

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55859; File No. SR-NYSE-2006-28)

June 5, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 4 to Proposed Rule Change and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment Nos. 2, 3, and 4 Relating to NYSE Rules 134 and 411

I. Introduction

On May 2, 2006, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rules 134 (Differences and Omissions-Cleared Transactions) and 411 (Erroneous Reports). On September 22, 2006, NYSE filed Amendment No. 1 to the proposed rule change. On February 20, 2007, NYSE filed Amendment No. 2 to the proposed rule change. The proposed rule change as modified by Amendment No. 2 was published for comment in the Federal Register on March 6, 2007.³ The Commission received no comments on the proposal. On March 22, 2007, NYSE filed Amendment No. 3 to the proposed rule change.⁴ On May 30, 2007, NYSE filed Amendment No. 4 to the proposed rule change.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55361 (February 27, 2007), 72 FR 9985 (“Notice”).

⁴ In Amendment No. 3, the Exchange made technical changes to the rule text of the proposed rule change to correctly identify the numbering of NYSE Rule 134(g)(i) and (ii) as proposed new text. These technical changes were reflected in the Notice. See footnote 5 of the Notice. This is a technical amendment and is not subject to notice and comment.

⁵ In Amendment No. 4, the Exchange made changes to the rule text of the proposed rule change to clarify the meaning of the term “system malfunction” contained in proposed NYSE Rule 134(h). The text of Amendment No. 4 is available on the Exchange’s Web

This order approves the proposed rule change, as modified by Amendment Nos. 2, 3, and 4, on an accelerated basis.

II. Description

A. Current Practice

Currently, recognized trading errors fall into two categories. The first category applies to held⁶ and not held⁷ orders and includes trades that are mistakenly executed outside the written order instructions. These types of errors encompass situations where the transaction was incorrectly executed: (i) in the wrong security; (ii) on the wrong side of the market; (iii) outside of the price instructions; (iv) for a quantity greater than specified in the instructions; or (v) duplicating a prior execution of the same original order. The second category of trading errors currently applies only to held orders and involves situations where a held order was executable in the prevailing market but the Floor broker failed to take advantage of the opportunity to execute the order at that time.

Under the current NYSE rules and interpretations, a Floor broker may use his or her error account to “assume or acquire” a position as a result of a recognized trading error so that the customer receives the trade he or she would have received had the recognized trading error not occurred. However, a Floor broker is not permitted to use his or error account in cases involving trading errors that are not recognized by the Exchange. Instead, in such cases, a Floor broker

site (<http://www.nyse.com>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

⁶ A “held” order is a market or limit order that the broker must execute as instructed without discretion as to the time of an execution.

⁷ A “not held” order is a market or limit order that gives the broker both time and price discretion to attempt to get the best possible execution.

would generally issue a difference check⁸ or offer a commission adjustment to resolve any monetary disadvantage suffered by the customer.⁹ According to the Exchange, the issuance of the difference check or commission adjustment ultimately is not in the best interest of the customer because the administrative cost associated with the processing of the difference check or commission adjustment ultimately is borne by the customer and thus the remedy does not serve to make the customer whole. In addition, according to the Exchange, many institutional investors do not want the administrative burden of processing a difference check or commission adjustment as a result of the Floor broker's failure to execute a not held order due to administrative mistake or system malfunction.

B. Proposed Amendments to NYSE Rule 134 (Differences and Omissions-Cleared Transactions)

The Exchange proposes to amend NYSE Rule 134 to codify the first category of recognized trading errors. Specifically, NYSE Rule 134(g) would define a trading error to include situations when an order is executed outside of a customer's instructions as entered in the electronic order tracking systems¹⁰ of the Exchange. Types of recognized trading errors would include, but are not limited to, the execution of a held or not held order: (i) in the incorrect

⁸ A "difference check" is a check issued to the customer by the member to cover the monetary difference between the execution price and the price the customer and the member agree was the proper price.

⁹ If, at the time the Floor broker identifies the execution failure, the customer's order can be executed in the market at an equal or better price than the customer could have received had the order been executed in the prevailing market, then the Floor broker will execute the order. In the event the market is adverse to the customer's interest at the time the error is identified, under the current rules and interpretation, the remedy is to have the Floor broker issue a difference check or offer a commission reduction to address any disadvantage to the customer. See NYSE Regulation, Information Memorandum 02-19, issued April 17, 2002, clarifying the application of NYSE Rules 134, 411, and 407A.

¹⁰ See NYSE Rule 123(e).

security; (ii) on the wrong side of the market; (iii) at a price outside the price instructions; (iv) for a quantity of shares greater than the amount of shares specified in the order instructions; or (v) the execution of an order in duplicate.¹¹ In addition, Rule 134(g)(ii) would expand the type of recognized trading errors to include situations where a member fails to execute a not held order because he or she committed an error as to symbol, side or price in the execution of said order.¹²

The Exchange also proposes to add Rule 134(h)(i) to codify the second category of recognized trading errors covering situations where the Floor broker failed to execute a held order that was executable in the prevailing market.¹³

The Exchange also proposes to add Rule 134(h)(ii) to the second category of recognized trading errors to cover those situations where a Floor broker failed to execute a not held order, in whole or in part, because the order was lost, misplaced or the order remains unexecuted as a result of a system malfunction.¹⁴ In addition to previously sanctioned uses of a Floor broker's error account, a Floor broker would now be allowed utilize his or her error account, under NYSE Rule 134(j)(ii), to execute a customer's not held order in alignment with the Consolidated Tape, when the not held order remains unexecuted as a result of the order being lost or misplaced or as a result of a system malfunction.¹⁵ To prevent abuse of the proposed new rules, the Exchange is also amending NYSE Rule 134(d)(iii) to require a Floor broker to keep contemporaneous records

¹¹ See proposed NYSE Rule 134(g)(i).

