provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[13] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, 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,'' and ''to protect investors and the public interest.'' [14]

Under the proposal, BNYM will calculate the Fund's NAV at 12:00 p.m., Eastern time, every day the New York Stock Exchange is open. In addition, to initiate an order for a creation unit, the Distributor or its agent must receive an irrevocable order from an authorized participant, in proper form, no later than 12:00 p.m., Eastern time, in each case on the date such order is placed in order to receive that day's NAV. Likewise, with respect to redemptions, an authorized participant must submit an irrevocable request to redeem shares of the Fund generally before 12:00 p.m., Eastern time on any business day in order to receive that day's NAV. The Commission notes the proposal does not provide any explanation for the early NAV calculation time and creation and redemption cut-off time. The proposal also does not explain whether the early NAV calculation time and creation and redemption cut-off time would have any impact on the trading of the Shares, including any impact on arbitrage. Accordingly, the Commission seeks commenters' views on the 12:00 p.m. NAV calculation time and creation and redemption cut-off time, and on whether the Exchange's statements relating to the NAV calculation and the creation and redemption process support a determination that the listing and trading of the Shares would be consistent with Section 6(b)(5) of the Act, which, among other things, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[15]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by November 17, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 1, 2016. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[16] in addition to any other comments they may wish to submit about the proposed rule change.

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2016–97 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2016–97. This file number should be included on the subject line if email 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 Web site 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–NYSEArca–2016–97 and should be submitted on or before November 17, 2016. Rebuttal comments should be submitted by December 1, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Brent J. Fields,

Secretary.

[FR Doc. 2016–25938 Filed 10–26–16; 8:45 am]

BILLING CODE 8011–01–P

[13] *Id.*

[14] 15 U.S.C. 78f(b)(5).

[15] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[16] *See supra* note 3.

[17] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79135; File No. SR–NYSEMKT–2016–45]

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

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''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–NYSEMKT–2016–45) to modify the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

NYSE Amex Options Fee Schedule with respect to fees, rebates, and credits relating to the Exchange's Customer Best Execution Auction (''CUBE Auction''),[3] and to increase credits available under the Exchange's Amex Customer Engagement Program (''ACE Program'').[4] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[5] Notice of filing of the proposed rule change was published in the **Federal Register** on April 26, 2016.[6] 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.[7] The Commission thereafter received ten comment letters on the proposal, one of which was from the Exchange.[8] This order disapproves the proposed rule change.

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).[9] 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[10] (''Penny classes'') and from $0.12 to $1.05 for classes not subject to the Penny Pilot (''Non-Penny classes'').

Further, the proposal increased a rebate available to Initiating Participants in CUBE Auctions (*i.e.,* ATP Holders that initiate such auctions)[11] 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.[12]

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.[13]

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.[14] 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.[15]

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.''[16] 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.''[17] 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.[18] The Exchange further stated that the proposal ''would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants.''[19] 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.''[20]

[3] 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.

[4] 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.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] *See* Securities Exchange Act Release No. 77658 (April 20, 2016), 81 FR 24674 (''Notice'').

[7] *See* Securities Exchange Act Release No. 78029, 81 FR 39089 (June 15, 2016) (''Order Instituting Proceedings'').

[8] *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'').

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

[10] *See* Commentary .02 to NYSE MKT Rule 960NY. *See also* Securities Exchange Act Release No. 75281 (June 24, 2015), 80 FR 37338 (June 30, 2015) (SR–NYSEMKT–2015–43) (extending the Penny Pilot through June 30, 2016).

[11] *See supra* note 3.

[12] *See* NYSE Amex Options Fee Schedule, Section I.G.

[13] *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.

[14] *See* Order Instituting Proceedings, *supra* note 7, at 39090 n.20.

[15] *See id.* at 39091.

[16] *See* Notice, *supra* note 6, at 24675.

[17] *See id.* at 24675–76.

[18] *See id.* at 24675 & n.10.

[19] *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.

