(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

In the Order Instituting Proceedings, the Commission expressed concern about the potential effect the proposal could have on the operation of the CUBE Auction and its potential to provide price improvement to customers, as well as about its effect upon ***competition*** among participants initiating CUBE Auctions and those responding to them. n24 The Commission acknowledged that increasing the rebates and break-up credits provided to Initiating Participants likely would strengthen their incentive to bring customer orders to the Exchange. n25 However, the Commission also noted that substantially increasing the fees paid by Non-Customer auction responders could deter them from participating in CUBE Auctions. n26 The Commission observed that in Penny classes, for example, the fee charged Non-Customer auction responders would exceed one-half the minimum trading increment, and the economic differential between such auction responders and the Initiating Participants with whom they are ***competing*** would be even more. n27

n24 *See* Order Instituting Proceedings, *supra* note 7, at 39090.

n25 *See id.* at 39091.

n26 *See id.*

n27 *See id.* *See also* *supra* text accompanying notes 14 and 15.

Further, in the Order Instituting Proceedings, the Commission raised questions as to whether the proposal would in fact provide the additional trading opportunities for Non-Customer auction responders and other market quality benefits suggested by the Exchange. n28 The Commission noted that the Exchange did not address the fact that the proposal would substantially increase the difference in the fees assessed by the Exchange on Initiating Participants and Non-Customer auction responders, and indicated that substantially exacerbating the differences in the fees assessed by the Exchange on Initiating Participants and those assessed on Non-Customer auction responders raises issues as to whether the proposal is equitable and not unfairly discriminatory *among* Exchange members. n29 The Commission also noted in the Order Instituting Proceedings that the Exchange did not support with specific reasoning or data its statement that the proposal would provide all members additional trading opportunities and other market quality benefits. The Commission further stated that the Exchange did not sufficiently address the potential burden that its proposed fee changes would have on ***competition*** between Initiating Participants and Non-Customer auction responders, or the prospect that ***competition*** in CUBE Auctions could be impaired, by substantially increasing the auction response fees paid by Non-Customer auction responders. Moreover, the Commission noted that the Exchange did not address in any detail the increases in the break-up credit payable to an Initiating Participant for each contract in a CUBE Order that is executed by others, and why the proposed increase in this payment is reasonable, equitable, and not unfairly discriminatory. n30

n28 *See* Order Instituting Proceedings, *supra* note 7, at 39090.

n29 *See id.* at 39091.

n30 *See id.*

The Commission received ten comment letters in response to the Order Instituting Proceedings, one of which was from the Exchange. n31 The nine commenters other than the Exchange either specifically recommended that the Commission disapprove the Exchange's proposal or expressed concerns about the proposal in its current form. n32 Broadly, these commenters echoed many of the concerns, summarized above, that were raised by the Commission in the Order Instituting Proceedings. Among other things, commenters focused on the potential impact of the proposed raising of fees for Non-Customer auction responders, increases in rebates to Initiating Participants, and heightened differential in the costs between Non-Customer auction responders and Initiating Participants, that would result from the proposal. They also questioned the level of auction response fees generally, the consequences of break-up credits, and the potential effect of the proposal on the quoting behavior of market makers.

n31 *See supra* note 8.

n32 *See* SIFMA Letter; FIA PTG Letter; Options Market Maker Firms Letter; Optiver Letter; Group One Letter; STA Letter; CTC Letter; Citadel Letter; KCG Letter.

