



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91154; File No. SR-NYSE-2021-12]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Establish Procedures for the Allocation of Power to Its Co-located Users**

February 18, 2021.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 4, 2021, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

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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.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

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

Recently, the Exchange added procedures for the allocation of cabinets (“Existing Procedures”)<sup>6</sup> in colocation should it become needed, which procedures are not currently being used. In addition, Users have had an unprecedented demand for power, largely driven by the demands caused by volatile market conditions related to the COVID-19 pandemic and higher than usual trading volumes. The Exchange is currently working to expand the amount of power and number of cabinets available in colocation. To complement the procedures for allocation of

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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 2010. See Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56). The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. (“ICE”). Through its ICE Data Services (“IDS”) business, ICE operates a data center in Mahwah, New Jersey (the “data center”), from which the Exchange provides co-location services to Users.

<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 Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40). As specified in the New York Stock Exchange Price List (“Price List”), 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 NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the “Affiliate SROs”). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSEAMER-2021-08, SR-NYSEArca-2021-11, SR-NYSECHX-2021-02, and SR-NYSEAT-2021-03.

<sup>6</sup> See Securities Exchange Act Release No. 90732 (December 18, 2020), 85 FR 84443 (December 28, 2020) (SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26, and SR-NYSEAT-2020-28) (Notice of Filings of Amendment No. 1 and Order Granting Approval of Proposed Rule Changes, Each as Modified by Amendment No. 1, Amending the Exchanges’ Co-Location Services To Establish Procedures for the Allocation of Cabinets to Co-Located Users if Cabinet Inventory Falls Below Certain Thresholds).

colocation cabinets, the Exchange believes it would be prudent to have procedures in place for the allocation of power, should such allocation be necessary. The Exchange accordingly proposes to expand the Existing Procedures to incorporate procedures for the allocation of power (“Proposed Procedures”).

### Background

Users currently have two options for purchasing power. First, a User may purchase a new dedicated or partial cabinet, which comes with power. The User pays an initial fee and a monthly fee based on the number of kilowatts (“kW”) contracted for the cabinet. The dedicated cabinets have a standard power allocation of either 4 kW or 8 kW (the “Standard Cabinet Power”). Partial cabinets are available in increments of eight-rack units of space, and each eight-rack unit may be allocated 1 or 2 kW. The Exchange allocates cabinets on a first-come/first-serve basis.

Second, a User may request power upgrades to dedicated cabinets in addition to the Standard Cabinet Power.<sup>7</sup> Users may request that such additional power (“Additional Power”) be allocated to a cabinet when it is first set up or later. A User with a dedicated cabinet, for example, may develop its infrastructure in a manner that allows it to expand the hardware within that cabinet by adding Additional Power. Because it could add Additional Power to its existing cabinet, the User would not need an additional cabinet. Adding Additional Power may entail overhauling wiring, circuitry and hardware for the dedicated cabinet so that it can handle the increased power.<sup>8</sup>

The Exchange also offers cabinets that do not have power: cabinets for which power is not utilized (“PNU cabinets”). PNU cabinets are reserved cabinet space that are not active, and that can be converted to a powered, dedicated cabinet when the User requests it.<sup>9</sup> Although PNU

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<sup>7</sup> See Securities Exchange Act Release No. 71122 (December 18, 2013), 78 FR 77739 (December 24, 2013) (SR-NYSE-2013-81).

<sup>8</sup> See Id. at 77740.

<sup>9</sup> See Securities Exchange Act Release No. 70913 (November 21, 2013), 78 FR 70987

cabinets do not use power, when the Exchange establishes a PNU cabinet, it allocates unused power capacity to it, depending on the User's requirements. The allocated power is kept in reserve for the PNU cabinet, and, upon the User's request, the PNU cabinet may be powered and used promptly.

If additional power or cabinets are needed, the Exchange may use established measures to convert PNU cabinets:

[i]f reserved cabinet space becomes needed for use, the reserving User will have 30 business days to formally contract with the Exchange for full payment for the reserved cabinet space needed or the space will be reassigned.<sup>10</sup>

The Exchange proposes to provide additional detail regarding the conversion of PNU cabinets in the Proposed Procedures.

