

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 53213; File No. SR-NYSE-2005-80)

February 2, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to NYSE Rule 36, RCMMs' Ability to Use Exchange Authorized and Issued Portable Phones on the NYSE Floor

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 22, 2005, 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. On January 18, 2006, NYSE filed Amendment No. 1 to the proposed rule change.³ NYSE filed this proposal pursuant to Section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder⁵ as non-controversial, and therefore the proposed rule change is effective immediately upon filing. The Commission is publishing this notice, as amended, 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

This filing amends NYSE Rule 36 to permit Registered Competitive Market Makers ("RCMMs"), as defined in NYSE Rule 107A, to use Exchange authorized and provided portable phones and consists of proposed member education bulletins which describe the conditions under

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange clarified proposed NYSE Rule 36.22 and added in the purpose section a new footnote relating to surveillance and examination procedures to monitor the activities of RCMMs.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

which Floor brokers and RCMMs may use such phones pursuant to the Exchange's portable phone pilot ("Pilot"). The conditions under which a Floor broker and a RCMM may use a portable phone pursuant to the Pilot are proposed as NYSE Rules 36.21 and 36.22.

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

Background

The Commission approved implementation of the Exchange's amendment to NYSE Rule 36 allowing Floor brokers to use Exchange authorized and provided portable phones on the Exchange Floor as a six-month pilot⁶ beginning no later than June 23, 2003.⁷ Since the inception of the Pilot, the Exchange has extended the Pilot five times, with the current Pilot expiring on January 31, 2006.⁸ In addition, the Exchange filed for permanent approval of this rule.⁹ The

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

⁷ 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).

⁸ 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);

Exchange represents that no administrative or technical problems, other than routine telephone maintenance issues, have resulted from the Pilot over the past few months.¹⁰

NYSE Rule 36

NYSE Rule 36 (Communications Between Exchange and Members' Offices) governs the establishment of telephone or electronic communications between the Exchange Floor and any other location. Today, NYSE Rule 36.20 permits a Floor broker to use an Exchange authorized and provided portable telephone on the Exchange Floor. NYSE Rule 36.20 does not apply to specialists who are prohibited under this rule from communicating with off-Floor locations from the Exchange Floor.¹¹

Currently, under the Pilot, with the approval of the Exchange, a Floor broker is permitted to engage in direct voice communication from the point of sale to an off-Floor location, such as a

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); and 52188 (August 1, 2005), 70 FR 46252 (August 9, 2005) (SR-NYSE-2005-53) (extending the Pilot for an additional six months ending January 31, 2006).

⁹ See SR-NYSE-2004-52, pending with the Commission.

¹⁰ The Exchange notes that it began receiving records of incoming telephone calls in June 2005 and will continue to receive monthly updates. With respect to regulatory actions concerning the Pilot, 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. With respect to one of these RCMMs, the use by the RCMM of an Exchange authorized and provided portable phone in or about January 2005 is under review as part of the investigation. Telephone conversation between Jeff Rosenstock, Senior Special Counsel, NYSE, and Molly M. Kim, Attorney, Division of Market Regulation, Commission, on January 27, 2006.

¹¹ NYSE Rule 36.30 provides that, with the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm or through a member (on the floor) of an options or futures exchange.

member firm's trading desk or the office of one of the Floor broker's customers.¹² Such communication permit Floor brokers to accept orders consistent with Exchange rules and provide status and oral execution reports for orders previously received, as well as "market look" observations as historically have been routinely transmitted from a Floor broker's booth location. The use of a portable telephone on the Exchange Floor other than one authorized and provided by the Exchange is prohibited.

RCMMs

The Commission approved the Exchange's proposed rule to permit members to register as RCMMs on May 1, 1978.¹³ Under NYSE Rule 107A, RCMMs may trade for their own account or the account of their member organization and may also serve as Floor brokers executing customer orders.¹⁴ Currently, there are eleven (11) registered RCMMs. RCMMs are also subject to being called by a Floor Official or a Floor broker holding an unexecuted customer order to improve the market in any listed stock by either bidding/offering to narrow the spread by at least the minimum trading variation or improving the depth of the market by at least one unit

¹² Floor brokers 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. For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, see Information Memos 05-37 (May 27, 2005) and 01-18 (July 11, 2001) (both available on <http://www.nyse.com>) and 91-25 (July 8, 1991).

