

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57611; File No. SR-NYSE-2008-20)

April 3, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto Relating to Exchange Rule 36 (Communications Between Exchange and Member's Offices) to Make Permanent an Existing Portable Phone Pilot

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 17, 2008, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On March 27, 2008, the Exchange submitted Amendment No. 1 to the proposed rule change.³ On April 2, 2008, the Exchange submitted Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange is proposing to amend Exchange Rule 36 (Communications Between

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange included the rule text of Exchange Rule 36 as originally approved by the Commission as a pilot and subsequently amended to include Registered Competitive Market Makers ("RCMMs"). See notes 6 and 8 infra. Amendment No. 1 replaced the original filing in its entirety. See also note 4 infra.

⁴ Amendment No. 2 replaced Amendment No. 1 in its entirety. In Amendment No. 2, the Exchange included an inadvertently omitted portion of the text of Exchange Rule 36. Amendment No. 2 amends Exhibit 5 of the 19b-4 so that it accurately reflects the existing portable phone pilot and the text of Exchange Rule 36 as it will appear upon permanent approval of the pilot.

Exchange Member's Offices) to make permanent the existing portable phone pilot (the "Pilot").⁵

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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Through this rule change, the Exchange seeks to amend Exchange Rule 36 to allow Floor brokers and Registered Competitive Market-Makers ("RCMMs")⁴ to use Exchange authorized and provided portable phones on the Exchange Floor, provided certain specified conditions are met. Such usage has been permitted on a pilot basis. The current Pilot expires on April 30, 2008, and the NYSE seeks to have the amendment to Exchange Rule 36 made permanent.

Background

The Commission originally approved the Pilot to be implemented for a six-month period⁵ beginning no later than June 23, 2003.⁶ Since the inception of the Pilot, the Exchange has

⁵ See also note 9 *infra*. Member Education Bulletins ("MEBs") and acknowledgment forms are part of the rule proposal.

⁴ See Exchange Rule 107A, which defines and governs the registration and dealings of RCMMs.

⁵ See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR-NYSE-2002-11).

⁶ See Securities Exchange Act Release No. 47992 (June 5, 2003), 68 FR 35047 (June 11, 2003) (SR-NYSE-2003-19) (delaying the implementation date for portable phones from on or about May 1, 2003, to no later than June 23, 2003).

extended the Pilot nine times, with the current Pilot set to expire on April 30, 2008.⁷ In 2006, the Exchange incorporated RCMs into the Pilot and subsequently amended the Pilot to allow RCMs to use an Exchange authorized and provided portable phone on the Exchange Floor to call to and receive calls from their booths on the Exchange Floor.⁸

Exchange Rule 36 governs the establishment of telephone or electronic communications between the Exchange Floor and any other location. Prior to the Pilot, Exchange Rule 36 prohibited the use of portable phone communications between the Exchange Floor and any off-Floor location. The only approved communication by Floor brokers between the Exchange Floor and an off-Floor location prior to the Pilot was by means of a telephone located at a broker's booth. Communications often involved a customer calling a broker at the booth for "market look" information. Prior to the Pilot, a broker could not use a portable phone in a trading Crowd at the point of sale to speak with a person located off the Exchange Floor.

⁷ See Securities Exchange Act Release Nos. 48919 (December 12, 2003), 68 FR 70853 (December 19, 2003) (SR-NYSE-2003-38) (extending the Pilot for an additional six months ending on June 16, 2004); 49954 (July 1, 2004), 69 FR 41323 (July 8, 2004) (SR-NYSE-2004-30) (extending the Pilot for an additional five months ending on November 30, 2004); 50777 (December 1, 2004), 69 FR 71090 (December 8, 2004) (SR-NYSE-2004-67) (extending the Pilot for an additional four months ending March 31, 2005); 51464 (March 31, 2005), 70 FR 17746 (April 7, 2005) (SR-NYSE-2005-20) (extending the Pilot for additional four months ending July 31, 2005); 52188 (August 1, 2005), 70 FR 46252 (August 9, 2005) (SR-NYSE-2005-53) (extending the Pilot for an additional six months ending January 31, 2006); 53277 (February 13, 2006), 71 FR 8877 (February 21, 2006) (SR-NYSE-2006-03) (extending the Pilot for an additional six months ending July 31, 2006); 54276 (August 4, 2006), 71 FR 45885 (August 10, 2006) (SR-NYSE-2006-55) (extending the Pilot for an additional six months ending January 31, 2007); 55218 (January 31, 2007), 72 FR 6025 (February 8, 2007) (SR-NYSE-2007-05) (extending the Pilot for an additional twelve months ending January 31, 2008); and 57249 (January 31, 2008), 73 FR 7024 (February 6, 2008) (SR-NYSE-2008-10) (extending the Pilot for an additional three months ending April 30, 2008).

