



October 12, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Release No. 34-84097; File No. SR-NYSE-2018-40

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to comment on the above-referenced immediately effective exchange filing¹ which seeks to revise NYSE's fees.

The NYSE Tier Filing does not provide sufficient information to support a finding by the Commission that the proposed changes:

- provide for an equitable allocation of reasonable dues, fees, and other charges;
- do not unfairly discriminate between different exchange participants;
- do not impose burdens on competition that are not necessary or appropriate; and
- do not impose impediments to the free and open market system.

As a result, the filing is insufficient to establish that the exchange has met its obligations under the Exchange Act and Commission rules. Accordingly, we request that the Commission suspend the NYSE Tier Filing and institute proceedings to disapprove it.

¹ *New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Price List*, SEC, Sept. 12, 2018, available at <https://www.sec.gov/rules/sro/nyse/2018/34-84097.pdf> (NYSE Tier Filing).

About Healthy Markets and Our Interest in Exchange Pricing Fairness

The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets.²

The conflicts of interest and costs associated with non-transparent, discriminatory, unreasonable, and anti-competitive exchange pricing have been a particular concern for Healthy Markets.

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act.³ Those requirements include, among other items, that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”⁴
- not be “designed to permit unfair discrimination”;⁵
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;⁶ and
- be designed “to protect investors and the public interest.”⁷

² To learn more about Healthy Markets, please see our website at <http://www.healthymarkets.org>.

³ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (“The SEC “shall approve” a self regulatory organization’s proposed rule change only “if it finds that such proposed rule change is consistent with” provisions of the Exchange Act.”).

⁴ 15 U.S.C. § 78f(b)(4).

⁵ 15 U.S.C. § 78f(b)(5).

⁶ 15 U.S.C. § 78f(b)(8).

⁷ 15 U.S.C. § 78f(b)(5).

Further, to satisfy the Administrative Procedures Act, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁸

This is not an easy task. In 2017, the securities exchanges and FINRA made over 1500 filings with the Commission. Of those, about 200 were directly related to listings, another 350 related to fees, and about 100 related to order types. No less than 500 were “other” filings. Many of these filings were extremely complex. The vast majority received no public comments. Many were immediately effective upon filing, and many were approved without any public findings by the Commission.

Nevertheless, the difficulty in wading through the massive volume of filings does not relieve the Commission of its legal obligation.⁹ The Commission must review all exchange filings, including those related to market data,¹⁰ connectivity costs,¹¹ and trading fees (such as the NYSE Tier Filing).

Background on Pricing Tiers

Transaction pricing tiers are common across exchanges, where they serve as powerful incentives for brokers and market makers to route orders to particular venues.

⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

⁹ *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (“We do not reach them because, as Petitioners also argue, the SEC’s Order approving the Plan fails in a more basic respect: the Commission did not itself “find[]” or “determin[e],” that the Plan met any of those requirements. Instead, the SEC effectively abdicated that responsibility...”) (citations omitted).

¹⁰ See, e.g., *Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan*, SEC, Rel. No. 34-83148, May 1, 2018, available at <https://www.sec.gov/rules/sro/nms/2018/34-83148.pdf>; see also *Order of Summary Abrogation of the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis*, SEC, Rel. No. 34-83149, May 1, 2018, available at <https://www.sec.gov/rules/sro/nms/2018/34-83149.pdf>.

¹¹ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Rel. No. 34-84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>; see also *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, SEC, Rel. No. 34-84175, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf>.

