

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60983; File No. SR-NYSE-2009-84)

November 10, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Amending NYSE Rule 36 to Permit the Use of Personal Portable or Wireless Communication Devices Off the Exchange Trading Floor and Outside Other Restricted Access Areas

I. Introduction

On August 27, 2009, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ a proposed rule change, as modified by Amendment No. 1,⁴ to amend NYSE Rule 36 to permit the use of personal portable or wireless communication devices off the Exchange Trading Floor and outside other restricted access areas, and make corresponding technical changes. The proposed rule change was published for comment in the Federal Register on September 28, 2009.⁵ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Background

Currently, NYSE Rule 36 (Communications Between Exchange and Members’ Offices) prohibits members and member organizations from establishing or maintaining

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ Amendment No. 1, which the Exchange filed on September 17, 2009, superseded and replaced the original filing in its entirety.

⁵ See Securities Exchange Act Release No. 60691 (September 18, 2009), 74 FR 49431 FR 34609 (“Notice”).

any telephonic or electronic communication, including the usage of any portable or wireless communication devices (i.e. cellular phone, wireless pager, BlackBerry™, etc.), between the Floor, as defined in NYSE Rule 6, and any other location without prior Exchange approval.

Notwithstanding the rule's general prohibition on the use of portable or wireless communication devices, current Rule 36 permits Floor brokers to use Exchange authorized and issued portable phones on the Floor to communicate with both member firms and non-members off the Floor, subject to certain restrictions.⁶ Floor brokers may not, however, use Exchange authorized and issued devices on the NYSE Amex Options Trading Floor (as defined in NYSE Rule 6A).⁷ In addition, current Rule 36 permits Designated Market Makers ("DMMs"), subject to restriction, to maintain at their posts telephone lines to the off-Floor offices of the DMM unit or the unit's clearing firm.⁸ Such telephone lines may only be used to enter options or futures hedging orders through the DMM unit's off-Floor office or the unit's clearing firm, or through a member (on the Floor) of an options or futures exchange. These lines may not, however, be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities. DMMs

⁶ All members and member firm employees who use an Exchange authorized and issued portable phone must execute a written acknowledgement as to the usage of the phone and authorizing the Exchange to receive data and records related to incoming and outgoing calls. See NYSE Information Memos 08-40 (August 14, 2008) and 08-41 (August 14, 2008) (concerning the use of Exchange authorized and issued portable phones on the Floor). See also NYSE/NYSE Amex Information Memo 08-66 (December 22, 2008).

⁷ See Rule 36, Supplementary Material .20 - .23.

⁸ The role of DMMs and their obligations on the Exchange are described in Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46). Notably, pursuant to this Release, the Exchange phased out the specialist system and adopted a Designated Market Maker ("DMM") structure.

are also permitted to use at their posts wired or wireless devices, including computer terminals or laptops, that are registered with the Exchange to communicate with their system algorithms.⁹ Under current Rule 36, the use of all other portable or wireless communication devices on the Floor is prohibited.

As noted in the foregoing paragraph, the restrictions on the use of portable or wireless communication devices in current Rule 36 relate to what is and is not permissible on the Exchange Floor. Under NYSE Rule 6, the term Floor is defined as “the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, and also means the telephone facilities available in these locations.”¹⁰

Recently, the Exchange adopted Rule 6A, setting forth a definition of Trading Floor that is distinct from the definition of Floor. Specifically, the Trading Floor is an area within the area of the “Floor” that is defined as “the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the ‘Main Room’ and the ‘Garage.’”¹¹ As such, the Trading Floor’s restricted access physical area

⁹ See NYSE Rule 36.30.

¹⁰ The Exchange also has issued interpretive guidance that the “Floor” also includes the areas outside the “Blue Line” (member and member organization booths adjacent to the trading Floor) and “any area reserved primarily for members, including members’ lounges and bathrooms.” See NYSE/NYSE Amex Information Memo 08-66 (December 22, 2008).

¹¹ In its filing, the Exchange noted that the NYSE Amex Options Trading Floor is within the restricted access perimeter that encompasses the NYSE Trading Floor and thus member and member firm employees would not be permitted to use such devices in that space under the terms of the proposed Rule defining where such devices are permissible. In addition, pursuant to the definitions of “Floor” and “Trading Floor” in NYSE Rules 6 and 6A, and corresponding Rules 6- and 6A – NYSE Amex Equities, the NYSE and NYSE Amex Equities Trading Floors

also includes the areas outside the Blue Line that include the member and member organization booths and/or trading desks.

