

thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of the ISE. All submissions should refer to the ISE letter of File No. SR-ISE-2002-24 and should be submitted by February 18, 2003.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>7</sup> and, in particular, the requirements of section 6 of the Act.<sup>8</sup> Specifically, the Commission finds that the proposal to require ISE market makers to be firm for up to their disseminated amount to all orders, other than matching ISE market maker quotations, is consistent with section 6(b)(5) of the Act,<sup>9</sup> in that by ensuring that a larger number of orders may be executed at a better price, the proposed rule change has been designed to remove impediments to and to perfect the mechanism of a free and open market and a national market system, while also protecting investors and the public interest.

The original rule proposal, including the proposal to add ISE rule 805(c), which the ISE subsequently withdrew by letter, was noticed for public comment on November 1, 2002. No comments were received on any aspect of the proposal. Because the ISE letter merely withdraws one provision of the proposal, which was previously published for comment, and because by withdrawing the one provision to add ISE rule 805(c), no other aspect of the proposal is affected, the Commission believes that approving this change to the proposal on an accelerated basis is appropriate. Accordingly, pursuant to section 19(b)(2) of the Act,<sup>10</sup> the

Commission finds good cause to approve the change to the proposal set forth in the ISE Letter prior to the thirtieth day after notice of the ISE letter is published in the **Federal Register**.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (File No. SR-ISE-2002-24) is hereby approved, as amended by the ISE letter, which is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-1882 Filed 1-27-03; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47221; File No. SR-NYSE-2002-11]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Establish a Six-Month Pilot Program Permitting a Floor Broker To Use an Exchange Authorized and Issued Portable Telephone on the Exchange Floor

January 21, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 28, 2002, the New York Stock Exchange, Inc. ("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 prepared by the Exchange. On December 30, 2002, the Exchange filed an amendment to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

<sup>1</sup> 15 U.S.C. 78s(b)(2).

<sup>2</sup> 17 CFR 200.30-3(a)(12).

<sup>3</sup> 15 U.S.C. 78s(b)(1).

<sup>4</sup> 17 CFR 240.19b-4.

<sup>5</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 30, 2002 ("Amendment No. 1"). Amendment No. 1 replaces the filing in its entirety and provides, in the proposed rule text and the purpose section of the filing, clarification and further details on the use of Exchange authorized and issued portable telephones on the Exchange floor.

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

The Exchange proposes to amend NYSE rule 36 (Communication Between Exchange and Members' Offices) to allow a Floor broker's use of an Exchange authorized and provided portable telephone on the Exchange Floor upon approval by the Exchange, by deleting the current prohibition against such use. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in brackets.

#### Rule 36 Communications Between Exchange and Members' Offices

No member or member organization shall establish or maintain any telephonic or electronic communication between the Floor and any other location without the approval of the Exchange. The Exchange may to the extent not inconsistent with the Securities Exchange Act of 1934, as amended, deny, limit or revoke such approval whenever it determines, in accordance with the procedures set forth in Rule 475, that such communication is inconsistent with the public interest, the protection of investors or just and equitable principles of trade.

#### Supplementary Material

.10 Installation of telephone lines to Exchange.—The Telephone Company will not recognize any order for the installation or disconnection of a telephone line between the Floor and any other location, except such orders as are issued by the Exchange directly to the Telephone Company.

Requests for telephone lines should be sent to Market Operations Division. Members or member organizations who desire such installations or disconnections should present their requests sufficiently in advance of the desired effective date to avoid any inconvenience resulting from insufficient notice to the Telephone Company.

.20 With the approval of the Exchange, a member or member organization *other than a specialist or specialist member organization* may maintain a telephone line or use an *Exchange authorized and provided portable telephone* which permits a non-member off the Floor to communicate with a member or member organization on the Floor. *However, use of an Exchange authorized and provided portable telephone is not permitted for orders in Investment Company Units (as defined in Section*

<sup>7</sup> The Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

703.16 of the Listed Company Manual). In addition, any Floor broker receiving orders from the public over portable phones must be properly qualified under Exchange rules to conduct such business (See, for e.g., Rules 342 and 345.) The use of a portable telephone on the Floor other than one authorized and issued by the Exchange is prohibited.

