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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-92368; File Nos. SR-NYSE-2021-25, SR-NYSEAMER-2021-21, SR-NYSEArca-2021-24, SR-NYSECHX-2021-07, SR-NYSENAT-2021-09)

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 Fee Schedule to Add Meet-Me-Room Connectivity Services Available at the Mahwah Data Center

July 9, 2021.

I. Introduction

On April 9, 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 schedule ("Fee Schedule") to set forth several "Meet-Me-Room" connectivity services available at the data center in Mahwah, New Jersey ("Mahwah Data Center") for associated fees, and establish procedures for the allocation of cabinets and power to such customers should availability become limited. The proposed rule changes were published for comment in the Federal Register on April 22, 2021.[3] On June 2, 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,

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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. 91598 (April 16, 2021), 86 FR 21373 (April 22, 2021) (SR-NYSE-2021-25); 91599 (April 16, 2021), 86 FR 21365 (April 22, 2021) (SR-NYSEAMER-2021-21); 91600 (April 16, 2021), 86 FR 21384 (April 22, 2021) (SR-NYSEArca-2021-24); 91601 (April 16, 2021), 86 FR 21410 (April 22, 2021) (SR-NYSECHX-2021-07); and 91602 (April 16, 2021), 86 FR 21393 (April 22, 2021) (SR-NYSENAT-2021-09) (collectively, the "Notices"). For ease of reference, citations to the Notice(s) are to the Notice for SR-NYSE-2021-25.

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

or institute proceedings to determine whether to disapprove the proposed rule changes.[5] The Commission has received no comment letters 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 propose to amend the Fee Schedule to set forth several "Meet-Me-Room" (or "MMR") connectivity services available at the data center in Mahwah, New Jersey ("Mahwah Data Center"), and associated fees, and establish procedures for the allocation of cabinets and power to MMR customers should availability become limited.[7]

The Exchanges state that Intercontinental Exchange, Inc. ("ICE"), through its ICE Data Services ("IDS") business, operates the Mahwah Data Center.[8] From the Mahwah Data Center, the Exchanges provide co-location services to any market participant that requests to receive co-location services directly from the Exchange ("Users").[9] Services are also available to customers that are not co-location Users ("NCL Customers")[10] (Users and NCL Customers, together the "Mahwah Customers").[11]

The Exchanges state that Mahwah Customers require circuits connecting into and out of the Mahwah Data Center in order to connect their equipment outside of the Mahwah Data Center

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5 See Securities Exchange Act Release No. 92089 (June 2, 2021), 86 FR 30510 (June 8, 2021). The Commission designated July 21, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

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

7 See Notice, supra note 3, at 21373.

8 See id. The Exchanges themselves are indirect subsidiaries of ICE. See id. at 21373 n.6.

9 See id. at 21373.

10 See id. The Exchanges recently filed proposed rule changes regarding the IDS circuits and certain other services offered to NCL Customers. See, e.g., Securities Exchange Act Release No. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR-NYSE-2021-14).

11 See Notice, supra note 3, at 21373.

to their equipment or port within the Mahwah Data Center.[12] They state that IDS and numerous third-party telecommunications service providers ("Telecoms") provide these connections to Mahwah Customers in the form of wired circuits into and out of the Mahwah Data Center.[13] The Exchanges explain that a Telecom completes a wired circuit by placing equipment in an MMR and installing carrier circuits between the Telecom's MMR equipment and one or more points outside the Mahwah Data Center.[14] Mahwah Customers that contract with a Telecom to use its circuit connection connect to the Telecom's MMR equipment using a cross connect.[15] Once connected to the Telecom's equipment, the Mahwah Customers can then use the Telecom's circuit to transport data into and out of the Mahwah Data Center.[16]

The Exchanges state that they make the current proposals solely as a result of their determination that the Commission's interpretations of the Act's definitions of the terms

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12 See id.

