

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39379; File No. SR-NYSE-97-17]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change to Amend the Exchange's Wireless Data Communications Initiatives

December 1, 1997.

I. Introduction

On May 28, 1997, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to 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 modify certain aspects of its program for the use of wireless data communications technology that allows a member in a trading crowd or elsewhere on the trading floor to communicate with other locations on the floor by means of a hand-held wireless device.

Notice of the proposed rule change, together with the substance of the proposal, was published for comment in Securities Exchange Act Release No. 38786 (June 30, 1997), 62 FR 36597 (July 8, 1997). No comments were received on the proposal. This order approves the proposed rule change.

II. Description

In 1995, the Committee approved a proposed rule change of the Exchange³ that allowed the Exchange to introduce wireless data communications technology onto the Exchange trading floor. The Exchange believes that such technology expedites, and makes more efficient, the process by which members receive and execute orders. The technology involves the floor-based use of wireless hand-held data communications devices. To effect that initiative, the Exchange undertook to develop and install a wireless data communications infrastructure on its floor. It determined to allow private vendors, as well as the Exchange itself, to offer hand-held device services to Exchange members.

As described at length in the 1995 Filing, the Exchange's plan has been to introduce the new technology in four phases:

(1) In Phase I, the Exchange supervised and monitored three "proof-of-concept" pilot programs on the floor of the Exchange.

(2) In Phase II, the Exchange monitored and supervised additional, more structured, pilot testing of independent wireless data communications services, including that offered by the Exchange.

(3) In Phase III, the Exchange will conduct on the floor a preproduction pilot test of its wireless data communications system infrastructure, will supervise the installation and testing of the infrastructure and will move its own wireless data communications system to the infrastructure. In addition, the Exchange will continue to allow pilot testing of private vendors' wireless data communications services.

(4) In Phase IV, the Exchange will direct the production roll-out of the wireless data communications infrastructure and the migration of vendors to the infrastructure.

The Exchange had completed Phase I prior to the time of its submission of the 1995 Filing. Since then, the Exchange has completed Phase II and recently entered into Phase III.

Specifically, the purposes of the proposed rule change are: (1) To modify the types of wireless data communications that the Exchange will permit over the infrastructure; (2) to clarify that a vendor cannot provide wireless data communications services to Exchange members unless it is a member organization of the Exchange; and (3) to introduce the forms of agreement and provisions pursuant to which the Exchange will allow vendors and member organizations to provide wireless data communications services to members on the trading floor of the Exchange in the production roll-out environment.

First, the Exchange proposes to modify the types of wireless communications permitted over the infrastructure. The 1995 Filing specified as follows:

A vendor's Phase II pilot program must restrict wireless data communications to communications between a hand-held device used by a member on the floor and a terminal in a floor booth location. The Exchange will prohibit all floor-based wireless data communications between any other points.

The Exchange limited communications during the Phase II pilot programs to communications between a booth terminal and a floor-based hand-held device and will continue that limitation during Phase III pilot programs. However, the Exchange proposes the ultimate addition of

communications between two hand-held devices on the floor.

As during the pilot programs, the Exchange will continue to prohibit wireless data communications either from a booth terminal or from a location on the trading floor to a location off of the floor. However, the same as under the pilot programs, a member subscribing to a wireless data communications service, whether from the Exchange or from a private vendor, may effect communications between a floor booth terminal and a member's off-floor system in the same "wired" manner as it can today, subject to applicable rules and policies. In addition, the subscribing member's booth terminal may interface with the Exchange's Common Message Switch ("CMS") in order to allow the member to enter orders into the Exchange's SuperDOT System complex. That interface would not differ from today's booth/CMS interfaces and would be subject to existing CSM interface standards.

Next, the Exchange proposes to only provide access to its wireless communications infrastructure to vendors that are member organizations. The Exchange anticipates that some member organizations that are interested in vending those services will enter into contracts with non-member organizations (e.g., traditional wireless data device vendors that desire to function as agents or contractors of the member organization) and that those contracts will delegate many of the service functions to those other entities. The Exchange is willing to permit that use of agents and contractors, so long as the member organization remains responsible for the performance of those functions and guarantees the performance of the agents and contractors.