In the case of members or member organizations acting solely in connection with transactions in "baskets" (as Rule 800 (Basket Trading: Applicability and Definitions) defines that term), the Exchange may approve the maintenance of such telephone lines at the basket trading location. In all other instances, the Exchange will approve the maintenance of such telephone lines only at the booth location of a member or member organization. [The Exchange will not approve the use of a portable telephone on the Floor].

## 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, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in item IV below and is set forth in sections A, B, and C below.

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

#### 1. Purpose

NYSE rule 36 governs the establishment of telephone or electronic communications between the Exchange's Trading Floor and any other location. Rule 36.20 prohibits the use of portable telephone communications between the Trading Floor and any off-Floor location. The only way that voice communication can be conducted today by Floor brokers between the Trading Floor and an off-Floor location is by means of a telephone located at a broker's booth. Communications often involve a customer calling a broker at the booth for "market look" information. A broker may not use a portable phone currently in a trading crowd at the point of sale to speak with a person located off the Floor.

The Exchange is proposing to amend NYSE rule 36 to permit a Floor broker to use an Exchange authorized and issued portable telephone on the Floor.

Currently, the Exchange does not permit the use of portable telephones on its Floor. Thus, with the approval of the Exchange, a Floor broker would be 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 would 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 are routinely transmitted from a broker's booth location today. Use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange would continue to be prohibited.

Both incoming and outgoing calls would be allowed, provided the requirements of all other Exchange rules have been met. A broker would not be permitted to represent and execute any order received as a result of such voice communication unless the order was first properly recorded by the member and entered into the Exchange's Front End Systemic Capture (FESC) electronic database.<sup>4</sup> In addition, Exchange rules require that any Floor broker receiving orders from the public over portable phones must be properly qualified to do direct access business under Exchange rules 342 and 345, among others.<sup>5</sup>

The Exchange would not permit portable communications at the point of sale for orders in Investment Company Units (as defined in Section 703.16 of the Listed Company Manual), also known as Exchange-Traded Funds (ETFs), since orders in ETFs can first be executed and then entered into FESC.<sup>6</sup> Technical restraints would be developed to implement this policy,

<sup>4</sup> See Securities Exchange Act Release No. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (SR-NYSE-98-25). See also Securities Exchange Act Release No. 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).

<sup>5</sup> For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, see Information Memo 01-41 (November 21, 2001), Information Memo 01-18 (July 11, 2001) (available on [www.nyse.com/regulation/regulation.html](http://www.nyse.com/regulation/regulation.html)), and Information Memo 91-25 (July 8, 1991).

<sup>6</sup> See Securities Exchange Act Release No. 45246 (January 7, 2002), 67 FR 1527 (January 11, 2002) (SR-NYSE-2001-52) (discussing an exception to FESC that allows ETFs to be entered within 90 seconds of execution). See also Securities Exchange Act Release No. 46713 (October 23, 2002), 67 FR 66033 (October 29, 2002) (SR-NYSE-2002-48) (extending the exception until January 5, 2004).

thus preventing the use of portable phones where ETFs currently trade.

This proposal would be implemented as a six-month pilot from the date of Commission approval with a commitment by the Exchange to complete within three months of Commission approval a study of communications on the Exchange Floor, pursuant to a recommendation of an Independent Consultant retained by the Exchange.<sup>7</sup>

Under the current policy, an off-Floor customer can communicate with a broker in a trading crowd only in an indirect, second-hand fashion by calling a broker's booth and using the booth clerk as an intermediary. The Exchange believes that eliminating the current restriction against the use of portable telephones would enable the Exchange to provide more direct, efficient access to its trading crowds and customers, increase the speed of transmittal of orders and the execution of trades, and provide an enhanced level of service to customers in an increasingly competitive environment.<sup>8</sup> By enabling customers to speak directly to a Floor broker in a trading crowd on an Exchange authorized and issued portable telephone, the proposed rule change would, in the Exchange's view, expedite and make more direct the free flow of information which today has to be transmitted somewhat more circuitously via the broker's booth.