Unfortunately, due to a lack of transparency in both the incentives, and brokers' routing behavior, we do not generally know the magnitude of their impacts.¹²

Of course, exchange filings, including those related to pricing tiers, are all public. However, as we have previously explained to the Commission

[T]he complexity, lack of key details, and cross-referencing of those filings makes it difficult, if not impossible, for market participants, researchers, or other third-parties to ascertain the exact levels of fees and rebates applicable to any particular firm or group of firms. In fact, in 2017, we at Healthy Markets have endeavored to review each exchange's filings and create a cost chart for each exchange. Despite decades of experience in this area, including specific expertise in deciphering complex exchange filings, we were unable to reasonably efficiently do so.¹³

For many market participants, this process is performed manually each month, based on their trading experiences and costs. These reviews may -- and often do -- lead to negotiations with exchanges for customized pricing tiers. While the exact number of utilized pricing tiers is unknown, there are now several hundred different pricing tiers at the major exchanges.¹⁴

Non-transparent, customized pricing tiers make it difficult, if not impossible, for investors to understand the incentives and conflicts of interest facing their brokers.¹⁵ A broker's

¹² The Commission recently recognized the importance of these pricing tiers and the need for greater transparency as part of its proposed transaction fee pilot program. *Transaction Fee Pilot for NMS Stocks*, SEC, 83 Fed. Reg. 13008, (March 26, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-03-26/pdf/2018-05545.pdf> ("Transaction Fee Pilot Proposal").

¹³ Letter from Tyler Gellasch, Healthy Markets Association to Brent J. Fields, SEC, 20, May 24, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3704495-162465.pdf> ("HMA Initial Fee Pilot Letter").

¹⁴ Nathaniel Popper, *Stock Exchange Prices Grow So Convolved Even Traders Are Confused, Study Finds*, N.Y. Times, Mar. 1, 2016, available at <https://www.nytimes.com/2016/03/02/business/dealbook/stock-exchange-prices-grow-so-convolved-even-traders-are-confused-study-finds.html> (citing to a RBC Capital Markets report that "at any moment in time more than 800 different pricing possibilities are being offered to trading firms across 12 official exchanges.").

¹⁵ The key question for investors is a simple one: Is my broker routing my order in a manner that is intended to provide me with the best execution, or in a way that is designed to maximize the broker's profits? To answer that question, however, investors need significantly greater transparency into their

pricing tier may directly impact to which exchange that broker sends an order. A broker may route to the exchange that has offered it a more beneficial tier, rather than the venue that is likely to provide for the best execution for its customer. Worse, some brokers may even change their order routing behavior during a particular month so as to ensure that they achieve volume thresholds for more beneficial pricing tiers.¹⁶

Pricing tiers offer different customers different prices.¹⁷ To the extent that different competitors fall into different tiers, it will directly impact the competitive balance between those firms.

In practice, these tiers serve as a one-two punch against fair competition--and a powerful force for order flow and industry consolidation. First, pricing tiers -- by design -- offer cheaper trading for larger firms with greater order volumes. This puts smaller firms at a competitive disadvantage on order and execution prices. Second, several larger trading firms will then use their lower rates to attract greater order flow--consolidating. For example, below as Figure 1 is an excerpt from a pricing sheet from one large bank broker-dealer that is a few years old.

brokers' order routing practices and incentives. On the one hand, the Commission is currently considering a proposal to enhance order routing disclosures. *Disclosure of Order Handling Information*, Sec. and Exch. Comm'n, 81 Fed. Reg. 49432 (July 27, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-27/pdf/2016-16967.pdf>. On the other, the Commission is considering a complex proposal for a transaction fee pilot. Transaction Fee Pilot Proposal. While both proposals will provide valuable information to investors, neither is sufficient to provide investors with all of the necessary information to answer the basic question that is the heart of their ability to fulfill their own fiduciary duties.

¹⁶ As demonstrated in the instant NYSE Tier Filing, pricing tiers are often dependent on meeting certain volume thresholds. Pricing tiers are typically calculated at month-end, and bills are sent to trading firms accordingly. Of course, these practices call into question the brokers' compliance with their best execution obligations. However, investors are currently unaware of their specific brokers' incentives with each exchange and may also have no practical way for identifying changes in their brokers' specific routing behaviors.