III. Description of the Proposal

The Exchange proposes to amend NYSE Rule 36 to permit the use of personal portable or wireless communication devices outside of the Exchange's Trading Floor and other restricted access areas, provided such usage is consistent with all other Exchange Rules and federal securities laws and rules thereunder. Floor brokers would still be limited to using only Exchange authorized and issued portable phones on the Exchange Trading Floor and DMMs would still only be permitted to use registered telephone lines and/or wired or wireless devices at their posts, and all such devices and communications would continue to be regulated by the Exchange.

The proposal would permit Exchange members and member firm employees to use personal portable or wireless communications devices in designated areas of the Exchange's buildings and facilities that fall within the technical definition of the Floor under Rule 6, but that are outside the Trading Floor, and other restricted access points (i.e. where there are turnstiles or card swipe pads that electronically release locked doors to permit authorized entry).¹² Because the lobby and other corridor areas where usage of personal portable or wireless communications will now be permitted still fall within the broader definition of "Floor" under Exchange rules, the Exchange will retain jurisdiction over its members in these areas. As such, in its filing, the Exchange noted that it would

overlap and thus references to Exchange's Trading Floor includes the NYSE Amex Equities Trading Floor. See Securities Exchange Act Release No. 59479 (March 2, 2009), 74 FR 10325 (March 10, 2009) (SR-NYSE-2009-23).

¹² In the filing, the Exchange represented that the majority of the doors that require card swipe for entry are opaque. See also note 19 infra.

retain jurisdiction over its members and member firm employees to regulate conduct that is inconsistent with Exchange Rules and the federal securities laws and rules thereunder (e.g., trading ahead, insider trading, market manipulation).¹³

The proposal would thus permit members and member firm employees to use their personal communications devices in the hallways, stairwells, lobbies or members-only areas of the Exchange premises that are adjacent to the Trading Floors of the Exchange, NYSE Amex Options and/or NYSE Amex Equities.¹⁴ The Exchange stated specifically that such usage would be permitted in the lobby areas of the Exchange's facilities at 11 Wall Street, 6 and 18 New Street, and 2, 12, 18 and 20 Broad Street, as well as in the corridor in front of the interior elevator bank inside of 18 Broad Street.¹⁵

In its filing, the Exchange stated that the purpose of the proposal is to provide Exchange members and member firm employees with a reasonable and comfortable space inside the physical confines of the Exchange's buildings and facilities within which they may use their personal portable or wireless communication devices, without diminishing the ability to monitor and regulate their conduct.¹⁶ According to the Exchange, the current prohibitions of Rule 36 and the broad definition of "Floor" under Rule 6 together effectively require members and member firm employees to exit the Exchange premises in order to use their personal portable or wireless communications

¹³ See Notice, supra note 5.

¹⁴ See supra note 11. In addition, while the NYSE Amex Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, those rules prohibit NYSE Amex Options members from using those devices on the Trading Floor of the Exchange. See NYSE Amex Options Rule 902NY.

¹⁵ See Notice, supra note 5.

¹⁶ See Notice, supra note 5.

devices.¹⁷ In the Exchange’s view, the distance afforded by allowing a DMM, for example, to use a personal portable or wireless communication device outside the turnstiles is, in essence, equivalent to requiring a DMM to leave the Exchange’s premises to do the same.¹⁸ Further, the Exchange represented that any time or place advantage to using such devices outside restricted access areas is significantly reduced by the fact that a DMM has no line of sight¹⁹ and no ability to hear trading activity¹⁹ on the Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.²⁰

In addition, noting that the proposed rule amendments specifically provide that the use of personal portable or wireless communication devices by Exchange members and member firm employees is subject to compliance with all other Exchange Rules and federal securities laws and rules thereunder, the Exchange represented that it will issue a Notice to Members that will, among other things, remind Exchange members and member firm employees of their obligations under the requirements of Securities Exchange Act Release Nos. 33-7288 and 34-37182, concerning the “Use of Electronic

¹⁷ See Notice, supra note 5. In the filing, the Exchange acknowledged that there are other areas on the Exchange’s premises where personal communications devices may be used by members and member firm employees (e.g., the cafeteria in 11 Wall Street), but represented that these areas are either too far from the Trading Floor to be practical or do not have adequate reception for such devices.

¹⁸ See Notice, supra note 5.

