

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99168; File No. SR-NYSENAT-2023-29)

December 14, 2023

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Connectivity Fee Schedule

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on December 1, 2023, NYSE National, Inc. (“NYSE National” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Connectivity Fee Schedule (the “Fee Schedule”) to add circuits provided by Fixed Income and Data Services (“FIDS”) for connectivity into and out of the data center in Mahwah, New Jersey (the “MDC”). The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

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

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule (the “Fee Schedule”) to add circuits provided by Fixed Income and Data Services (“FIDS”)⁴ for connectivity into and out of the data center in Mahwah, New Jersey (the “MDC”).

As background, market participants that request to receive colocation services directly from the Exchange (“Users”) require wired circuits⁵ to connect into and out of the MDC. A User’s equipment in the MDC’s colocation hall connects to a circuit leading out of the MDC, which connects to the User’s equipment in their back office or another data center.

Before 2013, all such circuits were provided by ICE’s predecessor, NYSE Euronext. In response to customer demand for more connectivity options, in 2013, the MDC opened two “meet-me-rooms” to telecommunications service providers (“Telecoms”),⁶ to enable Telecoms to offer circuits into the MDC in competition with NYSE Euronext. Currently, 16 Telecoms operate in the meet-me-rooms and provide circuit options to Users requiring connectivity into and out of the MDC. As of June 1, 2023, more than 95% of the circuits for which Users

⁴ Through its FIDS business (previously ICE Data Services), Intercontinental Exchange, Inc. (“ICE”) operates the MDC. The Exchange is an indirect subsidiary of ICE and is an affiliate of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE Chicago, Inc. (together, the “Affiliate SROs”). Each Affiliate SRO has submitted substantially the same proposed rule change. See SR-NYSE-2023-48, SR-NYSEAMER-2023-65, SR-NYSEARCA-2023-83, and SR-NYSECHX-2023-24.

⁵ In addition to wired fiber optic connections, Users may use FIDS or third-party wireless connections to the MDC. In such a case, the portion of the connection closest to the MDC is wired. Other than Telecoms, Users are the only FIDS customers with equipment physically located in the MDC.

⁶ In this filing, telecommunication service providers that choose to provide circuits at the MDC are referred to as “Telecoms.” Telecoms are licensed by the Federal Communications Commission (“FCC”) and are not required to be, or be affiliated with, a member of the Exchange or an Affiliate SRO.

contracted were supplied by Telecoms, and all but two of the Users that used FIDS circuits as of that date also connected to Telecom circuits in the MMRs.

The Exchange proposes to add several circuits provided by FIDS to the Fee Schedule. Specifically, the Exchange proposes to amend the Fee Schedule to add two different types of FIDS circuits, each available in three different sizes. Because FIDS is not a telecommunications provider, FIDS would purchase circuits from telecommunications providers, with portions allocated and sold to Users.

First, the Exchange proposes to amend the Fee Schedule to add “Optic Access” circuits supplied by FIDS. Users can use an Optic Access circuit to connect between the MDC and the FIDS access centers at the following five third-party owned data centers: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the “Secaucus Access Center”); and (5) Carteret, NJ (the “Carteret Access Center”). Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

Second, the Exchange proposes to amend the Fee Schedule to add lower-latency “Optic Low Latency” circuits supplied by FIDS that Users can use to connect between the MDC and FIDS’s Secaucus Access Center or Carteret Access Center. Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

The Exchange proposes to add the following chart to the Fee Schedule, under the new heading “E. FIDS Circuits”:

| Type of Service | Fees |
|------------------------------|--|
| Optic Access Circuit - 1 Gb | \$1,500 initial charge plus \$650 monthly charge |
| Optic Access Circuit - 10 Gb | \$5,000 initial charge plus \$1,900 monthly charge |

| | |
|-----------------------------------|---|
| Optic Access Circuit - 40 Gb | \$5,000 initial charge plus \$4,000 monthly charge |
| Optic Low Latency Circuit - 1 Gb | \$1,500 initial charge plus \$2,750 monthly charge |
| Optic Low Latency Circuit - 10 Gb | \$5,000 initial charge plus \$3,950 monthly charge |
| Optic Low Latency Circuit - 40 Gb | \$5,000 initial charge plus \$8,250 monthly charge |

Application and Impact of the Proposed Changes

The proposed change is not targeted at, or expected to be limited in applicability to, a specific segment of market participant. The FIDS circuits would be available for purchase for any potential User requiring a circuit between the MDC and the FIDS access centers at the third-party owned data centers listed above. The proposed changes do not apply differently to distinct types or sizes of customers. Rather, they apply to all customers equally.

