

April 25, 2014

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, Adopting Rule 971.1NY for an Electronic Price Improvement Auction for Single-Leg Options Orders

I. Introduction

On February 21, 2014, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt new Rule 971.1NY (“Rule 971.1NY” or “Rule”) to provide for an electronic crossing mechanism with a price improvement auction for options trading on the Exchange, to be referred to as the Customer Best Execution Auction (“CUBE Auction” or “Auction”). The proposal also would make related changes to certain Exchange rules to accommodate the new CUBE Auction. The proposed rule change was published for comment in the Federal Register on March 11, 2014.³ The Commission received no comments regarding the proposal. On April 21, 2014, the Exchange filed Amendment No. 1 to the proposed rule change. On April 23, 2014, the Exchange withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change.⁴ This

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71655 (March 5, 2014), 79 FR 13711 (“Notice”).

⁴ The Exchange withdrew Amendment No. 1 due to a technical error in the amendment. In Amendment No. 2, the Exchange clarified that Exchange-sponsored Floor Broker systems are not enabled to accept orders into the CUBE Auction mechanism from Floor Brokers; (2) revised the rule text to clarify that unrelated quotes and orders will never trade through their limit prices; and (3) revised the rule text to clarify that the Contra Order may not be cancelled or modified. Amendment No. 2 has been placed in the public

order approves the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposal

Proposed Rule 971.1NY would provide for an electronic price improvement auction for single leg options orders. The CUBE Auction would be available to Amex Trading Permit Holders (“ATP Holders”) both on and off the trading floor of the Exchange, subject to the requirements of Section 11(a) of the Act (discussed below).⁵ In the Notice, the Exchange stated that the CUBE Auction would operate in a manner consistent with – but not identical to – the operation of electronic price improvement auctions available on other options markets.⁶ The Exchange stated that the CUBE Auction is designed to work seamlessly with the Exchange’s Consolidated Book, which is the Exchange’s single electronic order book where all quotes and

comment file for SR-NYSEMKT-2014-17 at <http://www.sec.gov/comments/sr-nysemkt-2014-17/nysemkt201417.shtml> (see letter from Janet McGinness, EVP, Legal, NYSE MKT, to Secretary, Commission, dated April 23, 2014) and also is available on the Exchange’s website at http://www.nyse.com/nysenotices/nyseamex/rule-filings/pdf.action;jsessionid=0C79EAD580B05432B779CC2C14D4CDC2?file_no=SR-NYSEMKT-2014-17&seqnum=3.

⁵ See Notice, 79 FR at 13711. See also Amendment No. 2, *supra* note 4. In addition to utilizing the CUBE Auction, floor-based ATP Holders would be permitted to continue to use existing floor-based crossing rules. See Notice, 79 FR at 13711.

⁶ See Chicago Board Options Exchange, Inc. (“CBOE”) Rule 6.74A – Automated Improvement Mechanism (“AIM”); NASDAQ OMX PHLX, INC. (“PHLX”) Rule 1080(n) – Price Improvement XL (“PIXL”); BOX Options Exchange LLC (“BOX”) Rule 7150 – Price Improvement Period (“PIP”); International Securities Exchange (“ISE”) Rule 723 – Price Improvement Mechanism (“PIM”). NYSE MKT noted that the AIM, PIXL, PIP and PIM have features similar to the CUBE Auction including: (a) providing the opportunity for price improvement; (b) delineating an exposure period for the original agency order; (c) setting guidelines for the types of orders eligible for participation; and (d) setting allocation rules for orders considered by the mechanism. See Notice, 79 FR at 13711, n.4.

limit orders sent to the Exchange are placed and reside as a file on the NYSE Amex System (“System”).⁷

Under proposed Rule 971.1NY(a), an ATP Holder would be able to seek to guarantee the execution of a limit order it represents as agent on behalf of a public customer, broker-dealer, or any other entity (“CUBE Order”) through the CUBE Auction. The ATP Holder that submits the CUBE Order (“Initiating Participant”) would agree to guarantee the execution of the CUBE Order at a specified price (“single stop price”) by submitting a contra-side order (“Contra Order”) representing principal interest or interest that it has solicited to trade with the CUBE Order. In lieu of specifying a stop price, the Initiating Participant could utilize the auto-match or auto-match limit features of Rule 971.1NY(c)(1) (discussed below). The Initiating Participant’s manner of guaranteeing the CUBE Order and the price(s)⁸ at which the CUBE Order is stopped would not be displayed. The Exchange stated that, although the Contra Order would guarantee the CUBE Order an execution, the purpose of the CUBE Auction is to provide the opportunity for price improvement for the CUBE Order, as well as the opportunity for other market participants to interact with the CUBE Order.⁹

⁷ See Notice, 79 FR at 13711-12.

⁸ When the Initiating Participant utilizes the auto-match or auto-match limit features, there would be no single price at which the CUBE Order is stopped.

⁹ See Notice, 79 FR at 13712. The proposal also would amend Rule 900.2NY(18A) to provide that, for purposes of the CUBE Auction, Professional Customers as defined in that rule would be treated as broker-dealers. The Exchange stated that its proposed treatment of Professional Customers as broker-dealers for purposes of the CUBE Auction is consistent with the rules of the CBOE. See CBOE Rule 1.1(ggg). Further, the proposal would make a technical, non-substantive amendment to Rule 900.2NY(18A) that is unrelated to the CUBE Auction proposal and also would add a new provision to Rule 935.NY to provide an exception from the order exposure requirement if the CUBE Auction is utilized.

A. Initiating Price

As set forth in Rule 971.1NY(a), an Auction begins with an initiating price, which would be announced to all ATP Holders who subscribe to receive the Request for Response (“RFR”) messages that are sent by the Exchange over ArcaBook¹⁰ upon receipt of a CUBE Order.¹¹ In addition to the initiating price, the RFR would identify the series, side of market, and size of the CUBE Order.¹² For a CUBE Order to buy (sell), the initiating price would be the lower (higher) of the CUBE Order’s limit price or the National Best Offer (“NBO”) (National Best Bid (“NBB”),¹³ except as provided for in proposed paragraph (b)(1)(B) of the Rule (discussed below).¹⁴ The initiating price of the CUBE Order, as well as the Contra Order and any responsive GTX Orders (discussed below) could be priced in one cent increments, regardless of the Minimum Price Variation (“MPV”) applicable to the series.¹⁵

¹⁰ ArcaBook is a proprietary data feed offered by the Exchange and is available to anyone (including all ATP Holders) by subscription. The Exchange represents that RFRs for CUBE Auctions would be included in the options data feed at no incremental cost to the ArcaBook subscriber. Thus, any subscriber that opts to receive the options data, including any ATP Holder subscriber, would have the ability to enter an order in response to those RFRs (i.e., the election to receive RFRs would not be on a case-by-case basis).

¹¹ See proposed Rule 971.1NY(c)(2), discussed further below.

¹² See id.

¹³ See proposed Rule 971.1NY(a).

¹⁴ See proposed Rule 971.1NY(b)(1). See also Notice, 79 FR at 13712 for examples illustrating the initiating price.

¹⁵ See proposed Rule 971.1NY(b)(7). See also Notice, 79 FR at 13712 for an example illustrating the pricing increments and see infra notes 62-63 and accompanying text regarding unrelated orders arriving on the Exchange on the opposite side of the CUBE Order, which would be permitted to participate in an Auction but only if submitted in the MPV for the series.

B. Permissible Range of Executions

At the conclusion of the CUBE Auction, the CUBE Order would be executed at a price or prices within a permissible range of executions, as specified in proposed Rule 971.1NY(b)(1).¹⁶ A CUBE Order to buy (sell) generally would have a permissible range of executions with an upper (lower) bound equal to the initiating price and the lower (upper) bound equal to the NBB (NBO). However, pursuant to proposed paragraphs (b)(1)(A) and (b)(1)(B) of the Rule, tighter ranges of executions would apply when there is Customer interest¹⁷ in the BBO for orders of 50 contracts or more or for when there are orders for fewer than 50 contracts,¹⁸ as follows:

If the CUBE Order to buy (sell) is for 50 contracts or more and there is Customer interest in the Consolidated Book at the Exchange Best Bid (“BB”) (Exchange Best Offer (“BO”)), the lower (upper) bound of executions would be the higher (lower) of the BB plus one cent (BO minus one cent) or the NBB (NBO).¹⁹ If the CUBE Order to buy (sell) is for fewer than 50 contracts, the upper bound of executions would be the lower (higher) of the CUBE Order’s limit price, the NBO (NBB), or the BO minus one cent (BB plus one cent) and the lower (upper) bound of executions would be the higher (lower) of the NBB (NBO) or the BB plus one cent (BO minus one cent).²⁰

¹⁶ See infra Section III.C. for a discussion of the application of exceptions to Rule 991.NY (the Exchange’s Trade Through rule) in the context of a CUBE Auction.