¹³ See Securities Exchange Act Release No. 14718 (May 1, 1978), 45 FR 19738 (May 8, 1978) (SR-NYSE-78-24).

¹⁴ The Exchange has developed surveillance and examination procedures to monitor the activities of RCMMs, including their use of Exchange authorized and provided portable phones.

of trading (normally 100 shares).¹⁵ Further, a member may not act as a RCMM and a broker representing an agency order in the same security on the same day.¹⁶

Proposed Changes to NYSE Rule 36

Prior approval orders by the Commission concerning the Pilot and the current NYSE Rule 36.20 only apply to a Floor broker's ability to use an Exchange authorized and provided portable phone. RCMMs are non-specialist members of the Exchange and do not have the same type of information (i.e., access to the Display Book[®]) that a specialist has. As such, the Exchange believes it is appropriate for RCMMs to participate in the Pilot so that they could communicate with their offices in order to, among other things, enter off-Floor orders and better monitor their positions. Therefore, in order to clarify that NYSE Rule 36.20 would apply to RCMMs and Floor brokers, the Exchange proposes to delete the current reference in NYSE Rule 36.20 to "members and member organizations other than a specialist or specialist member organization" and replacing it with the terms "Floor brokers and RCMMs."

The Exchange believes that providing portable phones to RCMMs would increase the efficiency of their trading in accordance with NYSE Rule 107A, especially given the changes in the speed of trading.¹⁷ However, given their ability to trade for their own account or the account of their member organizations without the restrictions that apply to other non-specialist members

¹⁵ These RCMM trades are referred to as "affirmative obligation" trades or "call-in notifications."

¹⁶ See NYSE Rule 107A.B(1).

¹⁷ The Exchange believes that, currently, allowing Floor brokers to use portable phones enables 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. See Securities Exchange Act Release No. 52188 (August 1, 2005), 70 FR 46252 (August 9, 2005) (SR-NYSE-2005-53).

and member organizations, the Exchange also believes it appropriate to limit RCMMs' use of portable phones in accordance with the Pilot, as follows:

- limit their use of the portable phone solely to communications with their upstairs office's land line and the land line of their clearing member organization's upstairs office to enter off-Floor orders and discuss matters related to the clearance and settlement of transactions;
- RCMMs, their off-Floor offices, and their member organization's off-Floor offices would not be allowed to use portable phones to transmit to the Floor orders for the purchase or sale of securities by public customers or any other agency business;
- RCMMs' use of the portable phone pursuant to proposed NYSE Rules 36.20 and 36.22 must comply with all other rules, policies, and procedures of both the federal securities laws and the Exchange, including the record retention requirements, as set forth in NYSE Rule 440 and Rules 17a-3 and 17a-4 under the Act;¹⁸
- require that RCMMs implement procedures designed to deter their upstairs office or their clearing member organization's upstairs office calling their portable phone number from using caller ID block or other means to conceal the phone number from which a call is being made; and
- call-forwarding or conference calling are prohibited by RCMMs, their upstairs office personnel, and their clearing member organization's upstairs office.¹⁹

In addition, no other electronic communication devices may be used unless approved by the

¹⁸ 17 CFR 240.17a-3 and 240.17a-4.

¹⁹ All Exchange authorized and provided portable phones do not have call-forwarding or conference calling capabilities and would continue to not have such capabilities.

Exchange.²⁰ Finally, RCMMs must execute a written acknowledgement authorizing the portable phone service provider to provide New York Stock Exchange Regulation (“NYSE Regulation”) with data and records relating to incoming and outgoing calls.²¹

A member education bulletin describing the above conditions for the use of a portable phone by RCMMs, the acknowledgement procedure, and the proposed rule text would be sent to all RCMMs. The Exchange also proposes that this filing (including proposed conforming changes to NYSE Rule 36) become incorporated into the Pilot.

