SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93214; File Nos. SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01)

September 30, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Order Disapproving Proposed Rule Changes, as Modified by Partial Amendment No. 1, to Amend Each Exchange's Fee Schedule to Add Two Partial Cabinet Bundles Available in Co-location and Establish Associated Fees

I. Introduction

On January 19, 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") (each an "Exchange," 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 Exchanges' fee schedules related to co-location to add two Partial Cabinet Bundles available in co-location and establish associated fees. The proposed rule changes were published for comment in the Federal Register on February 5, 2021 or February 8, 2021, as applicable.[3] On March 18, 2021, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to either

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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. 91034 (February 1, 2021), 86 FR 8443 (February 5, 2021) (SR-NYSE-2021-05); 91035 (February 1, 2021), 86 FR 8449 (February 5, 2021) (SR-NYSEAMER-2021-04); 91036 (February 1, 2021), 86 FR 8440 (February 5, 2021) (SR-NYSECHX-2021-01); and 91037 (February 1, 2021), 86 FR 8424 (February 5, 2021) (SR-NYSENAT-2021-01); 91044 (February 2, 2021), 86 FR 8662 (February 8, 2021) (SR-NYSEArca-2021-07) (each, a "Notice"). For ease of reference, page citations are to the Notice for NYSE-2021-05.

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

approve the proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.[5] On May 6, 2021, the Division of Trading and Markets (the "Division"), acting on behalf of the Commission by delegated authority, issued an order instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule changes ("Order Instituting Proceedings") to determine whether to approve or disapprove the proposed rule changes.[7] The Commission received an initial comment letter from the Exchanges in response to the Order Instituting Proceedings.[8] On July 30, 2021, pursuant to Section 19(b)(2) of the Act,[9] the Commission designated a longer period for Commission action on the proceedings to determine

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5 See Securities Exchange Act Release Nos. 91357 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSE-2021-05); 91358 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSEAMER-2021-04); 91360 (March 18, 2021), 86 FR 15764 (March 24, 2021) (SR-NYSEArca-2021-07); 91362 (March 18, 2021), 86 FR 15765 (March 24, 2021)(SR-NYSECHX-2021-01); and 91363 (March 18, 2021), 86 FR 15763 (March 24, 2021) (SR-NYSENAT-2021-01).

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

7 See Securities Exchange Act Release No. 91785 (May 6, 2021), 86 FR 26082 (May 12, 2021) (SR-NYSE-2021-05, NYSEAMER-2021-04, NYSEArca-2021-07, SR-NYSECHX-2021-01 SR-NYSENAT-2021-01).

8 NYSE filed a comment letter on behalf of all of the Exchanges. See, letter dated July 6, 2021 from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE to Vanessa Countryman, Secretary, Commission ("First NYSE Response"). All comments received by the Commission on the proposed rule changes are available on the Commission's website at: https://www.sec.gov/comments/sr-nyse-2021-05/srnyse202105.htm; https://www.sec.gov/comments/sr-nyseamer-2021-04/srnyseamer202104.htm; https://www.sec.gov/comments/sr-nysearca-2021-07/srnysearca202107.htm; https://www.sec.gov/comments/sr-nysechx-2021-01/srnysechx202101.htm https://www.sec.gov/comments/sr-nysenat-2021-01/srnysenat202101.htm.

9 15 U.S.C. 78s(b)(2).

whether to approve or disapprove the proposed rule changes.[10] On September 14, 2021, each Exchange filed Partial Amendment No. 1, followed by a second comment letter.[11] This order disapproves the proposed rule changes, as modified by Partial Amendment No. 1.

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

The Exchanges offer "co-location services" to market participants from a data center in Mahwah, New Jersey ("Mahwah Data Center") where their electronic trading and execution systems are located.[12] These Exchange-offered services provide market participants (co-location

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10 See Securities Exchange Act Release Nos. 92532, 86 FR 42911 (August 5, 2021) (SR-NYSE-2021-05, SR-NYSENAT-2021-01, SR-NYSEAMER-2021-04, NYSECHX-2021-01); 92531, 86 FR 42956 (August 5, 2021) (SR-NYSEArca-2021-07).