¹⁷ We do not believe that the Commission is generally well-equipped to act as a "price controller." However, in adopting the 30 cents per 100 shares cap on fees to access a protected quote, the Commission appropriately recognized that it would be detrimental to the markets to, on the one hand, compel market participants to interact with the protected quote, and then not restrict the fees at the venue where that quote is offered. The government mandate to access that quote necessitates the further protections to ensure the reasonability of the fee to access it. Notably, there is no cap on the rebates that venues may pay--even though those rebates facially create conflicts of interest for routing brokers. Further, we do not urge the Commission to simply mandate one pricing tier for each exchange. Rather, to the extent that the Commission permits different pricing tiers, we urge the Commission to ensure that the distinctions between customers be transparent, justified, and consistent with the exchanges' Exchange Act obligations.

FIGURE 1: Broker A Exchange Pricing

	Tape A (NYSE)		Tape B (AMEX & Other)		Tape C (NASDAQ)	
	Taking	Providing	Taking	Providing	Taking	Providing
ARCA	0.00300	(0.00300)	0.00280	(0.00230)	0.00300	(0.00300)
BATS	0.00300	(0.00310)	0.00300	(0.00310)	0.00300	(0.00310)
NYSE	0.00250	(0.00180)	0.00250	(0.00180)	0.00250	(0.00180)
NASDAQ	0.00300	(0.00295)	0.00300	(0.00295)	0.00300	(0.00295)

Similarly, Figure 2 is another “price sheet” from another broker-dealer from around the same time period. Interestingly, the email enclosing Figure 2 noted the “tier improvement” to reflect Broker B had negotiated better rates.

Figure 2: Broker B Exchange Pricing

Description	Current Rate	New Rate
NASDAQ Make non-NBBO	-0.00295	-0.00305
NASDAQ Make NBBO	-0.0031	-0.00315
NASDAQ MidPoint	-0.0014	-0.0017
EDGA Make	0.0005	0.0003
Arca Make Tape A	-0.0029	-0.0032
Arca Make Tape B	-0.0022	-0.0025
Arca Make Tape C	-0.0029	-0.0032

These private advertising sheets, and many others like them, are often used by those who negotiate customized beneficial tiers to solicit greater order flow from other, likely smaller, brokers who are unable to negotiate the better rates.

The ability to negotiate a better pricing tier with an exchange or set of exchanges has become a point of competition between brokers--leading to unfair and anti-competitive practices. As we have previously articulated to the Commission:

In recent years, the number of brokers has declined. These economics may have nothing to do with the quality of service the smaller brokers provide, but rather their abilities to qualify for what are essentially volume discounts--notwithstanding the facts that the discount

providers (the exchanges) are obligated by the Exchange Act to not discriminate between customers.¹⁸

Again, despite the Exchange Act's mandate that exchange fees be "equitably allocated" and "non-discriminatory", each firm is subject to whatever rate it can convince an exchange (presumably for business reasons) to grant. This is left to the whims of the exchange and the market participants. Those without market power (e.g., the smallest) are likely to have the worst deals.

Worse, over time, as order flow has aggregated to the larger brokers, this has increased their ability to negotiate even better rates; further expanding the gap between themselves and the smaller firms.

As part of its Transaction Fee Pilot Proposal, the Commission included an Exchange Transaction Fee Summary, which is intended to facilitate comparison of exchanges' basic fee structures and identify changes.¹⁹

But rather than a comprehensive listing of fees and rebates, the proposed new summary would provide "Base" levels (which would be the "standard amount assessed or rebate offered before any applicable discounts, tiers, caps, or other incentives are applied") and "Top Tier" levels (which would be the fee assessed or rebate offered after all applicable discounts, tiers, caps, or other incentives are applied).²⁰ Exchanges would also have to calculate and disclose on a monthly basis the "average" and "median" per share realized fees and rebates, overall, and by test group.²¹ Of course, this is incredibly important and valuable information.

Similarly, it is important for regulators, market participants, researchers, and others to know which firms are subject to which fees. For example, it may be that one or more market makers or large brokers may enjoy remarkably different cost structures than other market participants.

The Transaction Fee Pilot Proposal recognizes that these disclosures -- while necessary to understanding order routing incentives -- nevertheless "ignore[] significant variation in exchange fee schedules."²² And while the Commission stopped short of

¹⁸ HMA Initial Fee Pilot Letter, at 22.

