

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-90732; File Nos. SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSENAT-2020-28, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26)

December 18, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE American LLC; NYSE National, Inc.; NYSE Arca, Inc.; NYSE Chicago, Inc.; 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

I. Introduction

On September 2, 2020, New York Stock Exchange LLC, NYSE American, LLC, NYSE National, Inc., NYSE Arca, Inc., and NYSE Chicago, Inc. (the "Exchanges") each filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to establish procedures for the allocation of cabinets to co-located Users if the Exchange cannot satisfy all User demand for cabinets.³ Each proposed rule change was published for comment in the Federal Register on September 21, 2020⁴ or September 22, 2020.⁵ On November 3, 2020,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See infra note 8 for the definition of "User."

⁴ See Securities Exchange Act Release Nos. 89879 (September 15, 2020), 85 FR 59361 (SR-NYSE-2020-73); 89880 (September 15, 2020), 85 FR 59365 (SR-NYSEAMER-2020-66) (each, a "Notice").

⁵ See Securities Exchange Act Release Nos. 89884 (September 16, 2020), 85 FR 59576 (SR-NYSENAT-2020-28); 89883 (September 16, 2020), 85 FR 59568 (SR-NYSEArca-2020-82); 89886 (September 16, 2020) 85 FR 59582 (SR-NYSECHX-2020-26) (each, a "Notice"). For ease of reference, page citations to the Notices refer to the Notice for SR-NYSE-2020-73, supra note 4, as published in the Federal Register.

the Commission extended the time period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule changes.⁶ The Commission received no comments on the proposed rule changes. On December 16, 2020, each Exchange filed Amendment No. 1 to its proposed rule change.⁷ Amendment No. 1 replaces and

⁶ See Securities Exchange Act Release Nos. 90330 (November 3, 2020), 85 FR 71364 (November 9, 2020) (SR-NYSE-2020-73) and 90327 (November 3, 2020), 85 FR 71373 (November 9, 2020) (SR-NYSEAMER-2020-66), in which the Commission designated December 20, 2020 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove these proposed rule changes; and Securities Exchange Act Release Nos. 90329 (November 3, 2020) 85 FR 71381 (November 9, 2020) (SR-NYSEARCA-2020-82); 90326 (November 3, 2020) 85 FR 71365 (November 9, 2020) (SR-NYSEARCA-2020-82); 90328 (November 3, 2020) 85 FR 71373 (November 9, 2020) 85 FR 71384 (November 9, 2020) (SR-NYSECHX-2020-26), in which the Commission designated December 21, 2020 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove these proposed rule changes.

⁷ Amendment No. 1 revises the proposals by: (i) adding representations that the Exchanges are not presently in a situation where they cannot satisfy all User demand for cabinets; do not anticipate being so in the foreseeable future; and are currently working to expand the number of cabinets available in co-location; (ii) stating that the Cabinet Threshold level of 40 cabinets (chosen as a threshold not easily triggered) is offered as a reasonable buffer during which the Purchasing Limits would apply before the Cabinet Waitlist would become effective; (iii) clarifying that the determination of whether the Cabinet Threshold is reached is not dependent on whether cabinets are configured to be subdivided into partial cabinets; (iv) specifying that if the Purchasing Limit of a maximum of four new dedicated cabinets applies, the maximum may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet; (v) clarifying that 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 Limits would only apply to the portion of the User's order below the Cabinet Threshold; and (vi) deleting the initially proposed 8 kW power limit for new dedicated cabinets when the cabinet Purchasing Limits are in effect. Amendment No 1 for each filing is available on the Commission's website at: <https://www.sec.gov/comments/sr-nyse-2020-73/srnyse202073-8154095-226755.pdf>; <https://www.sec.gov/comments/sr-nyseamer-2020-66/srnyseamer202066-8154097-226756.pdf>; <https://www.sec.gov/comments/sr-nysenat-2020-28/srnysenat202028-8154096-226737.pdf>; <https://www.sec.gov/comments/sr-nysearca-2020-82/srnysearca202082-8154094-226736.pdf>; <https://www.sec.gov/comments/sr-nysechx-2020-26/srnysechx202026-8154093-226754.pdf>.

supersedes each of the original filings in their entirety. This order provides notice of the filings of Amendment No. 1 to each of the proposed rule changes, and grants approval of the proposed rule changes, each as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Changes, as Modified by Amendment No. 1.