11 In Partial Amendment No. 1, the Exchanges propose that Users ordering a proposed Partial Cabinet Bundle Option E or F on or before December 31, 2022 (instead of December 31, 2021, as originally proposed) would receive a 50% reduction in the monthly recurring charge. See Partial Amendment No. 1 at 3-4. See also, letter dated September 15, 2021 from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE to Vanessa Countryman, Secretary, Commission ("Second NYSE Response"). Partial Amendment No. 1 and the Second NYSE Response are available on the Commission's website at: https://www.sec.gov/comments/sr-nyse-2021-05/srnyse202105.htm; https://www.sec.gov/comments/sr-nyseamer-2021-04/srnyseamer202104.htm; https://www.sec.gov/comments/sr-nysearca-2021-07/srnysearca202107.htm; https://www.sec.gov/comments/sr-nysechx-2021-01/srnysechx202101.htm https://www.sec.gov/comments/sr-nysenat-2021-01/srnysenat202101.htm. For ease of reference, citations to Partial Amendment No. 1 and the Second NYSE Response are to those for SR-NYSE-2021-05.

12 See e.g., Securities Exchange Act Release Nos. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56); 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80); 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR-NYSEArca-2010-100) (approving co-location services and fees for NYSE, NYSE American, and NYSE Arca); 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) (approving co-location services and fees for NYSE National and NYSE Chicago). The Commission has consistently reviewed proposed rule changes for co-location services at the Mahwah Data Center, which are facilities of the Exchanges.

"Users," as further described below) with a variety of options to obtain cabinet space, power, bandwidth, and related services that enable them to connect to the Exchanges from within the Mahwah Data Center and thereby obtain the most efficient access to the Exchanges' trading engines and market data.[13] As the Exchanges have stated, "[u]sers that receive co-location services normally would expect reduced latencies in sending orders to the Exchange and receiving market data from the Exchange."[14]

A market participant that seeks the benefits of co-location generally will, at a minimum, purchase cabinet space, power, and bandwidth connections (1 Gb, 10 Gb, or 40 Gb), and any necessary cross-connections. The 1 Gb, 10 Gb, and 40 Gb bandwidth connections that the Exchanges offer enable the transmission of data over local area networks in the Mahwah Data Center. These local area networks include the Internet Protocol ("IP") network and the Liquidity Center Network ("LCN"). Both the IP and LCN networks provide access to the Exchanges' trading and execution systems and to the Exchanges' proprietary market data products, with the

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13 See id. These services are for fees filed with the Commission, and reflected on an Exchange's Price List. A User that incurs co-location fees for a particular co-location service pursuant to any Exchange's Price List is not subject to co-location fees for the same co-location service charged by one of the affiliated Exchanges. See e.g., Notice, 86 FR at 8444 n.5.

14 See supra note 12. See also Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, at 3610 (January 21, 2010) (Concept Release on Equity Market Structure), in which the Commission described co-location as "a service offered by trading centers that operate their own data centers and by third parties that host the matching engines of trading centers. The trading center or third party rents rack space to market participants that enables them to place their servers in close physical proximity to a trading center's matching engine. Co-location helps minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants."

LCN network having lower latency than the IP network.[15] The IP network provides access to "away" (third-party) market data products and execution systems.[16] In 2020, the Exchanges added the NMS Network, a dedicated network in the Mahwah Data Center, providing co-location Users with 10 Gb and 40 Gb connections access to this additional network without an associated fee change.[17]

The Exchanges refer to direct purchasers of their co-location services as "Users," and permit any market participant that requests to receive co-location services directly from one or more of the Exchanges to be a User, subject to potential inventory constraints.[18] The Exchanges'

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15 See e.g., Securities Exchange Act Release No. 74222 (February 6, 2015), 80 FR 7888, 7889 (February 12, 2015).

16 Id.

17 See Securities Exchange Act Release Nos. 88837 (May 7, 2020), 85 FR 28671 (May 13, 2020) (SR-NYSE-2019-46, SR-NYSEAMER-2019-34, SR-NYSEArca-2019-61, SR-NYSENAT-2019-19) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the Exchanges' Co-Location Services to Offer Co-Location Users Access to the NMS Network; 88972 (May 29, 2020), 85 FR 34472 (June 4, 2020) (SR-NYSECHX-2020-18)(Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Services Available to Users That Use Co-location Services in the Mahwah, New Jersey Data Center). More specifically, the NMS Network offers dedicated access to the National Market System Plan data feeds ("NMS feeds") for which the Securities Industry Automation Corporation ("SIAC," a wholly-owned subsidiary of the NYSE) is engaged as the securities information processor, namely, the consolidated market data feeds distributed by (1) the Consolidated Trade Association Plan; (2) the Consolidated Quotation Plan; and (3) the Options Price Reporting Authority Plan). As a result, access to the NMS feeds became available via dedicated bandwidth and at lower latency than they had been over the IP network. Id.