13 See id. Mahwah Customers may also use a third party wireless connection, including a proprietary wireless connection, to the Mahwah Data Center, in which case the portion of the connection closest to the Mahwah Data Center is wired. See id. at 21373 n.8. Regarding services offered by Telecoms, the Exchanges state that Telecoms are licensed by the Federal Communications Commission and are not required to be, or be affiliated with, a member of the Exchanges. See id. at 21373 n.9.

14 See id. at 21373-74. The Exchanges state that a Telecom elects which MMR it will use, or if it will use both, and that neither IDS nor the Exchange knows the termination point of a Telecom's circuit or the content of any data sent on a circuit. See id. at 21374 n.10.

15 See id. at 21374.

16 In addition, the Exchanges state that a Telecom may sell access to its circuits to a second Telecom, which allows the second Telecom to use the first Telecom's circuit to access the Mahwah Data Center. The second Telecom thereby gains access to the Mahwah Data Center, where it installs its equipment in an MMR, without incurring the cost of installing its own proprietary circuits to the Mahwah Data Center. According to the Exchanges, IDS does not consent to, and need not be informed of, a Telecom's sale of a circuit to another Telecom. See id. at 21374.

"exchange"[17] and "facility"[18] apply to connectivity services described herein that are offered by entities other than the Exchanges.[19] The Exchanges state that they disagree with the Commission's interpretations, deny the services covered herein are offerings of an "exchange" or a "facility" thereof, and have sought review of the Commission's interpretations as expressed in the Wireless Approval Order in the Court of Appeals for the District of Columbia Circuit.[20]

A. Meet-Me-Room (MMR) Services

The Exchanges propose to change the title of the Fee Schedule to "Wireless and Meet-Me-Room Connectivity Fees and Charges," and add under the heading "C. Meet-Me-Room ('MMR') Services" the following services available to customers in the two MMRs on the north and south sides of the Mahwah Data Center.[21]

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17 See 15 U.S.C. 78c(a)(1) ("The term 'exchange' means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.").

18 See 15 U.S.C. 78c(a)(2) ("The term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.").

19 See Notice, supra note 3, at 21373; see also Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08) ("Wireless Approval Order").

20 See Notice, supra note 3, at 21373; see also Intercontinental Exchange, Inc. v. SEC, No. 20-1470 (D.C. Cir. 2020).

21 See Notice, supra note 3, at 21374. The Exchanges state that they recently filed proposed rule changes regarding the IDS circuits and services offered to NCL Customers, and that if such proposals are approved by the Commission, then the Exchanges expect to file amendments to the present proposals to conform to the relevant changes. See id. at 21374 n.11 (citing Securities Exchange Act Release No. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR-NYSE-2021-14)).

1. Cabinet-Related Services

The Exchanges propose to add to the Fee Schedule services and fees relating to the dedicated cabinets in the MMRs that IDS provides to Telecoms to house their equipment (collectively, "Cabinet-Related Services").[22] According to the Exchanges, these cabinets are available in sizes based on the number of kilowatts ("kW") allocated, subject to a maximum of 8 kW per cabinet.[23] Telecoms pay an initial fee for each cabinet and a monthly fee based on the number of kW allocated to all of the Telecom's cabinets.[24] The Exchanges propose an initial fee of $5,000 per dedicated MMR cabinet, and a monthly fee for power allocated to all of a Telecom's dedicated cabinets as follows: 4-8 kWs ($1,200); 9-20 kWs ($1,050); 21-40 kWs ($950); and 41+ kWs ($900) (each fee, per kW).[25]

2. Access and Service Fees

The Exchanges propose to add to the Fee Schedule the following services and fees relating to access and services that IDS provides to Telecoms (collectively, "Access and Service Fees").[26]

a. Data Center Fiber Cross Connect

According to the Exchanges, IDS offers fiber cross connects for an initial and monthly charge.[27] Cross connects may run between a Telecom's cabinets, between its cabinet and the

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22 The Exchanges state that the Cabinet-Related Services are substantially similar to co-location services and related fees that the Exchanges offer to Users, as set forth in their price lists and fee schedules. See id. at 21374.