¹⁹ Transaction Fee Pilot Proposal, at 13029.

²⁰ Id.

²¹ Id., at 13030.

²² Id.

proposing more comprehensive disclosures,²³ it clearly recognized the relative impacts of these pricing tiers on order routing behavior.

Various pricing tiers create facially discriminatory pricing practices for exchanges, and may create significant market distortions. For example, larger brokers who may hit tier levels could have dramatically different costs and revenues than smaller brokers on the same exchange for what would otherwise be the same order.

Even more disturbingly, the conflict of interest created by different pricing tiers may also impact how brokers treat their own customers. For example, a broker with a less-sophisticated customer may send orders to a venue so that the firm would reach a certain tier threshold, despite the broker's awareness that executions on that venue may result in inferior execution outcomes to investors. However, the same broker, if faced with the same order from a more-sophisticated customer, may not. Put simply, the broker may be tempted to engage in more conflicted routing practices based on the perceived likelihood of discovery by its customer.

NYSE Tier Filing

The NYSE Tier Filing proposes to amend the exchange's price list to:

- (1) modify the Tier 1 and Tier 3 Adding Credit requirements;
- (2) amend its routing fees; (3) introduce a new incremental SLP step up tier; and (4) modify the Tier 1 and Tier 2 Adding Tier and SLP Provide Tier requirements for UTP Securities (Tapes B and C).²⁴

All told, the filing appears to make several distinct pricing modifications. The NYSE Tier Filing offers no detailed justifications, explanations of how the revisions will operate, or analysis of potential impacts for any of the changes.

Changing the Tier 1 and Tier 3 Adding Credit Requirements

- 1) The Exchange currently provides an equity per share credit of \$0.0022 per transaction for all orders, other than

²³ Id.

²⁴ NYSE Tier Filing, at 2.



MPL and Non-Display Reserve orders, for transactions in stocks with a share price of \$1.00 or more when adding liquidity to the Exchange if the member organization (1) executes an average daily trading volume (“ADV”) that adds liquidity to the Exchange during the billing month (“Adding ADV”) that is at least 1.10% of NYSE consolidated average daily volume (“CADV”), excluding liquidity added by a Designated Market Maker (“DMM”), and (2) executes MOC and LOC orders of at least 0.12% of NYSE CADV. The Exchange proposes to modify the Adding ADV requirement for the Tier 1 Adding Credit to require an Adding ADV, excluding liquidity added by a DMM, of at least 1.20% of NYSE CADV.²⁵

- 2) The Exchange currently provides an equity per share credit of \$0.0018 per transaction for all orders, other than MPL and Non-Display Reserve orders, that add liquidity to the NYSE if the member organization (i) has Adding ADV that is at least 0.35% of NYSE CADV, and (ii) executes market at-the-close (“MOC”) and limit at-the-close (“LOC”) of at least 0.05% of NYSE CADV. The Exchange proposes to modify the Adding ADV requirement for the Tier 3 Adding Credit to require an Adding ADV that is at least 0.40% of NYSE CADV.²⁶

Changing Routing Fees

- 1) The Exchange currently charges a \$0.0030 per share fee to route in Tape A securities. The Exchange proposes to charge \$0.0035 per share fee to route and a lower \$0.0030 per share fee if the member organization has adding ADV in Tapes A, B, and C combined that is at least 0.20% of Tapes A, B and C CADV combined.²⁷

²⁵ NYSE Tier Filing, at 2-3.

²⁶ Id., at 3.

²⁷ Id., at 3.