More specifically, many commenters believed that the fee differentials created by the Exchange's proposal would significantly favor Initiating Participants over Non-Customer auction responders. n33 Some commenters highlighted the fact that the proposed increase in fees assessed on Non-Customer auction responders, without any change to the Initiating Participant fees, would widen the differential between these two groups of participants. n34 Several commenters acknowledged that the Exchange's auction fee structure was not unique in providing for differentials, but emphasized their belief that the Exchange's proposal would further and unacceptably exacerbate a trend of raising auction response fees and widening differentials. n35 To the extent that the proposal would further increase these fees and widen the disparity in fees assessed on the different participants, these commenters believed that the proposal was inequitable, unfairly discriminatory, and unreasonably burdensome on ***competition***. n36

n33 *See, e.g.,* Citadel Letter at 2-3; CTC Letter at 2-4; Group One Letter at 2; Options Market Maker Firms Letter at 3; Optiver Letter at 2; KCG Letter at 2, 6.

n34 *See* Citadel Letter at 2; KCG Letter at 2.

n35 *See, e.g.,* Citadel Letter at 2-3 (stating that the Exchange's proposal would "significantly" increase the difference in net cost to Non-Customer auction responders as compared to Initiating Participants and would be "starkly discriminatory"); Options Market Maker Firms Letter at 3-5; 8 (arguing that the fee differential for participating in CUBE is "so punitive that [Non-Customer auction responders] cannot ***compete*** on price at anywhere near equal terms with [Initiating Participants]" and objecting to fee differentials that would be "significantly higher" than any other options exchange auction); Optiver Letter at 2, 4 (noting a "gross disparity in fees" between Non-Customer auction responders and Initiating Participants under the proposal and finding such disparity to be the highest among ***competing*** exchanges). *See also* STA Letter at 1 (suggesting that the Exchange be permitted to adopt fees "more aligned with other exchanges").

n36 *See id.*

A few commenters stated that an effect of the proposed fees would be to limit opportunities for price improvement in the CUBE mechanism by discouraging auction responders from effectively participating. n37 One of these commenters further argued that the diminished ***competition*** would encourage Initiating Participants to submit less ***competitive*** prices to begin an auction. n38 Two commenters took the **[\*74845]** position that it was unfairly discriminatory to increase fees for Non-Customer auction responders while correspondingly increasing rebates to Initiating Participants. n39 One of these commenters further suggested that the Commission impose a maximum fee differential of $ 0.02 between Initiating Participants and non-Initiating Participants. n40

n37 *See, e.g.,* Citadel Letter at 2-3; CTC Letter at 4; Group One Letter at 2.

n38 *See* Group One Letter at 2.

n39 *See* CTC Letter at 2-4; KCG Letter at 2, 5-6.

n40 *See* CTC Letter at 2-4 (comparing this proposed limitation to transaction fee differentials between directed and unaffiliated market makers trading against a directed order).

Commenters expressed other concerns as well. One commenter stated that high response fees generally disincentivize firms from responding to an auction and offering price improvement. n41 Another commenter argued that auction response fees are comparable to access fees charged by exchanges and should be limited more generally. n42 Two commenters supported limiting auction response fees in both Penny and Non-Penny classes to no more than half the minimum trading increment. n43 Another commenter similarly supported a cap on auction response fees, but stated that the amount should be set at a much lower level than half the minimum increment in the Penny classes. n44 Still another commenter stated that an absolute cap would not be necessary. n45 Instead, this commenter maintained, the Commission should prohibit fee differentials between market participants, reasoning that, if exchanges were barred from discriminating between participant types, ***competitive*** market forces would lower the absolute fee levels to a reasonable amount. n46 In addition, five commenters expressed specific concern about break-up credits, n47 contending that they are per se unfairly discriminatory in that they provide a benefit solely to Initiating Participants and thereby discourage ***competition*** and limit price improvement. n48

n41 *See* SIFMA Letter at 2.

n42 *See* Citadel Letter at 4.

n43 *See* Citadel Letter at 7; CTC Letter at 3. Citadel supported limiting all transaction fees in Penny classes at $ 0.50, and stated that the minimum increment considered in setting auction fees should be the minimum increment of an auction response. Citadel Letter at 7. CTC stated that auction response fees should be limited at $ 0.50 for all series because all price improvement auctions allow responses in penny increments. CTC Letter at 3.

n44 *See* Options Market Maker Firms Letter at 9.

n45 *See* Optiver Letter at 5.

n46 *Id.* This commenter believes that, absent discriminatory fees, ***competition*** would lead to an amount that was much lower than half the minimum trading increment. *Id.* The commenter further stated that even if an absolute response fee limitation were to be imposed, an exchange could offer rebates sufficiently high to maintain a large differential in fees between market participants. *Id.*

n47 *See supra* text accompanying note 13.

n48 *See* CTC Letter at 4; Options Market Maker Firms Letter at 4; Optiver Letter at 3; Group One Trading Letter at 2-3; STA Letter at 2-3.

