

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57249; File No. SR-NYSE-2008-10)

January 31, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Rule 36 (Communication Between Exchange and Exchange Members' Offices)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 30, 2008, the New York Stock Exchange LLC ("NYSE" 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 substantially prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 seeks to extend its current portable phone pilot (the "Pilot") operating pursuant to Exchange Rule 36 from its scheduled January 31, 2008 expiration date to April 30, 2008.

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

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

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

The Exchange seeks to extend the Pilot operating pursuant to Exchange Rule 36 from the Pilot's scheduled January 31, 2008 expiration date to April 30, 2008. Pursuant to the Pilot, Floor brokers and Registered Competitive Market Makers ("RCMM") are permitted to use an Exchange authorized and provided portable telephone on the Exchange Floor provided certain conditions are met.

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 extended the Pilot eight times, with the current Pilot expiring on January 31, 2008.⁷ Exchange

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

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).

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 four 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

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 telephone communication between the Exchange Floor and any off-Floor location.

During the operation of the Pilot, Floor brokers and RCMMs may use Exchange authorized and issued portable telephones on the Exchange Floor. Floor brokers are 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 governing the entry of orders on the Exchange Floor;⁸ provide status and oral execution reports as to orders previously received, as well as "market look" observations as have historically 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

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); and 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). Also, the Exchange has incorporated RCMMs into the Pilot and subsequently amended the Pilot to allow RCMMs to use an Exchange authorized and provided portable telephone on the Exchange Floor to call to and receive calls from their upstairs offices, the upstairs offices of their clearing firm, and their booth locations on the Exchange Floor. 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).

⁸ Floor brokers receiving orders from the public over portable phones must be properly qualified to engage in such "direct access" business under Exchange Rules 342 and 345, among others. See also note 10 infra.

database (Exchange Rule 123(e)).⁹ In addition, Exchange rules require that any Floor broker receiving orders from the public over portable phones must be properly qualified to engage in such direct access business under Exchange Rules 342 and 345, among others.¹⁰

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 telephone line for these discussions. RCMMs, who trade for their own accounts on the Exchange Floor subject to the requirements of Exchange Rule 107A, are currently not allowed to use a portable phone to conduct any agency business.¹¹ For both RCMMs and Floor brokers, use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange is prohibited.

Specialists are subject to separate restrictions in Exchange Rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.¹² The Pilot

⁹ 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).

¹⁰ 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 on www.nyse.com/regulation/) and 91-25 (July 8, 1991).

¹¹ 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.

¹² 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).

does not apply to specialists, who would continue to be prohibited from speaking from the post to upstairs trading desks or customers.¹³

Pilot Program Results

Currently, there are approximately 400 portable phone subscribers.¹⁴ For a sample week of October 15 through October 19, 2007, an average of 2,518 calls/day was outgoing calls from portable phones issued to Floor brokers and RCMMs. An average of 960 calls/day was incoming calls to the portable phones. Of the outgoing calls from portable phones, an average of 1,026 calls/day was internal calls to the booth by Floor brokers and RCMMs, and 1,492 calls/day was external calls by RCMMs to the upstairs offices of their member organization and their clearing member organization and external calls of Floor brokers. Thus, approximately 47% of the outgoing calls from portable phones were internal calls to the booth by Floor brokers and RCMMs.

Of the 960 average incoming calls/day received, an average of 337 calls/day was external calls to RCMMs from the upstairs offices of their member organization and their clearing member organization and external calls to Floor brokers. An average of 623 calls/day was internal calls received from the booth. Thus, approximately 65% of all incoming calls received were from the booth and the remaining 35% of incoming calls received were external calls to

¹³ 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.

¹⁴ This data includes both Floor brokers and RCMMs.

RCMMs from the upstairs offices of their member organization and their clearing member organization and external calls to Floor brokers.¹⁵

The Exchange believes that the Pilot is operating successfully in that there is a reasonable degree of usage of portable phones. During the period of January 31, 2007 through January 31, 2008, there have been no significant regulatory concerns identified with their usage.¹⁶

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.

Conclusion

The Exchange proposes to extend the operation of the current Pilot for an additional three months to April 30, 2008. The Exchange believes that the approval of the Pilot's continuation for an additional three months will enable the Exchange to continue 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.¹⁷ Therefore the Exchange believes it is appropriate to extend the Pilot for an additional three months, expiring on April 30, 2008.

2. Statutory Basis

¹⁵ The Exchange has received records of incoming and outgoing telephone calls from January 31, 2007 through December 31, 2007 for Floor brokers and RCMMs and will continue to receive records of such telephone calls on a monthly basis.

¹⁶ With respect to regulatory actions concerning the Pilot, in October 2007, there were two matters concerning the receipt of a phone call from an unauthorized number by RCMMs that were each investigated and closed with no action by NYSE Regulation, Inc.

¹⁷ See Securities Exchange Act Release No. 43493 (October 30, 2000), 65 FR 67022 (November 8, 2000) (SR-CBOE-00-04), cited by Securities Exchange Act Release No. 43836 (January 11, 2001), 66 FR 6727 (January 22, 2001) (discussing and approving the Chicago Board Options Exchange's and the Pacific Exchange's proposals to remove current prohibitions against Floor brokers' use of cellular or cordless phones to make calls to persons located off the trading floor).

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)¹⁸ 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 for increased means by which communications to and from the Exchange Floor may take place.

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

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6).

action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange requests that the Commission waive the 30-day operative period under Rule 19b-4(f)(6)(iii) of the Act.²¹ The Exchange believes that the continuation of the Pilot is in the public interest as it will avoid inconvenience and interruption to the public. The Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative delay and make this proposed rule change immediately effective.²² The Commission believes that the waiver of the 30-day operative delay will allow the Exchange to continue, without interruption, the existing operation of its Pilot until April 30, 2008.

The Commission notes that proper surveillance is an essential component of any telephone access policy to an exchange trading floor. Surveillance procedures should help to ensure that Floor brokers and RCMs use portable phones as authorized by Exchange Rule 36 and that orders are being handled in compliance with Exchange rules.²³ The Commission expects the Exchange to actively review these procedures and address any potential concerns that have arisen during the Pilot. In this regard, the Commission notes that the Exchange should address whether telephone records are adequate for surveillance purposes.

The Commission also requests that the Exchange report any problems, surveillance, or enforcement matters associated with the Floor brokers' and RCMs' use of an Exchange

²¹ 17 CFR 240.19b-4(f)(6)(iii).

²² For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f). The Exchange provided the Commission written notice of its intent to file the proposed rule change at least five business days prior to filing.

²³ See note 10 *supra* and accompanying text for other NYSE requirements that Floor brokers be properly qualified before doing public customer business.

authorized and provided portable telephone on the Exchange Floor. As stated in the Original Order, NYSE should also address whether additional surveillance would be needed because of the derivative nature of the ETFs. Furthermore, in any future additional filings on the Pilot, the Commission would expect that NYSE submit information documenting the usage of the phones, any problems that have occurred, including, among other things, any regulatory actions or concerns, and any advantages or disadvantages that have resulted.²⁴

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-2008-10 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-2008-10. 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

²⁴ In any request for a permanent approval of the Pilot, the Commission would expect the information to distinguish between Floor brokers' and RCMs' usage of the phones.

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 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-2008-10 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.²⁵

Florence E. Harmon
Deputy Secretary

²⁵ 17 CFR 200.30-3(a)(12).