#### Proposed Procedures

Like the Existing Procedures, the Proposed Procedures would be set forth in General Notes 7 and 8. General Note 7 would be amended to provide that, if the amount of power or cabinets available fell below specified thresholds, Users would be subject to purchasing limits. General Note 7 would also specify when the purchasing limits would cease to apply. Consistent with the Existing Procedures, the amended General Note 7 would provide that if a User requests a number of Standard Cabinets and/or amount of Additional Power that would cause the unallocated power capacity to be below the specified power and cabinet thresholds, the purchasing limits would apply only to the portion of the User's order below the relevant threshold.<sup>11</sup>

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(November 27, 2013) (SR-NYSE-2013-74).

<sup>10</sup> Securities Exchange Act Release No. 62732 (August 16, 2010), 75 FR 51512 (August 20, 2010) (SR-NYSE-2010-56), at note 5. "Reserved cabinet space" is a PNU cabinet. See 78 FR 70987, 70987-70988, supra note 9.

<sup>11</sup> For example, if there was 365 kW unallocated power capacity in co-location and a User requested to purchase cabinets and Additional Power that would, together, total 55 kW, the purchasing limits in General Note 7 would not apply to the User's purchase of the first 15 kW, whether those kW were in the form of cabinets or Additional Power. Once

The Exchange proposes that, if either the Cabinet Threshold or the Power Threshold, or if both the Cabinet Threshold and Power Threshold are reached, all Users with PNU cabinets would be required to either convert or relinquish them, consistent with the applicable provisions. Doing so would allow all cabinets and power to be available for active use. As a result, no User would be subject to limitations on its ability to purchase and use cabinets or power at the same time that PNU cabinets were dormant.

General Note 8 would be amended to provide that, if the amount of power or cabinets available fell to zero, Users seeking to purchase power or cabinets would be put on a waitlist. The waitlist provisions for power would be substantially similar to those for cabinets in the Existing Procedures.<sup>12</sup> In both General Notes 7 and 8, the Proposed Procedures would also state how the Existing Procedures regarding cabinets and the new procedures regarding power would relate to each other. In each case, the Proposed Procedures would state what the threshold amount of power and cabinets would be to discontinue the limits, which would allow the Exchange to return to offering PNU cabinets. Finally, in clarifying changes, the existing text of General Notes 7 and 8 would be amended to change “Purchasing Limits” to “Cabinet Limits” and “waitlist” to “Cabinet Waitlist” and to delete redundant text.

*Proposed Amendments to General Note 7*

The Exchange proposes to amend General Note 7 as follows (additions italicized, deletions in [brackets]):

7. Cabinet and Power Purchasing Limits. If (i) unallocated cabinet inventory is at

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the power threshold was reached, the combined limits would be activated, limiting the User’s purchase of additional cabinets and Additional Power. In all, the User would be permitted to purchase a total of 47 kW out of its original order of 55 kW. The User could choose whether the 47 kW was in the form of cabinets, Additional Power, or both.

<sup>12</sup> Consistent with the Existing Procedures, the Proposed Procedures would provide that, as additional power and cabinets became available, the Exchange would offer it to the User at the top of the combined waitlist. Power may become available if, for example, (a) a User vacates a dedicated or partial cabinet or relinquishes Additional Power or (b) IDS builds additional capacity. Cabinets may become available if, for example, a User vacates a dedicated or partial cabinet.

or below 40 cabinets, whether or not such cabinets are configured to be subdivided into partial cabinets (“Cabinet Threshold”), or (ii) the unallocated power capacity in co-location is at or below 350 kW (the “Power Threshold”), the following limits on the purchase of new cabinets (“Purchasing Limits”) will apply:

a. Cabinet Limits. If only the Cabinet Threshold is reached, the following measures (the “Cabinet Limits”) will apply:

