

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78855; File No. SR-NYSE-2016-31)

September 15, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change Amending NYSE Rule 6A To Exclude the Physical Area Within Fully Enclosed Telephone Booths Located in 18 Broad Street From the Definition of Trading Floor

I. Introduction

On May 31, 2016, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rule 6A (“Trading Floor”) to exclude a physical area within fully enclosed telephone booths located in 18 Broad Street from the definition of Trading Floor. The proposed rule change was published for comment in the Federal Register on June 17, 2016.³ On July 29, 2016, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission received no comments on the proposed rule change. This order grants approval of the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 78057 (June 13, 2016), 81 FR 39722 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 78442 (July 29, 2016), 81 FR 51521 (August 4, 2016). The Commission designated September 15, 2016 as the date by which it shall approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 6A (“Trading Floor”) to exclude an area within fully enclosed telephone booths located in 18 Broad Street from the definition of “Trading Floor.” Under the proposal, as discussed in more detail below, the area within the enclosed telephone booths will remain within the Exchange’s broader definition of Floor under Rule 6.⁶ The Exchange also proposes to revise the definition of “Trading Floor” to reflect the renaming of a portion of its physical area and relocation of where NYSE Amex-listed options are traded.⁷

The Exchange currently defines “Trading Floor” in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the “Main Room,” the “Blue Room,” and the “Garage.”⁸ Rule 6A then excludes from the definition of “Trading Floor” those areas designated by the Exchange where NYSE Amex-listed options are traded, commonly known as the “Extended Blue Room,” which, for the purposes of the Exchange’s Rules, are referred to as the “NYSE Amex Options Trading Floor.”⁹

The Exchange proposes to exclude an additional area from the definition of Trading Floor. Specifically, the proposal would exclude from the defined Trading Floor the physical area within fully enclosed telephone booths located in 18 Broad Street at the Southeast wall of the Trading Floor.¹⁰ These telephone booths are located in a vestibule area adjacent to the 18 Broad Street elevator banks that provide access to the Trading Floor. The vestibule area is separated from the equity trading areas of the Main Room by approximately forty (40) feet and a partial

⁶ See, *infra*, notes 16-17 and accompanying text.

⁷ See proposed Rule 6A.

⁸ See NYSE Rule 6A; see also Securities Exchange Act Release No. 59479 (Mar. 2, 2009), 74 FR 10325 (Mar. 10, 2009) (SR-NYSE-2009-23).

⁹ See NYSE Rule 6A.

¹⁰ See proposed Rule 6A.

physical barrier. The Exchange represents that, while inside the telephone booths, there is no visual or auditory access to activities conducted at the trading posts or by Floor Brokers.¹¹

Currently Exchange members and employees of member organizations are allowed to use personal portable or wireless communication devices outside the Trading Floor, provided that such use is consistent with all other Exchange Rules and federal securities laws and rules thereunder.¹² By excluding the physical area within the fully enclosed telephone booths described herein from the definition of Trading Floor, the proposal would create an exception to restrictions that would otherwise prohibit the use of personal cellular telephones while in the telephone booths. In its filing, the Exchange states that it designed the telephone booths for use by Designated Market Makers (“DMMs”) and DMMs could use this space to communicate with issuers. However, the telephone booths could be used by anyone with access to the Trading Floor, including Floor Brokers.¹³ In the Exchange’s view, a DMM’s use of a personal cellular telephone while within a telephone booth to communicate with an issuer is no different than a DMM’s use of a personal cellular telephone to communicate with an issuer from a DMM’s office off the Exchange or while outside the restricted-access areas of the Floor.¹⁴

The Exchange states in its filing that, while in a telephone booth, a DMM would not have access to any time and place information that he or she may have at a trading post. According to the Exchange, the following aspects of the telephone booths would create privacy: (1) the closest location of any Floor Broker operations, which also contains privacy barriers, is

¹¹ See Notice, supra note 3, at 39722-23.

¹² See NYSE Rule 36, Supplementary Material .23.

¹³ Currently, Floor Brokers on the Trading Floor are only allowed to use an approved telephone line or Exchange authorized and provided portable phone. See NYSE Rule, Supplementary Material .20 and .21.