¹⁷ For purposes of the proposed Rule, the term “customer” (when capitalized) means an individual or organization that is not a broker-dealer, as set forth in Rule 900.2NY(18).

¹⁸ See proposed Rule 971.1NY(b)(1)(A).

¹⁹ See proposed Rule 971.1NY(b)(1)(B).

²⁰ See also Notice, 79 FR at 13713 for examples illustrating the initiating price and the permissible ranges of executions for various potential CUBE Orders. As discussed in further detail below, the provision concerning a CUBE Order for fewer than 50 contracts was proposed by NYSE MKT on a pilot basis. The Exchange stated that this is consistent with how electronic price improvement mechanisms of other markets operate,

An added stipulation regarding the initiation of a CUBE Auction relates to the Exchange's "Trade Collar Protection" rules, which are utilized to mitigate the risk of advancing too far through the Consolidated Book during periods of increased volatility or reduced liquidity.²¹ A Marketable Order (as defined in Rule 967NY(a)(1)) held at a Trading Collar (as defined in Rule 967NY(a)(2)) represents interest that is eligible to trade at a specific price, even though that price is not displayed. The Exchange determined that such orders must be taken into consideration in determining the range of permissible executions in a CUBE Auction.

Thus, under the proposal, if, at the time a CUBE Order is submitted, there are orders subject to Trade Collar Protection, i.e., collared orders, the range of permissible executions for the CUBE Order would be narrowed to ensure the priority of the collared order(s). Pursuant to proposed Rule 971.1NY(b)(1)(D), if at the time the CUBE Auction is initiated, there is a Marketable Order to sell (buy) that has been displayed pursuant to Rule 967NY(a)(4)(A), the displayed price of the collared order minus (plus) one Trading Collar would be considered the BO (BB) when determining the range of permissible executions.²²

A CUBE Order, once accepted, would never execute outside the range of permissible executions and would never trade through its own limit price nor would unrelated quotes and orders that participate in the CUBE Auction trade through their own limit price.²³

citing to CBOE Rule 6.74A Interpretation and Policies .03; PHLX Rule 1080(n)(vii); ISE Rule 723 Supplementary Material .03; and BOX IM-7150-1. Id.

²¹ See Rules 967NY(a)(1) and 967NY(a)(4)(A).

²² See Rule 967NY(a)(2).

See also Notice, 79 FR at 13713 for an example illustrating Trade Collar Protection.

²³ See Notice, 79 FR at 13714. See also Amendment No. 2, supra note 4.

C. Time of Execution and Duration of the CUBE Auction

Proposed Rule 971.1NY(b) would set forth that the time at which the CUBE Auction is initiated would be considered the time of execution for the CUBE Order.²⁴ Thus, the Exchange stated, even though the execution would print after the CUBE Auction has completed, the CUBE Auction would qualify for the exception to the general prohibition against Trade-Throughs for stopped orders.²⁵ Similarly, according to the Exchange, because the CUBE Auction would have a maximum duration of 750 milliseconds (as discussed below), to the extent that the NBBO may improve during the Auction, the CUBE Auction also would qualify for the exception to Trade-Through liability for transactions within one second prior to execution of the transaction.²⁶

D. Causes for Rejection of a CUBE Order

Rule 971.1NY(b) sets forth several instances in which a CUBE Order would be ineligible to commence an Auction and would be rejected along with its accompanying Contra Order. The Auction will reject CUBE Orders that are submitted to buy (sell) with a limit price below (above)

²⁴ The Exchange stated that, as a result, even though the execution would print after the CUBE Auction has completed, the CUBE Auction would qualify for an exception to the general prohibition against Trade-Throughs of the NBBO, pursuant to Rule 991NY(b)(9) (Order Protection, Exceptions to Trade-Through Liability) (“The transaction that constituted the Trade-Through was the execution of an order that was stopped at a price that did not Trade-Through an Eligible Exchange at the time of the stop”). Similarly, because the CUBE Auction would have a maximum duration of 750 milliseconds (as discussed below), to the extent that the NBBO may improve during the Auction, the Exchange stated that the CUBE Auction also would qualify for an exception to Trade-Through liability, pursuant to Rule 991NY(b)(5) (Order Protection, Exceptions to Trade-Through Liability) (“The Eligible Exchange displaying the Protected Quotation that was traded through had displayed, within one second prior to execution of the Trade-Through, a Best bid or Best offer, as applicable, for the options series with a price that was equal or inferior to the price of the Trade-Through transaction”). The Exchange stated that the proposed CUBE Auction is consistent with how the electronic price improvement auctions of other markets operate. See, e.g., CBOE Rule 6.74A; PHLX Rule 1080(n); BOX Rule 7150; ISE Rule 723.

²⁵ See Rule 991NY(b)(9).

²⁶ See Rule 991NY(b)(5).

the lower (upper) bound of the permissible range of executions;²⁷ and those that are submitted before the opening of trading;²⁸ during the final second of the trading session;²⁹ when the BBO is one cent wide if the CUBE Order is for fewer than 50 contracts;³⁰ and when the NBBO is crossed.³¹

E. Price Increments and Minimum Size

As noted above, CUBE Orders and Contra Orders would be permitted to be entered in one cent increments regardless of the MPV of the series being traded.³² Contra Orders may be priced in such increments when the Initiating Participant elects to submit a single stop price or

²⁷ See proposed Rule 971.1NY(b)(2). See also Notice, 79 FR at 13713 for an example illustrating such a case. The Exchange stated that it is appropriate to reject CUBE Orders to buy (sell) that are priced below (above) the lower (upper) bound because they are not the best-priced interest available and should not trade ahead of better-priced interest on the same side of the market. Id. at 13713-14.

²⁸ See proposed Rule 971.1NY(b)(4). The Exchange stated that it is appropriate to reject such CUBE Orders because a CUBE Order is deemed executed at the time of entry, and any CUBE Orders entered before the opening of trading would not be able to execute. See Notice, 79 FR at 13714.

²⁹ See proposed Rule 971.1NY(b)(5). The Exchange stated that, as the length of the CUBE Auction would be at least 500 milliseconds, it is appropriate to reject CUBE Orders submitted during the final second of the trading session to assure that the processing of a CUBE Order may be completed. See Notice, 79 FR at 13714.

³⁰ See proposed Rule 971.1NY(b)(6). The Exchange stated that it is appropriate to reject CUBE Orders in such scenarios because such orders would not be able to meet the permissible range of executions. See Notice, 79 FR at 13714.

³¹ See proposed Rule 971.1NY(b)(9). The Exchange stated that this is appropriate because the Exchange would not be able to determine a permissible range of executions if the NBBO is crossed. See Notice, 79 FR at 13714.

³² See proposed Rule 971.1NY(b)(7).

the auto-match limit price.³³ In addition, the minimum size requirement for a CUBE Order is one contract.³⁴

F. Initiation of the CUBE Auction Process

To initiate a CUBE Auction, the Initiating Participant would be permitted to elect one of three ways in which it would guarantee the execution of a CUBE Order – a single stop price, “auto-match”, or “auto-match limit.”³⁵

The Initiating Participant may elect to specify a single stop price, at which it would participate in the CUBE Auction at a single price only, regardless of the prices of other responses to the CUBE Auction. For a CUBE Order to buy (sell), an Initiating Participant would be permitted to specify a single stop price that is at or below (above) the initiating price of the CUBE Auction.³⁶

A stop price specified for a CUBE Order to buy (sell) that is below (above) the lower (upper) bound of the range of permissible executions would be repriced to the lower (upper) bound (i.e., the best-priced interest on the opposite side of the CUBE Order).³⁷ In this instance, the stop price is below the lower bound of permissible execution prices, and thus, the Exchange explains, the execution could be priced back to within the permissible execution range.³⁸ However, a stop price specified for a CUBE Order to buy (sell) that is above (below) the

³³ Id. “Single stop price” and “auto-match limit”, as well as a third option, “auto-match”, are discussed in Section III.F., infra.

