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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89884; File No. SR-NYSENAT-2020-28]

### **Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing of Proposed Rule Change to Establish Procedures for the Allocation of Cabinets to its Co-located Users**

September 16, 2020

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on September 2, 2020, NYSE National, Inc. (“NYSE National” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to establish procedures for the allocation of cabinets to its co-located Users. The proposed rule change is available on the Exchange’s website at

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

[www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to establish procedures for the allocation of cabinets to its co-located<sup>4</sup> Users.<sup>5</sup>

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<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (“Commission”) in in 2018. See Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSENAT-2018-07) (“NYSE National Co-location Notice”).

<sup>5</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange. See *id.*, *supra* note 4, at 26314 n.9. As specified in the NYSE National, Inc. Schedule of Fees and Rebates (“Fee Schedule”), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange, LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE Chicago, Inc. (together, the “Affiliate SROs”). See *id.* at 26314 n.11. Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSEArca-2020-82, and SR-NYSECHX-2020-26.

## Background

Presently, Users have two options for cabinets with power: dedicated cabinets and partial cabinets. Both options use power and house Users' servers and other equipment. When a User purchases a new cabinet, whether dedicated or partial, the Exchange provides the cabinet with power, and the User pays an initial fee and a monthly fee based on the number of kilowatts ("kW") contracted for the cabinet. The Exchange allocates cabinets on a first-come/first-serve basis.

The Exchange also offers a third cabinet option, cabinets for which power is not utilized ("PNU cabinets"). PNU cabinets are reserved cabinet space that can be converted to a dedicated cabinet when the User requests it.<sup>6</sup>

## Proposed Cabinet Allocation Procedure

The Exchange believes that it would be prudent for it to put in place measures for the allocation of cabinets (the "Cabinet Allocation") that could be used if, in the future, a situation arises where the Exchange cannot satisfy all User demand for cabinets.<sup>7</sup> The proposed Cabinet Allocation is as follows:

1. Cabinet Purchasing Limits:
  - a. The Exchange would place the following limits on Users' ability to purchase new cabinets ("Purchasing Limits") if the Exchange's unallocated cabinet inventory is at or below 40 cabinets (the "Cabinet

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<sup>6</sup> See NYSE National Co-location Notice, supra note 4, at 26316.

<sup>7</sup> The Exchange believes that the proposed procedures are consistent with the Nasdaq procedures for allocating cabinets if Nasdaq's inventory shrinks to zero. See Securities Exchange Act Release No. 62397 (June 28, 2010), 75 FR 38860 (July 6, 2010) (SR-NASDAQ-2010-019) ("Nasdaq Cabinet Waitlist Procedures").

Threshold”):

- i. A User with PNU cabinets would be required to either convert its PNU cabinets into dedicated cabinets or relinquish its PNU cabinets before being permitted to purchase new cabinets.<sup>8</sup>
  - ii. The Exchange would limit the purchase of new cabinets (dedicated and partial) to a maximum of four dedicated cabinets, each with a maximum of 8 kW, per User.<sup>9</sup>
  - iii. A User would have to wait 30 days from the date of its signed order form before purchasing new cabinets again.
- b. If the Cabinet Threshold is reached, the Exchange would cease offering new PNU cabinets to all Users.

2. Waitlist:

- a. The Exchange would create a waitlist if the available cabinet inventory is zero, or if a User requests, in writing, a number of cabinets that, if provided, would cause the available cabinet inventory to be below zero.
- b. The Exchange would place Users seeking cabinets on a waitlist, as

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<sup>8</sup> See NYSE National Co-location Notice, supra note 4, at 26316.

<sup>9</sup> A User may opt to purchase a mixture of dedicated and partial cabinets. In such a case, it would still be subject to the maximum, whether expressed in dedicated cabinets, partial cabinets, or a mixture thereof. The maximum is the equivalent of eight partial cabinets, at 2 kW each. The Nasdaq procedures similarly limit the purchase of cabinets if available cabinet inventory falls to 40 cabinets or fewer. Nasdaq Cabinet Waitlist Procedures, supra note 7, at 38861 (“Should available cabinet inventory shrink to 40 cabinets or less, the Exchange will limit new cabinet orders to a maximum of 4 cabinets each, and all new cabinets will be limited to a maximum power level of 5kW.”).

follows:<sup>10</sup>

- i. A User with PNU cabinets would not be placed on the waitlist if the User could meet its new cabinet request by converting its PNU cabinets to dedicated cabinets. A User would only be placed on the waitlist for the portion of its new cabinet request that exceeds its existing PNU cabinets, subject to the Purchasing Limitations.
- ii. A User would be placed on the waitlist based on the date its signed order is received. A User may only have one order for new cabinets on the waitlist at a time, and the order would be subject to the Purchasing Limits.
- iii. As cabinets become available,<sup>11</sup> the Exchange would offer them to the User at the top of the waitlist. If the User's order is completed, it would be removed from the waitlist. If the User's order is not completed, it would remain at the top of the waitlist.
- iv. A User would be removed from the waitlist (a) at the User's request or (b) if the User turns down an offer of a cabinet of the same size it requested in its order. If the Exchange offers the User a cabinet of a different size than the User requested in its order, the User may turn down the offer and remain at the top of the waitlist

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<sup>10</sup> The waitlist provisions are based on the Nasdaq Cabinet Waitlist Procedures and the procedures in General Note 3 of the Fee Schedule. See id. at 38861; NYSE National Co-location Notice, supra note 7, at 26315.

