

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54276; File No. SR-NYSE-2006-55)

August 4, 2006

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 27, 2006, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6)<sup>4</sup> thereunder, 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 is proposing to extend the portable phone pilot ("Pilot") for an additional six months, until January 31, 2007. The Pilot amends NYSE Rule 36 (Communication Between Exchange and Members' Offices) to allow a Floor broker and Registered Competitive Market Maker ("RCMM") to use an Exchange authorized and provided portable telephone on the

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

Exchange Floor provided certain conditions are met. The current Pilot expires on July 31, 2006.<sup>5</sup>

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 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 Commission originally approved the Pilot to be implemented as a six-month pilot<sup>6</sup> beginning no later than June 23, 2003.<sup>7</sup> Since the inception of the Pilot, the Exchange has extended the Pilot six times with the current Pilot expiring on July 31, 2006.<sup>8</sup> The Exchange has

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<sup>5</sup> See Securities Exchange Act Release No. 53277 (February 13, 2006), 71 FR 8877 (February 21, 2006) (SR-NYSE-2006-03).

<sup>6</sup> See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR-NYSE-2002-11) ("Original Order").

<sup>7</sup> 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).

<sup>8</sup> 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); and 53277, note 5 supra. Also, since the inception, the Exchange has incorporated RCMMs into the Pilot and subsequently amended the Pilot to allow RCMMs to use an Exchange authorized and provided portable

also filed for permanent approval of NYSE Rule 36, as amended.<sup>9</sup>

With respect to regulatory actions concerning the Pilot, as previously disclosed, there is an open investigation into possible insider trading in an NYSE listed security in which the trading activity of two RCMMs has been identified and is under review.<sup>10</sup> The use of an Exchange authorized and provided portable phone by one of the RCMMs in or about January 2005 is under review as part of the investigation. No administrative or technical problems, other than routine telephone maintenance issues, have resulted from the Pilot over the past few months.<sup>11</sup> The Exchange now proposes to extend the Pilot for an additional six months, until January 31, 2007.

#### NYSE Rule 36

NYSE Rule 36 governs the establishment of telephone or electronic communications between the Exchange's Trading Floor and any other location. Prior to the Pilot, NYSE Rule 36 prohibited the use of portable telephone communication between the Floor and any off-Floor location.

The Exchange proposes to extend the Pilot for an additional six months, permitting Floor brokers and RCMMs to use Exchange authorized and issued portable telephones on the Floor. Thus, with the approval of the Exchange, a Floor broker would continue to be permitted to

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telephone on the Exchange Floor to call to and receive calls from their booths on the 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).

<sup>9</sup> See SR-NYSE-2004-52 (September 7, 2004).

<sup>10</sup> See note 5 supra.

<sup>11</sup> The Exchange represents that it has received records of incoming telephone calls from January 31, 2006 to May 31, 2006 for Floor brokers and RCMMs and will continue to receive updates. Telephone conversation between David Matta, Principal Rule Counsel, NYSE, and Molly M. Kim, Special Counsel, Division of Market Regulation, Commission, on August 3, 2006.

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 would permit the Floor broker to accept orders consistent with NYSE rules, 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 Floor broker's booth location.<sup>12</sup>

The Pilot also allows RCMMs to use an Exchange authorized and portable phone solely to call and receive calls from their booths on the 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 are currently not allowed to use a portable phone to conduct any agency business until issues involving the use of portable phones by RCMMs acting in the capacity of agent have been fully reviewed and resolved by NYSE Regulation in consultation with the Commission.<sup>13</sup> For both RCMMs and Floor brokers, use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange will continue to be prohibited.

Both incoming and outgoing calls would continue to be allowed, provided the requirements of all other NYSE rules have been met. A Floor broker would not be permitted to represent and execute any order received as a result of such voice communication unless the order was first properly recorded by the member and entered into the Exchange's Front End

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<sup>12</sup> See note 15 *infra* and accompanying text.

<sup>13</sup> 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.

