

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64843; File No. SR-NYSE-2011-22)

July 8, 2011

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Amending NYSE Rule 70.40(3) to Permit Member Organizations to Engage in Proprietary Trading from Their Approved Booth Premises in Certain OTC Bulletin Board and OTC Markets Securities

I. Introduction

On May 11, 2011, 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 70.40(3) to permit member organizations to engage in proprietary trading from their approved booth premises in certain OTC Bulletin Board (“OTCBB”) and OTC Markets securities. The proposed rule change was published for comment in the Federal Register on May 25, 2011.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description

NYSE proposes to amend NYSE Rule 70.40(3) to permit member organizations to engage in proprietary trading from their approved booth premises in certain OTCBB and OTC Markets securities.⁴

In June 2007, the Exchange adopted NYSE Rule 70.40, which permits a member

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 64522 (May 19, 2011); 76 FR 30418 (“Notice”).

⁴ The Exchange’s affiliate, NYSE Amex LLC (“NYSE Amex”), has proposed to adopt the same rule. See SR-NYSEAmex-2011-34.

organization to operate its booth premises on the Exchange Floor in a manner similar to its “upstairs” office, thereby allowing member organizations to access other markets and trade a wider array of products from their booth premises and thus operate more efficiently and competitively.⁵ At the time that NYSE Rule 70.40 was adopted, it included certain conditions and limitations on such trading, including that only trading on behalf of customers would be permitted. As such, NYSE Rule 70.40(3) prohibits member organizations approved to operate booth premises pursuant to such Rule from effecting any transaction from their approved booth premises for their own account, the account of an associated person, or an account with respect to which they or an associated person thereof exercise investment discretion on the Exchange.

After more than three years of experience with NYSE Rule 70.40, member organizations have requested that certain types of proprietary trading be permitted under the Rule, and the Exchange has determined that it is appropriate to do so. Therefore, the Exchange proposes to revise NYSE Rule 70.40(3) to permit member organizations to effect transactions in the common, preferred, and debt securities of an operating company that is quoted on the OTC Bulletin Board or OTC Markets (an “OTC Security”) from their approved booth premises for their own account, the account of an associated person, or an account with respect to which they or an associated person thereof exercise investment discretion, except that such member organizations could not effect such transactions in an OTC Security that is related to a security listed or traded on the Exchange or NYSE Amex.⁶ Because trading would be limited to the

⁵ See Securities Exchange Act Release 55908 (June 14, 2007), 72 FR 34056 (June 20, 2007) (SR-NYSE-2007-51) (notice of filing and immediate effectiveness of proposed rule change permitting member organizations to operate their booth premises as an upstairs office). Under NYSE Rule 70.40, only Floor Brokers may conduct activity from booth premises.

⁶ Since the merger of NYSE and NYSE Amex in 2008, the exchanges have conducted equity trading from the same Trading Floor, and NYSE Amex has conducted options

common, preferred, and debt securities of an operating company, a member organization could not trade in an index-based or derivative security (e.g., a right or warrant) that is quoted on the OTCBB or OTC Markets.

Under the proposed rule change, an OTC Security would be considered related to a security listed or traded on the Exchange or NYSE Amex⁷ if:

- (a) the OTC Security is issued by an issuer of a security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, or an affiliate of such issuer;
- (b) the OTC Security is subject to a corporate action that relates to the issuer of a security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, or an affiliate of such issuer;
- (c) the OTC Security is issued by an issuer of a security that is a component of a narrow-based security index⁸ that is linked to a security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option; or
- (d) the OTC Security is issued by a foreign issuer or is a depositary receipt (or the equivalent thereof) for such a security, and a security issued by such foreign issuer or a depositary receipt (or the equivalent thereof) for such a security is listed or traded on the Exchange or NYSE Amex or underlies an NYSE Amex option.

Under the proposed rule, a corporate action would be any action by an issuer of an OTC Security or a security listed or traded on the Exchange or NYSE Amex that causes a relationship between the price of the OTC Security and the price of the security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, such as the announcement of

trading in rooms adjacent the Trading Floor. See Securities Exchange Act Release No. 58673 (September 29, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60), 73 FR 57707 (October 3, 2008), and NYSE Rule 6A.

⁷ Securities listed on The NASDAQ Stock Market are traded on NYSE Amex pursuant to unlisted trading privileges and thus would be considered a security traded on NYSE Amex under the proposed rule change. See Rules 500 - 525 - NYSE Amex Equities.

⁸ For purposes of the proposed rule, the definition of narrow-based security index would be the same as the definition in Section 3(a)(55) of the Securities Exchange Act of 1934 (the "Act").

a merger, acquisition, joint venture, spinoff, dissolution, bankruptcy filing or other similar type of event involving the issuers.