<sup>11</sup> Cabinets may become available if, for example, a User vacates a dedicated or partial cabinet.

until its order is completed.

- v. A User that is removed from the waitlist but subsequently submits a new written order for cabinets would be added to the bottom of the waitlist.

3. Termination of Purchasing Limits and Waitlist: When unallocated cabinet inventory is more than 10 cabinets, the Exchange would cease use of the waitlist. When unallocated cabinet inventory is more than 40 cabinets, the Exchange would discontinue the Purchasing Limits.

#### Proposed New General Notes

The Exchange proposes to add a new General Note 7 to the Exchange's Fee Schedule setting forth the proposed Purchasing Limits, as follows:

7. Cabinet Purchasing Limits. If unallocated cabinet inventory is at or below 40 cabinets ("Cabinet Threshold"), the following limits on the purchase of new cabinets ("Purchasing Limits") will apply:

- A User with PNU cabinets will be required to either convert its PNU cabinets into dedicated cabinets or relinquish its PNU cabinets before being permitted to purchase new cabinets.
- The Exchange will limit a User's purchase of new cabinets (dedicated and partial) to a maximum of four dedicated cabinets, each with a maximum of 8 kw.
- A User will have to wait 30 days from the date of its signed order form before purchasing new cabinets again.

- If the Cabinet Threshold is reached, the Exchange will cease offering new PNU cabinets to all Users.
- When unallocated cabinet inventory is more than 40 cabinets, the Exchange will discontinue the Purchasing Limits.

The Exchange proposes to add a new General Note 8 to the Exchange's Fee Schedule setting forth the proposed Waitlist, as follows:

8. Cabinet Waitlist. The Exchange will create a waitlist if the available cabinet inventory is zero, or if a User requests, in writing, a number of cabinets that, if provided, would cause the available cabinet inventory to be zero. The Exchange will place Users seeking cabinets on a waitlist, as follows:

- A User with PNU cabinets will not be placed on the waitlist if the User could meet its new cabinet request by converting its PNU cabinets to dedicated cabinets. A User will only be placed on the waitlist for the portion of its new cabinet request that exceeds its existing PNU cabinets, subject to the Purchasing Limitations.
- A User will be placed on the waitlist based on the date its signed order is received. A User may only have one order for new cabinets on the waitlist at a time, and the order is subject to the Purchasing Limits.
- As cabinets become available, the Exchange will offer them to the User at the top of the waitlist. If the User's order is completed, it will be removed from the waitlist. If the User's order is not completed, it will remain at the top of the waitlist.

- A User will be removed from the waitlist (a) at the User’s request or (b) if the User turns down an offer of a cabinet of the same size it requested in its order. If the Exchange offers the User a cabinet of a different size than the User requested in its order, the User may turn down the offer and remain at the top of the waitlist until its order is completed.
- A User that is removed from the waitlist but subsequently submits a new written order for cabinets will be added back to the bottom of the waitlist.
- When unallocated cabinet inventory is more than 10 cabinets, the Exchange will cease use of the waitlist.

The proposed change would apply the same way to all types and sizes of market participants. As is currently the case, the purchase of any colocation service is completely voluntary and the Fee Schedule is applied uniformly to all Users. The proposed change is not otherwise intended to address any other issues relating to colocation services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>13</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. In

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<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

addition, it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

#### The Proposed Rule Change is Reasonable and Equitable

The Exchange believes that the proposed rule change is reasonable and equitable for the following reasons.

The Exchange believes that User demand for cabinets will continue. In this context, the Exchange believes that it would be reasonable for it to put in place the proposed Cabinet Allocation to establish the allocation of cabinets on an equitable basis. The Cabinet Allocation would establish a rational, objective procedure that would be applied uniformly by the Exchange to all Users that requested new cabinets.

The Exchange believes that the Cabinet Allocation's two-tier structure of establishing, first, a purchasing limitation on order size, and second, a waitlist, would be a reasonable method to respond to increasing demand for cabinets in the future, and would be consistent with the Nasdaq procedures for allocating cabinets if Nasdaq's cabinet inventory shrinks to zero.<sup>14</sup>

The Exchange believes that the proposed Cabinet Threshold is reasonable and equitable. Based on experience, the Exchange believes that the Cabinet Threshold is sufficiently low that it would not be triggered easily.

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<sup>14</sup> See Nasdaq Cabinet Waitlist Procedures, supra note 7.

The Exchange believes that the proposed Purchasing Limits are reasonable and equitable. Based on its experience with co-location and purchasing trends over the last few years, the Exchange believes that in most cases the number of cabinets that a User would be allowed to buy under the proposed Purchasing Limits would be sufficient to allow the User to use its system to access the markets while leaving a margin for potential growth.