³⁴ See proposed Rule 971.1NY(b)(8). As discussed in Section III.L., infra, CUBE Orders for fewer than 50 contracts would be subject to a pilot program.

³⁵ See proposed Rule 971.1NY(c)(1).

³⁶ See proposed Rule 971.1NY(c)(1)(A).

³⁷ See id. See also infra note 55 for the Exchange’s explanation of this provision.

³⁸ See Notice, 79 FR at 13714.

initiating price would not be eligible to initiate a CUBE Auction.³⁹ The Exchange explains that, because in such an instance, the stop price is inferior to the pre-existing trading interest, it would not result in an execution within the permissible range.⁴⁰ Both the CUBE Order and the Contra Order would be rejected.⁴¹

The Initiating Participant may elect the “auto-match” option, which would automatically match both the price and size of all RFR Responses.⁴² Accordingly, the Initiating Participant could receive executions at multiple prices. Where the auto-match option is selected for a CUBE Order to buy (sell), the Initiating Participant would automatically match as principal or as agent on behalf of a Contra Order the price and size of all RFR Responses that are lower (higher) than the initiating price and within the range of permissible executions.⁴³

The Initiating Participant may elect the “auto-match limit” option, which for a CUBE Order to buy (sell) would automatically match the price and size of all RFR Responses at each price level that is lower (higher) than the initiating price down (up) to a specified limit price, referred to as the “auto-match limit price.”⁴⁴ Thus, for a CUBE Order to buy (sell), the Initiating Participant would automatically match, as principal or as agent on behalf of a Contra Order, the

³⁹ See proposed Rule 971.1NY(c)(1)(A).

⁴⁰ See Notice, 79 FR at 13714-15.

⁴¹ See Notice, 79 FR at 13715 for an example illustrating the impact of various single stop prices on a CUBE Order.

⁴² See proposed Rule 971.1NY(c)(1)(B). See Section III.G., infra, for a discussion of RFR Responses.

⁴³ See id. See also Notice, 79 FR at 13715 for an example illustrating the impact of auto-match on a CUBE Order.

⁴⁴ See proposed Rule 971.1NY(c)(1)(C).

price and size of RFR Responses that are lower (higher) than the initiating price down (up) to the auto-match limit price.⁴⁵

Only one Auction would be permitted to be conducted at one time.⁴⁶ In addition, once an Auction has commenced, the Initiating Participant would not be permitted to cancel or modify either the CUBE Order or the Contra Order.⁴⁷

G. Request for Responses, Response Time Interval, Responses, and Unrelated Orders and Quotes that are Posted to the Consolidated Book

Upon receipt of a valid CUBE Order (i.e., the CUBE Order is not rejected), the Exchange would announce the CUBE Auction by disseminating an RFR to all participants who subscribe to receive RFR messages, which, the Exchange stated, would be included in the data feed from ArcaBook for options.⁴⁸ As noted above, the RFR would identify the following characteristics of a CUBE Order: the series, the side of the market, the size, and the initiating price.

Once the RFR is disseminated, ATP Holders would be able to enter responses to the Auction for the duration of the CUBE Auction (“Response Time Interval”), which would last for a random period of time between 500 and 750 milliseconds.⁴⁹ The Exchange stated that the length of the Response Time Interval would be determined by the CUBE Auction mechanism

⁴⁵ See id. See also Notice, 79 FR at 13715 for an example illustrating the impact of auto-match limit on a CUBE Order.

⁴⁶ See proposed Rule 971.1NY(c).

⁴⁷ See id. The Exchange stated that this requirement reduces the potential for misuse of the CUBE Auction by ATP Holders that are not legitimately interested in making a bona fide trade in the CUBE Auction. See Notice, 79 FR at 13715. See also Amendment No. 2, supra note 4, which would revise the rule text to clarify that the Contra Order may not be cancelled or modified.

⁴⁸ See supra note 10 for a description of ArcaBook.

⁴⁹ See proposed Rule 971.1NY(c)(2).

following the receipt of a valid CUBE Order and contemporaneously with the dissemination of the RFR.⁵⁰

The Exchange stated that the use of an undisclosed random Response Time Interval of between 500 and 750 milliseconds would provide the CUBE Auction with a functional difference to distinguish it from similar price improvement mechanisms offered by other exchanges.⁵¹ The Exchange remarked that the length of time allotted on the CUBE Auction timer would provide ATP Holders with sufficient time to submit RFR Responses and would encourage competition among participants, thereby enhancing the potential for price improvement for the CUBE Order.⁵²

The Exchange stated that any ATP Holder would be able to respond to the RFR, either as principal or as agent on behalf of customers, provided that the RFR Response was properly marked specifying price, size, and side of the market.⁵³ Proposed Rule 971.1NY would introduce a new order type, the “GTX Order,” to serve as one way to respond to a CUBE Auction, designed solely for that purpose.⁵⁴ A “GTX Order” would be defined as a non-routable

⁵⁰ See Notice, 79 FR at 13715.

⁵¹ See id. See also, e.g., CBOE Rule 6.74A(b)(2)(A); PHLX Rule 1080(n)(ii)(B)(1); ISE Rule 723(c)(5)(I).

⁵² The Exchange stated that in December 2013, to determine whether the CUBE Auction timer would provide sufficient time to respond to an RFR, the Exchange asked ATP Holders that both subscribe to ArcaBook and act as Market Makers on the Exchange (“Relevant ATP Holders”) whether their firms “could respond to an Auction with a random duration of 500 – 750 milliseconds.” The Exchange reported that, of the 21 Relevant ATP Holders that responded to the question, 100% (n=21) indicated that their firms could respond in this time frame. Thus, the Exchange stated that the CUBE Auction duration of at least 500 milliseconds, which the Exchange noted is the mid-range of auction mechanisms at other market centers, would provide a meaningful opportunity for participants on NYSE Amex to respond to an Auction while at the same time facilitating the prompt execution of orders. See Notice, 79 FR at 13715, n.29.

⁵³ See proposed Rule 971.1NY(c)(2)(C).

⁵⁴ See proposed Rule 971.1NY(c)(2)(C)(i).

order with a time-in-force contingency for the Response Time Interval and would be required to specify price, size, and side of the market.⁵⁵ GTX Orders would not be displayed to the Consolidated Book nor disseminated to any participants⁵⁶ because, as explained by the Exchange, these orders would interact only with liquidity available during the Auction.⁵⁷ The minimum price increment for a GTX Order would be one cent, regardless of the MPV for the series subject to the Auction.⁵⁸ ATP Holders that submitted GTX Orders would be permitted to cancel them.⁵⁹

In addition, any unrelated orders and quotes received on the opposite side of the CUBE Order during the Response Time Interval and in the same series at the CUBE Order would be considered as RFR Responses that are eligible to participate in the Auction, provided that such unrelated orders and quotes are priced within the permissible range of executions, are not marked as GTX Orders, and are not marketable against the NBBO. The Exchange stated that considering these unrelated orders and quotes as RFR Responses – even if submitted coincidentally, as opposed to purposefully in response to an RFR – should increase the number of participants against which the CUBE Order may be executed, and should thus maximize

⁵⁵ See proposed Rule 971.1NY(c)(2)(C)(i). For a CUBE Order to buy (sell), a GTX Order priced below (above) the lower (upper) bound of executions would be repriced to the lower (upper) bound of executions as specified in proposed Rule 971.1NY(b)(1). See proposed Rule 971.1NY(c)(2)(C)(i)(f). According to the Exchange, such repricing would ensure that GTX Orders eligible to participate in the Auction would not be excluded if they are priced more aggressively than the lower (upper) bound of execution. See Notice, 79 FR at 13716 for an example illustrating the repricing of a GTX Order.

⁵⁶ See proposed Rule 971.1NY(c)(2)(C)(i)(a).

⁵⁷ Any portion of a GTX Order that is not executed in the CUBE Auction would be cancelled at the conclusion of the Auction. See *id.* However, see *infra* notes 75-76 and accompanying text for a case in which a GTX Order would interact with an unrelated order that arrived on the Exchange on the CUBE Order's side of the market.

⁵⁸ See proposed Rule 971.1NY(c)(2)(C)(ii)(a).