As more fully set forth in the Notices and their co-location fee schedules, the Exchanges offer co-location customers (“Users”)⁸ options for purchasing cabinet space to house their servers and other equipment in co-location.⁹ Cabinets are offered as dedicated cabinets or partial cabinets, and currently made available on a first-come, first-serve basis.¹⁰ Users are assessed an initial fee depending on type of cabinet purchased, and a monthly fee based on the power, in kilowatts (kW), they purchase with the cabinet.¹¹ Users can also purchase “PNU cabinets,”

⁸ For purposes of the Exchanges’ 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). A User that incurs co-location fees for a particular co-location service pursuant to any one Exchange’s co-location price list is not subject to co-location fees for the same co-location service charged by an affiliated SRO. See Notice, supra note 4 at n. 5.

⁹ See Notice, supra note 4 at 59362. See also, e.g., NYSE Price List, available at: https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.

¹⁰ See Notice, supra note 5 at 59362

¹¹ Partial cabinets are available in 8-rack units of space with power with options to purchase 1 kW (for \$1,500 per month) or 2kW (for \$2,700 per month) of power. A dedicated cabinet includes enough space for approximately four separate eight-rack units and includes the following options to purchase power: 4-8 kW (for \$1,200 per month), 9-20 kW (for \$1,050 per month), 21-40 kW (for \$950 per month), and 41 or more kW (for \$900 per month). See Securities Exchange Act Release Nos. 70978 (December 4, 2013), 78 FR 77739, 77740 (December 24, 2013) (SR-NYSE-2013-81); 71131 (December 18, 2013), 78 FR 77750 (December 24, 2013) (SR-NYSEMKT-2013-103); 71130 (December 18, 2013), 78 FR 77765 (December 24, 2013) (SR-NYSEArca-2013-143); 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSENAT-2018-07); 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR-NYSECHX-2019-12) (adding partial cabinets and related pricing). See Securities Exchange Act Release Nos. 62732 (August 16, 2010), 75 FR 51512, 51513 (August 20, 2010) (SR-NYSE-2010-56); 62960

which are cabinets in which power is not utilized. PNU cabinets are reserved cabinet space that may be converted to a dedicated cabinet when the User requests it.¹²

The Exchanges propose to amend their co-location rules to add new General Notes 7 and 8 to each fee schedule setting forth procedures for allocating cabinet space if, in the future, a situation arises where the Exchanges cannot fully satisfy User demand for the purchase of new cabinets.¹³ The Exchanges represent that they are not presently in such a situation, do not anticipate being so in the foreseeable future, and are currently working to expand the number of cabinets available in co-location, but believe that it would be prudent to have cabinet allocation procedures in place to address demand for the purchase of new cabinets if needed.¹⁴

As further described below, if cabinet inventory falls to 40 cabinets or fewer (the “Cabinet Threshold”), certain limits (“Purchasing Limits”) would apply to the purchase of new cabinets and remain in effect until unallocated cabinet inventory is more than 40 cabinets.

(September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56); 65237 (August 31, 2011), 76 FR 55432 (September 7, 2011) (SR-NYSE-2011-46); 62731 (August 16, 2010), 75 FR 51515 (August 20, 2010) (SR-NYSEAmex-2010-80); 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80); 65240 (August 31, 2011), 76 FR 55434 (September 7, 2011) (SR-NYSEAmex-2011-65); 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR-NYSEArca-2010-100); 65236 (August 31, 2011), 76 FR 55437 (September 7, 2011) (SR-NYSEArca-2011-65); 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSEArca-2018-07); 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR-NYSECHX-2019-12) (adding dedicated cabinets and related pricing).

¹² PNU cabinets are available at a monthly charge of \$360 per kW allocated to the PNU cabinet. See Securities Exchange Act Release Nos. 70913 (November 21, 2013), 78 FR 70987, 70988 (November 27, 2013) (SR-NYSE-2013-74); 70914 (November 21, 2013), 78 FR 71000 (November 27, 2013) (SR-NYSEMKT-2013-93); 70916 (November 21, 2013), 78 FR 70989 (November 27, 2013) (SR-NYSEArca-2013-124); 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSEArca-2018-07); 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR-NYSECHX-2019-12).

