

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64088; File No. SR-NYSE-2011-10)

March 17, 2011

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 36 to Permit Written Communications to be Sent Electronically Between the Designated Market Maker Unit's Post Location on The Floor and the DMM Unit's Off-Floor offices and to Persons Permitted to Provide Non-Trading Related Services to the DMM Under Rule 98

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 11, 2011, New York Stock Exchange LLC (the "Exchange" or "NYSE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE. 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 proposes to amend NYSE Rule 36 to permit written communications to be sent electronically between the Designated Market Maker ("DMM") unit's post location on the Floor and the DMM unit's off-Floor offices and to persons permitted to provide non-trading related services to the DMM under Rule 98. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and www.nyse.com.

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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

received on the proposed rule change. The text of those 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 parts of such statements.

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

1. Purpose

The Exchange proposes to amend NYSE Rule 36 to (i) expand the persons with whom DMM unit personnel on the Exchange Floor may communicate to include persons providing “non-trading related services” (as defined in Rule 98) to the DMM Unit; and (ii) to expand the means of permissible communication to include written electronic communications between the DMM unit's³ post location on the Floor and specified off-Floor personnel.⁴ The Exchange believes that expanding the persons with whom and the means by which DMMs⁵ on the Floor of the Exchange may communicate will both allow DMMs to operate more efficiently and enhance the audit trail associated with DMM communications, thus strengthening the regulatory program associated with reviewing such communications.

Current NYSE Rule 36

NYSE Rule 36 broadly provides that no member or member organization shall establish or maintain any telephonic or electronic communication between the Floor and any other

³ "DMM unit" means any member organization, aggregation unit within a member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to NYSE Rule 98(c), (ii) is eligible for allocations under NYSE Rule 103B as a DMM unit in a security listed on the Exchange, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit.

⁴ The Exchange notes that its affiliate, NYSE Amex LLC, has proposed parallel changes its rules. See SR-NYSEAmex-2011-16.

⁵ "DMM" means any individual qualified to act as a DMM on the Floor of the Exchange.

location without Exchange approval. NYSE Rule 36.30 provides a limited exception for DMM units. Specifically, the Rule provides that:

[w]ith the approval of the Exchange, a DMM unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the DMM unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the 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 floor) of an options or futures exchange as permitted under NYSE Rules 98 and 105.

All DMM units currently have Exchange-approved telephone connections between the Trading Floor post locations and the off-Floor offices of the DMM unit. On behalf of NYSE Regulation, FINRA regularly examines DMM units for compliance with Rule 36.30, and in particular, whether the DMM unit has appropriate policies and procedures governing the use of such telephone lines and to confirm that the telephone lines only connect to the approved locations.

Proposed Amendments to NYSE Rule 36

The Exchange proposes to amend Supplementary Material .30 to update the rule to reflect how DMM units are permitted to operate pursuant to Rule 98. Specifically, Rule 98(e) permits a DMM unit to share non-trading related services with its member organization or approved person. Pursuant to Rule 98(e), when sharing such non-trading related services, the DMM unit and approved person must have written procedures and guidelines to protect non-public order information to ensure that such information is not used for any purpose other than to provide non-trading related services to the DMM unit.

The Exchange believes that because Rule 98(e) sets forth protections for non-public order information, Rule 36.30 should be amended to permit DMM units on the Trading Floor to maintain specified telephone and other permitted communication devices (as discussed more

fully below) to persons providing non-trading related services permitted under Rule 98. This will enable DMM units to permit their Floor-based personnel to communicate directly with persons providing operational support services, such as a technology help desk that may be located within an approved person.

The Exchange further proposes to amend NYSE Rule 36 to add Supplementary Material .31 that would permit a DMM unit to install and maintain certain written electronic communication applications. Specifically, proposed Supplementary Material .31(a) would permit a DMM unit, with the approval of the Exchange and subject to the conditions set forth in Supplementary Material .31, to establish and maintain a wired or wireless device capable of sending and receiving written communications electronically through an Exchange-approved connection (a “Permitted Communications Device”).⁶

Except as specified in the amendment to Supplementary Material .30, the proposed addition of Supplementary Material .31 would not alter in any way the universe of off-Floor individuals with whom Floor-based personnel may communicate or the content of such communications; rather, it would only expand the means by which such communications may be transmitted. Accordingly, under proposed Supplementary Material .31(b), DMM units would be permitted to connect Floor-based personnel via the Permitted Communications Device to persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98, i.e., certain personnel in the off-Floor offices of the DMM unit, the DMM unit’s clearing operations, and persons who are permitted to provide non-trading related services to the DMM unit under

⁶ Except as provided in Rule 36, no other type of communication application may be used by a DMM or DMM unit to communicate between the DMM unit’s post location on the Floor and the off-Floor offices of the DMM unit and any other location, and the use of cell phones, Blackberrys, and similar devices by DMM’s while on the Trading Floor would continue to be prohibited.

Rule 98. Once connected, the on-Floor and off-Floor personnel would be permitted to use the Permitted Communications Device for two-way written electronic communications.