RCMM Acting as a Floor Broker

As noted above, RCMMs are permitted to serve as Floor brokers, executing customer orders, provided they do not execute RCMM and customer orders in the same security on the same day. However, the Pilot permits broader portable phone usage for Floor brokers than RCMMs. Accordingly, RCMMs would not be allowed to use a portable phone to conduct any agency business until issues involving the use of portable phones by a RCMM acting in a capacity of an agent have been fully reviewed and resolved by NYSE Regulation.²²

Use of Portable Phones by Floor Brokers

As noted above, the Exchange is providing in proposed NYSE Rule 36.21 the conditions under which Floor brokers can use portable phones during the Pilot. In addition, the Exchange

²⁰ Currently, only Exchange authorized and provided portable phones are approved.

²¹ This provision is being proposed as a precautionary measure to address the privacy concerns by the portable phone service provider.

²² In the future, the Exchange would consider allowing RCMMs to notify NYSE Regulation in writing of their intent to conduct such agency business, and NYSE Regulation would make a determination whether to require that a RCMM amend his or her Form BD with the Commission and/or file an amended membership application with NYSE Regulation. However, 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.

has developed an acknowledgement for Floor brokers participating in the Pilot to sign. Floor brokers must acknowledge the following:

- they authorize the portable phone service provider to provide NYSE Regulation with data and records relating to incoming and outgoing calls;
- their use of the portable phone pursuant to NYSE Rule 36.20 complies with all other rules, policies, and procedures of both the federal securities laws and the Exchange, including the record retention requirements, as set forth in NYSE Rule 440 and Rules 17a-3 and 17a-4 under the Act;²³
- they are required to implement procedures designed to deter anyone calling their portable phone number from using caller ID block or other means to conceal the phone number from which a call is being made; members and member organizations are required to make and retain records demonstrating compliance with such procedures; and
- no other electronic communication devices may be used unless approved by the Exchange.²⁴

A member education bulletin describing the proposed rule text and the acknowledgement procedure would be sent to all Floor brokers participating in the Pilot.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act²⁵ in general, and further the objectives of Section 6(b)(5) of the Act²⁶ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and

²³ 17 CFR 240.17a-3 and 240.17a-4.

²⁴ Currently, only Exchange authorized and provided portable phones are approved.

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

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 could take place.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, would 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, as amended, 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 Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸ At any time within 60 days of the filing of the proposed rule change, as amended, the Commission may summarily abrogate such rule change if it appears to the

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(6).

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.²⁹

The Exchange has requested that the Commission waive the 30-day operative period under Rule 19b-4(f)(6)(iii) of the Act.³⁰ 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, as amended, immediately effective upon filing on November 21, 2005. The Commission believes that the waiver of the 30-day operative delay may increase the efficiency of the Exchange by providing immediate use of Exchange authorized portable phones to RCMs. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.³¹

The Commission notes that proper surveillance is an essential component of any telephone access policy to an Exchange 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. The Commission expects the Exchange to actively review these procedures and address any potential concerns that have arisen during the Pilot. In this regard, the Commission notes that the Exchange should address whether telephone records are adequate for surveillance purposes.

²⁹ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on January 18, 2006, the date NYSE filed Amendment No. 1 to the proposed rule change. See 15 U.S.C. 78s(b)(3)(C).

³⁰ 17 CFR 240.19b-4(f)(6)(iii).

³¹ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

The Commission also requests that the Exchange report any problems, surveillance, or enforcement matters associated with use of an Exchange authorized and provided portable telephone by Floor brokers and RCMMs on the Exchange Floor. As stated in the Original Order, 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 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.³²

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-2005-80 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, D.C. 20549-1090.

³² 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-2005-80. 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 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-2005-80 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.³³

Nancy M. Morris
Secretary

³³ 17 CFR 200.30-3(a)(12).