⁵⁹ See proposed Rule 971.1NY(c)(2)(C)(i)(d).

opportunities for price improvement on the CUBE Order.⁶⁰ Such opposite-side, unrelated orders and quotes would be posted to the Consolidated Book⁶¹ and, if they are at the best RFR Response price at the conclusion of the Auction, they would participate in the execution of the CUBE Order.⁶²

Unrelated orders and quotes would be able to participate in an Auction, however, only if priced in the MPV for the series in the CUBE Auction.⁶³ Only CUBE Orders, GTX Orders and Contra Orders – which are specifically slated for the CUBE Auction – would be permitted to be priced in one cent increments, regardless of the MPV for that option.⁶⁴ Thus, an order or quote other than a CUBE Order, GTX Order or Contra Order submitted in a one cent increment when the series has either a \$0.05 or \$0.10 MPV would be rejected as invalid.

Unrelated orders and quotes arriving on the Exchange during the Response Time Interval on the same side of the market as the CUBE Order likewise would be posted on the Consolidated Book, provided that those orders and quotes do not cross the initiating price.⁶⁵ If such an order or quote does cross the initiating price – i.e., if an order to buy (sell) is priced higher (lower) than

⁶⁰ See Notice, 79 FR at 13716.

⁶¹ See generally Rule 964NY(a) (“The System shall display to Users all non-marketable limit orders in the Display Order Process, unless indicated otherwise”).

⁶² Any portion of these unrelated orders or quotes remaining after the CUBE Order is executed would remain on the Consolidated Book and processed in accordance with Rule 964NY, the Exchange’s options priority and order allocation rules. See proposed Rule 971.1NY(c)(5)(C).

⁶³ See proposed Rule 971.1NY(c)(2)(C)(ii)(c).

⁶⁴ See id.

⁶⁵ See generally Rule 964NY(a) (“The System shall display to Users all non-marketable limit orders in the Display Order Process, unless indicated otherwise”).

the initiating price – it would cause the CUBE Auction to conclude early and the unrelated order would be then posted to the Consolidated Book.⁶⁶

H. Conclusion of the CUBE Auction and Order Allocation

Unless there is an early conclusion to the Auction, as described more fully below, the CUBE Auction would conclude at the end of the Response Time Interval⁶⁷ and the CUBE Order would be allocated among the participants in the Auction at the best prices as set forth in proposed Rule 971.1NY(c)(5), as follows:

The Auction mechanism would determine whether the RFR Responses can fill the CUBE Order at a price or prices better than the initiating price. If so, the CUBE Order is matched against the better-priced RFR Responses, thereby granting the CUBE Order the maximum amount of price improvement possible.

When there are multiple RFR Responses at a given price, at each price level, any Customer orders resting on the Consolidated Book at the start of the CUBE Auction would have first priority, followed by Customer orders that arrived during the CUBE Auction as RFR Responses. The remaining contracts would be allocated among the RFR Responses at that price level on a pro rata basis in accordance with the size pro rata algorithm set forth in Rule 961.1NY(b)(3),⁶⁸ subject, however, to the following:

⁶⁶ See id. See also infra note 86 and accompanying text for a more detailed discussion of this provision.

⁶⁷ See proposed Rule 971.1NY(c)(3). However, as described in proposed Rule 971.1NY(c)(4) (and discussed below), certain events may result in the early conclusion of the CUBE Auction.

⁶⁸ Any single RFR Response that has a contract size that exceeds the size of the CUBE Order would be treated as if it were the same size as (*i.e.*, would be capped at) the size of the CUBE Order for allocation purposes. See Proposed Rule 971.1NY(c)(5). The Exchange stated that this encourages participation in the CUBE Auction (by not rejecting these RFR Responses) and assists in avoiding the opportunity for an ATP Holder to

If sufficient interest in the CUBE Order remains after executing against Customer interest or better priced interest, the Contra Order then would be entitled to a participation guarantee equal to the greater of one contract or either (a) 40% of the size of the initial CUBE Order (if there are multiple RFR Responses to the CUBE Auction) or (b) 50% of the size of the initial CUBE Order (if there is only one RFR Response to the CUBE Auction). The remaining contracts would then be allocated among the RFR Responses pursuant to the pro rata trading algorithm.⁶⁹ If all RFR Responses were filled, any remaining CUBE Order contracts would be allocated to the Contra Order.

As discussed above, an Initiating Participant can opt to guarantee the execution of a CUBE Order by specifying a single stop price, auto-match or an auto-match limit price.⁷⁰ Proposed Rule 971.1NY(c)(5)(B)(i)-(iii) sets forth the details of how an order is allocated in the case of each of these elections.⁷¹

Where the Initiating Participant elects auto-match or auto-match limit to guarantee the execution of a CUBE Order, the Contra Order would be allocated size equal to all other RFR Responses at each price point or at each price point within the limit price range—if a limit is specified—until a price point is reached where the balance of the CUBE Order could be fully executed (the “clean-up price”). At the clean-up price, if there is sufficient interest in the CUBE Order remaining after better-priced interest and Customer interest has been executed, the Contra

subvert the size pro rata allocation method by submitting outsized trading interest. See Notice, 79 FR at 13717.

⁶⁹ The Exchange stated that the participation guarantee is a fair inducement in exchange for guaranteeing that the entire size the CUBE Order, for which the Initiating Participant is an agent, and is consistent with the rules of NYSE MKT and other option exchanges. See Notice, 79 FR at 13717.

⁷⁰ See supra notes 35-45 and accompanying text.

⁷¹ See Notice, 79 FR at 13717-18 for examples illustrating trade allocations for guarantees with a single stop price, with auto-match and with auto-match limit.

Order would be allocated additional contracts to ensure its guaranteed participation rate—the greater of one contract or 40% (or 50%, if only one Response) of the size of the initial CUBE Order. If the Contra Order met its allocation guarantee at a price below (above) the clean-up price, it would cease matching RFR Responses that may be priced above (below) the price at which the Contra Order received its allocation guarantee. In addition, if there were other RFR Responses at the clean-up price, the remaining CUBE Order contracts would be allocated pursuant to the size pro rata algorithm set forth in Rule 964NY(b)(3) and any remaining CUBE Order contracts shall be allocated to the Contra Order at the initiating price. In the event that there were no RFR Responses to the Auction and an auto-match feature is selected, the CUBE Order would execute against the Contra Order at the initiating price.

I. Early Conclusion of a CUBE Auction

Proposed Rule 971.1NY describes certain events that would cause a CUBE Auction to conclude early (i.e., before the end of the Response Time Interval) and sets forth how the CUBE Order is to be allocated in each case.

Pursuant to proposed Rule 971.1NY(c)(3), a trading halt in the affected series would result in the early conclusion of an Auction.⁷² In such case, the CUBE Order would execute according to the procedures set forth in proposed Rule 971.1NY(c)(5).

Proposed Rule 971.1NY(c)(4) describes additional events where a CUBE Auction would conclude early. First, if, during a CUBE Auction, a new CUBE Auction in the same series is received by the Exchange, the original CUBE Order would conclude and execute according to

⁷² See proposed Rule 971.1NY(c)(3).

the procedures set forth in proposed Rule 971.1NY(c)(5).⁷³ The new CUBE Auction would proceed as described in proposed Rule 971.1NY(c).

Second, if, during a CUBE Auction, the Exchange receives an unrelated order or quote on the same side of the market as the CUBE Order that is marketable against any RFR Response or the NBBO (or BBO, if a non-routable order⁷⁴) at the time of arrival, the CUBE Auction would conclude early and the CUBE Order would be executed according to the procedures for a full term auction set forth in proposed Rule 971.1NY(c)(5).⁷⁵ In this circumstance, however, any GTX Orders that do not execute in the CUBE Auction would execute against the unrelated order or quote that caused the CUBE Auction to conclude early to the extent possible and would then cancel.⁷⁶ Any contracts remaining from the unrelated order or quote would then be posted to the Consolidated Book and processed in accordance with the Rule 964NY.⁷⁷

Third, a CUBE Auction would conclude early if, during the Auction, the Exchange receives any RFR Response (that is, on the opposite side of the CUBE Order) that is marketable

⁷³ See proposed Rule 971.1NY(c)(4)(A).