18 See e.g., Securities Exchange Act Release No. 65973 (December 15, 2011), 76 FR 79232 (December 21, 201) (SR-NYSE-2011-53) (expanding access to co-location to any market participant that requests to receive co-location services directly from one or more of the Exchanges, and designating such persons as "Users"); Securities Exchange Act Release No. 91515 (April 8, 2021), 86 FR 19674 (April 14, 2021) (SR-NYSE-2021-12, SR-NYSEAMER-2021-08, SR-NYSENAT-2021-03, SR-NYSEArca-2021-11, SR-NYSECHX-2021-02) (establishing rules for the allocation of cabinets and power to Users should inventory be insufficient to satisfy demand).

also permit "Hosting Users." A Hosting User is a User that subleases its cabinet space to a "Hosted Customer" and thereby resells or repackages and sells Exchange co-location services to customers of its own.[19] Hosting Users are subject to a Hosting Fee of $1,000 per month per Hosted Customer for each cabinet in which such Hosted Customer is hosted.[20] Thereby, the Exchanges receive payment from Hosting Users for co-location services they purchase from the Exchanges, as well as for cabinet space that a Hosting User resells, with the Hosting Fee determined on a per cabinet/per Hosted Customer basis.

Among the co-location services currently offered by the Exchanges are "Partial Cabinet Bundles."[21] Designed for "smaller Users" having limited power or cabinet space demands, the current bundles offer a small co-location package: a partial cabinet with network access via 1 Gb or 10 Gb connections, two fiber cross connections, and connectivity to a time feed protocol, discounted from what the price would be if a User purchased the elements separately.[22] Users currently may choose from four Partial Cabinet Bundles, labeled Options A, B, C, and D.

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19 A "Hosting User" means a User of co-location services that hosts a Hosted Customer in the User's co-location space. A "Hosted Customer" means a customer of a Hosting User that is hosted in a Hosting User's co-location space. See e.g., Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40).

20 Id.

21 See e.g., Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394 (February 11, 2016) (SR-NYSE-2015-53).

22 Id. at 7395-96. Partial Cabinet Bundle purchases are subject to eligibility conditions: a purchaser (together with its affiliates) of a Partial Cabinet Bundle from the Exchanges may have no more than one Partial Cabinet Bundle and is limited to a total footprint of 2 kW of power. See id. and Notice, 86 FR at 8444. Designed to limit purchases of Exchange-offered Partial Cabinet Bundles to "smaller Users," this condition applies even if the purchaser is also a "Hosted Customer." See Securities Exchange Act Release No. 76612 (December 10, 2015), 80 FR 78269, at 78271 (December 16, 2015) (SR-NYSE-2015-53).

Options A and B include a partial cabinet with either one or two kilowatts ("kW") of power; a 1 Gb connection to each of the LCN network and the IP network; two fiber cross connections; and connectivity to either the Network Time Protocol or the Precision Timing Protocol time feeds.[23] Options C and D originally included a 10 Gb connection to the LCN Network and a 10 GB connection to the IP network.[24] When the NMS Network was added, the Exchanges upgraded Options C and D, to further include, at no additional cost, two 10 Gb connections to the NMS Network.[25] Options C and D are available for an initial charge of $10,000 and a recurring monthly charge of $14,000 and $15,000, respectively.[26]

The Exchanges now propose to expand their co-location services to add two new Partial Cabinet Bundles, designated as Options E and F, and establish associated fees. Proposed Options E and F would offer a 40 Gb connection to the LCN network and a 40 Gb connection to the IP network, and two 40 Gb connections to the NMS Network.[27] Otherwise, proposed Options E and F would be the same as the Options C and D bundles, offering a 1 kW (Option E) or 2 kW (Option F) partial cabinet, two fiber cross connections, and either the Network Time

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23 See Notice, 86 FR at 8444. Cross connections are fiber connections at the Mahwah Data Center that provide the means to connect a User's multiple cabinets, a cabinet of one User to a cabinet of another User, or a User's cabinet to Exchange or third-party equipment. See e.g., Securities Exchange Act Release No. 74222 (February 6, 2015, 80 FR 7888 (February 12, 2015) (SR-NYSE-2015-05). The Network Time Protocol or the Precision Timing Protocol are options for time feeds that provide the current time of day, and which allow Users to receive time and synchronize clocks throughout a computer network, and can also be used for recordkeeping or measuring response times. See Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394 (February 11, 2016) (SR-NYSE-2015-53).