- All Users with PNU cabinets will be required to either convert [its]their PNU cabinets into dedicated cabinets or relinquish [its]their PNU cabinets [before being permitted to purchase new cabinets]. The Exchange will notify each User with a PNU cabinet that the User has 30 business days to decide whether to contract to convert the PNU cabinet to a dedicated cabinet. If the User does not contract to use the PNU cabinet as a dedicated cabinet within such time, the PNU cabinet will be relinquished.
- [Once the Cabinet Threshold is reached, t]The Exchange will limit each User’s purchase of new cabinets (dedicated and partial) to a maximum of four dedicated cabinets. The maximum may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet.
- If a User requests, in writing, a number of cabinets that, if provided, would cause the available cabinet inventory to be below 40 cabinets, the [Purchasing]Cabinet Limits will only apply to the portion of the User’s order below the Cabinet Threshold.
- 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 or providing new PNU cabinets to all Users and Users will not be permitted to convert a currently used dedicated cabinet to a PNU cabinet.
- When unallocated cabinet inventory is more than 40 cabinets, the Exchange will discontinue the [Purchasing]Cabinet Limits.

b. Combined Limits. If only the Power Threshold is reached or both the Cabinet Threshold and the Power Threshold are reached, the following measures (the “Combined Limits”) will apply:

- All Users with PNU cabinets will be required to either convert their PNU cabinets into dedicated cabinets or relinquish their PNU cabinets. The Exchange will notify each User with a PNU cabinet that the User has 30 business days to decide whether to contract to convert the PNU cabinet to a dedicated cabinet. If the User does not contract to use the PNU cabinet as a dedicated cabinet within such time, the PNU cabinet will be relinquished.
- A User may purchase either or both of the following, so long as the combined power usage of such purchases is no more than a maximum of 32 kW:
  - a. New cabinets (dedicated and partial), subject to a maximum of four dedicated cabinets with standard power allocations of 4 kW or 8 kW (“Standard Cabinets”). The purchase may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet.
  - b. Additional power for new or existing cabinets.
- If a User requests, in writing, a number of Standard Cabinets and/or an amount of additional power that, if provided, would cause the unallocated

power capacity to be below the Power Threshold or Cabinet Threshold, the Combined Limits would apply only to the portion of the User's order below the relevant threshold.

- A User will have to wait 30 days from the date of its signed order form before purchasing new Standard Cabinets or additional power again.
- If the Power Threshold or Cabinet Threshold is reached, the Exchange will cease offering or providing new PNU cabinets to all Users and Users will not be permitted to convert a currently used dedicated cabinet to a PNU cabinet.
- When unallocated power capacity is above the Power Threshold, the Exchange will discontinue the Combined Limits. If at that time the unallocated cabinet inventory is 40 or fewer cabinets, the Cabinet Limits would enter into effect.

c. Applicability. If the Cabinet Threshold is reached before the Power Threshold, the Cabinet Limits will be in effect until the Power Threshold is reached, after which the Combined Limits will apply.

*Proposed Amendments to General Note 8*

The Exchange proposes to amend General Note 8 as follows (additions italicized, deletions in [brackets]):

8. Cabinet and Combined Waitlists.

a. Cabinet Waitlist. Unless a Combined Waitlist is in effect, t[T]he Exchange will create a cabinet waitlist (“Cabinet Waitlist”) if the available cabinet inventory is zero, or a User requests, in writing, a number of cabinets that, if provided, would cause the available inventory to be zero. The Exchange will place Users seeking cabinets on a Cabinet [w]Waitlist, as follows:



- Users with PNU cabinets will ~~not~~ be required to either convert their PNU cabinets into dedicated cabinets or relinquish their PNU cabinets in accordance with the measures set forth in General Note 7(a), above. [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 Cabinet [w]Waitlist based on the date its signed order is received. A User may only have one order for new cabinets on the Cabinet [w]Waitlist at a time, and the order is subject to the [Purchasing]Cabinet Limits. If a User changes the size of its order while it is on the Cabinet Waitlist, it will maintain its place on the Cabinet Waitlist, and will remain subject to the Cabinet Limits.
- As cabinets become available, the Exchange will offer them to the User at the top of the Cabinet [w]Waitlist. If the User's order is completed, it will be removed from the Cabinet [w]Waitlist. If the User's order is not completed, it will remain at the top of the Cabinet [w]Waitlist.
- A User will be removed from the Cabinet [w]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 Cabinet [w]Waitlist until its order is completed.
- A User that is removed from the Cabinet [w]Waitlist but subsequently submits a new written order for cabinets will be added back to the bottom of the Cabinet [w]Waitlist.