- 2) For orders in UTP Securities that are routed, the Exchange currently charges a fee of \$0.0005 per share for executions in securities with a price at or above \$1.00 that route to and execute in an auction on the Exchange's affiliate NYSE American. For executions in securities with a price at or above \$1.00 that route to and execute in an auction on an Away Market other than NYSE American, the Exchange charges a fee of \$0.0010 per share, and a fee of \$0.0030 per share for all other executions. The Exchange proposes to charge a fee of \$0.0035 per share for all other executions in securities with a price at or above \$1.00. The Exchange also proposes a fee of \$0.0030 if the member organization has adding ADV in Tapes A, B, and C combined that is at least 0.20% of Tapes A, B and C CADV combined.²⁸

Adding a New SLP Tier

- 1) Exchange would provide a credit of \$0.0002 to a SLP in addition to the SLP's tiered or non-tiered credit for adding displayed liquidity provided that such combined credits do not exceed \$0.0031 per share, if the SLP (1) meets the 10% average 5 The term "Away Market" is defined in Rule 1.1(ff) to mean any exchange, alternative trading system ("ATS") or other broker-dealer (1) with which the Exchange maintains an electronic linkage, and (2) that provides instantaneous responses to orders routed from the Exchange. 6 For securities priced below \$1.00 that route to and execute on an Away Market, the Exchange charges a fee of 0.30% of the total dollar value of the transaction for executions in an Away Market auction as well as all other executions. The Exchange proposes no changes to these routing fees. The Exchange proposes to use "adding ADV" in connection with the routing fees for UTP Securities to distinguish it from the defined term

²⁸ NYSE Tier Filing, at 3-4.



“Adding ADV” that only applies to Tape A securities. See NYSE Price List, notes 2 & 4 and note 3, supra. 5 or more quoting requirement in an assigned security pursuant to Rule 107B (quotes of an SLP-Prop and an SLMM of the same member organization shall not be aggregated), and (2) adds liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same or an affiliated member organization) of an ADV of more than 0.15% of NYSE CADV in the billing month over the SLP’s adding liquidity for all assigned SLP securities in the aggregate (including shares of both an SLP-Prop and an SLMM of the same or an affiliated member organization) as a percent of NYSE CADV in the second quarter of 2018.²⁹

Changing Tier 1 and Tier 2 Adding Tier Requirements for UTP Securities

- 1) The current Tier 1 Adding Credit for UTP Securities offers a per tape credit of \$0.0026 per share (\$0.0025 if an MPL order) on a per tape basis for transactions in stocks with a per share price of \$1.00 or more when adding liquidity to the Exchange if the member organization has at least 0.05% of Adding CADV in Tape B or C. For purposes of qualifying for this tier, the 0.05% of Adding CADV could include shares of both an SLP-Prop and an SLMM of the same or an affiliated member organization. The Exchange proposes to require at least 0.10% of Adding CADV in Tape B or C in order to qualify for this credit.³⁰
- 2) The current Tier 2 Adding Credit offers a per tape credit of \$0.0023 per share for transactions in stocks with a per share price of \$1.00 or more when adding liquidity to the Exchange if the member organization has at least 0.01% of Adding CADV in Tape B or C. For purposes of

²⁹ NYSE Tier Filing, at 4-5.

³⁰ Id., at 6.



qualifying for this tier, the 0.01% of Adding CADV could include shares of both an SLP-Prop and an SLMM of the same or an affiliated member organization. The Exchange proposes to require at least 0.03% of Adding CADV in Tape B or C in order to qualify for this credit.³¹

Changing SLP Provide Tier Requirements for UTP Securities

- 1) Current SLP Provide Tier 2 provides a \$0.0029 per share credit per tape in an assigned UTP Security for SLPs adding displayed liquidity to the Exchange if the SLP (1) adds liquidity for all assigned UTP Securities in the aggregate of an CADV of at least 0.01% per tape, and (2) meets the 10% average or more quoting requirement in 250 or more assigned UTP Securities in Tapes B and C combined pursuant to Rule 107B, and (3) meets the 10% average or more quoting requirement in an assigned UTP Security pursuant to Rule 107B. The Exchange proposes to require SLPs to add liquidity for all assigned UTP Securities in the aggregate of an CADV of at least 0.03% per tape. The Exchange would also require SLPs to meet the 10% average or more quoting requirement in 200 or more assigned UTP Securities in Tapes B and C combined pursuant to Rule 107B.³²

- 2) Current SLP Provide Tier 1 offers a \$0.0032 per share credit per tape in an assigned UTP Security for SLPs adding displayed liquidity to the Exchange if the SLP (1) adds liquidity for all assigned UTP Securities in the aggregate of an CADV of at least 0.05% per tape, and (2) meets the 10% average or more quoting requirement in 500 or more assigned UTP Securities in Tapes B and C combined pursuant to Rule 107B, and (3) meets the 10% average or more quoting requirement in an assigned UTP Security pursuant to Rule 107B. The Exchange

³¹ Id., at 6-7.