Additionally, the Exchange included as part of the 1995 Filing, a form of agreement (the "Pilot Program Vendor Form") pursuant to which the Exchange would allow vendors of wireless data communications services to provide those services to Exchange members for the purposes of the Phase I and Phase II pilot testing. Now that the pilot testing period is completed, the Exchange has derived from the Pilot Program Vendor Form two different forms of agreement that are designed for use by member organizations that wish to provide wireless data communications services to members in the Exchange's production roll-out wireless data communications environment. One of those forms (the "Associated Member Form") allows a member organization to provide such

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 35931 (June 30, 1995), 60 FR 35767 (July 11, 1995) ("1995 Filing").

services to members that are officers, partners and employees of the member organization. The other form (the "Revised Vendor Form") allows a member organization to provide such services to other members.

The primary differences of substance between the Pilot Program Vendor Form and the Revised Vendor Form are as follows. The Revised Vendor Form eliminates: (1) References to the creation and installation of the infrastructure; (2) permission to use radio bands other than that which the Exchange provides through its infrastructure; (3) a requirement that members migrate to the infrastructure once it becomes available; and (4) a limited Exchange obligation to support the communications equipment of private vendors.

Also, the Revised Vendor Form clarifies that only member organizations may vend wireless data communications services on the Exchange's floor, but allows the member organization to delegate functions to agents and contractors, so long as the member organization guarantees the performance of the agents and contractors. The Revised Vendor Form will allow communications between members using hand-held devices at two different locations on the trading floor, as well as between a member using a hand-held device on the floor and a member at a booth terminal, as the Exchange permitted in the pilot programs.

In addition, the Revised Vendor Form will not contain the restriction on participating vendors that they refrain from discriminating among the members to whom they are willing to provide their vendor services.⁴ The Exchange believes that the completion of the infrastructure means that the technology necessary to allow every member to enjoy wireless data communications services will be available, whether from a vending member organization or from the Exchange. In Phase IV, the production roll-out phase, the Exchange will therefore allow vending member organizations to enter into such wireless data communications arrangements with members as they may see fit. For instance, a member organization may vend a wireless data communication service to Exchange members, but may offer preferential terms and conditions to members with which it is affiliated. As a result, the Revised Vendor Form will eliminate: (1) the several provisions found in the Pilot Program Vendor Form

that require the vendor to provide wireless data communications services only on unbiased, non-discriminatory grounds; and (2) the provision that limits the scope of any pilot program to 25 members.

The Revised Vendor Form also will eliminate the provision that prohibits a vendor from representing that it is the sole vendor of wireless data communications services on the Exchange floor. Finally, the Exchange proposes to add to the Revised Vendor Form a provision that prohibits a vending member organization from introducing its service, or from modifying its equipment or transmission methodology, until the Exchange has seen the service or the modification operate satisfactorily. In addition, the Revised Vendor Form grants the Exchange the right to test a service and related equipment.⁵

The vendor agreement form requires the vendor to prepare a description of its service for attachment to the form. *Attachment A* to the form ("the Revised Vendor Service Description") sets forth the information that the Exchange requires the vendor to include in the service description. The Exchange proposes to eliminate, from that required information, information that completion of the infrastructure makes irrelevant. In addition, the Exchange proposes to add to those required items of information the vendor's method and location for storing devices when not in use. Furthermore, the Exchange proposes to clarify that among the rules and regulations with which the vendor is required to comply are all health and safety standards.⁶

As an important element of the Pilot Program Vendor Form, the Exchange required a vendor of a Phase I or II pilot program to provide its service to a member only pursuant to a written contract with the member. The Exchange required that contract to govern six elements of the vendor-member relationship⁷ and to include certain provisions designed to protect the interests of the Exchange and its members. The Exchange set forth those

⁵ Finally, the proposed rule change provides that: the NYSE is not liable to the vendor, any Authorized Service Recipient, or any other person, for lost profits; and that the vendor cannot represent that the NYSE provides the service, except for the infrastructure and certain other equipment in support of the wireless data communications services.

