

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77680; File No. SR-NYSEMKT-2016-17)

April 21, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Establish Procedures for the Allocation of Cages to Co-located Users, Including the Waiver of Certain Fees, and to Amend the Visitor Security Escort Fee

I. Introduction

On February 23, 2016 NYSE MKT LLC (“the Exchange”) 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 cages to co-located Users, including the waiver of certain fees, and to amend the visitor security escort fee. On March 1, 2016, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on March 11, 2016.³ There were no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Background and Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to establish procedures for the allocation of cages to its co-located Users,⁴ including the waiver of certain fees subject to specified conditions, and to amend

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 34-77304 (March 7, 2016), 81 FR 12981 (“Notice”). Amendment No.1 was included in the Notice and provided certain clarifications, including that that the proposed waiver of fees for two bundles of 24 cross connects, applicable while a User is on the waitlist, would only apply to cross-connects used to connect an individual User’s non-contiguous cabinets.

⁴ 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. The

the visitor security escort fee.⁵ The Exchange proposes to amend the NYSE MKT Equities Price List (“Price List”) and the NYSE Amex Options Fee Schedule (“Fee Schedule”) to reflect the changes.⁶

As more fully set forth in the Notice, the Exchange offers Users the ability to rent cages to house their cabinets in the Data Center,⁷ and historically has offered these cages on a first come/first serve basis.⁸ The Exchange states that a cage typically is purchased by a User that has several cabinets within the Data Center and wishes to arrange its cabinets contiguously while also enhancing privacy around its cabinets.⁹ The Exchange offers three cage sizes, corresponding to the number of cabinets housed therein, and charges fees for the cages based on the size.¹⁰ The physical footprint of each cage is greater than that of the cabinets that it houses, as each cage is constructed so as to include aisles around the purchasing User’s cabinets, for accessibility and to comply with safety regulations.¹¹ In order to offer the cages, the Exchange must have sufficient contiguous open space available for the cage.¹²

In 2015, the Exchange determined that to continue to be able to meet its obligation to accommodate demand, and in particular to make available more contiguous, larger spaces for new and existing Users, it would exercise its right to move some Users’ equipment within the

Exchange provides co-location services to Users from its data center (“Data Center”) in Mahwah, New Jersey.

⁵ See Notice, 81 FR at 12981.

⁶ See id.

⁷ See Notice, 81 FR at 12982. A User must have at least two cabinets in the Data Center to purchase a cage. See id.

⁸ See Notice, 81 FR at 12982.

⁹ See id.

¹⁰ See id.

¹¹ See id.

¹² See id.

Data Center (the “Migration”).¹³ The Exchange established procedures to manage the Migration process, and continues to implement them.¹⁴ The Exchange states that, notwithstanding the Migration, contiguous open space will still be limited, and may become more limited over time.¹⁵

Proposed Cage Allocation Procedure

The Exchange has proposed to establish procedures governing the allocation of cages should the currently available open contiguous space in the Data Center be insufficient to house a new cage or if the open contiguous space available is sufficiently limited such that the Exchange cannot both provide new cages and satisfy all User demand for other co-location services.¹⁶ Specifically, the Exchange proposes that it will place Users seeking new cages on a waitlist: (1) the order of Users on the list will be based on the date the Exchange receives signed orders for the cages from each User; (2) once the list is established, Users, on a rolling basis, will be allocated a cage each time one becomes available; (3) if a cage becomes available and the User that is at the top of the waitlist turns it down because it requested a different size, that User will remain on the waitlist and the cage will be offered to the next User on the list, in order, until a User accepts it; (4) a User that turns down a cage that is the size that it requested will be

¹³ See Notice, 81 FR at 12982; see also Securities Exchange Act Release No. 76269 (October 26, 2015), 80 FR 66947 (October 30, 2015) (SR-NYSE-2015-42); Securities Exchange Act Release No. 76268 (October 26, 2015), 80 FR 66944 (October 30, 2015) (SR-NYSEMKT-2015-70); Securities Exchange Act Release No. 76270 (October 26, 2015), 80 FR 66944 (October 30, 2015) (SR-NYSEArca-2015-85) (collectively “Migration Filing”).

¹⁴ See Notice, 81 FR at 12982; see also Migration Filing supra note 13.

¹⁵ See Notice, 81 FR at 12982.