⁷⁴ The Exchange's rules provide that an order that has been designated as an order type that is not eligible to be routed away would either be placed on the Consolidated Book or cancelled if such order would lock or cross the NBBO. See Rule 964NY(c)(2)(E). The Exchange noted that, if an incoming non-routable order is marketable against the NBBO, but not the BBO, and by its terms, such order, e.g., an IOC Order, would cancel, it would not cause an early conclusion to an Auction. However, if such an order were marketable against the BBO, i.e., if the BBO equaled the NBBO, it would cause an early conclusion to the CUBE Auction. See Notice, 79 FR at 13719, n.40.

⁷⁵ See proposed Rule 971.1NY(c)(4)(B). See also Notice, 79 FR at 13719 for an example illustrating the early conclusion of the Auction due to a same side order marketable against the NBBO at the time of arrival. The Exchange stated the early conclusion of the Auction in this instance would ensure that the priority of quotes and orders on the Consolidated Book would not be disrupted.

⁷⁶ See proposed Rule 971.1NY(c)(4)(B).

⁷⁷ See id.

against the NBBO (or BBO, if a non-routable order) at the time of arrival.⁷⁸ The Auction would conclude early whether the RFR Response was a GTX Order or an unrelated order or quote that is a marketable limit order or a market order.⁷⁹ However, the allocation would differ, as follows:

- If the CUBE Auction concluded early because the Exchange received during the Response Time Interval an unrelated marketable limit order or quote on the opposite side of the CUBE Order, the CUBE Order would execute in accordance with the procedures set forth in proposed Rule 971.1NY(c)(5). Contracts remaining, if any, from unrelated orders or quotes at the time the CUBE Auction concludes would be processed in accordance with Rule 964NY. Any unfilled GTX Orders would cancel.⁸⁰
- If the opposite-side order that caused the CUBE Auction to conclude early was a market order, the allocation of the CUBE Order would vary, depending on how the Initiating Participant guaranteed the execution of the CUBE Order and what, if any, RFR Responses were received before the CUBE Auction concluded.

⁷⁸ See proposed Rule 971.1NY(c)(4)(C). The Exchange stated that early conclusion in such circumstances would ensure that the Auction interacts seamlessly with the Consolidated Book so as not to disturb the priority of orders on the Book. The unrelated order or quote that caused the Auction to end early would be considered an RFR Response for purposes of allocation pursuant to proposed Rule 971.1NY(c)(5), and thus would participate in the CUBE Auction consistent with its limit price and order instructions. See Notice, 79 FR at 13719.

⁷⁹ The Exchange noted that, while the incoming order that is on the opposite side of the CUBE Order may be marketable against an NBBO that updated during the Response Time Interval, the fact that the NBBO updated during the Response Time Interval in of itself does not cause an early conclusion to the CUBE Auction. *Id.* See also *id.* at 13720 for an example illustrating the early conclusion of an Auction as a result of the arrival of an opposite-side limit order that was marketable against an updated NBBO.

⁸⁰ See proposed Rule 971.1NY (c)(4)(C)(i). Regarding the cancellation of unfilled GTX Orders, see also *supra* note 57 and accompanying text. See also Notice, 79 FR at 13719-20 for examples illustrating the early conclusion of an Auction as a result of the arrival of an opposite-side marketable limit order.

- If the Initiating Participant selected auto-match and no RFR Responses had been received before the market order arrived that caused the CUBE Auction to conclude early, if the CUBE Order is to buy (sell), the CUBE Order would execute against the market order at the midpoint of the initiating price and the lower (upper) bound of the range of permissible executions.⁸¹ If no midpoint is possible, the execution would be rounded up (down) to the nearest whole penny toward the initiating price. Any unfilled size of the CUBE Order will then execute according to the procedures set forth in proposed Rule 971.1NY(c)(5).⁸²
- If the Initiating Participant selected auto-match and other RFR Responses are received before the arrival of the market order that caused the CUBE Auction to conclude early, if the CUBE Order is to buy (sell) and the market order is to sell (buy), the CUBE Order would execute against the unrelated market order at the lowest (highest) RFR Response price within the range of permissible executions.

⁸¹ See proposed Rule 971.1NY(c)(4)(C)(ii). See also Notice, 79 FR at 13720 for an example illustrating the early conclusion of an Auction due to the arrival of an opposite-side market order in a case where auto-match was selected and no RFR Responses had been received. The Exchange stated that rounding in the manner described ensures not only that the CUBE Order is afforded price improvement, but also that the priority of existing interest in the Consolidated Book is protected. *Id.*

⁸² As discussed above, the Exchange stated that the CUBE Auction would be permitted to execute orders in the CUBE Auction as exceptions to Trade-Through Liability pursuant to Rule 991NY(b)(5). Accordingly, an opposite-side market order that arrives during the CUBE Auction, which by definition is less than a second, may trade through any updated NBBO published by an away market. Because, pursuant to proposed Rule 971.1NY(b)(3), an update to the CUBE Order's same-side BBO would update the permissible range of executions, an opposite-side market order would execute consistent with that updated permissible range of executions. See Notice, 79 FR at 13720, n.49.

Any unfilled size of the CUBE Order would then execute according to the procedures set forth in proposed Rule 971.1NY(c)(5).⁸³

- If the Initiating Participant selected a single stop price or auto-match limit to guarantee the execution of a CUBE Order to buy (sell) and a market order to sell (buy) caused the CUBE Auction to conclude early, the CUBE Order would execute against the unrelated market order at the lowest (highest) price at which an execution could occur within the range of permissible executions, which may be either an RFR Response price, the single stop price, or the auto-match limit price. Any unfilled size of the CUBE Order would then execute according to the procedures set forth in proposed Rule 971.1NY(c)(5).⁸⁴

Fourth, the CUBE Auction also would conclude early upon the arrival of an unrelated, non-marketable quote or limit order on the same side as the CUBE Order that improves the CUBE Order's initiating price.⁸⁵ Specifically, if, during a CUBE Auction where the CUBE Order is to buy (sell), the Exchange receives such an order that is priced higher (lower) than the initiating price, and therefore creates a new BB (BO) that is higher (lower) than the initiating price, the CUBE Order would first execute against the RFR Response according to the

⁸³ See proposed Rule 971.1NY(c)(4)(C)(iii). See also Notice, 79 FR at 13721 for an example illustrating the early conclusion of an Auction as a result of the arrival of an opposite-side market order in a case where auto-match was selected and other RFR Responses were received.

⁸⁴ See proposed Rule 971.1NY(c)(4)(C)(iv). See also Notice, 79 FR at 13721 for examples illustrating the early conclusion of an Auction as a result of the arrival of an opposite-side market order where the Initiating Participant had selected a single stop price or the auto-match limit option.

⁸⁵ See proposed Rule 971.1NY(c)(4)(D). See also supra note 66 and accompanying text.

procedures set forth in proposed Rule 971.1NY(c)(5).⁸⁶ Any unfilled GTX Orders would be eligible to execute against the unrelated order or quote that caused the CUBE Auction to conclude early and would then cancel. Any contracts that remain from the unrelated non-marketable order after that order traded against interest in the CUBE Auction would then be processed in accordance with Rule 964NY.⁸⁷

Fifth, a CUBE Auction would conclude early when an All-or-None (“AON”) order is present on the same side as the CUBE Order. An AON order, whether it was resting on the book prior to an Auction or it arrived during Auction, would be permitted to trade only if sufficient size remained to fill the entire AON order after the CUBE Order was fully executed. If sufficient interest to fill an entire AON order was received during the Response Time Interval, the Auction would conclude early and the CUBE Order would be executed according to procedures set forth in proposed Rule 971.1NY(c)(5). After the Auction concluded, the Exchange would evaluate whether the AON could be executed.⁸⁸

⁸⁶ See proposed Rule 971.1NY(c)(5) regarding the allocation procedures of a full-term Auction, discussed above. The Exchange stated that early conclusion would avoid disturbing priority in the Consolidated Book, in accordance with Rule 964NY, which dictates the priority of bids within the NYSE Amex System, and would allow the Exchange to appropriately handle unrelated orders without the CUBE Auction impacting that handling, while at the same time allowing the CUBE Order to execute against the Contra Order and any RFR Responses that may have been entered up to that point. See Notice, 79 FR at 13716.

⁸⁷ See Notice, 79 FR at 13722 for an example illustrating the early conclusion of an Auction due to a same-side order that creates a new BBO that improves the initiating price. The Exchange stated that early conclusion in this circumstance would ensure that the CUBE Auction interacts seamlessly with the Consolidated Book so as not to disturb the priority of orders on the Book, while affording the CUBE Order (and the unrelated order) opportunities for price improvement. Id.