¹² See proposed NYSE Rule 134(g)(ii).

¹³ See proposed NYSE Rule 134(h)(i).

¹⁴ See proposed NYSE Rule 134(h)(ii). In Amendment No. 4 the Exchange added language to the proposed rule text to clarify that a system malfunction refers to the failure of physical equipment, devices and/or programming employed by the Floor broker or otherwise provided by the Exchange and used in the execution of orders.

¹⁵ See proposed NYSE Rule 134(j)(ii).

documenting the circumstances surrounding errors. A Floor broker would be required to make and keep a time stamped record¹⁶ of the error including supporting documentation of the error.¹⁷ In addition, the Member Firm Regulation Division of NYSE Regulation, Inc. would include a review of these records during the course of its routine member firm examinations. The burden of proof would be on the Floor broker to substantiate that a legitimate error occurred.¹⁸

C. Proposed Amendments to NYSE Rule 411

When a Floor broker commits an error as to security, side or price, there are instances where the Floor broker issues a report to the customer as a result of the execution. Currently, pursuant to NYSE Rule 411, in instances where a Floor broker issued a report to a customer based on a transaction that was made outside of the customer's instructions on a not held order, the Floor broker would be required to rescind the report, thus leaving the customer's order unexecuted and disadvantaging the customer. To allow the Floor broker to utilize his or her error account or the error account of the member organization to alleviate any disadvantage to the customer, the Exchange proposes to amend NYSE Rule 411 to allow a Floor broker to treat "erroneous reports"¹⁹ as "erroneous trades" when the Floor broker committed an error as to security, side, or price.

Pursuant to the proposed rule change, a Floor broker would be permitted to treat an

¹⁶ See proposed NYSE Rule 134(i).

¹⁷ The record must include the date and time of the error, the date and time the error was discovered, the size of the error, the stock in which the error occurred, the original instructions, the names of all involved parties including the client and any upstairs trader, a detailed narrative of how the error occurred, detail narrative of discussions with relevant parties, the steps taken to correct the error and the ultimate resolution of the error. See proposed NYSE Rule 134(j)(iii).

¹⁸ See proposed NYSE Rule 134(j)(iii).

¹⁹ An "erroneous report" is a report of an execution that is incorrect as to stock, price or whether an execution actually took place.

“erroneous report” as an “erroneous trade” when the price and size of the order would have been executable in the market at or near the time of the erroneous transaction. Specifically, the erroneous report based on a transaction that was made in error as to security, side or price would stand, provided that the price and size of the erroneous report were within the range of prices and sizes in the specified security reported to the NYSE portion of the Consolidated Tape on the day in which the order was executed.²⁰ The Floor broker would be required to report the error to the customer, including explaining to the customer whether the error was favorable or unfavorable to the customer.²¹ The Floor broker also would be required to document on a trade-by-trade basis, the name of the individual authorized to accept the erroneous report for the customer, the amount of the error and whether the error was favorable to the customer.²² The Floor broker would then treat the erroneous report as though it was an erroneous trade and his or her error account would become the opposite side to the report.²³ In addition, the Floor broker would assume any loss incurred and any profit that resulted would be paid to the New York Stock Exchange Foundation²⁴ as currently required by NYSE Rule 411(a)(ii)(5). Thus, any disadvantage would be borne by the Floor broker who was responsible for committing the error, and not by the customer.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements

²⁰ See proposed NYSE Rule 411(a)(iv)(1).

²¹ See proposed NYSE Rule 411(a)(iv)(2).

²² See proposed NYSE Rule 411(a)(iv)(3).

²³ See proposed NYSE Rule 411(a)(iv)(4).

²⁴ See proposed NYSE Rule 411(a)(iv)(5).

of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁵ In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,²⁶ which require that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The Commission believes that the proposed rules provide for a fair, transparent, and reasonable process in which NYSE Floor brokers can correct trading errors. In particular, the Commission believes that it is appropriate for the Exchange to codify and thus make transparent its processes regarding the use of a Floor Broker's error account. The Commission notes that the proposed rule change is designed to provide Floor brokers with greater flexibility in using error accounts to correct trading errors in a manner that is less burdensome for customers. The Commission also notes that the proposed rule change includes recordkeeping requirements that will help the Exchange to monitor any potential abuse of the rule.

Pursuant to Section 19(b)(2) of the Act,²⁷ the Commission finds good cause for approving the proposal prior to the thirtieth day after the publication of the proposal, as modified by Amendment No. 4, in the Federal Register. The revision to the proposed rule change made by Amendment No. 4 does not raise any novel or substantive regulatory issues, and simply clarifies the meaning of a term in the proposed rule change. Therefore, the Commission finds good cause for approving the amended proposal on an accelerated basis.

²⁵ 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).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 15 U.S.C. 78s(b)(2).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, as modified by Amendment No. 4, 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-2006-28 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2006-28. 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. Copies of such 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-2006-28 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-NYSE-2006-28), as modified by Amendment Nos. 2, 3, and 4, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁹

Florence E. Harmon
Deputy Secretary

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).