

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50777; File No. SR-NYSE-2004-67)

December 1, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. to Extend its Pilot Program Permitting a Floor Broker to Use an Exchange Authorized and Provided Portable Phone on the Exchange Floor

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 November 22, 2004, the New York Stock Exchange, Inc. (“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 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 extend its pilot program that amends NYSE Rule 36 (Communication Between Exchange and Members’ Offices) to allow a Floor broker’s use of an Exchange authorized and provided portable telephone on the Exchange Floor upon approval by the Exchange (“Pilot”) until March 31, 2005. The Pilot was in effect on a five-month pilot basis expiring on November 30, 2004.<sup>3</sup> The text of the proposed rule change is available at the Office of the Secretary, the Exchange, and at the Commission.

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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> See Securities Exchange Act Release No. 49954 (July 1, 2004), 69 FR 41323 (July 8, 2004) (SR-NYSE-2004-30).

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 and discussed any comments it received on 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>4</sup> beginning no later than June 23, 2003.<sup>5</sup> The Exchange extended the Pilot for an additional six months ending on June 16, 2004.<sup>6</sup> The Exchange further extended the Pilot for an additional five months ending on November 30, 2004.<sup>7</sup> The Exchange represents that no regulatory actions or administrative or technical problems, other than routine telephone maintenance issues, have resulted from the Pilot over the past few months. Therefore, the Exchange seeks to extend the Pilot for an additional four months, until March 31, 2005.

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<sup>4</sup> See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR-NYSE-2002-11) ("Original Order").

<sup>5</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>6</sup> See Securities Exchange Act Release No. 48919 (December 12, 2004), 68 FR 70853 (December 19, 2003) (SR-NYSE-2004-38).

<sup>7</sup> See note 3, *supra*.

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 36.20 prohibited the use of portable telephone communications between the Trading Floor and any off-Floor location, and the only way that voice communication could be conducted by Floor brokers between the Trading Floor and an off-Floor location was by means of a telephone located at a broker's booth. These communications often involved a customer calling a broker at the booth for "market look" information. Prior to the Pilot, a broker could not use a portable phone at the point of sale in the trading crowd to speak with a person located off the Floor.

The Exchange proposes to extend the Pilot until March 31, 2005. The Pilot would amend NYSE Rule 36 to permit a Floor broker to use an Exchange authorized and issued portable telephone on the Floor. Thus, with the approval of the Exchange, a Floor broker would be permitted to 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 broker to accept orders consistent with Exchange 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 broker's booth location. Use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange would continue to be prohibited.

Furthermore, both incoming and outgoing calls would continue to be allowed, provided the requirements of all other Exchange rules have been met. Under NYSE Rule 123(d), a 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 Systemic Capture ("FESC") electronic database.<sup>8</sup> In addition, Exchange 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>9</sup>

In addition, orders in Investment Company Units (as defined in Section 703.16 of Listed Company Manual), also known as Exchange-Traded Funds ("ETFs"), would also be subject to the same FESC requirements as orders in any other security listed on the Exchange.<sup>10</sup> As a result, the Pilot would continue to allow for the use of portable phones

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<sup>8</sup> See Securities Exchange Act Release No. 43689 (December 7, 2000), 65 FR 79145 (December 18, 2000) (SR-NYSE-98-25). See also Securities Exchange Act Release No. 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>9</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 <http://www.nyse.com/regulation>) and 91-25 (July 8, 1991).

<sup>10</sup> Previously, under an exception to NYSE Rule 123(e), orders in ETFs could first be executed and then entered into FESC. However, in SR-NYSE-2003-09, the Exchange eliminated the exception to NYSE Rule 123(e) for ETFs, and, as part of its proposal in SR-NYSE-2002-11, allowed the use of portable phones for orders in ETFs. See Securities Exchange Act Release No. 47667 (April 11, 2003), 68 FR 19063 (April 17, 2003). NYSE Rule 123(e) provides that all orders in any security traded on the Exchange be entered into FESC before they can be represented in the Exchange's auction market.

for orders in ETFs.<sup>11</sup>

The Exchange believes that the extension of the Pilot for an additional four months would enable the Exchange 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>12</sup> By enabling customers to speak directly to a Floor broker in a trading crowd on an Exchange authorized and issued portable telephone, the Exchange believes that the proposed rule change would expedite and make more direct the free flow of information which, prior to the Pilot, had to be transmitted somewhat more circuitously via the broker's booth.