⁸⁸ See Notice, 79 FR at 13722 for an example illustrating the early conclusion of an Auction due to sufficient interest to fill a resting AON order. The Exchange stated that early conclusion in this circumstance would ensure that the CUBE Auction interacts seamlessly with the Consolidated Book so as not to disturb the priority of orders on the Book, while affording the CUBE Auction opportunities for price improvement. Id.

J. Conduct Inconsistent with Just and Equitable Principles of Trade

The Exchange is proposing Commentary .02 to the proposed Rule to state that certain activity in connection with the CUBE Auction would be considered conduct inconsistent with just and equitable principles of trade to discourage ATP Holders from attempting to misuse or manipulate the CUBE Auction process. The following would be considered inconsistent with just and equitable principles of trade: (1) an ATP Holder entering RFR Responses to a CUBE Auction for which the ATP Holder is the Initiating Participant; (2) an ATP Holder engaging in a pattern and practice of trading or quoting activity for the purpose of causing a CUBE Auction to conclude early; (3) the Initiating Participant breaking up an agency order into separate CUBE Orders for the purpose of gaining a higher allocation percentage; and (4) an ATP Holder engaging in a pattern or practice of sending multiple RFR Responses at the same time that exceed the size of the CUBE Order.⁸⁹

K. Order Exposure

Rule 935NY prohibits ATP Holders from executing as principal any orders they represent as agent unless (i) agency orders are first exposed on the Exchange for at least one second or (ii) the ATP Holder has been bidding or offering on the Exchange for at least one second prior to receiving an agency order that is executable against such bid or offer. According to the Exchange, Rule 935NY helps to ensure that orders are properly exposed to market participants, affording them reasonable time in which to participate in the execution of agency orders.⁹⁰

The Exchange stated that the Response Time Interval, with a random length of between 500 and 750 milliseconds, would be of sufficient length to permit ATP Holders time to respond to a CUBE Auction, thereby enhancing opportunities for competition among participants and

⁸⁹ See also infra note 92 discussing Rule 935NY, Commentary .01.

⁹⁰ See Notice, 79 FR at 13722.

increasing the likelihood of price improvement for the CUBE Order.⁹¹ Accordingly, the Exchange's proposal would amend Rule 935NY to state that a CUBE Order would not be subject to the one-second order exposure requirement of Rule 935NY. The Exchange stated that, consistent with Rule 935NY, Commentary .01, ATP Holders would be permitted to utilize the CUBE Auction only where there is a genuine intention to execute a bona fide transaction.⁹²

L. Proposed Pilot Period for Auctions of Fewer than 50 Contracts

Under the proposal, proposed Rules 971.1NY(b)(1)(B), which relates to CUBE Auctions for fewer than 50 contracts, and 971.1NY(b)(8), which states that the minimum size for a CUBE Auction would be one contract, would be adopted for a pilot period effective for one year beginning on the approval date of the proposed rule change ("Pilot Period").⁹³ The Exchange stated that, during the Pilot Period, it would submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders and that there is an active and liquid market functioning on the Exchange outside of the CUBE Auction.⁹⁴

⁹¹ See supra note 52.

⁹² See Notice, 79 FR at 13237. Rule 935NY, Commentary .01, states: "Rule 935NY prevents a[n ATP Holder] from executing agency orders to increase its economic gain from trading against the order without first giving other trading interest on the Exchange an opportunity to either trade with the agency order or to trade at the execution price when the [ATP Holder] was already bidding or offering on the book."

⁹³ See proposed Rule 971.1NY, Commentary .01.

⁹⁴ To aid the Commission in its evaluation of the Pilot Program, the Exchange will provide the following additional information each month: (1) The number of orders of 50 contracts or greater entered into the CUBE Auction; (2) The number of orders of fewer than 50 contracts entered into the CUBE Auction; (3) The percentage of all orders of 50 contracts or greater sent to the Exchange that are entered into the CUBE; (4) The percentage of all orders of fewer than 50 contracts sent to the Exchange that are entered into the CUBE Auction; (5) The percentage of all Exchange trades represented by orders of fewer than 50 contracts; (6) The percentage of all Exchange trades effected through the CUBE Auction represented by orders of fewer than 50 contracts; (7) The percentage of

The Exchange further states that any data that is submitted to the Commission will be provided on a confidential basis.⁹⁵

all contracts traded on the Exchange represented by orders of fewer than 50 contracts; (8) The percentage of all contracts effected through the CUBE Auction represented by orders of fewer than 50 contracts; (9) The spread in the option, at the time an order of 50 contracts or greater is submitted into the CUBE Auction; (10) The spread in the option, at the time an order of fewer than 50 contracts is submitted into the CUBE Auction; (11) Of CUBE Auction trades for orders of fewer than 50 contracts, the percentage of CUBE Auction trades executed at the NBBO, NBBO plus \$.01, NBBO plus \$.02, NBBO plus \$.03, etc.; (12) Of CUBE Auction trades for orders of 50 contracts or greater, the percentage of CUBE Auction trades executed at the NBBO, NBBO plus \$.01, NBBO plus \$.02, NBBO plus \$.03, etc.; and (13) The number of orders submitted by an ATP Holder when the bid-ask spread was at a particular increment (e.g., \$.01, \$.02, \$.03, etc.). Also, relative to Item 13, for each spread, the Exchange will provide the percentage of contracts in orders of fewer than 50 contracts submitted to the CUBE Auction where the contra-side was: (a) the ATP Holder that submitted the order to the CUBE Auction; (b) market makers assigned to the class; (c) other Exchange Participants; (d) Customers; (e) Professional Customers and (f) unrelated orders. For each spread, also specify the percentage of contracts in orders of 50 contracts or greater submitted to the CUBE Auction where the contra-side was: (a) the ATP Holder that submitted the order to the CUBE Auction; (b) market makers assigned to the class; (c) other Exchange Participants; (d) Customers; (e) Professional Customers and (f) unrelated orders. See, e.g., Securities Exchange Act Release Nos. 53222 (February 3, 2006); 71 FR 7089 (February 10, 2006) (File No. SR-CBOE-2005-60); 63027 (October 1, 2010); 75 FR 62160 (October 7, 2010) (File No. SR-Phlx-2010-108); and 66871 (April 27, 2012) 77 FR 26323 (May 3, 2012) (File No. 10-206).

⁹⁵ Further, the Exchange will provide, for the first and third Wednesday of each month, the: (A) total number of CUBE Auctions on that date; (B) number of CUBE Auctions where the order submitted to the CUBE Auction was fewer than 50 contracts; (C) number of CUBE Auctions where the order submitted to the CUBE Auction was 50 contracts or greater; (D) number of CUBE Auctions (where the order submitted to the CUBE Auction was fewer than 50 contracts and where the order submitted was 50 contracts or greater) where the number of Participants (excluding the Contra Order) was zero, one, two, three, four, etc. The Exchange will also provide: the percentage of all Exchange trades effected through the CUBE Auction in which the Initiating Participant has elected to auto-match with a limit price and the percentage of such trades in which the Initiating Participant has elected to auto-match without a limit price, and the average amount of price improvement provided to the CUBE Order when the Initiating Participant has elected to auto-match with a limit price and the average without a limit price, versus the average amount of price improvement provided to the CUBE Order when the Initiating Participant has chosen a single stop price.