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

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;[21] (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;[22] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[23]

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.[24] 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.[25] However, the Commission also noted that substantially increasing the fees paid by Non-Customer auction responders could deter them from participating in CUBE Auctions.[26] 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.[27]

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.[28] 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.[29] 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.[30]

The Commission received ten comment letters in response to the Order Instituting Proceedings, one of which was from the Exchange.[31] 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.[32] 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.

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.[33] 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.[34] 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.[35] 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.[36]

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.[37] One of these commenters further argued that the diminished competition would encourage Initiating Participants to submit less competitive prices to begin an auction.[38] Two commenters took the

[21] 15 U.S.C. 78f(b)(4).

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78f(b)(8).

[24] *See* Order Instituting Proceedings, *supra* note 7, at 39090.

[25] *See id.* at 39091.

[26] *See id.*

[27] *See id. See also supra* text accompanying notes 14 and 15.

[28] *See* Order Instituting Proceedings, *supra* note 7, at 39090.

[29] *See id.* at 39091.

[30] *See id.*

[31] *See supra* note 8.

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

[33] *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.

[34] *See* Citadel Letter at 2; KCG Letter at 2.

[35] *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'').

[36] *See id.*

[37] *See, e.g.,* Citadel Letter at 2–3; CTC Letter at 4; Group One Letter at 2.

[38] *See* Group One Letter at 2.

position that it was unfairly discriminatory to increase fees for Non-Customer auction responders while correspondingly increasing rebates to Initiating Participants.[39] One of these commenters further suggested that the Commission impose a maximum fee differential of $0.02 between Initiating Participants and non-Initiating Participants.[40]

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.[41] Another commenter argued that auction response fees are comparable to access fees charged by exchanges and should be limited more generally.[42] Two commenters supported limiting auction response fees in both Penny and Non-Penny classes to no more than half the minimum trading increment.[43] 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.[44] Still another commenter stated that an absolute cap would not be necessary.[45] 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.[46] In addition, five commenters expressed specific concern about break-up credits,[47] 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.[48]

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.[49] 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.[50] 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.[51] 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.[52] 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.[53] 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.[54] Finally, commenters broadly suggested that the Commission conduct a holistic review of options exchange electronic auction mechanisms.[55]

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.[56] 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.[57] 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.[58]

IV. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,[59] 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.[60] The Commission shall disapprove a proposed rule change if it does not make such a finding.[61] 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.'' [62]

[39] *See* CTC Letter at 2–4; KCG Letter at 2, 5–6.

[40] *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).

[41] *See* SIFMA Letter at 2.

[42] *See* Citadel Letter at 4.

[43] *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.

[44] *See* Options Market Maker Firms Letter at 9.

[45] *See* Optiver Letter at 5.

[46] *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.*

[47] *See supra* text accompanying note 13.

[48] *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.

[49] *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.

[50] *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.

[51] *See* Citadel Letter at 6.

[52] *See* Options Market Maker Firms Letter at 2–3.

[53] *See* FIA PTG Letter at 1.

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

[55] *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.

[56] *See* NYSE MKT Letter at 4.

[57] *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.

[58] *See id.* at 1, 4.

[59] 15 U.S.C. 78s(b)(2)(C).

[60] 15 U.S.C. 78s(b)(2)(C)(i).

[61] 15 U.S.C. 78s(b)(2)(C)(ii); *see also* 17 CFR 201.700(b)(3).

[62] 17 CFR 201.700(b)(3). 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

Continued

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.[63] 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.[64] 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.[65] 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.[66] 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.[67] 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.[68] 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.[69]

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,[70] and expressed concern that the fee structure in auction mechanisms could harm options market quality by negatively impacting market maker quoting behavior.[71] 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.[72]

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.[73] 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.[74]

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.'' [75] 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.

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.[76] In particular, the Commission does not find that the proposed rule change is consistent with: (1) Section 6(b)(4) of the Act,[77] 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

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.*

[63] *See* Order Instituting Proceedings, *supra* note 7, at 39090.