⁶ The service description as so amended (the "Revised Vendor Service Description") is set forth in *Attachment A* to *Exhibit A* of the rule filing.

⁷ Responsibility for losses; training; system maintenance and support; technological limitations; the availability of equipment and spare parts; and service charges.

requirements in an *Attachment B* to the Pilot Program Vendor Form. For the purpose of the Revised Vendor Form, the Exchange is proposing to amend those contract requirements in the manner set forth in *Attachment B* to *Exhibit A* (the "Revised Vendor-Member Agreement Terms"). The amendments: reflect the fact that the Exchange will now permit communications between members using hand-held devices at two different locations on the floor; remove the requirement that the vendor-member agreement must govern the six prescribed elements of the relationship; remove the Exchange-imposed termination requirements for terminations by the vendor or the subscribing member; and add that NYSE rules apply.

For the production roll-out phase, the Exchange has prepared the Associated Member Form for use by a member organization that wishes to provide wireless data communications services on the Exchange's trading floor solely to officers, partners and employees of the member organization that are Exchange members.⁸

The Associated Member Form contains provisions that are almost identical in substance to those found in the Revised Vendor Form, except that the Associated Member Form requires the member organization to take responsibility for the actions of its members and to assure that its members will comply with all provisions of the Form as well as with relevant laws, rules and regulations. For that reason, the Exchange does not propose to require the member organization to enter into an agreement with a subscriber to its wireless data communications service if the subscriber is an Exchange member that is an officer, partner or employee of the member organization. As a result, the Exchange does not propose to impose on the member organization a set of terms and conditions—for application between the member organization and its members—that parallel those set forth in the Revised Vendor-Member Agreement Terms. However, the proposed rule change does add to the Associated Member Form a paragraph similar to one found in the Revised Vendor-Member Agreement Terms stating that if the Exchange determines that any Associated Member has failed to comply with the rules, policies and

⁸ A copy of the Associated Member Form is attached to the filing as *Exhibit B*. Attached as *Attachment A* to that form is a service description (the "Associated Member Service Description"), modified from the Revised Vendor Service Description as necessary to reflect the associated member context.

⁴ The Commission notes that the anti-discrimination restrictions will still apply through the completion of Phase III.

procedures of the NYSE, the Commission, or the Federal Communications Commission ("FCC"), then the vendor (customer) has to stop providing the Service to that Associated Member immediately, upon notice to the customer or after a reasonable amount of time after notice.

As in respect of Phase II, the Exchange reserves the right to limit the number of vendors that may provide wireless data communications systems on the floor during Phase IV, based on the ability of the Exchange to maintain its regulatory oversight responsibilities in a satisfactory manner. In addition, as the Exchange gains experience with the use of wireless data communications technology on its floor, it may determine that additional restrictions, such as in respect of permissible transmissions or hardware, are warranted.

The Exchange does not currently plan to charge vendors or Exchange members or member organizations for the privilege of providing wireless data communications services during Phase IV, although it reserves its right to do so. If the Exchange does determine to impose Phase IV charges or any other charges, it would first seek Commission approval of any such charge.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b).⁹ Specifically, the Commission believes the proposal is consistent with the Section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public, by continuing to expedite and improve the efficiency of the process by which members receive and execute orders on the floor of the Exchange.¹¹

The Commission believes that allowing communications between two hand-held devices located at two

different positions on the floor is consistent with the Act and the original pilot approval because it will expedite and allow for more efficient processing of orders and dissemination of information among members on the floor, by eliminating the current necessary step of communicating with the booth terminal. A member may rely on the information it receives from another member on the floor through a hand-held wireless device to make trading decisions, without having to first communicate with the booth. The Commission notes the pilot testing has demonstrated that the Exchange's wireless data communications infrastructure has the capacity to accommodate those communications. The Commission also notes that the restriction will still apply that any order or information coming from off the floor must go to a booth terminal before it can be transmitted to someone on the floor of the Exchange.