Use of the services proposed in this filing are completely voluntary and available to all market participants on a non-discriminatory basis.

The proposed changes are not otherwise intended to address any other issues relating to services related to the MDC and/or related fees, and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,⁹ because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable. In considering the reasonableness of proposed services and fees, the Commission’s market-based test considers “whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.”¹⁰ If the Exchange meets that burden, “the Commission will find that its proposal is consistent with the Act unless ‘there is a substantial countervailing basis to find that the terms’ of the proposal violate the Act or the rules thereunder.”¹¹ Here, the Exchange is subject to significant competitive forces in setting the

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSEAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSEAT-2020-08) (“Wireless Approval Order”), citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (“2008 ArcaBook Approval Order”). See NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹¹ Wireless Approval Order, supra note 10, at 67049, citing 2008 ArcaBook Approval Order, supra note 10, at 74781.

terms on which it offers its proposal, in particular because substantially similar substitutes are available, and the third-party vendors are not at a competitive disadvantage created by the Exchange.

The proposed FIDS circuits would compete with circuits currently offered by the 16 Telecoms operating in the meet-me-rooms at the MDC. The Telecom circuits are reasonable substitutes for the FIDS circuits. The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.¹² The circuits provided by FIDS and by the Telecoms all perform the same function: connecting into and out of the MDC. The providers of these circuits design them to perform with particular combinations of latency, bandwidth, price, termination point, and other factors that they believe will attract Users, and Users choose from among these competing services on the basis of their business needs.

The proposed FIDS circuits are sufficiently similar substitutes to the circuits offered by the 16 Telecoms even though the proposed FIDS circuits would all terminate in one of the five data centers mentioned above, while circuits from the 16 Telecoms could terminate in those locations or additional locations. While neither the Exchange nor FIDS knows the end point of any particular Telecom circuit, the Exchange understands that the Telecoms can offer circuits terminating in any location, including the five data center locations where the FIDS circuits would terminate. In addition, Users can choose to configure their pathway leading out of colocation in the way that best suits their business needs, which may include connecting to the User's equipment at one of the five data center locations that serve as termination points for the

¹² See 2008 ArcaBook Approval Order, *supra* note 10, at 74789 and note 295 (recognizing that products need not be identical to be substitutable).

proposed FIDS circuits, or connecting first to one of those five data centers with a FIDS- or Telecom-supplied circuit and then further connecting to another remote location using a telecommunication provider-supplied circuit.

The proposed FIDS circuits do not have a distance or latency advantage over the Telecoms' circuits within the MDC. FIDS has normalized (a) the distance between the meet-me-rooms and the colocation halls and (b) the distance between the rooms where the FIDS circuits are located and the colocation halls. As a result, a User choosing whether to use the proposed FIDS circuits or Telecom circuits does not face any difference in the distances or latency within the MDC.

The Exchange also believes that the proposed FIDS circuits do not have any latency or bandwidth advantage over the Telecoms' circuits as a whole outside of the MDC. FIDS would purchase the proposed FIDS circuits from third-party telecommunications providers and would allocate and resell portions of them to Users. The Exchange believes that the Telecoms operating in the meet-me-rooms offer circuits with a variety of latency and bandwidth specifications, some of which may exceed the specifications of the proposed FIDS circuits.¹³ The Exchange believes that Users consider these latency and bandwidth factors – as well as other factors, such as price and termination point – in determining which circuit offerings will best serve their business needs.¹⁴

In sum, the Exchange does not believe that there is anything about the proposed FIDS

¹³ The specifications of FIDS's competitors' circuits are not publicly known. The Exchange understands that FIDS has gleaned any information it has about its competitors through anecdotal communications, by observing customers' purchasing choices in the competitive market, and from its own experience as a purchaser of circuits from telecommunications providers to build FIDS's own networks.