24 Id.

25 See supra note 17 and accompanying text.

26 See Notice, 86 FR at 8445.

27 See Notice, 86 FR at 8444.

Protocol Feed or the Precision Timing Protocol.[28] The Exchanges state that the proposed new options are in response to customer interest[29] and that the option of a Partial Cabinet Bundle that includes 40 Gb connections would enable small market participants to connect to more data feeds or have the same size connection in co-location that they have elsewhere.[30] The Exchanges propose to offer each new bundle for an initial charge of $10,000, and, following an initial promotional period, a monthly charge of $18,000 for Option E, and $19,000 for Option F.[31]

III. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act,[32] the Commission shall approve a proposed rule change of a self-regulatory organization ("SRO") if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to such organization.[33] The Commission shall disapprove a proposed rule change if it does not make such a finding.[34] Rule 700(b)(3) of the Commission's Rules of Practice states that the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules

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28 See Notice, 86 FR at 8444. Purchases of the proposed new bundles would likewise be subject to the same eligibility requirements summarized in note 22 supra.

29 See id.

30 See id. at 8445.

31 As proposed in Partial Amendment No. 1, Users who order before December 31, 2022 would be charged $9,000 per month for Option E or $9,500 per month for Option F for the first 12 months of service. The Exchanges state that given the passage of time, extending this date beyond December 31, 2021, as originally proposed, would provide Users with the benefit of a longer period in which to order the proposed Partial Cabinet Bundles E and F with a reduced monthly rate, giving them more time to evaluate the benefits of these bundles as compared to bundles offered by various Hosting Users. See Partial Amendment No. 1 at 3-4.

32 15 U.S.C. 78s(b)(2)(C).

33 15 U.S.C. 78s(b)(2)(C)(i).

34 15 U.S.C. 78s(b)(2)(C)(ii). See also 17 CFR 201.700(b)(3).

and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."[35] Rule 700(b)(3) also states that "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."[36] Both the D.C. Circuit and the Commission have addressed the application of these and analogous standards, and the decision to disapprove the proposed rule changes is best understood in the context of that precedent.

A. The Relevant Precedent

1. The NetCoalition Litigation

In 2010, the D.C. Circuit vacated the Commission's approval of a fee rule filed by NYSE Arca.[37] The court held that focusing on whether competitive market forces constrained the exchange's pricing decisions was an acceptable basis for assessing the fairness and reasonableness of the fees, but determined that the record did not factually support the conclusion that significant competitive forces limited NYSE Arca's ability to set unfair or unreasonable prices. Although the D.C. Circuit vacated and remanded for further proceedings, it accepted the Commission's articulated "market-based approach" for assessing fees.[38]

Under the market-based approach, the Commission considers "whether the exchange was subject to significant competitive forces in setting the terms of its proposal …, including the

35 17 CFR 201.700(b)(3).

36 Id.

37 See NetCoalition v. SEC, 615 F.3d 525, 534-35, 539-44 (D.C. Cir. 2010) ("NetCoalition I").

38 Id.

level of any fees."[39] If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless "there is a substantial countervailing basis to find that the terms" of the rule violate the Act or the rules thereunder.[40] If an exchange cannot demonstrate that it was subject to significant competitive forces, it must "provide a substantial basis, other than competitive forces . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory."[41]

Subsequently, NYSE Arca filed with the Commission a new rule that imposed the same fees that had been vacated by the D.C. Circuit, but that designated the filing as effective immediately pursuant to a change in the law made by the Dodd-Frank Act.[42] The Securities Industry and Financial Markets Association ("SIFMA") filed a challenge with the Commission to NYSE Arca's 2010 fee rule under Section 19(d) of the Act on the ground that the fee rule was an improper limitation of access to exchange services. The Commission consolidated that challenge with another challenge to a fee rule filed by The Nasdaq Stock Market LLC.[43]

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39 Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (2008 ArcaBook Approval Order).

40 Id.

41 Id.

42 See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010). See also 15 U.S.C. 78s(b)(3)(A) (permitting SROs to designate as immediately effective rule changes "establishing or changing a due, fee, or other charge imposed by the [SRO] on any person, whether or not the person is a member of the [SRO]").