³² NYSE Tier Filing, at 7.

proposes to modify the adding liquidity requirement to require 8 SLPs to add liquidity for all assigned UTP Securities in the aggregate of an CADV of at least 0.10% per tape.³³

Because the exchanges filed the changes under Section 19(b)(3)(A) of the Exchange Act and Rule 19b-4(f)(2) thereunder, the proposed rule changes became effective upon filing with the Commission.³⁴ The fee changes were filed with the Commission on August 31, 2018, and became effective on September 4, 2018.³⁵

NYSE Tier Filing Is Inconsistent with the Exchange Act

As described above, the Exchange Act requires, among other items, that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”³⁶
- not be “designed to permit unfair discrimination”;³⁷
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;³⁸ and

³³ Id., at 7-8.

³⁴ As we have stated before:

This truncated process, wherein rules are immediately effective, was enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act. As one of a very small number of organizations that reads every filing of every exchange each month, we believe that this process has enabled the proliferation of fees and complexity with little SEC oversight. With upwards of 200 SRO filings each month, and remarkably limited SEC staff resources, we have significant questions regarding the staff's ability to review the filings, identify concerns, and take appropriate action to protect investors and promote fair and efficient markets on a consistent basis. Letter from Tyler Gellasch, Healthy Markets Association, to Brett J. Fields, SEC, at 4 n.15, Sept. 4, 2018, *available at* <https://www.sec.gov/comments/sr-miax-2018-19/srmiac201819-4300775-173209.pdf>.

³⁵ NYSE Tier Filing, at 1.

³⁶ 15 U.S.C. § 78f(b)(4).

³⁷ 15 U.S.C. § 78f(b)(5).

³⁸ 15 U.S.C. § 78f(b)(8).

- be designed “to protect investors and the public interest.”³⁹

Further, as the Commission has recently explained:

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.” 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, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴⁰

The NYSE Tier Filing fails to meet this burden.

Interestingly, under the section titled “*Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*”, the NYSE Tier Filing offers no actual “statement of purpose.”⁴¹ Instead, it simply states the substance of the changes. Presumably, the changes are intended to increase revenues for the exchange, but that is not clear. In fact, there is no statement regarding the intention for any of the changes articulated in the filing.

Somewhat confusingly, after explaining the changes to the technical requirements for each of the fees, the NYSE Tier Filing concludes “The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any problems that member organizations would have in complying with the proposed

³⁹ 15 U.S.C. § 78f(b)(5).

⁴⁰ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, SEC, Rel. No. 34-84175, at 6, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf> (citations omitted).

⁴¹ NYSE Tier Filing, at 2-12.

change.”⁴² The filing never articulated any issues sought to be addressed by any of the proposed changes.

NYSE Tier Filing Fails to Offer Sufficient Evidence to Support a Commission Finding That it Provides for an Equitable Allocation of Reasonable Fees, Costs, and Charges

By law, the proposed fees must be both (1) reasonable and (2) equitably allocated.⁴³ The NYSE Tier Filing makes little attempt to demonstrate compliance with either mandate. The NYSE Tier Filing makes no attempt at all to explore how the benefits and burdens of the fees will be applied across its customer base.

The NYSE Tier Filing Does Not Establish the Fees Are Reasonable

The NYSE Tier Filing offers almost no discussion regarding the “reasonability” of the pricing changes. There are no statistics or comparisons to other fees offered. Reasonability is a normative judgment that must be made in relation to something else. In the abstract, a \$20 movie ticket may seem reasonable. Of course, if we knew that the price charged by the five other movie theaters in the area was \$5, then the \$20 movie ticket could be found to be unreasonable.

