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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-91785; File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01]**

**Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Exchange's Price List Related to Co-location to Establish Two Additional Partial Cabinet Solution Bundles**

May 6, 2021.

I. Introduction

On January 19, 2021, New York Stock Exchange LLC ("NYSE"), NYSE American LLC ("NYSE American"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. ("NYSE Chicago"), and NYSE National, Inc. ("NYSE National") (collectively, the "Exchanges") each filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend the Exchanges' fee schedules related to co-location to add two Partial Cabinet Solution bundles. The proposed rule changes were published for comment in the Federal Register on February 5, 2021 or February 8, 2021, as applicable.[3]

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

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release Nos. 91034 (February 1, 2021), 86 FR 8443 (February 5, 2021) (SR-NYSE-2021-05); 91035 (February 1, 2021), 86 FR 8449 (February 5, 2021) (SR-NYSEAMER-2021-04); 91036 (February 1, 2021), 86 FR 8440 (February 5, 2021) (SR-NYSECHX-2021-01); and 91037 (February 1, 2021), 86 FR 8424 (February 5, 2021) (SR-NYSENAT-2021-01); 91044 (February 2, 2021), 86 FR 8662 (February 8, 2021) (SR-NYSEArca-2020-08) (each, a "Notice"). For ease of reference, page citations are to the Notice for NYSE-2021-05.

On March 18, 2021, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either approve the proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.[5] The Commission received no comments on the proposed rule changes.

This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule changes.

II. Description of the Proposed Rule Changes

The Exchanges, as part of their co-location services, currently offer Users[7] four Partial Cabinet Solutions bundles, labeled Options A, B, C, and D. Options A and B include a partial cabinet powered to either one or two kilowatts ("kW"); a 1 Gb connection to the liquidity center network ("LCN") and a 1 Gb connection to the internet protocol ("IP") network, two fiber cross connections, and connectivity to one of two time feeds.[8] Options C and D include a 10 Gb

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4 15 U.S.C. 78s(b)(2).

5 See Securities Exchange Act Release Nos. 91357 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSE-2021-05); 91358 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSEAMER-2021-04); 91362 (March 18, 2021), 86 FR 15765 (March 24, 2021) (SR-NYSECHX-2021-01); and 91363 (March 18, 2021), 86 FR 15763 (March 24, 2021) (SR-NYSENAT-2021-01). The Commission designated May 6, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

See Securities Exchange Act Release No. 91360 (March 18, 2021), 86 FR 15764 (March 24, 2021) (SR-NYSEArca-2020-08). The Commission designated May 9, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

6 15 U.S.C. 78s(b)(2)(B).

7 For purposes of the Exchanges' co-location services, a "User" means any market participant that requests to receive co-location services directly from one or more of the Exchanges.

8 See Notice, supra note 3, at 8444. See Securities Exchange Act Release Nos. 77072 (February 5, 2016), 81 FR 7394 (February 11, 2016) (SR-NYSE-2015-53); 77070 (February 5, 2016), 81 FR 7401 (February 11, 2016) (SR-NYSEArca-2015-102); 77072 (February 5, 2016), 81 FR 7382 (February 11, 2016) (SR-NYSEMKT-2015-89); 83351 (May 31, 2018), 83 FR 26314, 26315 (June 6, 2018) (SR-NYSENAT-2018-07); 87408 (October 28, 2019), 84 FR 58778, 58779-80 (November 1, 2019) (SR-NYSECHX-2019-12).

connection to the LCN Network and a 10 GB connection to the IP network and are otherwise the same as Options A and B.[9] The Exchanges state that the Partial Cabinet Solution bundles are designed to attract smaller Users, including those with minimal power or cabinet space demands or those for which the costs of having a dedicated cabinet are too burdensome.[10] To purchase a bundle, Users must pay an initial charge and a monthly charge per bundle.[11]

The Exchanges recently amended Options C and D, which offer 10 Gb connections to the LCN and IP networks, to also offer, at no additional cost, two 10 Gb connections to the NMS Network, an alternate dedicated network connection that Users could use to access the NMS feeds for which the Securities Industry Automation Corporation is engaged as the securities information processor.[12] The Exchanges now propose to add two new Partial Cabinet Solution bundles: proposed Options E and F would offer a 40 Gb connection to the LCN network and a 40 Gb connection to the IP network, and two 40 Gb connections to the NMS Network. Otherwise, proposed Options E and F would be the same as the Options C and D bundles, offering a 1 kW (Option E) or 2 kW (Option F) partial cabinet, two fiber cross connects, and either the Network Time Protocol Feed or the Precision Timing Protocol. [13] The Exchanges state that, currently, Users who are interested in Partial Cabinet Solution bundles, either because they have minimal power and cabinet space demands or because the costs attendant with having a dedicated cabinet are too burdensome, cannot access 40 Gb connections and are limited to the 10

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9 Id.

10 See id. at 8444.

11 Id. In addition, Users must satisfy the following conditions to qualify for a Partial Cabinet Solution bundle: (1) a User and its Affiliates are limited to one Partial Cabinet Solution bundle at a time, and (2) after the purchase of the Partial Cabinet Solution bundle, the User, together with its Affiliates, must have an aggregate cabinet footprint of no more than 2 kW. See General Note 2 of the Price List. The Exchanges also propose that General Note 2 apply to the Option E and F bundles, without alteration. Id.