⁸ See Securities Exchange Act Release Nos. 53213 (February 2, 2006), 71 FR 7103 (February 10, 2006) (SR-NYSE-2005-80) and 54215 (July 26, 2006), 71 FR 43551 (August 1, 2006) (SR-NYSE-2006-51).

Under the Pilot, sections .21 and .22 of Exchange Rule 36 delineate the conditions under which Floor brokers and RCMs, respectively, are allowed to use an Exchange authorized and provided portable phone on the Exchange Floor.⁹ Currently, under the Pilot, with the approval of the Exchange, a Floor broker is permitted to engage in direct voice communication from the point of sale to an off-Floor location, such as a member firm's trading desk or the office of one of the broker's customers. Such communications permit the broker to accept orders consistent with Exchange rules, provide status and oral execution reports as to orders previously received, as well as "market look" observations as historically have been routinely transmitted from a broker's booth location.

Both incoming and outgoing calls are allowed, provided the requirements of all other Exchange rules have been met. A Floor broker is not permitted to represent and execute any order received as a result of such voice communication unless the order is first properly recorded by the member and entered into the Exchange's Front End Systemic Capture (FESC) electronic database.¹⁰ In addition, Exchange Rules require that Floor brokers receiving orders from the

⁹ See MEBs 2005-20 (November 28, 2005) and 2005-23 (December 2, 2005). MEBs describe the conditions for the use of a portable phone by Floor brokers and RCMs, the acknowledgement procedure, and the rule text. These MEBs were previously filed as exhibits with the Commission in connection with the operation of the Pilot. See Securities Exchange Act Release No. 53213 (February 2, 2006), 71 FR 7103 (February 10, 2006) (SR-NYSE-2005-80). Revised MEBs will be sent to all Floor brokers and RCMs utilizing portable phones pursuant to Exchange Rule 36.

¹⁰ See Exchange Rule 123(e). See also Securities Exchange Act Release Nos. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (SR-NYSE-98-25) and 44943 (October 16, 2001), 66 FR 53820 (October 24, 2001) (SR-NYSE-2001-39) (discussing certain exceptions to FESC, such as orders to offset an error, or a bona fide arbitrage, which may be entered within 60 seconds after a trade is executed).

public over portable phones must be properly qualified to engage in such direct access business under Exchange Rules 342 and 345, among others.¹¹

It is impermissible for Floor brokers to use call-forwarding or conference calling. Accordingly, Exchange authorized and provided portable phones used by Floor brokers do not have call forwarding or conference calling capabilities, and Floor brokers and their member organizations must have procedures designed to deter anyone calling their portable phone from using caller ID block or attempting to conceal the phone number from which the call is being made. Moreover, members and member organizations must make and retain records which reflect compliance with these procedures.

The Pilot also allows RCMMs to use an Exchange authorized portable phone solely to call and receive calls from their booths on the Exchange Floor, to communicate with their or their member organizations' off-Floor office, and to communicate with the off-Floor office of their clearing member organization to enter off-Floor orders and to discuss matters related to the clearance and settlement of transactions, provided the off-Floor office uses a wired phone line for these discussions. RCMMs and their or their member organization's off-Floor offices may not use portable phones to transmit to the Exchange Floor orders for the purchase or sale of securities by public customers or any other agency business.¹² For both RCMMs and Floor brokers, use of a portable phone on the Exchange Floor other than one authorized and provided by the Exchange is prohibited.

¹¹ For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, see Information Memos 01-41 (November 21, 2001), 01-18 (July 11, 2001) (available at www.nyse.com), and 91-25 (July 8, 1991).

¹² Allowing RCMMs acting as Floor brokers to use portable phones would involve further discussions with the Commission and would be the subject of a separate filing with the Commission.

It is impermissible for RCMMs, their booth personnel, their member organization's off-Floor office, and their clearing member organization's off-Floor office to use call-forwarding or conference calling. Accordingly, Exchange authorized and provided portable phones used by RCMMs do not have call forwarding or conference calling capabilities and booth phones used to make calls to and receive calls from RCMMs are prohibited from having call forwarding or conference calling features enabled. RCMMs and their member organizations must implement procedures designed to deter their or their member organization's off-Floor office and the off-Floor office of their clearing member organization calling their portable phone from using caller ID block or any other means designed to conceal the phone number from which the call is being made.