For the adding tiers changes, the NYSE Tier Filing offers no discussion at all regarding reasonability. For the routing fee changes, the exchange simply notes that the changes are similar to the routing fees charged by another exchange within its own family.⁴⁴ For the Incremental SLP Step Up Tier, the exchange argues that it “is reasonable because it provides SLPs as well as SLPs that are also DMMs with added incentive to bring additional order flow to a public market.”⁴⁵ With respect to the UTP changes, again, the exchange argues that they are “reasonable because it would further contribute to incenting member organizations to provide additional amounts of liquidity on the Exchange.”⁴⁶

We strain to see how the motivation to offer an incentive to attract order flow *de facto* makes any incentive -- regardless of size or form -- reasonable. If the exchange were to

⁴² Id., at 8.

⁴³ 5 U.S.C. § 78f.

⁴⁴ NYSE Tier Filing, at 9-10.

⁴⁵ Id., at 10.

⁴⁶ Id., at 11.

offer \$100 million cash payments each month to its top 5 customers, the “incentive” would be present, but the payments would clearly not be “reasonable.”

The NYSE Tier Filing Does Not Establish That the Fees are Equitably Allocated

The NYSE Tier Filing asserts that the fees are equitable because they apply to any qualifying customer.⁴⁷

While the fee schedule may apply to all members, the actual impact of those fees is extremely inequitable. Under the exchange’s logic, it would be “equitable” and “non-discriminatory” for the exchanges to provide free trading for its largest three volume customers, if the volume thresholds applied for all members. Of course, smaller firms would be forced to continue paying to trade, while larger firms would not. And so the smaller firms would be effectively subsidizing the largest firms. Further, this would effectively exclude smaller firms from the opportunity to effectively compete on price, leading to greater market consolidation and weaker markets. Such a fee would be facially inequitable, discriminatory, an unnecessary barrier to competition, and contrary to fair and open markets. It would be -- put simply -- unquestionably contrary to the Exchange Act.

By definition, the pricing changes proposed (and implemented) by the NYSE Tier Filing discriminate between customers who meet the articulated criteria and those who do not. Unfortunately, the exchange does not offer any explanation for making the distinctions. There is also no information or logic on how they arrived at the requirements for the various tiers. The filing does not explain which, how many, or the nature of the firms that meet the qualifications. The NYSE Tier Filing does not explain why those firms selected as “deserving” the preferential treatment. Other than saying the changes will serve as incentives for qualifying firms, the NYSE Tier Filing does not explain what impact, if any, the changes will have on quote behavior by market participants, trading activity on the exchange, execution quality, or overall market quality.

⁴⁷ Id., at 8-9 (The new tiers “are equitable and not unfairly discriminatory because they would apply equally to all qualifying member organizations, including Floor brokers, that submit orders to the NYSE and add liquidity to the Exchange.”); see also NYSE Tier Filing, at 9 (routing fees are “reasonable, equitable and not an unfairly discriminatory allocation of fees because the fee would be applicable to all member organizations in an equivalent manner.”).

For example, what is the justification for changing the consolidated average daily volume requirement from 0.35% to 0.4% in the Adding Credit changes? Why are those numbers selected? What will be the impact on market participants? What will be the impact on the order and trading activity on the exchange?

Lastly, somewhat bizarrely, the exchange seems to argue that the fees are “equitable” because they “will encourage liquidity.”⁴⁸ How offering an incentive to a small subset of customers is “equitable” for all customers is unexplained.

We struggle to understand how the Commission could reasonably find that the changes provide for “reasonable” fees that are “equitably” allocated when the Commission has not been provided with any information about the magnitude of the fees, the impacted parties, or the allocation of the fees across the different customers of the exchange. Accordingly, because the NYSE Tier Filing fails to establish that the changes provide for an equitable allocation of reasonable fees, costs, and charges, the Commission should suspend the filing and initiate proceedings to disapprove it.

The NYSE Tier Filing Imposes a Burden on Competition That is Not Necessary or Appropriate, Unfairly Discriminates Between Different Exchange Participants, and Imposes Impediments to the Free and Open Market System

In the NYSE Tier Filing, the exchange offers a statement on the burden on competition.