The Exchange further notes that nothing in proposed Supplementary Material .31 would alter the obligations of a DMM unit to meet existing requirements under Rule 98 to, among other things, protect non-public order information and maintain appropriate information barriers in accordance with Rule 98. Because DMM units would continue to be subject to Rule 98, while on the Floor, DMM unit personnel could not use the Permitted Communications Device to communicate with off-Floor personnel in violation of Rule 98. For example, DMM units will continue to be subject to provisions of Rule 98 governing restrictions on communications with off-Floor individuals or systems responsible for making trading decisions in related products.⁷

A DMM unit would be obligated to program its communications system so that a Permitted Communications Device would not operate in a manner that enables written electronic communications to or from any location or individual other than as described in the proposed Supplementary Material. Among other things, the DMM unit would be required to program its communications system to ensure that messages cannot be forwarded to individuals with whom Floor personnel are not permitted to communicate. As part of the approval process, DMM units would need to identify to the Exchange who would have access to the Permitted Communications Devices and the basis for why any proposed off-Floor persons are permitted to communicate with individuals located on the Trading Floor.

Under proposed Supplementary Material .31(c), a DMM unit's member organization would be required to maintain records of all written communications sent from or to the DMM unit's Floor-based employees via the Permitted Communications Device in accordance with

⁷ See, e.g., Rules 98(d)(2)(B)(iii) and (f)(1)(A)(ii).

NYSE Rule 440 and SEC Rule 17a-4(b)(4) and in such format as may be prescribed by the Exchange.

Under proposed Supplementary Material .31(d), a DMM unit's member organization would be required to establish policies and procedures reasonably designed to ensure that use of the Permitted Communications Device is consistent with all SEC rules and Exchange rules, policies and procedures. In particular, pursuant to NYSE Rule 342, DMM units would be required to implement appropriate procedures of supervision and control and to provide for the review of the written electronic communications sent to and from the DMM unit's post location on the Floor via the Permitted Communications Device. Among other things, the written procedures should address the regulatory requirements associated with the program, including what measures the DMM unit will follow to ensure that only those individuals permitted to communicate via the Permitted Communications Device have access to it.

The Exchange believes that allowing DMM units to use a Permitted Communications Device would provide an effective way for DMMs to communicate with their member organization and promote more efficient supervision, compliance, and operations. For example, a DMM unit could use a Permitted Communications Device to obtain permission from senior management to exceed risk limits to facilitate a block trade or otherwise meet an affirmative obligation, to more quickly correct a technological issue with the DMM unit's algorithms, to meet business continuity obligations by providing an additional means of communication in the event of a wide-ranging telephone outage or other Exchange system outage, and to confirm that a stock could be borrowed to cover a short position.

The Exchange further believes that the use of such written communications and the related retention requirements not only would enable the DMM unit to monitor communications

to and from the Floor, but also would enable FINRA to enhance its regulatory program associated with reviewing such communications. In particular, FINRA would be able to review the email system operating the connections between the Trading Floor and off-Floor locations and related written supervisory procedures. The regulatory program would be further strengthened because with the use of auditable written electronic communications, FINRA would also be able to review both the content of communications and the parties to such communications. The Exchange believes that the enhanced regulatory program associated with the more robust audit trail would benefit the markets by providing a better manner by which to review DMM compliance with federal and Exchange rules.

Finally, the Exchange proposes a technical change to Rule 36.30 to conform Rule 36 to changes made to Rule 104 that deleted the requirement that DMM units obtain annual certifications for their algorithms. The Exchange added the relevant provision to Rule 36.30 in connection with the Hybrid Market changes to Rule 104, when the then specialist algorithm had an advance “look” at incoming orders.⁸ In connection with the adoption of the New Market Model, the Exchange eliminated the algorithmic order-by-order look, which rendered the need for an annual certification moot.⁹ Accordingly, Rule 104 no longer includes a requirement that DMM units annually certify their algorithms. The Exchange therefore proposes to amend Rule 36 to conform to the changes to Rule 104 and similarly delete the requirement for an annual certification.

⁸ See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05).

⁹ See Securities Exchange Act Release No. 58845 (Oct. 24, 2008), 73 FR 64379 (Oct. 29, 2008) (SR-NYSE-2008-46).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and further the objectives of Section 6(b)(5) of the Act,¹¹ in particular, in that they are 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. The Exchange believes that the proposed rule change supports the objectives of the Act by permitting greater and more effective communication between DMMs and DMM unit's on the Floor and their upstairs offices, while at the same time providing for a more robust audit trail that would enable FINRA to enhance the regulatory program associated with reviewing DMM communications from the Trading Floor. The Exchange believes that these regulatory enhancements will benefit the market by protecting investors and the public interest.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

the Act¹² and Rule 19b-4(f)(6) thereunder.¹³ Because the 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 prior to 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁴ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁵ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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

¹² 15 U.S.C. 78s(b)(3)(A)(iii).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2011-10 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2011-10. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2011-10 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.¹⁶

Cathy H. Ahn
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).