Further, the Exchange believes that, by establishing a waitlist on the basis of the date it receives signed orders, limiting the size and number of orders a User may have on the waitlist at any one time, and removing a User from the waitlist if it turns down a cabinet that is the size that it requested, the Cabinet Allocation is reasonably designed to prevent Users from utilizing the waitlist as a method to obtain a greater portion of the cabinets available, thereby facilitating a more equitable distribution of cabinets. Similarly, the Exchange believes that by requiring a 30-day delay before a User subject to the Purchasing Limits could purchase cabinets again, the Cabinet Allocation is reasonably designed to prevent a User from obtaining a greater portion of the cabinets available.

The Exchange believes that the proposed change is reasonable and equitable because the Exchange would only place limits on Users' ability to purchase new cabinets if cabinet inventory fell to specific thresholds. Similarly, the Exchange believes that the proposed change is reasonable and equitable because the waitlist would only be created if unallocated cabinet inventory fell to zero, and because there would be an established threshold for cessation of the waitlist.

## The Proposed Rule Change Would Protect Investors and the Public Interest

The Exchange believes that the proposed rule change would perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest for the following reasons.

The Exchange believes that User demand for cabinets will continue. In this context, the proposed rule change would allow the Exchange to protect investors and the public interest, first, by setting limits on Users' ability to purchase cabinets, and second, by using a waitlist to allocate any unallocated cabinets on a first come-first served rolling basis.

Based on experience, the Exchange believes that the Cabinet Threshold is sufficiently low that it would not be triggered easily, which would protect investors and the public interest. Similarly, the Exchange believes that in most cases the number of cabinets that a User would be allowed to buy under the proposed Purchasing Limits would be sufficient to allow the User to use its system to access the markets while leaving a margin for potential growth, which would protect investors and the public interest.

In addition, the proposed Cabinet Allocation would protect investors and the public interest in that it is designed to prevent Users from utilizing the Purchasing Limit and waitlist procedures to obtain a greater portion of the cabinets available, thereby facilitating a more equitable distribution.

The proposed rule change would protect investors and the public interest because the proposed new General Notes would articulate rational, objective procedures and would serve to reduce any potential for confusion on how cabinets would be allocated if a

shortage in unallocated cabinets were to arise in the future, and would thereby make the Fee Schedule more transparent and reduce any potential ambiguity.

The Proposed Change is Not Unfairly Discriminatory

The Exchange believes that the proposed change is not unfairly discriminatory for the following reasons.

The proposed change would apply equally to all types and sizes of market participants. If the Cabinet Allocation were in place, all Users would be able to identify the permitted cabinet options and the procedures that would apply to them in the event that unallocated cabinet supply runs low in the future. The Cabinet Allocation would assist the Exchange in accommodating demand for co-location services, and cabinets in particular, on an equitable basis.

For the reasons above, the proposed changes do not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,<sup>15</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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<sup>15</sup> 15 U.S.C. 78f(b)(8).

### Intramarket Competition

The Exchange does not believe that the proposed change would place any burden on intramarket competition that is not necessary or appropriate. The proposed change would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all Users equally.

The Exchange believes that, if triggered, the imposition of the Cabinet Allocation would not impose a burden on a User's ability to compete that is not necessary or appropriate. The Exchange believes that User demand for cabinets will continue in the future. In this context, the Exchange believes that it would be reasonable for it to put in place the proposed Cabinet Allocation to establish a method for allocating cabinets on an equitable basis. The Exchange would only follow the Cabinet Allocation and place limits on Users' ability to purchase new cabinets if unallocated cabinet inventory fell to the proposed Cabinet Threshold. Similarly, the Exchange would only create the waitlist if unallocated cabinet inventory fell to zero. Based on its experience with co-location and purchasing trends over the last few years, the Exchange believes that in most cases the number of cabinets that a User would be allowed to buy under the proposed Purchasing Limits would be sufficient to allow the User to use its system to access the markets while leaving a margin for potential growth.

The Exchange believes that the proposed new General Notes would articulate rational, objective procedures and would serve to reduce any potential for confusion on how cabinets would be allocated if a shortage in unallocated cabinets were to arise in the future, and would thereby make the Fee Schedule more transparent and reduce any potential ambiguity.

Use of any co-location service is completely voluntary, and each market participant is able to determine whether to use co-location services based on the requirements of its business operations.

#### Intermarket Competition

The Exchange does not believe that the proposed change would impose any burden on intermarket competition that is not necessary or appropriate.

The Exchange operates in a highly competitive market in which exchanges and other vendors (i.e., Hosting Users) offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>16</sup>

The proposed rule change would protect investors and the public interest because the proposed new General Notes would articulate rational, objective procedures and

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<sup>16</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

would serve to reduce any potential for confusion on how cabinets would be treated in the case of a shortage in unallocated cabinets, and would thereby make the Fee Schedule more transparent and reduce any potential ambiguity.

For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSENAT-2020-28 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-NYSENAT-2020-28. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only

information that you wish to make available publicly. All submissions should refer to File Number SR-NYSENAT-2020-28, and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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