In addition, NYSE Rule 36.20, both prior to the Pilot, and as proposed to be amended, would not apply to specialists who are prohibited from speaking from the post to upstairs trading desks or customers. The Exchange notes that specialists are subject to

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<sup>11</sup> Telephone conversation between Jeffrey Rosenstock, Senior Special Counsel, NYSE and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission, dated November 30, 2004.

<sup>12</sup> See, e.g., Securities Exchange Act Release No. 43493 (October 30, 2000), 65 FR 67022 (November 8, 2000) (SR-CBOE-00-04) (expanding the Chicago Board Options Exchange, Inc.'s existing policy and rules governing the use of telephones at equity option trading posts by allowing for the receipt of orders over outside telephone lines, from any source, directly at equity trading posts), and Securities Exchange Act Release No. 43836 (January 11, 2001), 66 FR 6727 (January 22, 2001) (SR-PCX-00-33) (discussing and approving the Pacific Exchange, Inc.'s proposal to remove current prohibitions against Floor brokers' use of cellular or cordless phones to make calls to persons located off the trading floor).

separate restrictions in NYSE Rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.<sup>13</sup>

### Pilot Program Results

Since the Pilot's inception, the Exchange represents that there have been approximately 800 portable phone subscribers. In addition, with regard to portable phone usage, for a sample week of July 12, 2004 through July 16, 2004, an average of 16,608 calls per day were originated from portable phones, and an average of 5,219 calls per day were received on portable phones. Of the calls originated from portable phones, an average of 13,271 calls per day were internal calls to the booth, and 3,337 calls per day were external calls. Thus, over 80% of the calls originated from portable phones were internal calls to the booth. With regard to received calls, of the 5,219 average calls per day received, an average of 2,447 calls per day were external calls, and an average of 2,772 calls per day were internal calls received from the booth. Thus, approximately 53% of all received calls were internally generated, and 47% were calls from the outside.

The Exchange represents that no regulatory actions or administrative or technical problems, other than routine telephone maintenance issues, have resulted from the Pilot since its inception. The Exchange believes that the Pilot appears to be successful in that there is a reasonable degree of usage of portable phones, but as noted earlier, no

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<sup>13</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).

regulatory or administrative or technical problems associated with their usage. The Exchange believes that the Pilot appears to facilitate communication on the Floor without any corresponding drawbacks. Accordingly, the Exchange believes it is appropriate to extend the Pilot until March 31, 2005.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>15</sup> in particular, in that it is 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 that the amendment to NYSE Rule 36 would support 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.

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<sup>14</sup> 15 U.S.C. 78f(b).

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





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 interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</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 five-day pre-filing period and 30-day operative period under Rule 19b-4(f)(6)(iii).<sup>18</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 five-day pre-filing period and the 30-day operative delay and make this proposed rule change immediately effective

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>18</sup> 17 CFR 240.19b-4(f)(6)(iii).

upon filing on November 22, 2004.<sup>19</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 March 31, 2005.

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 who are interacting with the public on portable phones are authorized to do so, as NYSE Rule 36 requires,<sup>20</sup> and that orders are being handled in compliance with NYSE rules. The Commission expects the Exchange to actively review these procedures and address any potential concerns that have arisen during the extension of the Pilot. The Commission also requests that the Exchange report any problems, surveillance or enforcement matters associated with the Floor brokers' use of an Exchange authorized and provided portable telephone on the 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, we 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>21</sup>

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<sup>19</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>20</sup> See note 9 *supra*, and accompanying text for other NYSE requirements that Floor brokers be properly qualified before doing public customer business.

<sup>21</sup> This information along with any proposal to extend the pilot should be submitted at least one to two months prior to the expiration of the four-month pilot.

#### 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 for (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2004-67 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-67. 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

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inspection and copying in the Commission's Public Reference Room. Copies of the 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-2004-67 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>22</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).