

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58068; File No. SR-NYSE-2008-20]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of a Proposed Rule Change and Amendments No. 1 and 2 Thereto Relating to Exchange Rule 36 (Communications Between Exchange and Member's Offices) To Make Permanent an Existing Portable Phone Pilot

June 30, 2008.

On March 17, 2008, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to make permanent an existing portable phone pilot. On March 27, 2008, and April 2, 2008, the Exchange submitted Amendments No. 1 and 2, respectively, to the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on April 9, 2008.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendments No. 1 and 2.

#### I. Description of the Proposal

The Exchange proposes to make permanent NYSE Rule 36 (Communications Between Exchange Member's Offices), which permits Floor brokers and Registered Competitive Market-Makers ("RCMMs")<sup>4</sup> to use on a pilot basis an Exchange authorized and issued portable phone ("Exchange Phone") on the Exchange Floor ("Pilot"). The Commission originally approved the Pilot to be implemented for a six-month period<sup>5</sup> in 2003.<sup>6</sup> Since the inception of the Original Pilot, the Exchange extended the Pilot ten times, with the current Pilot set to expire on

June 30, 2008.<sup>7</sup> In 2006, the Exchange incorporated RCMMs into the Pilot<sup>8</sup> and subsequently amended the Pilot to allow RCMMs to use Exchange Phones to call to and receive calls from their booths.<sup>9</sup>

NYSE Rule 36 governs the establishment of telephonic or electronic communications between the Exchange Floor and any other location. Prior to the Pilot, NYSE Rule 36 prohibited the use of portable phone communications between the Exchange Floor and any off-Floor location. Floor brokers could communicate from the Exchange Floor to off-Floor location only by means of a telephone located at a broker's booth. Such communication often involved a customer calling a broker at the booth for "market look" information. A broker could not use a portable phone in a trading crowd at the point of sale to speak with a person located off the Exchange Floor.

Currently, on a pilot basis, NYSE Rule 36 outlines the conditions under which Floor brokers and RCMMs may use Exchange Phones.<sup>10</sup> Only Exchange

Phones are permitted to be used under the Pilot and any other type of portable phones are prohibited pursuant to NYSE Rule 36. A Floor broker may, with the Exchange's approval, 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. The Pilot permits both incoming and outgoing calls, provided all requirements of NYSE Rule 36 and other Exchange rules have been met.

During the permitted communication as provided in NYSE Rule 36, a broker may accept orders, provide status and oral execution reports as to orders previously received, and provide market look observations as historically have been routinely transmitted from a broker's booth location. A Floor broker, however, may not represent and execute any order received as a result of such communication unless the order is first properly recorded by the member and entered into the Exchange's Front End Systemic Capture ("FESC") electronic database.<sup>11</sup> In addition, Exchange rules require that Floor brokers receiving orders from the public over Exchange Phones must be properly qualified to engage in such direct access business under NYSE Rules 342 and 345, among others.

The Pilot also allows RCMMs to use an Exchange Phone, solely to call and receive calls from their booths on the Exchange 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 phone line for these discussions. RCMMs and their or their member organization's off-Floor offices may not use Exchange Phones to transmit to the Exchange Floor orders for the purchase or sale of securities by public customers or any other agency business.

Under the Pilot, Floor brokers may not use call-forwarding or conference calling. Likewise, RCMMs, their booth

Exchange represents that revised MEBs would be sent to all Floor brokers and RCMMs utilizing portable phones pursuant to NYSE Rule 36. The Commission notes that MEBs and acknowledgment forms attached thereto are part of this rule proposal.

<sup>11</sup> See 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>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. 57611 (April 3, 2008), 73 FR 19274.

<sup>4</sup> See NYSE Rule 107A, which defines and governs the registration and dealings of RCMMs.

<sup>5</sup> See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR-NYSE-2002-11) ("Original Pilot"). The Original Pilot permitted Exchange Phones to be used only by Floor brokers. See note 8 and 9 *infra* and accompanying text.

<sup>6</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 Exchange Phones from on or about May 1, 2003, to no later than June 23, 2003).

<sup>7</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 six months ending January 31, 2006); 53277 (February 13, 2006), 71 FR 8877 (February 21, 2006) (SR-NYSE-2006-03) (extending the Pilot for an additional six months ending July 31, 2006); 54276 (August 4, 2006), 71 FR 45885 (August 10, 2006) (SR-NYSE-2006-55) (extending the Pilot for an additional six months ending January 31, 2007); 55218 (January 31, 2007), 72 FR 6025 (February 8, 2007) (SR-NYSE-2007-05) (extending the Pilot for an additional twelve months ending January 31, 2008); 57249 (January 31, 2008), 73 FR 7024 (February 6, 2008) (SR-NYSE-2008-10) (extending the Pilot for an additional three months ending April 30, 2008); and 57746 (April 30, 2008), 73 FR 25816 (May 7, 2008) (SR-NYSE-2008-34) (extending the Pilot to no later than the approval of SR-NYSE-2008-20 or June 30, 2008, the earlier thereof).