Several commenters expressed concern that high transaction fees in auction mechanisms generally, not only the fees under the Exchange's proposal, could harm options market quality by negatively impacting market maker quoting behavior. n49 A few commenters believed that high auction response fees, such as those proposed by the Exchange, would discourage quoting in the options markets because they would encourage increased internalization in the auctions. n50 One of these commenters stated that market makers would respond to the proposed fees by reducing the number, size, and quality of their displayed quotations. n51 Another commenter believed that this would diminish the degree of actual price improvement provided by the auctions, because, while auction executions will occur at or better than the NBBO, this NBBO may have been better at the outset if not for the negative effects of the high auction fees. n52 One commenter contended that increased transaction fees in general, and especially disproportionate fees among various market participants, will lead to overall decreased ***competition*** and liquidity in the options market. n53 In addition, several commenters expressed concerns that break-up fees, break-up credits, auto-match functionality, and the ability to initiate an auction at the NBBO are all among features of auctions that may incentivize internalization, decrease ***competition***, and impair market quality. n54 Finally, commenters broadly suggested that the Commission conduct a holistic review of options exchange electronic auction mechanisms. n55

n49 *See, e.g.,* Citadel Letter at 6; FIA PTG Letter at 1; NYSE MKT Letter at 2; Options Market Maker Firms Letter at 2-3, 6; SIFMA Letter at 2; KCG Letter at 2.

n50 *See, e.g.,* Citadel Letter at 6; Options Market Maker Firms Letter at 6; SIFMA Letter at 2. In response, the Exchange acknowledged that price improvement auctions encourage internalization to the detriment of displayed market maker quotations, but argued that this was the result of a lack of guaranteed price improvement in most exchanges' auctions. *See* NYSE MKT Letter at 2.

n51 *See* Citadel Letter at 6.

n52 *See* Options Market Maker Firms Letter at 2-3.

n53 *See* FIA PTG Letter at 1.

n54 *See, e.g.,* FIA PTG Letter at 2, Options Market Maker Firms Letter at 3, CTC Letter at 3.

n55 *See* Citadel Letter at 7; CTC Letter at 1; FIA PTG Letter at 2; Group One Trading Letter at 1, 3; NYSE MKT Letter at 4-5; Options Market Maker Firms Letter at 2; Optiver Letter at 1, 4; SIFMA Letter at 3; STA Letter at 3; KCG Letter at 5-6. The Commission notes that while the Exchange supported such a review in its letter, the Exchange requested that the Commission end the suspension of the instant filing while undertaking this review. *See* NYSE MKT Letter at 5.

In its comment letter, the Exchange broadly expressed concerns with options exchange electronic auction mechanisms, and stated its belief that such mechanisms should guarantee price improvement. n56 However, the Exchange did not provide additional justification for the proposal, or respond specifically to the concerns expressed in the Order Instituting Proceedings. Rather, the Exchange stated that its proposal was developed in response to ***competitive*** concerns and that the suspension placed it at a ***competitive*** disadvantage compared to other exchanges with comparable fees that were unaffected by the Order Instituting Proceedings. n57 The Exchange requested that the Commission end its temporary suspension of the proposal while the Commission undertakes a broad review of the fee structures applied by the options exchanges to their price improvement auctions. n58

n56 *See* NYSE MKT Letter at 4.

n57 *See id.* at 3-4 In particular, the Exchange stated that it was aware of two other options exchanges that, like the Exchange, were charging auction response fees in Penny classes of more than $ 0.50 per contract. *See id.* at 4.

n58 *See id.* at 1, 4.