Specialists are subject to separate restrictions in NYSE rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.<sup>9</sup> The Exchange's proposed amendment to NYSE rule 36 would not apply to specialists, who would continue to be prohibited from speaking from the post to upstairs trading desks or customers.

#### 2. Statutory Basis

The Exchange represents that the statutory basis for this proposed rule change is the requirement under section 6(b)(5) of the Act<sup>10</sup> that an exchange have rules that are designed to promote just and equitable principles of trade, to

<sup>7</sup> See *In the Matter of New York Stock Exchange*, 70 S.E.C. Docket 106, Release No. 41574, 1999 WL 430863 (June 29, 1999).

<sup>8</sup> See Securities Exchange Act Release No. 43836 (January 11, 2001), 66 FR 6727 (January 22, 2001) (SR-PCX-00-33) (discussing and approving the Pacific Exchange, Inc.'s proposal to remove the current prohibition against Floor brokers' use of cellular or cordless phones to make calls to persons located off the trading floor).

<sup>9</sup> 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).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the amended proposed change to NYSE rule 36 supports the mechanism of free and open markets by providing for increased means by which communications to and from the Floor of the Exchange may take place.

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

The Exchange does not believe that the proposed rule change, as amended, 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 such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the 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, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. 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. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All should refer to File No. SR-NYSE-2002-11 and should be submitted by February 18, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-1879 Filed 1-27-03; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47215; File No. SR-NYSE-2002-50]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Adopt Amendments to Exchange Rules 450 ("Restrictions on Giving of Proxies"), 451 ("Transmission of Proxy Material"), 452 ("Giving Proxies by Member Organizations"), and 465 ("Transmission of Interim Reports and Other Material")

January 17, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 16, 2002, the New York Stock Exchange, Inc. ("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 prepared by the NYSE. On December 19, 2002, the NYSE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> 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 NYSE is proposing to amend NYSE rule 450 ("Restriction on Giving

of Proxies"), NYSE rule 451 ("Transmission of Proxy Material"), NYSE rule 452 ("Giving Proxies by Member Organizations"), and NYSE rule 465 ("Transmission of Interim Reports and Other Material") to allow authorized state-registered investment advisers to receive and vote proxy materials on behalf of beneficial owners. The text of the proposed rule change is below. Proposed new language is in italics; deleted language is in brackets.

#### Restriction on Giving of Proxies

Rule 450. No member organization shall give or authorize the giving of a proxy to vote stock registered in its name, or in the name of its nominee, except as required or permitted under the provisions of rule 452, unless such member organization is the beneficial owner of such stock. Notwithstanding the foregoing,

(1) Any member organization, designated by a named fiduciary as the investment manager of stock held as assets of an ERISA Plan that expressly grants discretion to the investment manager to manage, acquire, or dispose of any plan asset and which has not expressly reserved the proxy voting right for the named fiduciary, may vote the proxies in accordance with its ERISA Plan fiduciary responsibilities; and

(2) Any person registered as an investment adviser, *either* under the Investment Advisers Act of 1940 *or under the laws of a state*,<sup>4</sup> who exercises investment discretion pursuant to an advisory contract for the beneficial owner and has been designated in writing by the beneficial owner to vote the proxies for stock which is in the possession or control of the member organization, may vote such proxies.

#### Transmission of Proxy Material

Rule 451. (a) Whenever a person soliciting proxies shall furnish a member organization:

(1) [C]opies of all soliciting material which such person is sending to registered holders, and

(2) satisfactory assurance that [he] *the person* will reimburse such member organization for all out-of-pocket expenses, including reasonable clerical expenses, incurred by such member organization in connection with such solicitation,

such member organization shall transmit to each beneficial owner of stock which is in its possession or

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Darla Stuckey, Corporate Secretary, NYSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated December 19, 2002 ("Amendment No. 1"). In Amendment No. 1, the NYSE revised the first footnote of proposed NYSE rule 451 to define the term "state" by reference to the Investment Advisers Act of 1940, instead of the Securities Exchange Act of 1934

<sup>4</sup> The term "state" as used herein shall have the meaning given to such term in Section 3(a)(16) of the Investment Advisers Act of 1940, and as such term may be amended from time to time therein.