43 See In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 72182, (May 16, 2014), available at: https://www.sec.gov/litigation/opinions/2014/34-72182.pdf.

On October 16, 2018, the Commission issued its decision in the consolidated proceeding.[44] The Commission held that the exchanges had failed to meet their burden of establishing that certain challenged fees were consistent with the purposes of the Act. Specifically, the Commission concluded that the exchanges had not established that competitive forces constrained their pricing decisions with respect to the fees at issue and that the fees were fair and reasonable and not unreasonably discriminatory. In so finding, the Commission stated specifically that it was not making a determination that the fees themselves were not fair and reasonable. The Commission also explained that it was possible the challenged fees could be shown to be consistent with the Act, but that the evidence provided by the exchanges failed to satisfy their burden on the existing record. Accordingly, the Commission set those fees aside.[45] After an appeal by the affected exchanges, the D.C. Circuit issued its opinion, holding that Section 19(d) of the Act is not available as a means to challenge the reasonableness of generally-

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44 See In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 84432 (October 16, 2018), available at https://www.sec.gov/litigation/opinions/2018/34-84432.pdf ("SIFMA Decision"), vacated on other grounds, NASDAQ Stock Mkt., LLC v. SEC, 961 F.3d 421 (D.C. Cir. 2020). See text accompanying note 46 infra.

45 See id. at 17-54. During the pendency of this Section 19(d) challenge, over 60 related challenges to exchange rule changes and NMS plan amendments were filed with the Commission. Contemporaneously with the Commission's October 16, 2018 decision, the Commission issued a separate order remanding those related challenges to the respective exchanges and NMS plan participants and instructed the exchanges and plan participants to consider the impact of the October 16, 2018 decision on the challengers' assertions that the contested rule changes and plan amendments should be set aside under Section 19(d) of the Act. See In the Matter of the Applications of SIFMA and Bloomberg L.P., Securities Exchange Act Release No. 84433 (October 16, 2018), available at https://www.sec.gov/litigation/opinions/2018/34-84433.pdf. The Commission further directed the exchanges and NMS plan participants to develop or identify fair procedures for assessing the challenged rule changes and NMS plan amendments as potential denials or limitations of access to services. See id.

applicable fee rules, vacated the Commission's decision, and remanded for proceedings consistent with the court's opinion.[46]

2. Susquehanna

In August 2017, the D.C. Circuit issued its decision in Susquehanna International Group v. SEC.[47] There, the court held that the Commission's order approving a proposed rule change filed by the Options Clearing Corporation ("OCC")—its "Capital Plan"—did not provide the reasoned analysis required under the Act and the Administrative Procedure Act.[48] The court found that the Commission's analysis was flawed in that the Commission relied too heavily on OCC's representations rather than performing an independent analysis of the Capital Plan or critically evaluating OCC's analysis of the Plan.[49] The court emphasized that the Commission's "unquestioning reliance on OCC's defense of its own actions is not enough to justify approving the Plan"; rather, the Commission "should have critically reviewed OCC's analysis or performed its own."[50] Nor, according to the court, could the Commission reach a conclusion "unsupported by substantial evidence."[51] The D.C. Circuit remanded the case to the Commission for further proceedings.

Following the remand, the Commission disapproved the OCC Capital Plan because it determined that the information OCC submitted before the Commission was insufficient to

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46 See NASDAQ Stock Mkt., LLC v. SEC, 961 F.3d 421 (D.C. Cir. 2020).

47 866 F.3d 442 (D.C. Cir. 2017).

48 See id. at 447 (citing NetCoalition I).

49 See id.

50 Id.

51 Id. at 447-48.

support a finding that the plan was consistent with the Act.[52] In reaching this determination, the Commission reiterated the D.C. Circuit's holding that it must "critically evaluate the representations made and the conclusions drawn" by the SRO in determining whether a proposed rule change is consistent with the Act.[53]

B. The Proposed Rule Change at Issue Here

As discussed above, the Commission applies a market-based approach to assessing proprietary market data fees, which has also been applied to connectivity fees.[54] Under the market-based approach, the Commission considers "whether the exchange was subject to significant competitive forces in setting the terms of its proposal …, including the level of any fees."[55] If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless "there is a substantial countervailing basis to find that the terms" of the rule violate the Act or the rules thereunder.[56] If an exchange cannot demonstrate that it was subject to significant competitive forces, it must "provide a substantial basis, other than competitive forces . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory."[57]

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52 See Securities Exchange Act Release No. 85121 (February 13, 2019), 84 FR 5157 (February 20, 2019) (SR-OCC-2015-02).