Finally, during the Pilot Program, the Exchange will provide information each month with respect to situations in which the CUBE Auction is terminated prematurely or a

market or marketable limit order immediately executes with an initiating order before the CUBE Auction's conclusion. The following information will be provided: (a) The number of times that the Auction concluded early upon the arrival of an unrelated quote or order that is on the same side of the market as the CUBE Order, that is marketable against any RFR Responses or the NBBO (or the BBO, for a non-routable order) at the time of arrival, and at what time such unrelated order/quote ended the Auction. Also, (i) the number of times such orders were entered by the same (or affiliated) firm that initiated the CUBE Auction that was concluded early, and (ii) the number of times such orders were entered by a firm (or an affiliate of such firm) that participated in the execution of the CUBE Order; (b) For the orders addressed in each of (a)(i) and (a)(ii) above, the percentage of CUBE Auctions that concluded early due to the receipt, during the CUBE Auction, of an unrelated quote or order on the same side of the market as the CUBE Order, that is marketable against any RFR Responses or the NBBO (or the BBO, for a non-routable order) at the time of arrival; and the average amount of price improvement provided to the CUBE Order where the CUBE Auction is concluded early; (c) The number of times that the Auction concluded early upon the arrival of any RFR Response that is marketable against the NBBO (or the BBO, for a non-routable order) at the time of arrival, and at what time such RFR Response ended the Auction. Also, (i) the number of times such RFR Responses were entered by the same (or affiliated) firm that initiated the CUBE Auction, and (ii) the number of times such RFR Responses were entered by a firm (or an affiliate of such firm) that participated in the execution of the CUBE Order; (d) For the orders addressed in each of (c)(i) and (c)(ii) above, the percentage of CUBE Auctions that concluded early due to the receipt, during the CUBE Auction, of any RFR Response that is marketable against the NBBO (or the BBO, for a non-routable order) at the time of arrival; and the average amount of price improvement provided to the CUBE Order where the CUBE Order is immediately executed; (e) The number of times that the Auction concluded early due to a trading halt and at what time the trading halt ended the CUBE Auction. Of the CUBE Auctions that concluded early due to a trading halt, the number that resulted in price improvement over the CUBE Order stop price, and the average amount of price improvement provided to the CUBE Order. Further, in the Auctions that concluded early due to a trading halt, the percentage of contracts that received price improvement over the CUBE Order stop price; (f) The number of times that the Auction concluded early upon the initiation of a new CUBE Auction in the same series and at what time the initiation of a new CUBE Auction ended the ongoing CUBE Auction; (g) The number of times that the Auction concluded early upon the receipt of an order with either an IOC, FOK or NOW contingency and at what time the receipt of such order ended the ongoing CUBE Auction; (h) The number of times that the Auction concluded early because sufficient interest to fill an entire AON order is received during the Response Time Interval and at what time the ongoing CUBE Auction was completed; and (i) The average amount of price improvement provided to the initiating order when the CUBE Auction is not concluded early.

M. Implementation

The Exchange stated that it would announce the implementation date of the proposed rule change in a Trader Update to be published no later than 60 days following Commission approval. The implementation date would be no later than 60 days following publication of the Trader Update announcing Commission approval. The Exchange stated that this implementation schedule would provide ATP Holders with adequate notice of the CUBE Auction and would allow ample time for ATP Holders to prepare their systems for participation in the CUBE Auction process, if such participation is desired.

III. Discussion and Commission Findings

After careful review, the Commission finds 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 and, in particular, with Section 6(b) of the Act.⁹⁶ In particular, the Commission finds that the proposed rule change is consistent with Sections 6(b)(5) of the Act,⁹⁷ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

⁹⁶ 15 U.S.C. 78f(b). In approving this 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).

⁹⁷ 15 U.S.C. 78f(b)(5).

The Commission believes that approving the Exchange's proposal to establish the CUBE Auction mechanism may increase competition among those options exchanges that offer similar mechanisms. The Commission further believes that allowing ATP Holders to enter orders into the CUBE Auction mechanism may provide additional opportunities for such orders to receive price improvement over the NBBO.

The Exchange's CUBE Auction mechanism is similar to electronic price improvement auction mechanisms available at other options exchanges.⁹⁸ The features of the CUBE Auction are similar in many aspects to the features found in the price improvement mechanisms of other exchanges, including: the characteristics of the CUBE Order that are identified in the RFR;⁹⁹ the auto-match and auto-match limit options;¹⁰⁰ the participation guarantee allocated to the Initiating Participant;¹⁰¹ early conclusions of the auction in specific circumstances, including trading halts¹⁰² and same-side unrelated orders that create a BBO that crosses the initiating price;¹⁰³ and provisions regarding just and equitable principles of trade.¹⁰⁴

The Commission notes that the initiating price would be equal to or better than the NBBO at the time of commencement of the CUBE Auction and that an ATP Holder that enters a CUBE Order in the CUBE Auction must submit a Contra Order for the full size of that CUBE

⁹⁸ See supra note 6 and accompanying text.

⁹⁹ See supra note 48 and accompanying text, and see, e.g., ISE Rule 723(c).

¹⁰⁰ See supra notes 42-45 and accompanying text, and see, e.g., Phlx Rule 1080(n)(ii)(A)(1).

¹⁰¹ See supra notes 68-69 and accompanying text. Participation guarantees are a basic feature of electronic improvement mechanisms of all options exchanges that have them.

¹⁰² See supra note 72 and accompanying text, and see, e.g., CBOE Rule 6.74A(b)(2)(F) and Phlx Rule 1080(n)(ii)(B)(4).

¹⁰³ See supra notes 85-87 and accompanying text, and see, e.g., Phlx Rule 1080(n)(ii)(B)(2), which sets forth a very similar provision.

¹⁰⁴ See supra note 89 and accompanying text. All the exchanges with electronic price improvement mechanisms have similar rules.

Order.¹⁰⁵ Once the CUBE Order and the Contra Order are submitted to the Auction, they may not be cancelled or modified.¹⁰⁶ Therefore, a CUBE Order submitted to the CUBE Auction, regardless of its size, would be guaranteed an execution price of at least NBBO at the time the CUBE Auction commences and, moreover, would be given an opportunity for price improvement beyond the NBBO by being exposed to ATP Holders during the CUBE Auction.

The CUBE Auction mechanism also provides for responses to the RFR on behalf of all types of interest, including unrelated quotes and orders as well as GTX Orders that are specifically designated as responses. The Commission believes that this feature provides the potential for a CUBE Order to be exposed to a competitive auction. Further, when the Exchange receives a properly designated CUBE Order for CUBE Auction processing, it will send to all subscribers of its ArcaBook data feed, an RFR detailing the series, side and size of the CUBE Order and the initiating price. This RFR message, available to any ArcaBook subscriber, is designed to help attract responses to a CUBE Auction, which may result in a competitive CUBE Auction and ultimately better prices for the CUBE Order to the extent that the RFR message is successful in attracting competitive responses.

The RFR will be subject to a Response Time Interval for a random period of time between 500 and 750 milliseconds. In December 2013, to determine whether the CUBE Auction timer would provide sufficient time to respond to an RFR, the Exchange asked Relevant ATP Holders whether their firms “could respond to an Auction with a random duration of 500 – 750 milliseconds.”¹⁰⁷ Of the 21 Relevant ATP Holders that responded to the question, all indicated that their firms could respond in this time frame. Based on NYSE MKT’s statements, the

¹⁰⁵ Rule 971.1NY(a).

¹⁰⁶ Rule 971.1NY(c). See also Amendment No. 2.

¹⁰⁷ See supra note 52. See also Notice, 79 FR at 13715, n.29

Commission believes that the random Response Time Interval could facilitate the prompt execution of CUBE Orders in the CUBE Auction, while providing market participants with an opportunity to compete for exposed bids and offers. The Commission notes that it has previously approved auction mechanisms with a random time feature¹⁰⁸ and with a 500 millisecond auction response period.¹⁰⁹

At the conclusion of a CUBE Auction, Customer orders resting on the Consolidated Book have first priority to trade against the CUBE Order, followed by Customer orders that arrived during the CUBE Auction as RFR Responses. After execution of Customer responses and orders, the Initiating Participant may be allocated a limited percentage of the CUBE Order, not to exceed 40% of the contracts at the applicable price point (except that, if only one response matches the Initiating Participant's single price submission at the best price, then the Initiating Participant may be allocated up to 50% of the order). The Commission notes that the established principles of priority of interest contained in Rule 964NY would apply to the CUBE Auction. The Commission believes that the proposed matching algorithm set forth in proposed Rule 971.1NY is sufficiently clear regarding how orders are to be allocated in the CUBE Auction and does not raise any novel issues.

¹⁰⁸ See Securities Exchange Act Release No. 53222 (February 3, 2006), 71 FR 7089 (February 10, 2006) (approval of File No. SR-CBOE-2005-60, CBOE's proposal to adopt AIM, which included a random time period of three to five seconds for exposure of orders entered into that mechanism). See also Securities Exchange Act Release No. 58088 (July 2, 2008), 73 FR 39747 (July 10, 2008) (approval of File No. SR-CBOE-2008-16, which eliminated the random time period and established an exposure period of one second).

¹⁰⁹ See ISE Rule 723(c)(5)(i). See also Securities Exchange Act Release No. 68849 (February 6, 2013), 78 FR 9973 (February 12, 2013) (approval of File No. SR-ISE-2012-100, ISE's proposal to adopt a 500 millisecond response period).