¹⁴ See Notice, supra note 3, at 39723.

approximately forty (40) feet from the proposed location of the telephone booths; (2) there are high arching walls with limited line and sight vision separating the telephone booths from any trading posts on the Trading Floor; and (3) the telephone booths are fully enclosed so any conversation that would occur would take place behind closed doors. The Exchange states that it “believes that the combination of these visual and acoustical barriers would substantially eliminate the risk that any conversations occurring inside the telephone booth could be overheard [and] it substantially eliminates the risk that an individual having a conversation while inside the telephone booth would be able to hear or see anything at a trading post where securities trade.”¹⁵

The term “Trading Floor” is distinct from the term “Floor,” which 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 the telephone facilities available in these locations.¹⁶ Because the area within the fully enclosed telephone booths, while outside the “Trading Floor,” would still fall within the broader definition of “Floor” under Exchange rules, the Exchange would retain jurisdiction over its members while they are within the telephone booths. The Exchange notes that it would therefore retain jurisdiction within the telephone booths to regulate conduct that is inconsistent with Exchange Rules and the federal securities laws and rules thereunder.¹⁷

Specifically, current Exchange restrictions governing the protection of material non-public information would continue to apply to DMMs even when off the Trading Floor and thus would apply to their communications within the telephone booths. NYSE Rule 98 (“Operation of a DMM Unit”) provides that “[w]hen a Floor-based employee of a DMM unit moves to a

¹⁵ See Notice, supra note 3, at 39723.

¹⁶ See NYSE Rule 6.

¹⁷ See Notice, supra note 3, at 39723.

location off of the Trading Floor of the Exchange or if any person that provides risk management oversight or supervision of the Floor-based operations of the DMM unit is aware of Floor-based non-public order information,¹⁸ he or she shall not (1) make such information available to customers, (2) make such information available to individuals or systems responsible for making trading decisions in DMM securities in away markets or related products, or (3) use any such information in connection with making trading decisions in DMM securities in away markets or related products.”¹⁹ The Exchange, in its filing, explains that the proposed rule change is not intended to circumvent the restrictions prescribed in Rule 98 applicable to DMMs, including those pertaining to the misuse of material non-public information.²⁰

NYSE Rule 36, Supplementary Material .30 (“DMM Unit Post Wires”) permits DMMs to maintain telephone lines at their trading posts to communicate with personnel at the off-Floor offices of the DMM, the DMM’s clearing firm, or with persons providing non-trading-related services to the DMM, and wired or wireless devices that are registered with the Exchange to communicate with the system employing the DMM’s algorithms and with individual algorithms.²¹ The Exchange further states in its filing that it is not proposing any changes to

¹⁸ NYSE Rule 98(b)(4) states that “Floor-based non-public order” means “any order, whether expressed electronically or verbally, or any information regarding a reasonably imminent non-public transaction or series of transactions entered or intended for entry or execution on the Exchange and which is not publicly available on a real-time basis via an Exchange-provided datafeed, such as NYSE OpenBook® or otherwise not publicly available.”

¹⁹ See NYSE Rule 98(c)(3)(C). Rule 98(c)(3)(C) does not restrict communications between a DMM and the DMM’s risk manager off the Trading Floor, as may be necessary if a Floor Broker needs to discuss the risk profile of a proposed transaction.

²⁰ See Notice, supra note 3, at 39723.

²¹ See NYSE Rule 36, Supplementary Material .30.

Rule 36 and that DMMs would continue to be subject to Supplementary Material .30 to Rule 36.²²

Additionally, the Exchange proposes amendments to reflect the renaming and relocation of certain trading areas. The Exchange has renamed the former “Garage” as the “Buttonwood Room.”²³ The Exchange also recently closed the “Blue Room” and the “Extended Blue Room” and moved all member organizations, member organization employees, and NYSE Amex Options trading activities that were previously housed in these areas to the Buttonwood Room. Therefore the proposal would delete references to the “Blue Room” and “Extended Blue Room” and replace them with references to the “Buttonwood Room.”²⁴ The current rule excludes the NYSE Amex Options Trading Floor from the definition of Trading Floor.²⁵ The proposal would exclude from the definition of Trading Floor the designated areas in the Buttonwood Room where NYSE Amex-listed options are traded, which, for the purposes of the Exchange's Rules, would continue to be referred to as the “NYSE Amex Options Trading Floor.”²⁶ The Exchange states that this proposal does not alter the substance of the rule and reflects only the location change for NYSE Amex Options.²⁷

II. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent

²² See Notice, supra note 3, at 39723.