¹⁹ The Commission notes that in at least one lobby area there is a line of sight to the Trading Floor and a trading post, unlike other lobby areas where the doors to the Trading Floor are opaque. See supra note 12. The Commission acknowledges, however, that it would be difficult to see any specific information on the post screens from this lobby area. The Commission expects the Exchange to monitor this to ensure that this remains the case and that such line of sight to the Trading Floor is not misused.

²⁰ See Notice, supra note 5.

Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.”²¹

The Exchange also proposed corresponding technical amendments to Rule 36.20.

IV. Discussion

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. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²² which requires, among other things, that the rules of a national securities exchange be designed 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.²³

The Exchange has proposed that members and member firm employees be permitted to use personal portable or wireless communication devices off the Exchange Trading Floor and outside of restricted access areas (i.e. restricted access areas are areas where there are turnstiles or card swipe pads that electronically release locked doors to

²¹ See Securities Exchange Act Release Nos. 33-7288 and 34-37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7-13-96). See also FINRA Regulatory Notice 2007-59 (December 7, 2007), concerning the supervision of electronic communications.

²² 15 U.S.C. 78f(b)(5).

²³ In approving this 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).

permit authorized entry),²⁴ subject to compliance with all other Exchange Rules and the federal securities laws and rules thereunder. The proposal marks a departure from the Exchange’s current prohibition on the use of such devices in areas that are in close proximity to the Trading Floor of the Exchange, and its stated policy that “best practice” is for “personal contacts made using portable communication devices, whether Exchange issued or not, [to] be made outside the building.”²⁵

The Commission finds, however, that the proposal strikes a reasonable balance between the Exchange’s interest in providing a convenient and comfortable space for Exchange members and member firm employees to use their personal portable communications devices inside Exchange buildings and its interest in minimizing the risk of misuse of such devices, which are not subject to the same surveillance as Exchange authorized and issued devices. In particular, the Commission notes the Exchange’s representation that any time or place advantage to using personal portable communication devices outside restricted points of access to the Trading Floor is “significantly reduced by the fact that a Floor Broker or DMM has no line of sight and no ability to hear trading activity on the [Trading] Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.”²⁶ As noted above, the Commission expects that the Exchange will, in the exercise of its regulatory responsibilities, work to ensure that any line of sight to the Trading Floor that

²⁴ As noted above, restricted access areas include the areas outside the Blue Line that include member and member organization booths and/or trading desks.

²⁵ See NYSE/NYSE Amex Information Memo 08-66 (December 22, 2008).

²⁶ See Notice, supra note 5.

may exist does not allow access to Trading Floor information that may raise concerns.²⁷

The Commission notes that the Exchange retains jurisdiction over its members for their conduct in the new areas where the use of personal communication devices will now be permitted because these areas are still within the broader definition of Floor under NYSE Rule 6.²⁸ The Commission further notes the Exchange's representation that it will issue a Notice to Members reminding members of their obligations under Securities Exchange Act Release Nos. 33-7288 and 34-37182, concerning the "Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information."²⁹ In these releases, among other things, the Commission noted that the substantive and liability provisions of the federal securities laws, as well as the recordkeeping requirements of the Act apply equally to electronic and paper based media.³⁰

Based on the foregoing, the Commission therefore finds the proposal to be consistent with the Act. The Commission believes that the proposal to permit the use of personal communication devices in certain specified areas adjacent to the Trading Floor, while not without any risk, is tempered by the speed of electronic trading, the existence

²⁷ See supra note 19.

²⁸ See note 13 and accompanying text supra.

²⁹ See Securities Act Release No 7288 and Securities Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7-13-96).

³⁰ Id. See also FINRA Regulatory Notice 2007-59 (December 7, 2007), concerning the supervision of electronic communications, which among other things, reminds member firms of their obligation to (1) have supervisory policies and procedures to monitor all electronic communications technology used by the firm and its associated persons to conduct the firm's business; and (2) ensure that their use of electronic communications media enables them to make and keep records, as required by Commission and Exchange rules (e.g., Rules 17a-3 and 17a-4 under the Act and NYSE Rule 440.)

of access barriers between the Trading Floor and the areas where use of personal communication devices will now be permitted, and the fact that the Exchange retains jurisdiction over its members while they are in these areas. The Commission expects, however, that the Exchange will monitor compliance with the new rule and inform the Commission if it encounters difficulties in implementing and enforcing it or otherwise finds that the new rule raises regulatory concerns.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³¹ that the proposed rule change (SR-NYSE-2009-84), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Florence E. Harmon
Deputy Secretary

³¹ 15 U.S.C. 78s(b)(2).

³² 17 CFR 200.30-3(a)(12).