23 See id.

24 See id.

25 The Exchanges also propose to add a note to the Fee Schedule stating that the monthly fee is based on total kWs allocated to all of a Telecom's cabinets. See id.

26 The Exchanges state that most of the Access and Service Fees are substantially similar to services and related fees that the Exchanges offer to Users, as set forth in their price lists and fee schedules. See id.

27 See id.

cabinet of another Telecom, or between its cabinet and its customer's cabinet or port.[28] Cross connects may be bundled (i.e., multiple cross connects within a single sheath) such that a single sheath can hold either one cross connect or six cross connects.[29] The Exchanges propose to amend the Fee Schedule to describe these services and set forth corresponding fees as follows: furnish and install 1 cross connect ($500 initial charge plus $600 monthly charge); and furnish and install bundle of 6 cross connects ($500 initial charge plus $1,800 monthly charge).[30]

b. Conduit Sleeve Fee

According to the Exchanges, a Telecom's circuits into and out of the Mahwah Data Center run through IDS conduits.[31] Telecoms are assessed an initial charge for the installation of circuits in the IDS conduit, which covers up to five hours of work, and a monthly fee per conduit sleeve for using the IDS conduit.[32] The Exchanges propose to amend the Fee Schedule to describe these services and set forth corresponding fees as follows: install (5 hrs) and maintain conduit sleeve supporting Telecom circuit into data center ($1,000 initial charge plus $2,000 monthly charge per conduit sleeve).[33]

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28 See id. The Exchanges state that a cross connect to MMR cabinets may be purchased by the Telecom or the Telecom's customer. The same fee applies irrespective of which entity purchases the cross connect. See id. at 21374 n.15.

29 See id. at 21374.

30 See id. at 21375.

31 The Exchanges state that there are currently three IDS conduit paths leading into the Mahwah Data Center, and a Telecom determines which conduit or conduits it will use to carry its circuits, which are carried in individual conduit sleeves. See id. at 21374. According to the Exchanges, the number of conduit sleeves a Telecom uses is dependent on the equipment and technology it uses and the size of the circuits it sells to Mahwah Customers, and that most Telecoms that use them have one conduit sleeve. See id. at 21374 n.16.

32 See id. at 21374.

33 See id. at 21375.

c. Carrier Connection Fee

As noted above,[34] Telecoms contract with their customers for circuits into and out of the Mahwah Data Center.[35] According to the Exchanges, Telecoms are charged a monthly fee for providing such circuits to Mahwah Customers, on a per connection basis.[36] The Exchanges propose to amend the Fee Schedule to describe this service and set forth the corresponding fee as follows: maintain Telecom's connections to its non-Telecom data center customers ($1,150 monthly charge per connection).[37]

d. Connection to Time Protocol Feed

According to the Exchanges, IDS offers Telecoms the option to purchase connectivity to the Precision Time Protocol, with monthly and initial charges.[38] Telecoms may make use of time feeds to receive time and to synchronize clocks between computer systems or throughout a computer network, and time feeds may assist Telecoms in other functions, including record keeping or measuring response times.[39] The Exchanges propose to amend the Fee Schedule to describe this service and set forth corresponding fees as follows: Precision Time Protocol ($1,000 initial charge plus $250 monthly charge).[40]

e. Expedite Fee

According to the Exchanges, IDS offers Telecoms the option to expedite the completion of MMR services purchased or ordered by the Telecoms.[41] The Exchanges propose to amend the

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34 See supra notes 12-13 and accompanying text.