Systemic Capture (FESC) electronic database.<sup>14</sup> In addition, NYSE 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 NYSE Rules 342 and 345, among others.<sup>15</sup>

Specialists are subject to separate restrictions in NYSE Rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.<sup>16</sup> The Pilot would not apply to specialists, who would continue to be prohibited from speaking from the post to upstairs trading desks or customers.<sup>17</sup>

The Exchange believes that the approval of the Pilot's continuation for an additional six 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.<sup>18</sup> The Exchange further believes that by enabling customers to speak directly to a

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<sup>14</sup> NYSE Rule 123 (e). See also Securities Exchange Act Release Nos. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (SR-NYSE-98-25) and 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).

<sup>15</sup> 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/regulation.html](http://www.nyse.com/regulation/regulation.html)) and 91-25 (July 8, 1991). See also note 13 supra.

<sup>16</sup> 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).

<sup>17</sup> NYSE Rule 36.30.

<sup>18</sup> 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).

Floor broker in a trading crowd on an Exchange authorized and issued portable telephone and by allowing RCMMs to communicate with their upstairs office's land line, the land line of their clearing member organization's upstairs office, and their booth, the Pilot will expedite and make more direct the free flow of information.

### Pilot Program Results

Since the Pilot's inception, there have been approximately 734 portable phone subscribers.<sup>19</sup> In addition, with regard to portable phone usage, for a sample week of 5/1/06 - 5/5/06, an average of 10,542 calls/day were originated from portable phones issued to Floor brokers and RCMMs. An average of 4,672 calls/day were received on portable phones.<sup>20</sup> Of the calls originated from portable phones, an average of 6,724 calls/day were internal calls to the booth and 3,200 calls/day were external calls.<sup>21</sup> Thus, approximately 68% of the calls originated from portable phones were internal calls to the booth by Floor brokers.

With regard to received calls, of the 4,672 average calls/days received, an average of 2,441 calls/day were external calls and an average of 2,231 calls/day were internal calls received from the booth. Thus, approximately 48% of all received calls were internally generated and 52% were calls from the outside.

RCMMs made 384 outgoing calls and received no incoming calls on their portable phones for the above referenced week.

The Exchange believes that the Pilot appears to be successful in that there is a reasonable degree of usage of portable phones. Except as noted above, there have been no other regulatory, administrative, or other technical problems identified with their usage. The Exchange further

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<sup>19</sup> This data includes both Floor brokers and RCMMs.

<sup>20</sup> Only Floor Brokers received incoming calls. RCMMs only made outgoing calls and these were to their upstairs offices.

<sup>21</sup> During this period RCMMs were not authorized to communicate with their booths.

believes that the Pilot appears to facilitate communication on the Floor for both Floor brokers and RCMMs without any corresponding drawbacks. Therefore, the Exchange believes it is appropriate to extend the Pilot for an additional six months, expiring on January 31, 2007.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirement under Section 6(b)(5) of the Act<sup>22</sup> 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 Exchange believes the amendment to NYSE Rule 36 supports the mechanism of free and open markets by providing for increased means by which communications to and from the Floor of the Exchange 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

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<sup>22</sup> 15 U.S.C. 78f(b)(5).

interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>23</sup> and Rule 19b-4(f)(6) thereunder.<sup>24</sup> 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 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).<sup>25</sup> 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 upon filing on July 27, 2006.<sup>26</sup> 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 January 31, 2007.

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 NYSE Rule 36 and that orders are being handled in compliance with NYSE rules.<sup>27</sup> The Commission expects the Exchange to actively review these procedures and address any potential concerns that have

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f)(6).

<sup>25</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>26</sup> 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).

<sup>27</sup> See note 15 *supra* and accompanying text for other NYSE requirements that Floor brokers be properly qualified before doing public customer business.

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 RCMMs' use of an Exchange authorized and provided portable telephone on the Exchange Floor. As stated in the Original Order, the 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 the 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.<sup>28</sup>

#### 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 Exchange 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2006-55 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.

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<sup>28</sup> The Commission expects the information to distinguish between Floor brokers' and RCMMs' usage of the phones.

All submissions should refer to File Number SR-NYSE-2006-55. 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 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-2006-55 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>29</sup>

Nancy M. Morris  
Secretary

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<sup>29</sup> 17 CFR 200.30-3(a)(12).