¹³ See Notice, supra note 4 at 59362.

¹⁴ See Amendment No. 1.

Further, if the available cabinet inventory is zero, the Exchanges would create and maintain a waitlist (“Cabinet Waitlist”) until unallocated cabinet inventory is more than 10 cabinets.

If unallocated cabinet inventory is at or below 40 cabinets, whether or not such cabinets are configured to be subdivided into partial cabinets, the following Purchasing Limits would apply:¹⁵ (i) a User with PNU cabinets would be required to either convert its PNU cabinets into dedicated cabinets or relinquish its PNU cabinets before being permitted to purchase new cabinets;¹⁶ (ii) a User’s purchase of new cabinets (dedicated and partial) would be limited to a maximum of four dedicated cabinets, which maximum may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet;¹⁷ (iii) 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 Limits would only apply to the portion of the User’s order below the Cabinet Threshold;¹⁸ (iv) a User purchasing new cabinets would be

¹⁵ See Notice, supra note 4 at 59362 and Amendment No. 1.

¹⁶ See Notice, supra note 4, at 59363.

¹⁷ See id. and Amendment No. 1 (specifying that the maximum may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet.) In the original Notices, the proposed that when the Purchasing Limits were in effect, Users would be limited to purchasing 8 kW of power when purchasing a new dedicated cabinet. In Amendment No. 1, the Exchanges deleted this proposed limitation. Noting that the they makes dedicated cabinets available with standard power allocation of either 4 kW or 8 kW, and that partial cabinets are available in increments of eight-rack units of space, and each eight-rack unit may be allocated up to 2 kW, the Exchanges also noted that currently a User may request power upgrades to dedicated cabinets beyond 8 kW. See Securities Exchange Act Release Nos. 70978 (December 18, 2013), 78 FR 77739 (December 24, 2013) (SR-NYSE-2013-81); 71131 (December 18, 2013), 78 FR 77750 (December 24, 2013) (SR-NYSEMKT-2013-103); 71130 (December 18, 2013), 78 FR 77765 (December 24, 2014) (SR-NYSEArca-2013-143); 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSEArca-2018-07); and 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR-NYSEArca-2019-12).

¹⁸ See Amendment No. 1. For example, if the Exchange had 50 available cabinets and a User requested to purchase 20 cabinets, the Purchasing Limits would not apply to the

required to wait 30 days from the date of its signed order form before purchasing new cabinets again;¹⁹ and (v) new PNU cabinets would not be offered.²⁰ These Purchasing Limits would be discontinued when the unallocated cabinet inventory is more than 40 cabinets.²¹

If the available cabinet inventory is zero, or a User submits a written request for a number of cabinets that, if provided, would cause the available cabinet inventory to be zero, the Exchanges would create and maintain a Cabinet Waitlist, as follows:²² (i) a User with PNU cabinets would be placed on the waitlist for the portion of its new cabinet request that exceeds its existing PNU cabinets (subject to the Purchasing Limits), and the User would not be placed on the waitlist if it could meet its request by converting its PNU cabinets to dedicated cabinets;²³ (ii) a User would be placed on the waitlist based on the date its signed order is received and may only have one order for new cabinets that is subject to the Purchasing Limits on the waitlist at a time; (iii) as cabinets become available, the Exchanges would offer them to the User at the top of the waitlist. ²⁴

In addition, a User would be removed from the Cabinet Waitlist when its order is completed and would remain at the top of the Cabinet Waitlist if its order is not completed.²⁵ A

User's purchase of the first 10 cabinets. Once the available inventory reached 40 cabinets, the Purchasing Limits would be activated, limiting the User's purchase of additional cabinets to 4 cabinets. In all, the User would be permitted to purchase a total of 14 cabinets out of its original order of 20 cabinets. Id.