35 See Notice, supra note 3, at 21374.

36 See id.

37 See id. at 21375.

38 See id. at 21374.

39 See id.

40 See id. at 21375.

41 See id. at 21374.

Fee Schedule to describe this service and set forth the corresponding fee as follows: expedited installation/completion of MMR service ($4,000 per request).[42]

3. Service-Related Fees

The Exchanges propose to add to the Fee Schedule the following services and fees relating to services IDS provides to Telecoms (collectively, "Service-Related Fees").[43]

a. Change Fee

According to the Exchanges, IDS charges a Telecom a "Change Fee" if the Telecom requests a change to one or more existing MMR services that IDS has already established or completed for the Telecom.[44] The Change Fee is charged per order.[45] The Exchanges propose to amend the Fee Schedule to describe this service and set forth the corresponding fee as follows: change to a service that has already been installed/completed for a Telecom ($950 per request).[46]

b. Hot Hands Service

According to the Exchanges, IDS offers Telecoms a "Hot Hands Service," which allows Telecoms to use on-site data center personnel to maintain Telecom equipment, support network troubleshooting, rack and stack a server in a Telecom's cabinet, power recycling, and install and document the fitting of cable in a Telecom's cabinet(s).[47] A Hot Hands Service fee is charged per half hour.[48] The Exchanges propose to amend the Fee Schedule to describe this service and set forth the corresponding fee as follows: allows Telecom to use on-site data center personnel

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42 See id. at 21375.

43 The Exchange state that the Service-Related Fees are substantially similar to services and related fees that the Exchanges offer to Users, as set forth in their price lists and fee schedules. See id.

44 See id.

45 If a Telecom orders two or more services at one time, the Exchanges state that the Telecom is charged a one-time Change Fee, which would cover the multiple services. See id.

46 See id.

47 See id.

48 See id.

to maintain Telecom equipment, support network troubleshooting, rack and stack, power recycling, and install and document cable ($100 per half hour).[49]

c. Shipping and Receiving

According to the Exchanges, IDS offers shipping and receiving services to Telecoms, with a per shipment fee for the receipt of one shipment of goods at the Mahwah Data Center from the Telecom or supplier.[50] The Exchanges propose to amend the Fee Schedule to describe this service and set forth the corresponding fee as follows: receipt of one shipment of goods at data center on behalf of Telecom (includes coordination of shipping and receiving) ($100 per shipment).[51]

d. Visitor Security Escort

According to the Exchanges, Telecom representatives are required to be accompanied by a visitor security escort during visits to the Mahwah Data Center, for which a fee per visit is charged.[52] The Exchanges propose to amend the Fee Schedule to describe this service and set forth the corresponding fee as follows: all Telecom representatives are required to be accompanied by a visitor security escort during visits to the data center ($75 per visit).[53]

B. Allocation of Cabinets and Power

The Exchanges propose to establish procedures for the allocation of cabinets and power to Telecoms ("Proposed Allocation Procedures").[54] As noted above,[55] IDS offers dedicated cabinets in the MMRs to Telecoms to house their equipment.[56] According to the Exchanges, the

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49 See id.

50 See id.

51 See id.

52 See id.

53 See id.

54 See id.

55 See supra note 22 and accompanying text.

56 See Notice, supra note 3, at 21375.

Exchanges allocate cabinets on a first-come/first-serve basis.[57] When a cabinet is first set up or later, a Telecom may request power upgrades ("Additional Power") to a dedicated cabinet in addition to the power allocated to such cabinet (the "Standard Cabinet Power"), subject to a maximum of 8 kW per cabinet.[58] The Exchanges maintain that it would be prudent to have procedures in place for the allocation of cabinets and power to Telecoms should such allocation be necessary.[59]

The Exchanges propose to add the Proposed Allocation Procedures to the Fee Schedule under the heading "MMR Notes," setting forth the procedures under proposed Notes 1 and 2.[60] Proposed Note 1 would provide that, if the amount of power or cabinets available fell below specified thresholds, Telecoms would be subject to purchasing limits.[61] Note 1 would also specify when the purchasing limits would cease to apply and would provide that if a Telecom requests a number of cabinets and/or amount of Additional Power that would cause the

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57 See id.