- When unallocated cabinet inventory is more than 10 cabinets, the Exchange will cease use of the Cabinet [w]Waitlist.

b. Combined Waitlist. The Exchange would create a power and cabinet waitlist (“Combined Waitlist”) if the unallocated power capacity is zero, or if a User requests, in writing, an amount of power (whether power allocated to a Standard Cabinet or additional power) that, if provided, would cause the unallocated power capacity to be below zero. The Exchange would place Users seeking cabinets or power on the Combined Waitlist, as follows:

- All Users with PNU cabinets will be required to either convert their PNU cabinets into dedicated cabinets or relinquish their PNU cabinets in accordance with the measures set forth in General Note 7(b), above.
- If a Cabinet Waitlist exists when the requirements to create a Combined Waitlist are met, the Cabinet Waitlist will automatically convert to the Combined Waitlist. If a Combined Waitlist exists when the requirements to create a Cabinet Waitlist are met, no new waitlist will be created, and the Combined Waitlist will continue in effect.
- A User will be placed on the Combined Waitlist based on the date its signed order for cabinets and/or additional power is received. A User may only have one order for new cabinets and/or additional power on the Combined Waitlist at a time, and the order would be subject to the Combined Limits. If a User changes the size of its order while it is on the Combined Waitlist, it will maintain its place on the Combined Waitlist, and will remain subject to the Combined Limits.
- As additional power and/or cabinets become available, the Exchange will offer them to the User at the top of the Combined Waitlist. If the User’s order is completed, the order will be removed from the Combined

Waitlist. If the User's order is not completed, it will remain at the top of the Combined Waitlist.

- A User will be removed from the Combined Waitlist (a) at the User's request; (b) if the User turns down an offer that is the same as its order (e.g. the offer includes cabinets of the same size and/or the amount of additional power that the User requested in its order). If the Exchange offers the User an offer that is different than its order, the User may turn down the offer and remain at the top of the Combined Waitlist until its order is completed.
- A User that is removed from the Combined Waitlist but subsequently submits a new written order for cabinets and/or additional power will be added back to the bottom of the waitlist.
- If the Combined Waitlist is in effect, when unallocated power capacity in co-location is at 100 kW, the Exchange will cease use of the waitlist. If at that time the unallocated cabinet inventory is 10 or fewer cabinets, the Cabinet Limits would enter into effect.

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 Price List is applied uniformly to all Users. The proposed change is not otherwise intended to address any other issues relating to co-location 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>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>14</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 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 power will continue. The Exchange is currently working to expand the amount of power and number of cabinets available in colocation. Nevertheless, the Exchange believes that it would be reasonable for it to put in place the Proposed Procedures to establish the allocation of power and cabinets on an equitable basis, consistent with the Established Procedures. The Proposed Procedures would establish a rational, objective procedure that would be applied uniformly by the Exchange to all Users that requested new cabinets or Additional Power.

The Exchange believes that integrating the procedures for the allocation of power with the Existing Procedures would be reasonable, because cabinets are provided with power. Having both power and cabinets covered by the Proposed Procedures would ensure that the procedures for all relevant services are consistent and coordinated. Having the Proposed Procedures state what would occur if the Cabinet Threshold and Power Threshold are reached at different times,

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

<sup>14</sup> 15 U.S.C. 78f(b)(4) and (5).

and how the Cabinet Waitlist and Combined Waitlist interrelate, is reasonable for the same reason.

The Exchange believes that following the Existing Procedures' 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 power and cabinets in the future. The Exchange notes that the Existing Procedures are consistent with the Nasdaq procedures for allocating cabinets if its cabinet inventory shrinks to zero.<sup>15</sup> The Exchange believes that it is reasonable to amend the Existing Procedures to clarify what would occur if a User changes the size of its order while it is on the Cabinet Waitlist.