The Commission also believes that it is consistent with the Act to allow the Exchange to provide access to its wireless data communications infrastructure only to vendors that are member organizations because only member organizations are subject to the Exchange's Constitution, rules, and oversight. The Exchange notes that the only vendors that participated in wireless data communications service pilot tests during Phases I and II were a member organization of the Exchange and a party affiliated with a member organization of the Exchange. It is unlikely that this restriction will dampen the availability of available vendors, given that member organizations will be allowed to contract out the provided vendor services.

The Commission believes that the proposed changes to the Pilot Program Vendor form, resulting in two separate forms, the Revised Vendor Form and the Associated Member Form, are consistent with the Act. The Commission believes that the proposed changes that eliminate references to the creation and installation of the infrastructure, permission to use radio bands other than that which the Exchange provides through its infrastructure, the requirement that members migrate to the infrastructure once it becomes available, and a limited Exchange obligation to support the communications equipment of private vendors, are reasonable because the Exchange will use the Revised Vendor Form in an environment in which the Exchange will already have completed the development and installation of its

wireless data communications infrastructure.

In addition, because the Exchange limited the scope of the Phase I and II pilot programs and will similarly limit Phase III pilot programs, the Exchange insisted that each participating vendor refrain from discriminating among the members to whom it was willing to provide its pilot service through the end of Phase III. However, the completion of the infrastructure means that the technology necessary to allow every member to enjoy wireless data communications services will be available, whether from a vending member organization or from the Exchange. Therefore, in Phase IV, the production roll-out phase, the proposed rule change will allow vending member organizations to enter into such wireless data communications arrangements with members as they may see fit. The Commission believes that this portion of the proposed rule change will not result in unfair discrimination between customers, issuers, brokers, and dealers, in part because the NYSE's own system will be available to everyone,¹² which means that a member will always be able to have access to wireless data communication services. The Commission notes that eliminating the non-discriminatory requirements allows both vendors and potential customer/members to negotiate more freely regarding various aspects of the service.

The Commission believes that the proposed rule change that eliminates from the Revised Vendor Form the provision that prohibits a vendor from representing that it is the sole vendor of wireless data communications services on the Exchange floor is reasonable under the Act because the Exchange feels certain that all members will be aware that the Exchange and certain member organizations will provide service alternatives.¹³

Finally, the Commission believes that the addition to the Revised Vendor Form of a provision that prohibits a vending member organization from introducing its service, or from modifying its equipment or transmission methodology, until the Exchange has seen the service or the modification operate satisfactorily, and allows the Exchange to test the service

¹² Phone call between Santo Famularo, NYSE and Heather Seidel, Attorney, Market Regulation, Commission, on October 3, 1997.

¹³ The Exchange has represented that it will circulate a bulletin to its members informing them that there will be service alternatives through Exchange members and the Exchange itself. Telephone conversation between Santo Famularo, NYSE, and Heather Seidel, Attorney, Market Regulation, Commission, on November 25, 1997.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

or related equipment, is consistent with the Act. The Commission believes that this change gives the Exchange sufficient authority to oversee its infrastructure by strengthening the Exchange's contractual safeguards at a time¹⁴ when the Exchange will allow vendors to have access to the Exchange's infrastructure, unlike Phases I and II, and when the Exchange may not have the same degree of communication with vending member organizations as it has had during the earlier phases.¹⁵

The Commission believes that the Revised Vendor-Member Agreement Terms¹⁶ are consistent with the Act.¹⁷ The proposed change that will remove the requirement that the vendor-member agreement must govern the six prescribed elements of that relationship is reasonable under the Act because it allows both the vendor and the member greater flexibility in fashioning a service agreement that is agreeable to both parties. Now that there will be no restriction on the number of customers a vendor may have,¹⁸ and the Exchange's service will be available to all parties who wish to utilize it, it is reasonable to allow the vendors and members more freedom in structuring their service agreements, within the boundaries set forth in the Revised Vendor Form and its attachments. Also, the provision that adds that the NYSE Constitution and rules apply is consistent with the Act because the NYSE is charged with ensuring that its members (and hence, the vendors and their customers) comply with the NYSE rules.