<sup>8</sup> See Securities Exchange Act Release No. 53213 (February 2, 2006), 71 FR 7103 (February 10, 2006) (SR-NYSE-2005-80).

<sup>9</sup> See Securities Exchange Act Release No. 54215 (July 26, 2006), 71 FR 43551 (August 1, 2006) (SR-NYSE-2006-51).

<sup>10</sup> See also Member Education Bulletins 2005-20 (November 28, 2005) and 2005-23 (December 2, 2005) ("MEBs"). MEBs describe the conditions for the use of a portable phone by Floor brokers and RCMMs, the acknowledgement procedure, and the rule text. These MEBs were previously filed as exhibits with the Commission in connection with the operation of the Pilot. See Securities Exchange Act Release No. 53213 (February 2, 2006), 71 FR 7103 (February 10, 2006) (SR-NYSE-2005-80). The

personnel, their member organization's off-Floor office, and their clearing member organization's off-Floor office may not use call-forwarding or conference calling. Accordingly, Exchange Phones used by Floor brokers and RCMMs do not have call-forwarding or conference calling capabilities. The Exchange also prohibits booth phones used to make calls to and receive calls from RCMMs from having call-forwarding or conference calling features enabled. Further, Floor brokers and their member organizations must have procedures designed to deter anyone calling their Exchange Phone from using caller ID block or attempting to conceal the phone number from which the call is being made. Similarly, RCMMs and their member organizations must implement procedures designed to deter their or their member organization's off-Floor office and the off-Floor office of their clearing member organization from doing the same.

Use of the Exchange Phone by Floor brokers and RCMMs 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. Further, every Floor broker and RCMM must sign a written agreement consenting to specified terms of usage in connection with the operation of the Pilot and their use of the Exchange authorized and provided portable phones.<sup>12</sup> For surveillance purposes, the Exchange receives records of all incoming and outgoing calls on Exchange Phones. The Exchange represents that it will continue to receive such records on a monthly basis.

Specialists are subject to separate restrictions in NYSE Rule 36 on their ability to engage in communications from the specialist post to an off-Floor

location.<sup>13</sup> The Exchange's proposal would not apply to specialists, who would continue to be prohibited from communicating from the post to upstairs trading desks or customers.<sup>14</sup>

The Exchange is proposing to adopt the Pilot on a permanent basis under the same rules and conditions that currently exist.

## II. 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.<sup>15</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>16</sup> which requires that the rules of the an exchange be 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 securities system, and, in general, to protect investors and the public interest.

The Exchange adopted the prohibition on the use of portable telephones on the Exchange Floor in 1988.<sup>17</sup> In approving the prohibition, the Commission noted that, by being able to communicate directly with a broker in the trading crowd, a customer (invariably, a large or institutional one) could have a significant time and place advantage. The Commission further noted that certain concerns could result from such

advantage. The Commission, however, also observed that the approval of the prohibition did not foreclose an exchange from devising a program to permit the use of portable phones on the floor and that such prohibition was not the only approach consistent with the Act.

The Exchange subsequently proposed to permit on a pilot basis the use of Exchange Phones on the Exchange Floor. In approving the Original Pilot,<sup>18</sup> the Commission noted that Exchange Phones could provide more direct access to the Exchange's trading crowds and increase speed in the transmittal and execution of orders. The Commission, however, continued to express an ongoing concern and requested that, if the Exchange decides to request permanent approval, it submit information documenting the usage of the Exchange Phones, any problems that has occurred, and any advantages or disadvantages of such usage. The Commission noted that such information would help ensure that the Exchange Phones provide for fair access, with adequate monitoring of orders being taken and information being disseminated.

The Exchange has duly provided such information with each extension of the Pilot and in its proposal to permanently adopt the Pilot. Since the inception of the Original Pilot, the Commission also notes that the Exchange did not identify significant regulatory issues and also represented that that no administrative or technical problems, other than routine telephone maintenance issues, have occurred. Further, in its proposal to permanently adopt the Pilot, the Exchange states that there has been a reasonable degree of usage of the Exchange Phones. In addition, the Commission notes that there does not appear to be any complaints concerning fair access to the NYSE's trading floor as a result of the Pilot.<sup>19</sup> Rather, the Exchange states in its proposal that the Pilot demonstrates that the Exchange Phones facilitate communication without any corresponding drawbacks.