58 See id.

59 See id.

60 See id.

61 See id. Specifically, the Exchanges propose to provide under the heading "Note 1: Cabinet and Power Purchasing Limits" that if (i) unallocated cabinet inventory is at or below 3 cabinets ("Cabinet Threshold"), or (ii) the unallocated power capacity in the MMRs is at or below 8 kW (the "Power Threshold"), then the following limits on the purchase of new cabinets ("Purchasing Limits") will apply: If only the Cabinet Threshold is reached, then under the following measures (the "Cabinet Limits"), the Exchanges will limit each Telecom's purchase of new cabinets to a maximum of one dedicated cabinet. A Telecom will have to wait 30 days from the date of its signed order form before purchasing a new cabinet again. If only the Power Threshold is reached or both the Cabinet Threshold and the Power Threshold are reached, then under the following measures (the "Combined Limits"), a Telecom may purchase either or both of a one new cabinet, subject to a maximum standard power allocation of 4 kW ("Standard Cabinets"), or additional power for new or existing cabinet, so long as the combined power usage of such purchases is no more than a maximum of 4 kW. A Telecom will have to wait 30 days from the date of its signed order form before purchasing a new Standard Cabinet or additional power again. 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. See id. at 21376.

unallocated capacity to be below the specified power and cabinet thresholds, the purchasing limits would apply only to the portion of the Telecom's order below the relevant threshold.[62]

Note 2 would provide that, if the amount of power or cabinets available fell to zero, Telecoms seeking to purchase power or cabinets would be put on a "Cabinet Waitlist"[63] or a "Combined Waitlist."[64] In both proposed Notes 1 and 2, the Proposed Allocation Procedures

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62 See id. at 21375. Specifically, the Exchanges propose to provide that if a Telecom requests, in writing, a number of cabinets that, if provided, would cause the available cabinet inventory to be below 3 cabinets, the Cabinet Limits will only apply to the portion of the Telecom's order below the Cabinet Threshold. When unallocated cabinet inventory for the MMRs is more than 3 cabinets, the Exchanges will discontinue the Cabinet Limits. If a Telecom 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 Telecom's order below the relevant threshold. When unallocated power capacity is above the Power Threshold, the Exchanges will discontinue the Combined Limits. If at that time the unallocated cabinet inventory is 3 or fewer cabinets, the Cabinet Limits would enter into effect. See id. at 21376.

63 Specifically, the Exchanges propose to provide under the heading "Note 2: Cabinet and Combined Waitlists" that the Exchanges will create a cabinet waitlist ("Cabinet Waitlist") if the available cabinet inventory is zero, or a Telecom requests, in writing, a number of cabinets that, if provided, would cause the available inventory to be zero. The Exchanges will place Telecoms seeking cabinets on a Cabinet Waitlist as follows: A Telecom will be placed on the Cabinet Waitlist based on the date its signed order is received. A Telecom may only have one order for a new cabinet on the Cabinet Waitlist at a time, and the order is subject to the Cabinet Limits. If a Telecom changes the size of its order while it is on the Cabinet Waitlist, it will maintain its place on the Cabinet Waitlist, provided that the Telecom may not increase the size of its order such that it would exceed the Cabinet Limits. As cabinets become available, the Exchanges will offer a cabinet to the Telecom at the top of the Cabinet Waitlist. If the Telecom's order is completed, it will be removed from the Cabinet Waitlist. A Telecom will be removed from the Cabinet Waitlist (a) at the Telecom's request or (b) if the Telecom turns down an offer of a cabinet of the same size it requested in its order. If the Exchange offer the Telecom a cabinet of a different size than the Telecom requested in its order, the Telecom may turn down the offer and remain at the top of the Cabinet Waitlist until its order is completed. A Telecom that is removed from the Cabinet Waitlist but subsequently submits a new written order for a cabinet will be added back to the bottom of the Cabinet Waitlist. When unallocated cabinet inventory is more than 3 cabinets, the Exchange will cease use of the Cabinet Waitlist. See id.