²³ See Notice, supra note 3, at 39722.

²⁴ See Notice, supra note 3, at 39722.

²⁵ See NYSE Rule 6A.

²⁶ See proposed Rule 6A. The Exchange states that, as when the NYSE Amex Options Trading Floor was located in the Extended Blue Room, the Exchange has erected physical barriers between the NYSE Amex Options Trading Floor and any Exchange member organizations or Exchange personnel that are also located in the Buttonwood Room. See Notice, supra note 3, at 39722 n7.

²⁷ See Notice, supra note 3, at 39722.

with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁹ 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.

The Exchange proposes to exclude from the definition of “Trading Floor” the physical area within fully enclosed telephone booths located in 18 Broad Street.³⁰ Through this definitional change, the proposal would allow persons within the telephone booths to use personal portable or wireless communications devices outside the Trading Floor, provided such use is consistent with all other Exchange Rules and federal securities laws and the rules thereunder.³¹ The Exchange states that it designed the telephone booths for use by DMMs, and DMMs could use a personal cellular telephone within this space to communicate with issuers, but the telephone booths could also be used by anyone with access to the Trading Floor.³²

When approving the use of personal portable or wireless communications devices outside of the Exchange’s Trading Floor and other restricted access areas, the Commission found there to be a reasonable balance between the Exchange’s interest in providing a convenient and comfortable space for Exchange members and member firm employees to use personal portable

²⁸ 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).

²⁹ 15 U.S.C. 78f(b)(5).

³⁰ See proposed Rule 6A.

³¹ See NYSE Rule 36, Commentary .23.

³² See Notice, supra note 3, at 39723.

communications devices inside the Exchange buildings and in minimizing the risk of misuse of such devices.³³ Based on representations made by the Exchange, the Commission believes that this proposal provides a similar balance between the Exchange's interest to provide a convenient location for DMMs and others on the Trading Floor to place telephone calls while minimizing the risk of any potential time and place advantage that could come with using personal portable communication devices in proximity to trading activity.³⁴ While the telephone booths fall within the physical turnstiles that generally control entry onto the Trading Floor, they are separated from trading activity by approximately forty (40) feet. According to the Exchange, the location of the telephone booths, and the enclosed setting within such booths, would provide sufficient visual and auditory barriers between the area within the telephone booths and trading activity, so as to minimize the possibility of any time and place advantage.³⁵ The Exchange has also indicated that the glass on the telephone booths has been frosted to make it opaque, which should help further reduce any sight lines to non-public Trading Floor information.³⁶ Additionally, the

³³ See Securities Exchange Act Release No. 60983 (November 10, 2009), 74 FR 59596, 59598 (November 18, 2009) (Order Approving SR-NYSE-2009-84) (noting that personal portable communications devices are not subject to the same surveillance as devices authorized and issued by the Exchange).

³⁴ The Commission notes that “[t]he term ‘facility’ when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any systems of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.” 15 U.S.C. 78c(a)(2).

³⁵ See Notice, supra note 3, at 39723. The Commission notes the Exchange's representation that “while inside the telephone booths, there is not any visual or auditory access to activities conducted at the trading posts or by Floor Brokers.” See id.

³⁶ See note 32, supra, at 59597 n12, which noted when approving the use of personal portable or wireless communication devices outside the Exchange's Trading Floor that the majority of the doors that require card swipe entry are opaque. The Commission expects the Exchange to continue to ensure that the telephone booths remain in an area

Commission believes that given the current speed of electronic trading, any Floor-based non-public order information that the DMM, or other floor-based personnel using the telephone booths, had prior to leaving his or her trading post or booth area would likely be rendered stale by the time he or she reached the telephone booths, thereby substantially reducing the risk of any time and place advantage.