12 See Securities Exchange Act Release Nos. 88837 (May 7, 2020), 85 FR 28671 (May 13, 2020) (SR-NYSE-2019-46, SR-NYSEAMER-2019-34, SR-NYSEArca-2019-61, SR-NYSENAT-2019-19) and 88972 (May 29, 2020), 85 FR 34472 (June 4, 2020) (SR-NYSECHX-2020-18).

13 See Notice, supra note 3, at 8444.

Gb connections offered as part of the Option C and D bundles.[14] According to the Exchanges, Users and potential customers requested that the Exchange offer Partial Cabinet Solution bundles that include 40 Gb connections, enabling them to connect to more of the Included Data Products and Third Party Data Feeds or have the same size connection in co-location that they have everywhere.[15]

The Exchanges propose to offer each new bundle for an initial charge of $10,000, and, following an initial promotional period, a charge of $18,000 per month for Option E, and $19,000 per month for Option F.[16] In support of the proposed fees, the Exchanges state that the proposed $10,000 initial charge for a new Option E or F bundle is reasonable because it is the same as that assessed for Users choosing the currently available Options C or D, and setting up each of the four options involves a similar amount of work for the Exchanges. The Exchanges also state that proposed monthly charges of $18,000 and $19,000 for Options E and F, respectively, each of which reflects a $4,000 increase over Options C and D, respectively, are reasonable because the Exchanges will have to supply multiple 40 Gb connections to offer the proposed new options.[17]

The Exchanges state that the proposed fees are equitably allocated and not unfairly discriminatory, and will not impose any burden on competition that is not necessary or appropriate because they would apply to all Users equally, the purchases would be completely voluntary, and the Exchanges are subject to significant competitive forces.[18] Regarding the competitive environment, the Exchanges state that offering Options E and F to potential Users would expand the range of options available, possibly making the proposed bundles more

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14 Id.

15 Id. The list of Included Data Products and Third Party Data Feeds are set forth in the Exchanges' fee schedules.

16 Users who order before December 31, 2021 would be charged $9,000 per month for Option E or $9,500 per month for Option F for the first 12 months of service.

17 Id.

18 See Notice, supra note 3, at 8446.

attractive to potential Users who might otherwise seek similar services from Hosting Users.[19] According to the Exchanges, the proposal would enhance the competitive environment for potential Users while also allowing the Exchanges to attempt to maintain a more level playing field with Hosting Users.[20] The Exchanges further state that the fees charged for co-location services are constrained by the active competition for the order flow and other business from market participants who believe that co-location enhances the efficiency of their operations.[21]

## III. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the Exchanges' proposed rule changes should be approved or disapproved.[22] Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,[23] the Commission is providing notice of the grounds for possible disapproval under consideration:

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19 Id. As the Exchanges acknowledge, a Hosting User is itself a co-location User, allowed by the Exchanges to host other entities in the data center for monthly fees charged by the Exchanges. See Notice, supra note 3, at 8445 and n. 10. The Exchanges state that they believe Hosting Users offer similar services to those proposed, and that because Hosting Users' services are not regulated, they may offer differentiated pricing and are not required to make their pricing public. See Notice, supra note 3, at 8445 and n. 11.

20 See Notice, supra note 3**Error! Bookmark not defined.**, at 8446.

21 See id.

22 15 U.S.C. 78s(b)(2)(B).

23 Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"[24]
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to perfect the operation of a free and open market and a national market system" and "protect investors and the public interest," and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers;"[25] and
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[26]

As discussed in Section II above, the Exchanges make various arguments in support of the proposals, including that the proposed initial charge and proposed monthly charge of $18,000 for Option E and $19,000 for Option F are reasonable in relation to the fees charged for Options C and D, based on the work entailed to provide the services and supply the 40 Gb connections, and that the Exchanges are subject to significant competitive forces. The Commission believes that there are questions as to whether the Exchanges have provided sufficient information to demonstrate that the proposals, including the proposed fees, are consistent with the Act.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder .

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24 15 U.S.C. 78f(b)(4).

25 15 U.S.C. 78f(b)(5).

26 15 U.S.C. 78f(b)(8).

. . is on the self-regulatory organization ['SRO'] that proposed the rule change."[27] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.[28] Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[29]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;[30] as well as any other provision of the Act, or the rules and regulations thereunder.

IV. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated

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27 17 CFR 201.700(b)(3).

28 See id.

29 See id.

30 See 15 U.S.C. 78f(b)(4), (5), and (8).

by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[31]

The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule changes are 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. Please include File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, and SR-NYSENAT-2021-01 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 Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, and SR-NYSENAT-2021-01. The file numbers 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

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31 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 Exchanges. 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 publicly available. All submissions should refer to File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, and SR-NYSENAT-2021-01and should be submitted on or before **[INSERT DATE 21 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021-09971 Filed: 5/11/2021 8:45 am; Publication Date: 5/12/2021]

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32 17 CFR 200.30-3(a)(57).