64 See id. at 21375. Specifically, the Exchanges propose to create a power and cabinet waitlist ("Combined Waitlist") if the unallocated power capacity is zero, or if a Telecom 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 Exchanges will place Telecoms seeking cabinets or power on the Combined Waitlist, as follows: If a Cabinet Waitlist exists when the requirements to

would state how the procedures regarding cabinets and the procedures regarding power would relate to each other, and in each case would state what the threshold amount of power and cabinets would be to discontinue the limits.[65]

III. Exchanges' Justification

With respect to the MMR services and fees, the Exchanges generally argue that the proposals are reasonable, equitable, not unfairly discriminatory, and would not impose a burden on competition that it not necessary or appropriate, as required by Sections 6(b)(4), (5) and (8) of the Exchange Act, because use of the proposed services is completely voluntary and their use enables Telecoms to compete with IDS in providing connectivity services to Mahwah Customers.[66] According to the Exchanges, IDS operates in a highly competitive market in which

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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 Telecom will be placed on the Combined Waitlist based on the date its signed order for a cabinet and/or additional power is received. A Telecom may only have one order for a new cabinet and/or additional power on the Combined Waitlist at a time, and the order would be subject to the Combined Limits. If a Telecom changes the size of its order while it is on the Combined Waitlist, it will maintain its place on the Combined Waitlist, provided that the Telecom may not increase the size of its order such that it would exceed the Combined Limits. As additional power and/or cabinets become available, the Exchanges will offer them to the Telecom at the top of the Combined Waitlist. If the Telecom's order is completed, the order will be removed from the Combined Waitlist. If the Telecom's order is not completed, it will remain at the top of the Combined Waitlist. A Telecom will be removed from the Combined Waitlist (a) at the Telecom's request; or (b) if the Telecom turns down an offer that is the same as its order (e.g., the offer includes a cabinet of the same size and/or the amount of additional power that the Telecom requested in its order). If the Exchanges offer the Telecom an offer that is different than its order, the Telecom may turn down the offer and remain at the top of the Combined Waitlist until its order is completed. A Telecom that is removed from the Combined Waitlist but subsequently submits a new written order for a cabinet 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 8 kW or more, the Exchanges will cease use of the Combined Waitlist. If at that time the unallocated cabinet inventory is 3 or fewer cabinets, the Cabinet Waitlist would enter into effect. See id. at 21376-77.

65 See id. at 21375-36.

66 See id. at 21377-79.

exchanges, third party telecommunications providers, Hosting Users,[67] and other third-party vendors offer connectivity services as a means to facilitate the trading and other market activities of market participants.[68] By making it possible for Telecoms to offer their customers circuits into and out of the Mahwah Data Center, the Exchanges state that the proposed MMR services allow Telecoms to compete with IDS, and that the continued availability of choices for Mahwah Customers is beneficial to both the Telecoms and the Mahwah Customers.[69] The Exchanges state that if these MMR services were not available, all Mahwah Customers and third-party telecommunications service providers would be required to use IDS circuits to access the Mahwah Data Center, thereby reducing competition.[70] The Exchanges also state that the described services and fees are offered to and subscribed to by existing Telecoms, and thus expect that the impact of the proposals would be minimal.[71]

In addition, the Exchanges argue that the proposals are reasonable because use of any MMR service is completely voluntary and available to purchasers on an equal basis, with each Telecom able to determine whether to use MMR services based on the requirements of its business operations, and each Telecom being charged only for the services that it selects and for the same amount as all other Telecoms purchasing such services.[72] The Exchanges also argue that the fees proposed for the MMR fees are reasonable because, to the extent the services IDS offers to Telecoms are substantially the same as the services offered by the Exchange to Users,

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67 "Hosting" is a service offered by a User to another entity in the User's space within the Mahwah Data Center. The Exchanges allow Users to act as Hosting Users for a monthly fee. See id. at 21377 n.21 (citing Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40)).