The Exchange believes that the proposed Power Threshold is reasonable and equitable. Based on experience, the Exchange believes that the Power Threshold of 350 kW is reasonable and appropriate because it is sufficiently low that it would not be triggered repeatedly, yet it offers a reasonable buffer during which the Combined Limits would apply before the Combined Waitlist would become effective.

The Exchange believes that the proposed Combined 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 amount of power that a User would be allowed to buy under the proposed Combined Limits, whether in the form of cabinets or Additional Power, would be sufficient for a User's needs 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, stating what happens if a User changes its order while on the waitlist, and removing a User from the waitlist if it turns down an offer that is the same as what it requested, the Combined Waitlist is largely consistent with the Existing Procedures and reasonably

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<sup>15</sup> See Securities Exchange Act Release No. 62397 (June 28, 2010), 75 FR 38860 (July 6, 2010) (SR-NASDAQ-2010-019).

designed to prevent Users from utilizing the waitlist as a method to obtain a greater portion of the power and cabinets available, thereby facilitating a more equitable distribution. Similarly, the Exchange believes that by requiring a 30-day delay before a User subject to the Combined Limits could purchase Standard Cabinets or Additional Power again, the Proposed Procedure is reasonably designed to prevent a User from obtaining a greater portion of the power and 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 Standard Cabinets or Additional Power if either or both the Power Threshold and Cabinet Threshold are reached. Similarly, the Exchange believes that the proposed change is reasonable and equitable because the Combined Waitlist would only be created if unallocated power capacity in co-location is zero, or if a User requests, in writing, an amount of power (whether power allocated to a Standard Cabinet or Additional Power) that, if provided, would cause the unallocated power capacity to be below zero, and because there would be an established threshold for cessation of the Combined Waitlist.

The Exchange believes that it would be reasonable and equitable to require Users with PNU cabinets to either convert their PNU cabinets into dedicated cabinets or relinquish them if either or both the Cabinet Threshold and Power Threshold are reached. Doing so would make the power reserved for PNU cabinets and the cabinets themselves available to meet User demand for power and cabinets. As a result, no User would be subject to limitations on its ability to purchase and use power or cabinets at the same time that PNU cabinets were dormant. The Exchange believes that the measure is therefore reasonably designed to prevent a User from reserving, but not using, power or cabinets at a time when other Users are subject to limitations, facilitating a more equitable distribution.

The Proposed Procedures would provide additional specificity to the existing PNU cabinet provision permitting conversion of PNU cabinets, by stating what the relevant thresholds

would be, when the Exchange would require Users to decide whether to convert their PNU cabinets, and when PNU cabinets would be offered again, thereby increasing transparency and adding clarity.

The Exchange believes that the proposed change would be a reasonable method for the Exchange to accommodate demand for power and cabinets on an equitable basis, while allowing all Users that currently have a PNU cabinet to have a choice between converting their PNU cabinet to a dedicated cabinet or relinquishing it. The Exchange notes that Nasdaq's co-location customers that have a "Cabinet Proximity Option" have a similar choice if Nasdaq determines that the reserved data center space is needed for use.<sup>16</sup> Finally, the Exchange believes that it would be fair and equitable to require all Users with PNU cabinets to be subject to the same measures if the Cabinet Threshold or Power Threshold were met.

#### 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 and power 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 power, and second, by using a waitlist to allocate any unallocated cabinets and power on a first come-first served rolling basis.

Based on experience, the Exchange believes that the Power Threshold is sufficiently low that it would not be triggered repeatedly, which would protect investors and the public interest. Similarly, based on its experience with co-location and purchasing trends over the last few years, the Exchange believes that in most cases the amount of power that a User would be allowed to

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<sup>16</sup> Co-location customers may either contract with Nasdaq for full payment or have the cabinet reassigned. Securities Exchange Act Release No. 62354 (June 22, 2010), 75 FR 38860 (July 6, 2010) (SR-Nasdaq-2010-019).

buy under the proposed Combined Limits, whether in the form of cabinets or Additional Power, would be sufficient for a User's needs while leaving a margin for potential growth, which would protect investors and the public interest.