Use of the portable phone by Floor brokers and RCMMs pursuant to sections .21 and .22 of Exchange Rule 36 must comply with all other rules, policies, and procedures of both the federal securities laws and the Exchange, including the record retention requirements, as set forth in Exchange Rule 440 and SEC Rules 17a-3 and 17a-4. Further, every Floor broker and RCMM must sign a written agreement consenting to specified terms of usage in connection with the operation of the Pilot and their use of the Exchange authorized and provided portable phones.¹³

¹³ Floor brokers and RCMMs agree to comply with sections .20, .21, and .22 of Exchange Rule 36, all other rules, policies, and procedures of both federal securities laws and the Exchange, including the record retention requirements of Exchange Rule 440 and Rules 17a-3 and 17a-4 under the Act, and acknowledge that the Exchange has the right to request from their Exchange authorized portable phone service provider any records relating to incoming and outgoing calls that NYSE Regulation, Inc. deems necessary. Floor brokers additionally agree that to the extent they are aware that a customer or any other incoming caller is using a caller ID block, the Floor broker will request in writing that the customer/caller disable such block when calling the Floor broker. Such written request must be documented and a copy of the same retained. RCMMs acknowledge that they may only call and receive calls from the locations delineated in section .22 of Exchange Rule 36. RCMMs additionally agree to disable the functionality that allows

Specialists are subject to separate restrictions in Exchange Rule 36 on their ability to engage in communications from the specialist post to an off-Floor location.¹⁴ The amendments to Exchange Rule 36 proposed in this filing will not apply to specialists, who would continue to be prohibited from communicating from the post to upstairs trading desks or customers.¹⁵

Pilot Program Results

Currently, there are approximately 400 portable phone subscribers.¹⁶ For a sample week of October 15 through October 19, 2007, an average of 2,518 calls/day were outgoing calls from portable phones issued to Floor brokers and RCMMs. An average of 960 calls/day were incoming calls to the portable phones. Of the outgoing calls from portable phones, an average of 1,026 calls/day were calls to the booth by Floor brokers and RCMMs, and 1,492 calls/day were calls by RCMMs to the upstairs offices of their member organization and their clearing member organization and calls of Floor brokers. Approximately 41% of the outgoing calls from portable phones were calls to the booth by Floor brokers and RCMMs.

Of the 960 average incoming calls/day received, an average of 337 calls/day were calls to RCMMs from the upstairs offices of their member organization and their clearing member organization and calls to Floor brokers. An average of 623 calls/day were calls received from

call-forwarding, conference calling, caller ID block, or any other means to conceal the phone number from which the call is being made.

¹⁴ See Securities Exchange Act Release No. 46560 (September 26, 2002), 67 FR 62088 (October 3, 2002) (SR-NYSE-00-31) (discussing restrictions on specialists' communications from the post).

¹⁵ Exchange Rule 36.30 provides that, with the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Exchange Floor orders for the purchase or sale of securities, but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm, or through a member (on the Exchange Floor) of an options or futures exchange.

¹⁶ This data includes both Floor brokers and RCMMs.

the booth. Thus, approximately 65% of all incoming calls received were from the booth and the remaining 35% of incoming calls received were calls to RCMMs from the upstairs offices of their member organization and their clearing member organization and calls to Floor brokers.¹⁷

The Exchange believes that the Pilot is operating successfully in that there is a reasonable degree of usage of portable phones. Based on the Pilot, the Exchange has not identified any additional significant regulatory issues to report at this time. Moreover, there have been no administrative or technical problems, other than routine telephone maintenance issues, that have resulted from the operation of the Pilot over the past few months.

Proposal to Make Portable Phone Pilot Permanent

The Exchange proposes to make permanent the amendment to Exchange Rule 36 permitting a Floor broker and an RCMM to use an Exchange authorized and issued portable phone on the Exchange Floor.

The permanent incorporation of the Pilot's provisions will enable the Exchange to continue to provide more direct, efficient access to its trading crowds and customers, increase the speed of transmittal and execution of orders, and provide an enhanced level of service to customers in an increasingly competitive environment. In particular, by enabling customers to speak directly to a Floor broker in a trading crowd on an Exchange authorized and issued portable phone, the proposed rule change will continue what has become a more expeditious and direct free flow of information than the circuitous manner in which information was transmitted prior to the Pilot.

¹⁷ The Exchange has received records of incoming and outgoing telephone calls from January 31, 2007, through January 31, 2008, for Floor brokers and RCMMs and will continue to receive records of such telephone calls on a monthly basis.

The Exchange believes that the successful operation of the Pilot since 2003 for Floor brokers with the inclusion of RCMMs in 2006 amply demonstrates that the Pilot facilitates communication on the Exchange Floor for both Floor brokers and RCMMs without any corresponding drawbacks. Therefore, the Exchange believes it is appropriate to amend Exchange Rule 36 to make permanent the existing Pilot.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) of the Act¹⁸ that an Exchange have rules that are designed 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. The amendment to Exchange Rule 36 supports the mechanism of free and open markets by providing a means for increased communication by Floor brokers and RCMMs to and from the Exchange Floor.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds

¹⁸ 15 U.S.C. 78f(b)(5).

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (a) by order approve such proposed rule change; or
- (b) institute proceedings to determine whether the proposed rule change should be 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-NYSE-2008-20 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-20. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2008-20 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.¹⁹

Florence E. Harmon
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).