¹⁹ See Notice, supra note 4, at 59363.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

User would be removed from the Cabinet 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.²⁶ The User may turn down an Exchange's offer of a cabinet of a different size than the User requested in its order and remain at the top of the waitlist until its order is completed.²⁷ A User that is removed from the Cabinet Waitlist but subsequently submits a new written order for cabinets would be added to the bottom of the Cabinet Waitlist.²⁸ The Exchanges would cease use of the Cabinet Waitlist when unallocated cabinet inventory is more than 10 cabinets.²⁹

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes, each as modified by Amendment No. 1, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁰ In particular, the Commission finds that the proposed rule changes, each is modified by Amendment No. 1, are consistent with Section 6(b)(5) of the Act,³¹ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect

²⁶ Id.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ In approving this proposed rule change, as modified by Amendment No. 1, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78f(b)(5).

investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchanges propose rational, objective procedures for allocating cabinet space in a situation in which all User demand cannot fully be satisfied, and particularly for responding to User demand for new cabinets when inventory falls and remains below specified thresholds. As noted above, the Exchanges represent that they are not presently in such a situation, do not anticipate being so in the foreseeable future, and are currently working to expand the number of cabinets available in co-location.

The proposed cabinet allocation procedures, establishing a Purchasing Limit on order size for new cabinet space when the Cabinet Threshold is reached and a Cabinet Waitlist when inventory falls to zero, are measures designed to respond to increasing demand for cabinets and facilitate an equitable distribution of new cabinet purchases if cabinet inventory becomes limited. The Commission notes the Exchanges' representation that the proposed Cabinet Threshold of 40 cabinets would not be easily triggered, yet would establish a reasonable buffer before the Cabinet Waitlist is effective. Because the Purchasing Limits provide a method for making limited cabinet space available to Users requesting new cabinets that is transparent, as well as reasonably designed to accommodate Users' needs while mitigating the potential for some Users to seek to obtain additional cabinet space resulting in limitations on other Users, the Commission believes the Purchasing Limits would promote just and equitable principles of trade and protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.

Further, the Commission believes that the establishment of the Cabinet Waitlist based on the date of receipt of signed orders, limiting the size and number of orders a User may have on

the waitlist at any one time, and removing a User from the waitlist if it turns down a cabinet that is the size that it requested, should prevent Users from utilizing the waitlist as a method to obtain a greater portion of the cabinets available, thereby facilitating a more equitable distribution of cabinets. Similarly, a 30-day delay before a User subject to the Purchasing Limits could purchase cabinets again, is reasonably designed to prevent a User from obtaining a greater portion of the cabinets available.

For the foregoing reasons, Commission finds that the proposals, each as modified by Amendment No. 1, are consistent with the Act.

IV. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to 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. Please include File Numbers SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSESTAT-2020-28, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26 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 Numbers SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSESTAT-2020-28, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26. 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 Numbers SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSENAT-2020-28, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Changes, Each as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule changes, each as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice of Amendment No. 1 in the Federal Register. As noted above, Amendment No. 1 revises the proposals by: (i) adding the Exchanges' representations that they are not presently in a situation where they cannot satisfy all User demand for cabinets, do not anticipate being so in the foreseeable future, and are currently working to expand the number of cabinets available in co-

location; (ii) specifying that the Cabinet Threshold level of 40 cabinets (chosen as a threshold not easily triggered) is offered as a reasonable buffer during which the Purchasing Limits would apply before the Cabinet Waitlist would become effective; (iii) clarifying that the determination of whether the Cabinet Threshold is reached is not dependent on whether cabinets are configured to be subdivided into partial cabinets, (iv) specifying that if the Purchasing Limit of a maximum of four new dedicated cabinets applies, the maximum may be comprised of a mix of dedicated and partial cabinets, with two partial cabinets counting as one dedicated cabinet; (v) clarifying that 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 Limits would only apply to the portion of the User's order below the Cabinet Threshold; and (vi) deleting the initially proposed 8 kW power limit for new dedicated cabinets when the cabinet Purchasing Limits are in effect. The Commission believes that Amendment No. 1 provides additional clarity and detail to the rule text and additional analysis and examples of aspects of the proposal, thereby facilitating the Commission's ability to make the findings set forth above to approve the proposal.

Accordingly, pursuant to Section 19(b)(2) of the Exchange Act,³² the Commission finds good cause to approve the proposed rule changes, each as modified by Amendment No. 1, on an accelerated basis.

³² 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³³ that the proposed rule changes (SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSENAT-2020-28, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26), each as modified by Amendment No. 1 be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

J. Matthew DeLesDernier
Assistant Secretary

³³ See id.

³⁴ 17 CFR 200.30-3(a)(12).