The proposed proprietary transactions in OTC Securities would remain subject to all of the other provisions of NYSE Rule 70.40. First, a member organization would have to obtain approval from NYSE Regulation, Inc. (“NYSER”) to engage in proprietary OTC Securities trading from booth premises.⁹ Second, all such transactions would be subject to the regulatory requirements that apply to “upstairs” trading, including registration requirements and audit trail requirements applicable to those markets and supervision requirements under NYSE Rule 342.¹⁰ Finally, a member organization would be required to adopt and implement comprehensive written procedures governing the conduct and supervision of proprietary trading in OTC Securities handled through the booth and the staff responsible for such activities; such procedures must be reasonably designed to ensure that the member organization would be trading in compliance with the requirements of NYSE Rule 70.40, including that it is not effecting transactions from booth premises in OTC Securities that are related to securities listed or traded on the Exchange or NYSE Amex. A member organization would be required to obtain NYSER approval of such written procedures before such trading commences.¹¹ A member organization would be required to regularly review such procedures and compliance therewith, and obtain approval from NYSER of any subsequent changes to such procedures.¹²

At a minimum, such written procedures must require the member organization to exercise

⁹ NYSE Rule 70.40(1).

¹⁰ NYSE Rule 70.40(4) and (5).

¹¹ If a member organization had already obtained approval to operate booth premises under NYSE Rule 70.40, it would still be required to update its written procedures to address proprietary trading in OTC Securities and obtain NYSER approval under NYSE Rule 70.40(7).

due diligence before commencing trading in an OTC Security from the booth premises pursuant to this Rule to ensure that such trading is in compliance with the requirements of this Rule and that the member organization has procedures to monitor its trading activity in order to remain in compliance. A member organization must have supervisory systems in place that produce records sufficient to reconstruct, in a time-sequenced manner, all orders with respect to which the member organization is trading from the booth premises under this Rule. The member organization must be able to demonstrate which OTC Security transactions were effected from the booth premises (as compared to off-Floor trading, if applicable). If the member organization could not demonstrate which trading is from the booth premises, the Exchange would presume that all such trading was effected from the booth premises.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act¹³ and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the Exchange's rules 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 Commission notes that the proposed rule change will enable member organizations

¹² NYSE Rule 70.40(6) and (7).

¹³ 15 U.S.C. 78f.

¹⁴ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

to expand the types of activities that can be conducted from booth premises to include transactions in certain OTCBB and OTC Markets securities for the member organization's own account, the account of an associated person, or an account with respect to which they or an associated person thereof exercise investment discretion. At the same time, the proposal excludes such transactions in an OTC Security that is related to a security listed or traded on the Exchange or on NYSE Amex. In addition, the Commission notes that the proposed proprietary transactions in OTC Securities would remain subject to the registration, audit trail, and supervision requirements of NYSE Rule 70.40.¹⁶ This includes the requirement to adopt and implement comprehensive written procedures governing the conduct and supervision of proprietary trading in OTC Securities handled through the booth and the staff responsible for such activities. These procedures must be reasonably designed to ensure that member organizations are not effecting transactions from booth premises in OTC Securities that are related to securities listed or traded on the Exchange or NYSE Amex.¹⁷

The primary reason for the earlier restriction on proprietary trading by Floor Brokers was concern that the Floor Broker's knowledge of events on the floor and the state of the market would provide him with an unfair advantage over off-floor market participants. However, in light of the proposed rule's restriction on trading OTC Securities that are related to a security listed or traded on the Exchange or NYSE Amex, the Commission believes that the opportunities for members to trade on non-public information will be appropriately minimized or eliminated.

In addition to written procedures, the member organization must have a supervisory system in place to produce records sufficient to reconstruct, in a time-sequenced manner, all

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ See Notice, supra note 3.

¹⁷ See id.

orders with respect to trading from booth premises and must be able to demonstrate which OTC Security transactions were effected from the booth premises. Furthermore, as noted above, to the extent that a member organization has already obtained approval to operate booth premises under NYSE Rule 70.40, it would still be required to update its written procedures to address proprietary trading in OTC Securities and obtain NYSE approval under NYSE Rule 70.40(7).¹⁸

In light of the foregoing requirements, which provide for appropriate limitations on and oversight of proprietary trading by Exchange members from their approved booth premises adjacent to the floor, the Commission finds that the proposed rule change is consistent with the Act.

¹⁸ See Notice. See also supra note 11.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NYSE-2011-22) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Cathy H. Ahn
Deputy Secretary

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).