53 Id. at 5157.

54 See Section III.A.1, supra.

55 Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (2008 ArcaBook Approval Order). See also NetCoalition I, supra note 37 at 535, and SIFMA Decision, supra note 44 at 22.

56 Id.

57 Id.

In support of the proposals, the Exchanges argue principally that the proposed Partial Cabinet Bundles and fees therefor are subject to significant competitive forces because they are offered in a competitive environment where substitutes are available.[58] Specifically, the proposal states that the Exchanges "operate in a highly competitive market in which exchanges and other vendors (e.g., Hosting Users) offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations.[59] In the First NYSE Response, the Exchanges further state that Hosting Users can and do offer a competing substitutable product.[60] In the Second NYSE Response, the Exchanges add that, currently, 89 percent of customers receiving bundled services via the Mahwah Data Center receive them from Hosting Users, while only 11 percent purchase them from the Exchanges as one of the existing Partial Cabinet Bundle Options A – D.[61] They state further that "the fact that the vast majority of customers obtain their bundles from Hosting Users shows that the Exchanges are subject to significant competitive forces in the market for bundled services."[62]

In addition, the Exchanges state that it is reasonable to set monthly charges of $18,000 for an Option E bundle (a $4,000 increase over Option C) and $19,000 for an Option F bundle (a $4,000 increase over Option D), "which reflects the fact that the Exchange will have to supply multiple 40 Gb connections in the Option E and F bundles, as opposed to the 10 Gb

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58 See infra Section II.B.2.

59 See Notice, 86 FR at 8445.

60 See First NYSE Response at 7-8.

61 See Second NYSE Response at 1.

62 See Second NYSE Response at 1.

connections included in the Option C and D."[63] They also urge that disapproval of the proposal would be unfair and would harm competition. The Commission's discussion below begins with the Exchanges' competition argument based on substitutability, and then turns to consideration of the Exchanges' other arguments.

After careful consideration, the Commission is disapproving the proposed rule changes, as modified by Partial Amendment No. 1, because the information before us is insufficient to support a finding that the proposed rule changes are consistent with the requirements of the Act. Specifically, the Commission is unable to find that the proposed rule changes are consistent with: (1) Section 6(b)(4) of the Act,[64] 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; (2) Section 6(b)(5) of the Act,[65] 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 investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (3) Section 6(b)(8) of the Act,[66] which requires that the rules of a national securities exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of

63 See Notice, 86 FR at 8445

64 15 U.S.C. 78f(b)(4).

65 15 U.S.C. 78f(b)(5).

66 15 U.S.C. 78f(b)(8).

the Act. Because an inability to make any of these determinations under the Act independently necessitates disapproving the proposal, the Commission disapproves the proposed rule changes.[67]

1. The Exchanges' competition-based argument in support of the proposed fee rules lacks sufficient information for the Commission to determine whether the proposed rule changes are consistent with the Act.

In their proposals, the Exchanges state that they operate "in a highly competitive market in which exchanges and other vendors (*e.g.*, Hosting Users) offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations."[68] In the First NYSE Response, they state that competition is demonstrated because substitutes for the proposed services are readily available from third-party providers, and specifically from the Exchanges' Hosting Users.[69] They also state that Partial Cabinet Bundle Options E and F are proposed in response to customer interest and for the purpose of competing with bundled services offered by Hosting Users.[70] The Exchanges further state that Hosting Users are third parties that pay a monthly fee to the Exchanges in exchange for permission to subdivide cabinets and resell those partial cabinets, along with other services, and, in this way, Hosting Users are third parties that offer services in

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67 In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f), and text accompanying notes 92-94 infra

68 See Notice, 86 FR at 8445.

69 See First NYSE Response at 7.

70 See First NYSE Response at 7-8 (stating, "approximately 10% of Users in colocation are Hosting Users capable of selling such bundles to customers," and "the Exchanges believe that at least one of the Hosting Users currently does offer a Hosting User Bundle that includes 40 Gb connections.").

direct competition with the Exchanges.[71] As noted above, the Exchanges state that competition is demonstrated by the fact that 89% of customers obtain their bundle services from alternate providers despite the availability of Partial Cabinet Bundle Options A - D from the Exchanges.[72]