The Commission notes that the Associated Member Form contains provisions that are almost identical in substance to those found in the Revised Vendor Form.¹⁹ However, under the proposed rule change, the Associated Member Form requires the member organization to take responsibility for

the actions of its members and to assure that its members will comply with all provisions of the Form as well as with relevant laws, rules and regulations. For that reason, the Exchange does not propose to require the member organization to enter into an agreement with a subscriber to its wireless data communications service if the subscriber is an Exchange member that is an officer, partner or employee of the member organization; as a result, the proposed rule change does not impose on the member organization a set of terms and conditions that parallel those set forth in the Revised Vendor-Member Agreement Terms. The Commission believes that this portion of the proposed rule change is consistent with the Act because it still provides for sufficient control over the vendor-customer relationship and notes that the proposed rule change does provide that the vendor must terminate its relationship with an Associated Member whom the Exchange has determined has failed to comply with the rules, policies, and procedures of the NYSE, the Commission, or the FCC.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NYSE-97-17) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²¹

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97-32028 Filed 12-5-97; 8:45 am]

BILLING CODE 8010-01-M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Notice of Meeting of the Industry Sector Advisory Committee on Small and Minority Business (ISAC-14)

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of meeting.

SUMMARY: The Industry Sector Advisory Committee on Small and Minority Business (ISAC 14) will hold a meeting on December 15, 1997 from 9:15 a.m. to 4:00 p.m. The meeting will be open to the public from 9:15 a.m. to 1:00 p.m. and closed to the public from 1:00 p.m. to 4:00 p.m.

DATES: The meeting is scheduled for December 15, 1997, unless otherwise notified.

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).

ADDRESSES: The meeting will be held at the Department of Commerce in Room 4830, located at 14th Street and Constitution Avenue, N.W., Washington, D.C., unless otherwise notified.

FOR FURTHER INFORMATION CONTACT: Millie Sjoborg, Department of Commerce, 14th St. and Constitution Ave., N.W., Washington, D.C. 20230, (202) 482-4792 or Bill Daley, Office of the United States Trade Representative, 600 17th St. N.W., Washington, D.C. 20508, (202) 395-6120.

SUPPLEMENTARY INFORMATION: The ISAC 14 will hold a meeting on December 15, 1997 from 9:15 a.m. to 4:00 p.m. The meeting will include a review and discussion of current issues which influence U.S. trade policy. Pursuant to Section 2155(f)(2) of Title 19 of the United States Code and Executive Order 11846 of March 27, 1975, the Office of the U.S. Trade Representative has determined that part of this meeting will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives or bargaining positions with respect to the operation of any trade agreement and other matters arising in connection with the development, implementation and administration of the trade policy of the United States. During the discussion of such matters, the meeting will be closed to the public from 1:00 p.m. to 4:00 p.m. The meeting will be open to the public and press from 9:15 a.m. to 1:00 p.m. when other trade policy issues will be discussed. Attendance during this part of the meeting is for observation only. Individuals who are not members of the committee will not be invited to comment.

Pate Felts,

Acting Assistant United States Trade Representative, Intergovernmental Affairs and Public Liaison.

[FR Doc. 97-31950 Filed 12-5-97; 8:45 am]

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Trade Policy Staff Committee; Public Comments on the Triennial Review of the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement")

ACTION: Notice and request for comments.

SUMMARY: The Trade Policy Staff Committee (TPSC) is requesting written

¹⁴ The Commission notes that the Revised Vendor Form is to be used only during Phase IV.

¹⁵ The Commission believes that the proposed changes to the Revised Vendor Service Description, which sets forth the information that the Exchange requires the vendor to include in the service description, are consistent with the Act because the proposed changes eliminate the requirement of certain information that completion of the infrastructure makes irrelevant.

¹⁶ See *supra* note 7 and accompanying text.

¹⁷ The proposed rule change that permits communications between members using hand-held devices at two different locations on the floor is incorporated into this document and is consistent with the Act for the same reasons discussed above.

¹⁸ The vendor must still not exceed capacity.

¹⁹ Therefore, the Commission believes that the reasoning behind approving the changes to the Revised Vendor Form also applies to the Associated Member Form, for the similar proposed changes.