¹⁴ The fact that the FIDS circuits do not have an advantage is reflected by the fact that Users choose to use Telecom circuits for the vast majority of their circuit needs. Whereas before 2013, NYSE Euronext provided 100% of such circuits, today more than 95% of the circuits that Users have contracted for are supplied by third-party Telecoms, with FIDS supplying less than 5%.

circuits that would make the Telecoms' circuits inadequate substitutes.

Nor does the Exchange have a meaningful competitive advantage over the Telecoms by virtue of the fact that it owns and operates the MDC's meet-me-rooms. The Exchange understands that Telecoms choose to pay fees to the Exchange for the opportunity to install equipment in the MDC's meet-me-rooms because of the financial benefits those Telecoms can accrue by selling circuits to Users. It is therefore in the Exchange's best interest to set fees at the MDC – including both the meet-me-room fees that Telecoms pay and the FIDS circuit fees that Users would pay – at a level that encourages market participants, including Telecoms, to maximize their use of the MDC.¹⁵

Setting the FIDS circuit fees at a reasonable level makes it more likely that Users will connect into and out of the MDC. Competitive rates for circuits, whether FIDS circuits or Telecom circuits, help draw more Users and Hosted Customers¹⁶ into the MDC, which directly benefits the Exchange by increasing the customer base to whom the Exchange can sell its colocation services (including cabinets, power, ports, and connectivity to many third-party data feeds) and encouraging greater participation on the Exchange. In other words, by setting the fees for FIDS circuits at a level attractive to Users, the Exchange spurs demand for all of the services it sells at the MDC.

If the Exchange were to set the price of the FIDS circuits too high, Users would likely respond by choosing one of the many alternative options offered by the 16 Telecoms.

Conversely, if the Exchange were to offer the FIDS circuits at prices aimed at undercutting

¹⁵ See Securities Exchange Act Release No. 98002 (July 26, 2023), 88 FR 50232 (August 1, 2023) (SR-NYSENAT-2023-12) (“MMR Notice”).

¹⁶ “Hosting” is a service offered by a User to another entity in the User's space within the MDC. The Exchange allows Users to act as Hosting Users for a monthly fee. See Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSENAT-2018-07). Hosting Users' customers are referred to as “Hosted Customers.”

comparable Telecom circuits, the Telecoms might reassess whether it makes financial sense for them to continue to participate in the MDC's meet-me-rooms. Their departure might negatively impact User participation in colocation and on the Exchange. As a result, the Exchange is not motivated to undercut the prices of Telecom circuits.

For these reasons, the proposed change is reasonable.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes that its proposal equitably allocates its fees among market participants. The Exchange believes that the proposed change is equitable because it would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally.

In addition, the Exchange believes that the proposal is equitable because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

Moreover, any telecommunications service provider licensed by the FCC is eligible to be a Telecom operating in the MRR, irrespective of size and type. The Exchange's MMR services are available to all Telecoms on an equal basis at standardized pricing.

The Proposed Change Is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory. The proposed change does not apply differently to distinct types or sizes of market participants. Rather, it applies to all market participants equally. The purchase of any proposed service is completely voluntary and the Fee Schedule will be applied uniformly to all market participants.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.¹⁷

The proposed change would not impose a burden on competition among national securities exchanges or among members of the Exchange. The proposed change would enhance competition in the market for circuits transmitting data into and out of colocation at the MDC by adding FIDS as the 17th provider of such circuits, in addition to the 16 Telecoms that also sell such circuits to Users. The proposed FIDS circuits do not have any latency, bandwidth, or other advantage over the Telecoms' circuits. The proposal would not burden competition in the sale of such circuits, but rather, enhance it by providing Users with an additional choice for their circuit needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

¹⁷ 15 U.S.C. 78f(b)(8).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁸ and Rule 19b-4(f)(6) thereunder.¹⁹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²⁰ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form

(<https://www.sec.gov/rules/sro.shtml>); or

¹⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 15 U.S.C. 78s(b)(2)(B).

- Send an email to rule-comments@sec.gov. Please include file number SR-NYSENAT-2023-29 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 number SR-NYSENAT-2023-29. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NYSE-NAT-2023-29 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Sherry R. Haywood,
Assistant Secretary.

²¹ 17 CFR 200.30-3(a)(12).