**IV. Discussion and Commission Findings**

Under Section 19(b)(2)(C) of the Act, n59 the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and ***regulations*** thereunder that are applicable to such organization. n60 The Commission shall disapprove a proposed rule change if it does not make such a finding. n61 Rule 700(b)(3) of the Commission's Rules of Practice states that the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and ***regulations*** issued thereunder . . . is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient." n62

n59 [*15 U.S.C. 78s(b)(2)(C)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=).

n60 [*15 U.S.C. 78s(b)(2)(C)(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=).

n61 [*15 U.S.C. 78s(b)(2)(C)(ii)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=); *see also* [*17 CFR 201.700(b)(3)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5KXR-XW30-008G-Y4CP-00000-00&context=).

n62 [*17 CFR 201.700(b)(3)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5KXR-XW30-008G-Y4CP-00000-00&context=). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. *See id.* Any failure of a self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and ***regulations*** issued thereunder that are applicable to the self-regulatory organization. *Id.* **[\*74846]**

In the Order Instituting Proceedings, the Commission raised concerns about the effect the proposal could have on the operation of the CUBE Auction and its ability to provide price improvement to customers, as well as the impact it could have on ***competition*** among participants initiating CUBE Auctions and those responding to them. n63 The Commission pointed to several specific elements of the proposal for which, in its view, the Exchange had not provided sufficient justification to enable the Commission to find that the proposal was consistent with the Act. n64 In particular, the Commission noted that the Exchange justified the proposal on the grounds that it would create incentives for Initiating Participants to bring customer orders to the Exchange, and thereby benefit all members by providing more trading opportunities, potential price improvement, tighter spreads, and enhanced market quality. n65 The Commission acknowledged that increasing the rebates and break-up credits provided to Initiating Participants likely would strengthen their incentives to bring customer orders to the Exchange, but expressed concern that substantially increasing the fees paid by Non-Customer auction responders could deter them from participating in CUBE Auctions. n66 The Commission further noted that the proposal would substantially exacerbate the differences in the fees assessed by the Exchange on Non-Customer auction responders as compared to those for Initiating Participants. n67 The Commission stated that in Penny classes, for example, the fee charged Non-Customer auction responders would exceed one-half the minimum trading increment, and the economic differential between Non-Customer auction responders and the Initiating Participants with whom they are ***competing*** would be even more. n68 Accordingly, the Commission believed that questions were raised as to whether the proposal would in fact provide the additional trading opportunities for non-Initiating Participants and other market quality benefits suggested by the Exchange. n69

n63 *See* Order Instituting Proceedings, *supra* note 7, at 39090.

n64 *See id.*

n65 *See id.* at 39091.

n66 *See id.*

n67 *See id.*

n68 *See id.*

n69 *See id.*

As discussed above, most commenters broadly echoed the Commission's concerns, and several expressed the view that the proposal would not provide the additional trading opportunities for non-Initiating Participants and other market quality benefits suggested by the Exchange. Specifically, several commenters stated that an effect of the proposed fees would be to limit opportunities for price improvement in the CUBE mechanism by discouraging auction responders from effectively participating, n70 and expressed concern that the fee structure in auction mechanisms could harm options market quality by negatively impacting market maker quoting behavior. n71 In addition, commenters were concerned that the proposed fees would widen the cost differential between Non-Customer auction responders and Initiating Participants such that the differential would be excessive as compared with those of other options exchanges. n72

n70 *See supra* note 37.

n71 *See supra* notes 50-52 and accompanying text.

n72 *See supra* notes 33-36 and accompanying text.