The Exchanges have not provided sufficient information to demonstrate that the market for the proposed Partial Cabinet Bundles is competitive. As an initial matter, the Exchanges' broad rationale that fees for proposed Partial Cabinet Bundle Options E and F are, like fees for all co-location services, constrained by competition, is not supported with data and analysis. They state that "fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants," and that "if a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange [and pursue alternative strategies]."[73] However, they offer no evidence that substitutes for Partial Cabinet Bundle Options E and F may be available from other exchanges or vendors outside of the Mahwah Data Center. Instead, the Exchanges argue that substitutable services are available from Hosting Users.[74]

Based on the information provided, it appears that the market for the proposed Partial Cabinet Bundles could be accessed in two ways: directly from the Exchanges, or from Hosting

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71 See id. at 7.

72 See Second NYSE Response at 2.

73 See Notice, 86 FR at 8446.

74 See First NYSE Response at 9-11.

Users offering a similar product.[75] But it remains unclear how the presence of Hosting Users brings significant competitive forces to bear on Exchange pricing of the proposed products, if, as it appears, Hosting User access to the key services comprising the proposed Partial Cabinet Bundles is controlled by the Exchanges and the ability of a Hosting User to resell cabinet space and thereby obtain Hosted Customer business is contingent on payment of $1,000 per Hosted Customer for each cabinet in which such Hosted Customer is hosted.

The Exchanges argue that they compete with their Hosting Users, and that the proposal is an attempt to "to maintain a more level playing field between the Exchanges and the Hosting Users, who compete for Hosted Customer business."[76] They also urge that Hosting Users have freedom in the relevant market that the Exchanges lack, stating: "Hosting Users are free to create a wide array of bespoke bundles of services for specific customers, charging whatever fees those customers will pay, without having to file such services with the Commission. Because Hosting Users are not required to pre-clear such bundles with the Commission, they have unfettered freedom to compete *with each other* in the market for partial cabinet bundled services."[77] The Exchanges state that there are currently five Hosting Users available to offer similar substitutes, with at least one currently believed to have a customer.[78] Further, the Exchanges state that they

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75 In the First NYSE Response, the Exchanges state that acquiring a partial cabinet from Hosting Users is not the only way that a customer could acquire the services contained in the proposal. They state that customers could buy a partial cabinet from the Exchanges without any network connectivity, then cross-connect to a Hosting User for access to network connections. See First NYSE Response at 8. Such partial cabinet and network connectivity would have to be purchased from the Exchanges, however, as would the cross connects.

76 See Notice, 86 FR at 8446.

77 See First NYSE Response at 7 (italics added).

78 See note 70 supra.

do not expect the availability of proposed Options E and F to cause customers that currently obtain bundled services from Hosting Users to migrate their business to the Exchanges, because the freedoms that Hosting Users have put Hosting Users in a superior competitive position relative to the Exchanges in the provision of bundled services.[79]

These arguments are not sufficient to demonstrate the presence of a competitive market for the proposed Partial Cabinet Bundles. In order for it to offer the substitute services that the Exchanges claim will bring competitive forces to bear on fees, a Hosting User must accept the Exchanges' operational environment, purchase the key services comprising the Partial Cabinet Bundles (*e.g.*, cabinet space, power, bandwidth connections) from the Exchanges, and bear the applicable Hosting Fees. In this environment,[80] the Exchanges impose charges that represent a portion of the costs of their competitors, the Hosting Users. While offering Options E and F may expand the range of co-location offerings available, the extent to which these offerings will result in Hosting Users being able to offer similar services concomitantly with the Exchanges at a competitive price is unclear. The evidence regarding Options A-D provided in the Second NYSE Response is not evidence regarding Options E-F, and so does not provide support for the Exchanges' competition arguments. The Exchanges do not explain how Hosting Users may compete with the Exchanges when access to the services comprising the proposed Partial Cabinet Bundles is controlled by the Exchanges. Neither do they explain how the presence of Hosting Users is a force that constrains the Exchanges' pricing decisions.[81] Further, it remains

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79 See Second NYSE Response at 2.

80 As noted above, the physical environment is in space proximate to the Exchanges' trading engines and market data systems, over which the Exchanges have control.