The Commission notes that the Exchange will retain jurisdiction over its members and member organizations, including DMM units and their employees, for their conduct within the telephone booths because this area is still within the broader definition of Floor under NYSE Rule 6.³⁷ With respect to DMMs in particular, NYSE Rule 98 contains restrictions on a DMM's conduct while on and off the Trading Floor. These restrictions include a general prohibition on the misuse of Floor-based non-public order information.³⁸ When a DMM moves to a location off the Trading Floor, the DMM must not make Floor-based non-public order information available to customers or to individuals or systems responsible for making trading decisions in DMM securities in away markets or related products, or use any such information in connection with trading decisions in DMM securities in away markets or related products.³⁹

In addition, the Commission has been concerned about whether there could be a misuse of any information about customer orders or other material information that is passed to a DMM

inside the Trading Floor turnstiles that minimizes any line of sight, including through the use of opaque glass on the booths. The Exchange has represented that it continues to monitor and surveil its Trading Floor for the misuse of material, non-public information, including trading ahead of customer orders, and that these surveillance procedures should be effective for monitoring for the misuse of material non-public information with the addition of telephone booths in close proximity to the Trading Floor within which individuals may use personal cellular telephones.

³⁷ See note 17 and accompanying text *supra*.

³⁸ See NYSE Rule 98(c)(3)(A).

³⁹ See NYSE Rule 98(c)(3)(C).

or other floor personnel through the use of personal cellular telephones within private telephone booths in close proximity to the Trading Floor. For similar reasons noted above that reduce the risk of misuse of Floor-based non-public order information,⁴⁰ such as the speed of electronic trading, and the Exchange's representations concerning its surveillance of transactions occurring on the Exchange Trading Floor, the Commission believes the Exchange has addressed these concerns.

The Exchange has represented that information DMMs and other floor-based personnel relay, receive, or discuss on personal cellular phones within the telephone booths adjacent to the Trading Floor, will not, in the Exchange's view diminish the ability of the Exchange to adequately surveil its market for the misuse of Floor-based non-public order information and other material non-public information.⁴¹ The Commission, therefore, believes that based on the Exchange's representations noted above, and in particular its representations that it has the ability to effectively conduct surveillance for the misuse of material non-public information despite permitting DMMs and others to use personal cellular telephones within telephone booths placed adjacent to the restricted Trading Floor, that the NYSE proposal is consistent with the Act.

Finally, the Exchange proposes amendments to the definition of "Trading Floor" in

⁴⁰ See supra note 18, which noted that Floor-based non-public order information includes information expressed verbally.

⁴¹ The Exchange has represented that in surveilling for compliance with its rules, NYSE can require a member firm to produce any additional information necessary regarding telephone booth use. In addition, the Exchange has represented that members firms will need to amend their policies and procedures concerning compliance with NYSE Rule 98 to account for the introduction of these telephone booths and will send an Information Memorandum to its members to remind them of this obligation, as well as obligations to comply with Rule 98 and, in particular, Rule 98(c)(3).

NYSE Rule 6A to reflect the renaming and relocation of certain trading areas.⁴² The Commission believes that updating the names of the renamed or relocated trading areas in the Exchange rules to reflect the current use of the Exchange Trading Floor would eliminate any potential confusion among investors and other market participants on the Exchange regarding the parameters of the Trading Floor and thereby where certain conduct is, or is not, permitted.

Based on the foregoing, the Commission therefore finds the proposal to be consistent with the Act. The Commission believes that the proposal to exclude the area within the telephone booths described herein from the definition of Trading Floor, and thereby permit the use of personal communication devices within this area, while not without risk, is tempered by the existence of physical barriers that limit visual and auditory access between the telephone booths and the location of trading activities, the speed of electronic trading, and the fact that the Exchange retains jurisdiction over its members while they are in the telephone booths. The Commission expects that the Exchange will monitor compliance with Exchange rules within the telephone booths and on the Trading Floor and inform the Commission if it encounters difficulties in enforcing its rules or otherwise finds that the amendment to the definition of Trading Floor raises regulatory concerns.

⁴² See proposed Rule 6A.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19b(2) of the Act,⁴³ that the proposed rule change (SR-NYSE-2016-31) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴

Brent J. Fields
Secretary

⁴³ 15 U.S.C. 78s(b)(2).

⁴⁴ 17 CFR 200.30-3(a)(12).