[64] *See id.*

[65] *See id.* at 39091.

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See supra* note 37.

[71] *See supra* notes 50–52 and accompanying text.

[72] *See supra* notes 33–36 and accompanying text.

[73] 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.

[74] *See* Securities Exchange Act Release Nos. 78117 (June 21, 2016), 81 FR 41634 (June 27, 2016) (SR–NYSEMKT–2016–60); 78394 (July 22, 2016), 81 FR 49709 (July 28, 2016) (SR-Phlx–2016–77); 78427 (July 27, 2016), 81 FR 50777 (August 2, 2016) (SR–BOX–2016–34).

[75] 17 CFR 201.700(b)(3). 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.*

[76] 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).

[77] 15 U.S.C. 78f(b)(4).

using its facilities; (2) Section 6(b)(5) of the Act,[78] 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,[79] 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.

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,[80] that the proposed rule change (SR–NYSEMKT–2016–45) be, and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[81]

Brent J. Fields,

Secretary.

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[78] 15 U.S.C. 78f(b)(5).

[79] 15 U.S.C. 78f(b)(8).

[80] 15 U.S.C. 78s(b)(2).

[81] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79130; File No. SR–NYSE–2016–67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 497

October 21, 2016.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 13, 2016, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Rule 497 regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The proposed rule change is available on the Exchange's Web site at *www.nyse.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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

The Exchange proposes to amend Rule 497 (Additional Requirements for Listed Securities Issued by Intercontinental Exchange, Inc. or its Affiliates) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. Rule 497 sets forth certain requirements that securities issued by the Exchange's ultimate parent, Intercontinental Exchange, Inc. (''ICE''), or its affiliates, must meet before they can be listed on the Exchange, including certain pre-listing approvals and post-listing monitoring requirements.

Specifically, the Exchange is proposing to make the following changes to Rule 497: (i) Expand the definition of Affiliate Security under Rule 497(a)(2); (ii) require that the annual review required under Rule 497(c)(2) be forwarded to the Exchange's Regulatory Oversight Committee (''ROC''); and (iii) make non-substantive typographical changes.

Rule 497(a)(2) currently defines ''Affiliate Security'' as ''any security issued by an ICE Affiliate, with the exception of Investment Company Units as defined in Para. 703.16 of the Listed Company Manual.'' [4] The Exchange proposes to expand the definition of Affiliate Security to include any Exchange-listed option on any security issued by an ICE Affiliate. As a consequence, under Rule 497(b), prior to listing any new class of options on a security issued by an ICE Affiliate, Exchange regulatory staff would be required to make a finding that the option class satisfies the Exchange's rules for listing, and the ROC would be required to approve such finding. Likewise, throughout the continued listing of such option class on the Exchange, it would be covered by the reporting requirements of Rule 497(c). In a non-substantive grammatical change to Rule 497(a)(2), the Exchange also proposes to replace the ''a'' before ''ICE Affiliate'' with ''an.''

In the event that an ICE Affiliate lists an Affiliate Security, Rule 497(c)(2) requires that, throughout the continued listing of the Affiliate Security on the Exchange, an independent accounting firm will review the listing standards for the Affiliate Security and a copy of the report shall be forwarded promptly to the Securities and Exchange Commission (''Commission''). The Exchange proposes to expand Rule 497(c)(2) to require that such report also be forwarded to the ROC.

The Exchange proposes to make the following additional, non-substantive changes to Rule 497(c):

- It proposes to move ''the Exchange shall'' from the end of Rule 497(c) to the start of Rule 497(c)(1), as the text only applies to Rule 497(c)(1), and not sub-paragraphs (2) or (3), and change ''shall'' to ''will.''
- It proposes to add ''and trading'' after ''Throughout the continued listing'' in Rule 497(c), as Rule 497 (c)(1)

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] For purposes of Rule 497, an ''ICE Affiliate'' is ''ICE and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with ICE, where 'control' means that one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.'' Rule 497(a)(1).