68 In this regard, the Exchanges maintain that most of the Telecoms that provide circuits do so at fees lower than those of IDS, and that most Mahwah Customers use Telecom circuits into and out of the Mahwah Data Center. See id. at 21377.

69 See id.

70 See id.

71 The Exchanges further state that they do not expect that IDS would attract any new customers as a result of the proposals. See id.

72 See id.

the fees are the same.[73] With respect to the two services not offered to Users (the Conduit Sleeve Fee and Carrier Connection Fee), the Exchanges state that the fees IDS charges Telecoms are reasonable because the services correspond to the Telecoms' usage of the IDS conduits and the Telecoms' ability to offer their circuits to their customers.[74] In addition, the Exchanges provide some cost-based justifications for why the proposals are reasonable, claiming that IDS must provide, maintain, and operate the Mahwah Data Center technology infrastructure, expand the network infrastructure to keep pace with the services available to Telecoms, and handle the installation, administration, monitoring, support, and maintenance of the MMR services.[75]

The Exchanges contend that the proposals provide for an equitable allocation of fees and are not unfairly discriminatory, again arguing generally that the proposed services would allow Telecoms to continue to compete with IDS, in addition to being voluntary and available to all market participants on an equal basis.[76] The Exchanges claim that the proposed rule changes would apply to all market participants and would not apply differently to distinct types or sizes of licensed telecommunications service providers, but rather would apply to all equally.[77]

The Exchanges argue that the proposed rule changes do not impose an unnecessary or inappropriate burden on competition because the proposals would preserve the ability of IDS to offer the services described herein, allowing the Telecoms to compete with IDS in providing connectivity services into and out of the Mahwah Data Center.[78] According to the Exchanges, the proposals do not affect competition among national securities exchanges or among members of the Exchanges, but rather the Exchanges' filing of the proposals puts IDS at a competitive disadvantage relative to its commercial competitors that are not subject to filing requirements of

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73 See id.

74 See id.

75 See id.

76 See id. at 21378-79.

77 See id. at 21379.

78 See id.

Section 19(b) of the Act.[79]

Regarding the Proposed Allocation Procedures, the Exchanges argue principally that it would be reasonable to put in place procedures to establish the allocation of power and cabinets to Telecoms on an equitable basis should the need arise, and that the Proposed Allocation Procedures are consistent with those of another exchange and those recently approved for allocating cabinets and power in the context of the Exchanges' co-location service offerings.[80]

IV. 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.[81] 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,[82] the Commission is providing notice of the grounds for possible disapproval under consideration:

- 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;"[83]

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79 See id. at 21379-80.

80 See id. at 21378, 21378 n.26.

81 15 U.S.C. 78s(b)(2)(B).

82 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.

83 15 U.S.C. 78f(b)(4).

- 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;"[84] 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]."[85]

As discussed in Section III above, the Exchanges make various arguments in support of the proposals. 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 for MMR services, 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 . . . is on the self-regulatory organization ['SRO'] that proposed the rule change."[86] 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.[87] Any failure of an SRO to provide this information

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84 15 U.S.C. 78f(b)(5).

85 15 U.S.C. 78f(b)(8).

86 17 CFR 201.700(b)(3).

87 See id.

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.[88]

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;[89] as well as any other provision of the Act, or the rules and regulations thereunder.

V. 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 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.[90]

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88 See id.

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

90 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).

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

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposals 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-2021-25, SR-NYSEAMER-2021-21, SR-NYSEArca-2021-24, SR-NYSECHX-2021-07, SR-NYSENAT-2021-09 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-2021-25, SR-NYSEAMER-2021-21, SR-NYSEArca-2021-24, SR-NYSECHX-2021-07, and SR-NYSENAT-2021-09. 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 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-2021-25, SR-NYSEAMER-2021-21, SR-NYSEArca-2021-24, SR-NYSECHX-2021-07, and SR-NYSENAT-2021-09 and 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.[91]

J. Matthew DeLesDernier,
Assistant Secretary.

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[91] 17 CFR 200.30-3(a)(57).