[T]he Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed change would foster liquidity provision and stability in the marketplace, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. In this regard, the Exchange

⁴⁸ Id., at 8-9. We can argue that it would be an overall good thing for a town to build a new school. However, if the town seeking to build that school were to seek to pass a school levy that was to be paid exclusively by only the poorest 25% of residents in the town, the result would be both inequitable and discriminatory. Yet, under the exchange’s logic, it would be neither.

believes that the transparency and competitiveness of attracting additional executions on an exchange market would encourage competition. The Exchange also believes that the proposed rule change is designed to provide the public and investors with a Price List that is clear and consistent, thereby reducing burdens on the marketplace and facilitating investor protection.⁴⁹

This statement is little more than an unsupported assertion that it doesn't "believe" the filing will impose any burden on competition. Unfortunately, the exchange offers no data to support that belief. As stated above, it offers no details regarding:

- the number and types of firms impacted by each change;
- the dollars involved in each change;
- how each change is expected to impact order routing behavior in qualitative or quantitative terms;
- how each change is expected to impact trading (including execution quality) in qualitative or quantitative terms;
- How each change may impact the competition between exchange customers; and
- Overall market quality.

Under the exchange's assertion, there also appears to be no particular boundary regarding what is permitted, versus impermissible, fee discrimination. For example, what if one broker was able to negotiate an outrageous subsidy of 1 penny per share for all trades? Or perhaps more realistically, what if an exchange granted a proprietary trading firm with a senior executive that was personally close to an exchange executive a unique, highly-beneficial set of rates?

Is that fair? Is that equitable? Is that competitive?

Rather than simply stating its belief that the proposed fee changes won't impact competition, the exchange offers no analysis or data with which to assess the impact of any of the proposed changes on the competition between its customers--much less conclude that the changes are not an undue burden on competition. Yet, it must. That is what the Exchange Act requires.

⁴⁹ NYSE Tier Filing, at 12.

Because the NYSE Tier Filing imposes fees and limits that impose a burden on competition that is not necessary or appropriate and unfairly discriminates between different exchange participants, and imposes impediments to the free and open market system, it should be disapproved.

Conclusion

In sum, the NYSE Tier Filing is yet another example of a conflicted process wherein an exchange has proposed non-transparent, discriminatory benefits to some selected customers. Presumably, the exchange is seeking to further its own profit-seeking motives (as is its right), but that must still be balanced by the exchange's obligations under the Exchange Act.

Unfortunately, the NYSE Tier Filing is facially inconsistent with the exchange's obligations under the Exchange Act, and should be disapproved.

Further, the NYSE Tier Filing is but one of many fee filing changes--almost none of which provide sufficient details to permit the Commission to find that the proposals are consistent with the Exchange Act. Accordingly, we urge the Commission to, for this and all similar filings, take any appropriate actions to pause and carefully review the filings for their compliance with the law.

Lastly, because of the importance of pricing tiers on order routing incentives more broadly, we strongly urge the Commission to strengthen disclosure of pricing tiers. Requiring basic disclosures of pricing tiers would greatly improve market participants' and regulators' understanding of how they work, and what the impacts of pricing tiers have on market participant behavior and execution quality.⁵⁰

⁵⁰ See, e.g., HMA Initial Fee Pilot Letter, 19-23; see also, Chester S. Spatt, *Is Equity Market Structure Anti-Competitive?*, May 24, 2018 (working draft available upon request to the author).

Thank you for the opportunity to highlight our concerns contained within the NYSE Tier Filing. Should you have any questions or seek further information please contact me at

[REDACTED]

Sincerely,



Tyler Gellasch
Executive Director

Cc: Hon. Jay Clayton, Chairman
Hon. Kara M. Stein, Commissioner
Hon. Hester Peirce, Commissioner
Hon. Robert J. Jackson, Jr., Commissioner
Brett Redfearn, Director of the Division of Trading and Markets
John Roeser, Associate Director, Division of Trading and Markets