81 See, e.g., NetCoalition I at 542 ("the existence of a substitute does not necessarily preclude market power. . . . Rather, whether a market is competitive notwithstanding potential alternatives depends on factors such as the number of buyers who consider other

unclear how the proposals would result in a more level playing field between the Exchanges and Hosting Users, which the Exchanges state is their goal. Because the Exchanges have not provided sufficient evidence to establish that competitive forces constrain their ability to price the proposed Partial Cabinet Bundles, they must provide an alternative basis to support the proposed fees.[82]

2. The Exchanges' other arguments lack sufficient information for the Commission to determine whether the proposed rule changes are consistent with the Act.

Under the market-based approach, if an exchange cannot demonstrate that it was subject to significant competitive forces, it must "provide a substantial basis, other than competitive forces, . . . demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory."[83] The Exchanges have not done so on the record here.

In support of the fee levels proposed for Partial Cabinet Bundle Options E and F, the Exchanges state that the $10,000 initial charge is reasonable because it is the same as that which Users currently pay when choosing the existing Option C or D bundles, which reflects the fact that setting up each of these four cabinet options involves a similar amount of work for the Exchanges.[84] They also state that the proposed monthly charges of $18,000 for an Option E bundle (a $4,000 increase over Option C) and $19,000 for an Option F bundle (a $4,000 increase

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products interchangeable and at what prices. . . . The inquiry into whether a market for a product is competitive, therefore, focuses on the customer and, in particular, his price sensitivity—in economic terms, the product's 'elasticity of demand.'"); and id. at 544 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C.Cir.2001) ("The test of reasonable interchangeability . . . consider[s] only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function.").

82 See supra note 57 and accompanying text.

83 See id.

84 See Notice, 86 FR at 8445.

over Option D) are reasonable because these fees reflect the fact that the Exchanges will have to supply more expensive multiple 40 Gb connections in the Option E and F bundles, as opposed to the 10 Gb connections included in the Option C and D bundles.[85] However, although these arguments appear generally to be based on the costs incurred by the Exchanges in providing the proposed Partial Cabinet Bundles, the Exchanges provide no specific cost information to support their arguments. In making any finding or determination, the Commission cannot "[s]imply accept what the [SRO] has done," and cannot have an "unquestioning reliance" on an SRO's representations in a proposed rule change.[86] Without more, these statements do little to inform the analysis into the level of the particular fees proposed here.

The Exchanges also assert that the Commission may be applying improper standards to the rule filings.[87] Specifically, the First NYSE Response expresses the concern that the Commission may be improperly demanding that the Exchanges provide cost data in connection with all rule filings, even where the Exchanges have demonstrated that sufficient competition exists.[88] The Exchanges are incorrect. As described above, the Commission takes a market-based approach to assessing proprietary market data fees, which has also been applied to connectivity fees. The Commission considers "whether the exchange was subject to significant competitive forces in setting the terms of its proposal …, including the level of any fees."[89] If an

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85 Id.

86 See Susquehanna supra note 47, 866 F.3d 442 (D.C. Cir. 2017).

87 See First NYSE Response at 4-7.

88 See id.

89 Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (2008 ArcaBook Approval Order). See also NetCoalition I, supra note 37 at 535, and SIFMA Decision, supra note 44 at 22.

exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless "there is a substantial countervailing basis to find that the terms" of the rule violate the Act or the rules thereunder.[90] If an exchange cannot demonstrate that it was subject to significant competitive forces, it must "provide a substantial basis, other than competitive forces . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory."[91]

Finally, the Exchanges argue that disapproval of the proposals would be harmful to competition.[92] The Exchanges indicate that their inability to offer Partial Cabinet Bundles with 40 Gb connections hinders competition with Hosting Users, and may deny more cost effective alternatives for Users with minimal power or cabinet space demands, but higher bandwidth requirements.[93] The Commission encourages the Exchanges to propose rule changes that enhance competition, and the Exchanges are free to refile these fees and accompany them with an updated explanation demonstrating that their proposals are consistent with the Act.[94] For the reasons discussed above, they have not met this burden on the current record.

IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule changes, as modified by Partial Amendment No. 1, are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, Sections

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90 Id.

91 Id.

92 See First NYSE Response at 9-10.

93 See id. at 9.

94 See supra 67.

6(b)(4), 6(b)(5), and 6(b)(8) of the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[95] that the proposed rule changes (SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01), each as modified by Partial Amendment No 1, be, and hereby are, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[96]

J. Matthew DeLesDernier
Assistant Secretary

95 15 U.S.C. 78s(b)(2).

96 17 CFR 200.30-3(a)(12).