Under the Exchange's proposal, there would be no minimum size requirement for orders entered into the CUBE for a pilot period expiring on April 25, 2015.¹¹⁰ The Commission believes that approval of these provisions on a pilot basis is appropriate and that the Exchange's proposal should provide small customer orders with the opportunity for price improvement in a manner that is consistent with the Act. The Commission expects that the data submitted to the Commission by the Exchange will be used by both the Exchange and the Commission staff to analyze whether there is meaningful competition for all size orders and that there is an active and liquid market functioning on the Exchange outside of the CUBE Auction. In addition, data submitted by the Exchange with respect to situations in which the CUBE Auction is terminated prematurely will afford both the Commission and the Exchange an opportunity to analyze the impact of early terminations and unrelated orders on the CUBE Auction.¹¹¹ The Commission will evaluate the CUBE Auction during the Pilot Period to determine whether it would be beneficial to customers and to the options market as a whole to approve any proposal requesting permanent approval to permit orders of fewer than 50 contracts to be submitted to the CUBE Auction

IV. Section 11(a) of the Act

Section 11(a)(1) of the Act¹¹² prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person,

¹¹⁰ Rule 971.1NY(b)(1)(B), which relates to CUBE Auctions for fewer than 50 contracts, and Rule 971.1NY(b)(8), which states that the minimum size for a CUBE Auction would be one contract. See also BOX Rule 7150, IM-7150-1, CBOE Rule 6.74A, Interpretations and Policies .03, ISE Rule 723, Supplementary Material .03, and Phlx Rule 1080(n)(i)(C) (establishing pilot programs regarding the no minimum size requirement for orders entered into price improvement auctions).

¹¹¹ See supra notes 94-95 and accompanying text.

¹¹² 15 U.S.C. 78k(a)(1).

or an account over which it or its associated person exercises discretion (collectively, “covered accounts”), unless an exception applies. Section 11(a)(1) and the rules thereunder contain a number of exceptions for principal transactions by members and their associated persons, including the exceptions set forth in Rule 11a2-2(T) under the Act.¹¹³ The Exchange has represented that it has analyzed its rule proposed hereunder, and has determined that they are consistent with Section 11(a) of the Act and rules thereunder. For the reason set forth below, the Commission believes that the proposed CUBE Auction rules are consistent with the requirements of Section 11(a) of the Act and the rules thereunder.

A. Rule 11a2-2(T) under the Act (“Effect versus Execute” Rule)

Rule 11a2-2(T) under the Act,¹¹⁴ known as the “effect versus execute” rule, provides exchange members with an exception from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with the conditions of Rule 11a2-2(T), a member: (1) may not be affiliated with the executing member; (2) must transmit the order from off the exchange floor; (3) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;¹¹⁵ and (4) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule. The Exchange

¹¹³ 17 CFR 240.11a2-2(T).

¹¹⁴ Id.

¹¹⁵ The member may, however, participate in clearing and settling the transaction. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the Designated Order Turnaround System of the New York Stock Exchange (“1978 Release”)).

believes that orders sent by off-floor ATP Holders, for covered accounts, to the proposed CUBE Auction would qualify for this “effect versus execute” exception.

Rule 11a2-2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as MKT’s CUBE Auction, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the Exchange.¹¹⁶ The Exchange represents that the design of the CUBE Auction ensures that ATP Holders do not have any special or unique trading advantages in the handling of their orders after transmission. Based on the Exchange’s representations, the Commission believes that the CUBE Auction’s rules satisfy this requirement.

Second, Rule 11a2-2(T) requires orders for covered accounts be transmitted from off the exchange floor. The Exchange represents that orders for covered accounts sent to the CUBE Auction from off-floor ATP Holders will be transmitted from remote terminals directly to the CUBE Auction by electronic means. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account

¹¹⁶ In considering the operation of automated execution systems operated by an exchange, the Commission has noted that, while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange’s Post Execution Reporting System and Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange Automated Communications and Execution System (“1979 Release”)).

order is transmitted from a remote location directly to an exchange's floor by electronic means.¹¹⁷ With respect to such orders transmitted electronically from remote terminals directly to the CUBE Auction, the Commission believes that the CUBE Auction's rules satisfy the off-floor transmission requirement.¹¹⁸ The Commission believes that, based on the foregoing, the proposal satisfies the off-floor transmission requirement for the purposes of "effect versus execute" rule.

Third, Rule 11a2-2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution. The Exchange represents that, upon submission to the CUBE Auction, an order will be executed automatically pursuant to the proposed rules set forth for the Auction. The Exchange states that, in particular, execution of an order sent to the Auction depends not on the ATP Holder entering the order, but rather on what other orders are present and the priority of those orders. Thus, at no time following the submission of an order is an ATP Holder able to acquire control or influence over

¹¹⁷ See, e.g., Securities Exchange Act Release Nos. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48) (approving, among other things, the equity rules of the Boston Stock Exchange ("BSE")); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (approving rules governing the trading of options on The NASDAQ Options Market); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15) (approving the Boston Options Exchange as an options trading facility of BSE); the 1979 Release; and the 1978 Release.

¹¹⁸ The Exchange further represents that there may be instances of orders for a covered account that may be sent by an off-floor ATP Holder to an unaffiliated Floor Broker for entry into the CUBE Auction mechanism. The Exchange represents that at the current time, Exchange-sponsored Floor Broker systems are not enabled to accept orders into the CUBE Auction mechanism from Floor Brokers. The Exchange further represents that, if a Floor Broker were to gain access to the CUBE Auction mechanism via a third-party system, that Floor Broker may not rely on any exceptions found in Section 11(a) of the Act or rules thereunder to enter orders for their own covered accounts into the Auction mechanism from on the floor, or transmit such orders from on the floor to off of the floor for entry into the CUBE Auction mechanism. See Amendment No. 2, supra note 4.

the result or timing of order execution.¹¹⁹ Accordingly, the Commission believes that an ATP Holder does not participate in the execution of an order submitted into the CUBE Auction. Based on the Exchange's representations, the Commission believes that the proposal satisfies the non-participation requirement of Rule 11a2-2(T).

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T).¹²⁰ The Exchange recognizes that ATP Holders trading for covered accounts over which they exercise investment discretion must comply with this condition to rely on the Rule's exception. The Exchange represents that it will enforce this requirement pursuant to its obligation under Section 6(b)(1) of the Act to enforce compliance with the federal securities laws

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

¹¹⁹ The Exchange represents that the Initiating Participant may not cancel or modify a CUBE Order once a CUBE Auction has started. See proposed Rule 971.1NY(c).

¹²⁰ 17 CFR 240.11a2-2(T)(a)(2)(iv). In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release (stating "[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests").

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2014-17 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-NYSEMKT-2014-17. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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 publicly available. All submissions should refer to File Number SR-NYSEMKT-2014-17 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause for approving the proposed rule change, as amended by Amendment No. 2, prior to the 30th day after the date of publication of notice in the Federal Register. Amendment No. 2: (1) clarified that Exchange-sponsored Floor Broker systems are not enabled to accept orders into the CUBE Auction mechanism from Floor Brokers; (2) revised the rule text to clarify that unrelated quotes and orders will never trade through their limit prices; and (3) revised the rule text to clarify that the Contra Order may not be cancelled or modified. As to the first item, Amendment No. 2 provides additional clarity in the discussion concerning the analysis of the original proposal's compliance with the requirements of Section 11(a) of the Act. As to the second item, Amendment No. 2 merely clarifies the rule text. As to the third item, Amendment No. 2 merely conforms the rule text to the description of the limitation in the Notice. The CUBE Auction will function in a manner substantially similar to that described in the Notice and Amendment No. 2 simply provides additional clarity regarding a few features of the proposal.

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹²¹ that the proposed rule change, as modified by Amendment No. 2 (SR-NYSEMKT-2014-17) is approved on an accelerated basis, except that (1) paragraphs (b)(1)(B) and (b)(8) of Rule 971.1NY are approved on a pilot basis until April 25, 2015; and (2) there shall be no minimum size requirements for orders entered into the CUBE Auction for a pilot period expiring on April 25, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²²

Kevin M. O'Neill
Deputy Secretary

¹²¹ 15 U.S.C. 78s(b)(2).

¹²² 17 CFR 200.30-3(a)(12).