In addition, the Proposed Procedures would protect investors and the public interest in that they are designed to prevent Users from utilizing the Combined Limit and waitlist procedures to obtain a greater portion of the power and cabinets available, thereby facilitating a more equitable distribution.

The Exchange believes that it would protect investors and the public interest to require Users with PNU cabinets to either convert their PNU cabinets into dedicated cabinets or relinquish them if either or both the Cabinet Threshold and Power Threshold are reached. Doing so would mean that no User would be subject to limitations on its ability to purchase and use power or cabinets at the same time that PNU cabinets were dormant. The Exchange believes that the measure is therefore reasonably designed to prevent a User from reserving but not using power or cabinets at a time when other Users are subject to limitations.

The proposed rule change would protect investors and the public interest because the proposed revised General Notes would articulate rational, objective procedures consistent with the Existing Procedures and PNU cabinet provisions, and would serve to reduce any potential for confusion on how cabinets and power would be allocated if a shortage in one or the other were to arise in the future, and would thereby make the Price List 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 Proposed Procedures were in place, all Users would be able to identify the permitted cabinet and power options and the procedures that would apply to them in the event that unallocated



cabinet or power supply runs low in the future. All Users with PNU cabinets would be subject to the same measures if the Cabinet Threshold or Power Threshold were met. The Proposed Procedures would assist the Exchange in accommodating demand for co-location services, and power 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>17</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.

**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 Combined Limits or Combined Waitlist 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 power will continue in the future, and the Exchange is presently working to expand the amount of power and number of cabinets available in colocation. In this context, the Exchange believes that it would be reasonable for it to put in place the Proposed Procedures to expand on the Existing Procedures and establish a method for allocating not just cabinets but also power on an equitable basis.

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<sup>17</sup> 15 U.S.C. 78f(b)(8).

The Exchange would only follow the Proposed Procedures and place limits on Users' ability to purchase new power and cabinets if either or both the proposed Power Threshold and existing Cabinet Threshold were met, as specified in the proposed General Notes. Similarly, the Exchange would only create the Proposed Waitlist if the unallocated power capacity is zero, or if a User requests, in writing, an amount of power that, if provided, would cause the unallocated power capacity to be below zero. Based on its experience with co-location and purchasing trends over the last few years, the Exchange believes that in most cases the amount of power that a User would be allowed to buy under the proposed Combined Limits, whether in the form of cabinets or Additional Power, would be sufficient for a User's needs while leaving a margin for potential growth.

The Exchange believes that the proposed revised General Notes would articulate rational, objective procedures consistent with the Existing Procedures and PNU cabinet provisions, and would serve to reduce any potential for confusion on how power and cabinets would be allocated if a shortage in one or the other were to arise in the future, and would thereby make the Price List more transparent and reduce any potential ambiguity.

The Exchange believes that it would not impose a burden on a User's ability to compete that is not necessary or appropriate to require Users with PNU cabinets to either convert or relinquish their PNU cabinets if either or both the Cabinet Threshold and Power Threshold are reached. Doing so would make the power reserved for PNU cabinets and the cabinets themselves available to meet User demand for power and cabinets. As a result, no User would be subject to limitations on its ability to purchase and use power or cabinets at the same time that PNU cabinets were dormant. A User does not require a PNU cabinet to trade on the Exchange, and whether or not a User has a PNU cabinet has no effect on such User's orders going to, or trade data coming from, the Exchange, or the User's ability to utilize other co-location services. Rather, the proposed change would assist the Exchange in accommodating demand for co-location services on an equitable basis.

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>18</sup>

The proposed rule change would protect investors and the public interest because the proposed revised General Notes would articulate rational, objective procedures consistent with the Existing Procedures and PNU cabinet provisions, and would serve to reduce any potential for confusion on how cabinets and power would be allocated if a shortage in one or the other were to arise in the future, and would thereby make the Price List more transparent and reduce any potential ambiguity.

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<sup>18</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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-NYSE-2021-12 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2021-12. 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-NYSE-2021-12 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>19</sup> 17 CFR 200.30-3(a)(12).