

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93589; File No. SR-NYSEAMER-2021-42)

November 16, 2021

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Update the Procedures for the Allocation of Cabinets and Power to its Colocated Users

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on November 3, 2021, NYSE American LLC (“NYSE American” 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 update the procedures for the allocation of cabinets and power to its colocated Users. 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 places

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 establish⁴ procedures for the allocation of power to its co-located⁵ Users.⁶

In December 2020, the Exchange established procedures for the allocation of cabinets in colocation should it become needed.⁷ In April 2021, the Exchange added procedures for the allocation of power in colocation (together with the cabinet procedures, the “Existing Procedures”).⁸

⁴ The Commission notes that the Exchange proposes to update previously established procedures for allocation of cabinets and power to its collocated Users.

⁵ The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission (“Commission”) in 2010. See Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80).

⁶ 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. See Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMKT-2015-67). As specified in the NYSE American Equities Price List and Fee Schedule and the NYSE American Options Fee Schedule (together, the “Price List and Fee Schedule”), a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the “Affiliate SROs”). Each Affiliate SRO has submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2021-66; SR-NYSEArca-2021-96; SR-NYSECHX-2021-16; SR-NYSESTAT-2021-22.

⁷ See Securities Exchange Act Release No. 90732 (December 18, 2020), 85 FR 84443 (December 28, 2020) (SR-NYSE-2020-73, SR-NYSEAMER-2020-66, SR-NYSEArca-2020-82, SR-NYSECHX-2020-26, and SR-NYSESTAT-2020-28).

⁸ See Securities Exchange Act Release No. 91515 (April 8, 2021), 86 FR 19674 (April 14, 2021) (SR-NYSE-2021-12, SR-NYSEAMER-2021-08, SRNYSESTAT-2021-03, SR-

Proposed Changes to the Waitlist Procedures

Pursuant to the Existing Procedures, a Combined Waitlist is currently in effect. To be placed on the Combined Waitlist, a User must submit an order that complies with the Combined Limits – that is, the order must be for no more than 32 kW, and no more than four dedicated cabinets with standard power allocations of 4 kW or 8 kW as part of the 32 kW total.⁹

The Existing Procedures provide that “[a] User may only have one order for new cabinets and/or additional power on the Combined Waitlist at a time”¹⁰ The Exchange has become aware that some Users are attempting to circumvent this provision by submitting additional orders in the names of entities affiliated with the User.¹¹

The Exchange believes that such actions by Users are contrary to the objectives of the Existing Procedures, which were intended to foreclose Users from obtaining a greater portion of the cabinets and power available than the portion defined by the Cabinet Limits and Combined Limits. Such actions by Users could result in a distribution of cabinets and power that is contrary to the intent of the Cabinet Limits and Combined Limits, with Users that are willing to submit multiple orders in the names of their affiliates obtaining more cabinets and power than

NYSEArca-2021-11, and SR-NYSECHX-2021-02). The Existing Procedures are set forth in General Notes 7 and 8 under “Co-location Fees” in the Price List and Fee Schedule.

⁹ See Price List and Fee Schedule, Co-Location Fees, General Notes 7 and 8.

¹⁰ See Price List and Fee Schedule, Co-Location Fees, General Note 8(b).

¹¹ For example, a User that wants 64 kW could submit an order for 32 kW to the Combined Waitlist, and then have an affiliated entity submit a second order to the Combined Waitlist for an additional 32 kW. Once the affiliated entity obtained its 32 kW, it could assign the power to the User. As a result, the User would obtain two times more power than the Combined Limit would allow. The Exchange has been informed that at least one User has contemplated utilizing affiliates for this purpose.

the Cabinet Limits and Combined Limits allow, to the detriment of other Users seeking to purchase cabinets or power.

To address this issue, the Exchange proposes to amend the Existing Procedures to add to General Note 8(b) that “[w]hile a User is on the Combined Waitlist, no Affiliate of such User may also be on the Combined Waitlist.” The Exchange similarly proposes to amend General Note 8(a), regarding the Cabinet Waitlist, to provide that “[w]hile a User is on the Cabinet Waitlist, no Affiliate of such User may also be on the Cabinet Waitlist.” The term “Affiliate” is already defined in the Co-Location Fees section of the Price List and Fee Schedule as follows: “An ‘Affiliate’ of a User is any other User or Hosted Customer that is under 50% or greater common ownership or control of the first User.” This definition of “Affiliate” was introduced in connection with the Exchange’s filing regarding partial cabinet solutions, and the Exchange believes that the definition is appropriate to also use in the present context.¹²