¹⁶ See id.

removed from the waitlist; and (5) if a User requests two cages, that User will be moved to the bottom of the waitlist upon the receipt of its first cage.¹⁷

In connection with the proposed waitlist procedures, the Exchange further proposes to add General Note 3 to the Price List and Fee Schedule,¹⁸ to provide that the Exchange would, subject to specified conditions, waive the initial and monthly fee for two bundles of 24 cross connects between a User's non-contiguous cabinets while it is on the waitlist.¹⁹ Specifically, the initial and monthly charge for two bundles of 24 cross connects will be waived for a User that is waitlisted for a cage for the duration of the waitlist period, provided that the cross connects may only be used to connect the User's non-contiguous cabinets.²⁰ The charge will no longer be waived once a User is removed from the waitlist.²¹ In addition, a User that is removed from the waitlist but subsequently requests a cage will be added back to the bottom of the waitlist, provided that, if the User was removed from the waitlist because it turned down a cage that is the size that it requested, it will not receive a second waiver of the charge.²²

Visitor Security Escorts

The Exchange also proposes to amend its visitor security escort fee. Currently, a User visiting its cabinet(s) in the Data Center is required to pay a \$75/hour fee for a security escort.²³

¹⁷ See id.

¹⁸ See Notice, 81 FR at 12983.

¹⁹ See id.

²⁰ See id.

²¹ As noted above, a User that turns down a cage because it is not the correct size will remain on the waitlist. A User that requests to be removed or that turns down a cage that is the size that it requested will be removed from the waitlist. See supra note 17 and accompanying text.

²² See Notice, 81 FR at 12983.

²³ See id.

The Exchange proposes to eliminate this fee for Users visiting their own cage in the Data Center,²⁴ and change the fee for those not visiting their own cage from \$75/hour to \$75/visit.²⁵

The Exchange states that a security escort is not needed when a User visits its own cage because that User would have access only to its own cabinets locked within its own cage,²⁶ and that User will not have access to the cabinets of other Users or Exchange equipment, which are locked as well.²⁷

III. Discussion and Commission Findings

After careful review and consideration of the Exchange's proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁸ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(4) of the Act,²⁹ 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, and with Section 6(b)(5) of the Act,³⁰ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to

²⁴ See id. The Exchange is also making a technical change to the fee schedule visitor fee to add clarity. See id.

²⁵ See id. The Exchange stated that many of the escorted visits lasted an hour or less. See id.

²⁶ See id.

²⁷ See id.

²⁸ In approving this proposed rule change, as modified by Amendment No. 1, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁹ 15 U.S.C. 78f(b)(4).

³⁰ 15 U.S.C. 78f(b)(5).

remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed procedures for the allocation of cages to its co-located Users and associated waiver of fees subject to specified conditions are consistent with Sections 6(b)(4) and 6(b)(5) of the Act. In particular, the Commission believes that the proposed cage allocation and waitlist procedures are reasonably designed to assist the Exchange in offering cages to current and future Users in the Data Center on terms that are equitable and not unfairly discriminatory in the event that available open contiguous space in the Data Center is not sufficient to house a newly requested cage or sufficiently limited that the Exchange cannot both provide new cages and satisfy all User demand for other co-location services. The Commission further believes that the proposal to waive the initial and monthly fee for two bundles of 24 cross connects between a User's non-contiguous cabinets while a User is on the waitlist is consistent with the Act. Users can qualify for the fee waiver by requesting a cage and being placed on the waitlist until a cage becomes available to them. Once the Exchange offers the requested size cage to a User through the allocation procedure or when a User is removed from the waitlist, the fee would no longer be waived. In addition, if a User was removed from the waitlist because it turned down a cage that was the size that it requested, it would not receive a second waiver of the charge. The Commission believes that the proposed fee waiver and associated conditions are reasonably designed to alleviate the inconvenience for waitlisted Users of having cabinets in non-contiguous spaces by removing the cost that those Users would otherwise avoid if a cage were available.

The Commission also finds the proposed amendments to the visitor security escort fee consistent with Sections 6(b)(4) and 6(b)(5) of the Act. The Exchange represents that a security escort is not needed when a User visits its own cage because that User would have access only to its own cabinets locked within its own cage,³¹ and will not have access to the cabinets of other Users or Exchange equipment, which are locked as well.³² In addition, the proposed rate of \$75/visit for the visitor security escort would be a fee reduction for any visit that lasted more than an hour, and so it would reduce the burden placed on Users that remain subject to the fee. Therefore, the Commission finds the proposed amendments to the visitor security escort fee to be reasonable, equitable, and not unfairly discriminatory.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

³¹ See supra notes 26-27 and accompanying text.

³² See id.

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³³ that the proposed rule change, as modified by Amendment No.1, (File No. SR-NYSEMKT-2016-17) be, and hereby is, approved.

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

Brent J. Fields
Secretary

³³ 15 U.S.C. 78s(b)(2).

³⁴ 17 CFR 200.30-3(a)(12).