In its comment letter, the Exchange did not respond specifically to the concerns articulated in the Order Instituting Proceedings or in the comments, or otherwise offer any additional information to support its view that the proposal would provide additional trading opportunities for non-Initiating Participants and other market quality benefits. n73 The Exchange simply characterized its proposal as a ***competitive*** response to certain other options exchanges, two of which had been charging auction response fees in Penny classes in excess of $ 0.50 per contract. The Commission notes that, in the interim, both such exchanges have reduced their auction response fees (inclusive of marketing fees) so that they no longer exceed half the minimum trading increment in Penny classes. n74

n73 In particular, the Exchange did not address the fact that the proposal would substantially increase the difference in the fees assessed by the Exchange on Initiating Participants and Non-Customer auction responders; did not support with specific reasoning or data its statement that the proposal would provide all members additional trading opportunities and other market quality benefits; did not sufficiently address the potential burden that its proposed fee changes would have on ***competition*** between Initiating Participants and Non-Customer auction responders, or the prospect that, by substantially increasing the auction response fees paid by Non-Customer auction responders, ***competition*** in CUBE Auctions could be impaired; and did not address in any detail the increases in the break-up credit payable to Initiating Participants for each contract that they are not able to execute in CUBE, and why this payment is reasonable, equitable, and not unfairly discriminatory.

n74 *See* Securities Exchange Act Release Nos. 78117 (June 21, 2016), [*81 FR 41634*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5K3P-5RS0-006W-818W-00000-00&context=) (June 27, 2016) (SR-NYSEMKT-2016-60); 78394 (July 22, 2016), [*81 FR 49709*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5KB9-JBY0-006W-84TC-00000-00&context=) (July 28, 2016) (SR-Phlx-2016-77); 78427 (July 27, 2016), [*81 FR 50777*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5KCC-BWP0-006W-8027-00000-00&context=) (August 2, 2016) (SR-BOX-2016-34).

As noted, Rule 700(b)(3) of the Commission's Rules of Practice states that the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and ***regulations*** issued thereunder . . . is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient." n75 The Exchange has taken the position that its proposal meets applicable Exchange Act standards, including that fees be reasonable, equitably allocated, and not unfairly discriminatory, and that they not impose any unnecessary or inappropriate burden on ***competition***, on the grounds that the proposed fee changes would benefit all market participants through increased trading opportunities and improved market quality. Although the Commission expressed concern, in the Order Instituting Proceedings, that the reasoning behind this assertion was not clear and no supporting data had been provided, the Exchange has offered no additional justification or evidence to support this key aspect of its statutory basis.

n75 [*17 CFR 201.700(b)(3)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5KXR-XW30-008G-Y4CP-00000-00&context=). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. *See id.* Any failure of a self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and ***regulations*** issued thereunder that are applicable to the self-regulatory organization. *Id.*

Accordingly, after careful consideration, the Commission does not find that the proposed rule change is consistent with the requirements of the Act and the rules and ***regulations*** thereunder applicable to a national securities exchange. n76 In particular, the Commission does not find that the proposed rule change is consistent with: (1) Section 6(b)(4) of the Act, n77 which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons **[\*74847]** using its facilities; (2) Section 6(b)(5) of the Act, n78 which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (3) Section 6(b)(8) of the Act, n79 which requires that the rules of a national securities exchange do not impose any burden on ***competition*** not necessary or appropriate in furtherance of the purposes of the Act. Because any of these determinations under the Act independently necessitates disapproving the proposal, the Commission does so.

n76 In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, ***competition***, and capital formation. *See* [*15 U.S.C. 78c(f)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GHC1-NRF4-407J-00000-00&context=).

n77 [*15 U.S.C. 78f(b)(4)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

n78 [*15 U.S.C. 78f(b)(5)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

n79 [*15 U.S.C. 78f(b)(8)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPC1-NRF4-4309-00000-00&context=).

**V. Conclusion**

For the reasons set forth above, the Commission does not find that the proposed rule change is consistent with the Act and the rules and ***regulations*** thereunder applicable to a national securities exchange, and in particular, Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, n80 that the proposed rule change (SR-NYSEMKT-2016-45) be, and hereby is, disapproved.

n80 [*15 U.S.C. 78s(b)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GTY1-NRF4-41M9-00000-00&context=).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. n81

**Brent J. Fields,**

*Secretary.*

n81 [*17 CFR 200.30-3(a)(57)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SPP-2120-008G-Y2ND-00000-00&context=) and (58).

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