Proposed Changes to the Purchasing Limit Procedures

The Exchange also proposes to amend the Existing Procedures regarding Cabinet and Power Purchasing Limits in General Note 7 to prevent Users from circumventing the Cabinet Limits and Combined Limits in a similar fashion when they are in effect but a waitlist is not. The Existing Procedures provide that when the Cabinet Limit or Combined Limits are in effect, a User will have to wait 30 days from the date of the User’s signed order before purchasing cabinets or power again. The Exchange proposes to amend such provisions to specify that this 30-day limitation applies not just to Users that have already purchased cabinets or power subject

¹² To the extent that the Combined Waitlist currently includes orders submitted by two or more Users that are Affiliates, the Exchange intends to remove all but the first of such Affiliates’ orders from the Combined Waitlist upon this proposed rule change becoming operative.

to the applicable Purchasing Limit, but also to any Affiliate of such User, so long as the applicable Purchasing Limit remains in effect.

General

The proposed rule change would apply the same way to all types and sizes of market participants. As is currently the case, the purchase of any colocation service is completely voluntary and the Price List and Fee Schedule is applied uniformly to all Users. The proposed change is not otherwise intended to address any other issues relating to colocation services and/or related fees, and the Exchange is not aware of any problems that Users 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,¹³ in general, and with Section 6(b)(5),¹⁴ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 believes that the proposed rule change would prevent fraudulent and manipulative acts and practices, and would remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest, because it would prevent a User from obtaining a greater share of cabinets and

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

power than the Existing Procedures intended, and thereby facilitate a more equitable distribution of cabinets and power.

As noted above, the Exchange has become aware that some Users are attempting to circumvent the Combined Waitlist by submitting additional orders in the names of entities affiliated with the User, in order to avoid the Existing Procedures' prohibition against a User having more than one order on the Combined Waitlist at the same time. The Exchange believes that such actions by Users are contrary to the objectives of the Existing Procedures, which were intended to foreclose Users from obtaining a greater portion of the cabinets and power available than the portion defined by the Cabinet Limits and Combined Limits. Unless prohibited, such actions by Users could result in an inequitable distribution of cabinets and power, with Users that are willing to submit multiple orders in the names of their affiliates obtaining more than their intended share of cabinets and power, to the detriment of other Users seeking to purchase cabinets and power. The proposed rule change to General Note 8 would address this concern.

The Exchange believes that the proposed amendments to the Existing Procedures regarding Cabinet and Power Purchasing Limits in General Note 7 would similarly prevent Users from circumventing the Cabinet Limits and Combined Limits when there is no waitlist in effect. The Exchange believes that having both Users and their Affiliates wait 30 days from the date of the signed order to purchase new cabinets or power would foreclose Users' ability to use their Affiliates to obtain a greater portion of the cabinets and power available. In this way, the Exchange believes that that the proposed amendments to General Note 7 would prevent fraudulent and manipulative acts and practices, and would remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

The proposed rule change would not unfairly discriminate between or among market participants, as it would apply to all types and sizes of market participants equally.

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

In accordance with Section 6(b)(8) of the Act,¹⁵ the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change is designed to prevent Users from obtaining an unfair competitive advantage by submitting multiple orders in the names of affiliated entities, in order to avoid the Existing Procedures' prohibition against a User having more than one order on the Cabinet Waitlist or the Combined Waitlist at the same time and to obtain a greater portion of the cabinets and power available than the portion defined by the Cabinet Limits and Combined Limits. The proposed rule change would prevent a User from obtaining this unfair competitive advantage, thereby facilitating a more equitable distribution of cabinets and power.

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.

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 Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷ 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

¹⁵ 15 U.S.C. 78f(b)(8).

¹⁶ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁷ 17 CFR 240.19b-4(f)(6).

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.¹⁸

A proposed rule change filed under Rule 19b-4(f)(6)¹⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes that implementing the proposed rule change as soon as possible would allow the Exchange to prevent Users from unfairly obtaining more cabinets or power than the Existing Procedures were intended to provide. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.²¹

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

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

²¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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)²² 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2021-42 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-NYSEAMER-2021-42. 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

²² 15 U.S.C. 78s(b)(2)(B).

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 Number SR-NYSEAMER-2021-42 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

J. Matthew DeLesDernier
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).