The Commission also notes that, as proposed to be permanently adopted, NYSE Rule 36 requires Floor brokers and RCMMs to comply with all rules, policies, and procedures of the Exchange and the federal securities law, including the record retention requirements. Additionally, a Floor broker would not be permitted to

<sup>12</sup> Floor brokers and RCMMs agree to comply with NYSE Rule 36, all other rules, policies, and procedures of both federal securities laws and the Exchange, including the record retention requirements of NYSE Rule 440 and Rules 17a-3 and 17a-4 under the Act, and acknowledge that the Exchange has the right to request from their Exchange Phone service provider any records relating to incoming and outgoing calls that NYSE Regulation, Inc. deems necessary. Floor brokers additionally agree that, to the extent they are aware that a customer or any other incoming caller is using a caller ID block, the Floor broker would request in writing that the customer/caller disable such block when calling the Floor broker. Such written request must be documented and a copy of the same retained. RCMMs acknowledge that they may only call and receive calls from the locations provided in NYSE Rule 36.22. RCMMs additionally agree to disable the functionality that allows call-forwarding, conference calling, caller ID block, or any other means to conceal the phone number from which the call is being made.

<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).

<sup>14</sup> 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 may not be used for the purpose of transmitting to the Exchange 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 Exchange Floor) of an options or futures exchange.

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> See Securities Exchange Act Release No. 25842 (June 23, 1998), 53 FR 24539 (June 29, 2008) (SR-NYSE-87-18). The proposal resulting in the adoption of the prohibition was in response to a Commission order setting aside actions by the Exchange denying two of its members permission to install telephone connections to communicate from the Exchange Floor with non-member customers located off-Floor. See Securities Exchange Act Release No. 24429 (May 6, 1987). The Exchange's proposal ultimately approved by the Commission permitted access to non-member customers at the Floor booth but prohibited such access through portable phones in the trading crowd.

<sup>18</sup> See note 5 *supra*.

<sup>19</sup> The Commission notes that since the inception of the Original Pilot, the Commission received only one comment letter. The comment letter pertains to the Original Pilot and was supportive of it. See note 5 *supra*.

represent and execute an order unless first inputted in FESC. Floor brokers and RCMMs, moreover, are not permitted to use call-forwarding or conference calling and must implement procedures designed to deter anyone calling the Exchange Phones from concealing the phone number from which a call is being made. Further, the Exchange has the right to request from the Exchange Phone service provider any records relating to incoming and outgoing calls.<sup>20</sup> The Exchange represents that it has received, and will continue to receive, records of such calls on a monthly basis. With respect to Exchange Phones, these requirements and records should help the Exchange detect and deter any violations of the Exchange rules and the Act.

The Commission, therefore, finds that the proposal is consistent with the Act.<sup>21</sup> The conditions stated above should continue to aid the Exchange in surveilling for compliance with Exchange rules and the Act and address concerns identified in the adoption of the original prohibition.<sup>22</sup> The Commission also believes that the operation of the Pilot without incident since its inception helps to address the Commission's initial concerns. Accordingly, as noted by the Commission when it approved the Original Pilot, the Commission continues to believe that the Pilot helps to expedite orders and make the flow of information more direct.

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-NYSE-2008-20), as modified by Amendments No. 1 and 2 be, and it hereby is, approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58079; File No. SR-NYSEArca-2008-69]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit the Use of a New Order Type Known as Price Improving Orders and Quotes

July 2, 2008.

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 June 25, 2008, NYSE Arca, Inc. ("NYSE Arca" 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 substantially prepared by the Exchange. NYSE Arca designated the proposed rule change as "non-controversial" under Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> 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 proposes to amend various rules to permit the use of a new order type known as Price Improving Orders and Quotes that may be submitted in increments as small as one cent, and to govern their use. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

#### 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 purpose of this rule change is to permit all authorized Exchange participants to submit Price Improving Orders and Quotes in increments smaller than the minimum price variation ("MPV") in the security. The Exchange will designate the classes/series eligible for this penny pricing, and the penny pricing will be available electronically and in open outcry.

Price Improving Orders and Quotes will allow market participants to submit an order priced between the MPV that will be rounded to the nearest lower MPV bid or the nearest higher MPV offer for display, but would maintain the one-cent increment limit for trade allocation purposes. Without this order type, market participants would not be able to submit orders priced between the disseminated MPV. However, since the orders will be displayed in aggregate at the nearest MPV, the order type will not "take away" transparency that would already exist. Incoming market and marketable limit orders will receive price improvement when executed against Price Improving Orders or Quotes resting in the Consolidated Book. For example, where the NYSE Arca market is 1.00-1.20 and an order is received to buy 10 contracts at 1.08, NYSE Arca would disseminate a 1.05 bid for 10 contracts, and any subsequent sell market order received by the Exchange would trade at 1.08 for up to 10 contracts (after which the quote would revert back to 1.00-1.20).

The Exchange also proposes to allow OTP Holders to execute Price Improving Orders in open outcry in one-cent increments and to allow Market Makers to respond to a call for a market with bids and offers in one-cent increments. However, the Exchange will require OTP Holders, prior to effecting any transactions in open outcry in one-cent increments, to electronically "sweep" any Price Improving Orders or Quotes in the NYSE Arca System. The "sweep" would ensure that better-priced orders resting in one-cent increments are executed prior to the open outcry transaction and would also ensure that same priced orders receive executions consistent with existing rules governing priority of orders in the Consolidated Book when trading with an order represented in open outcry (NYSE Arca Rules 6.47 and 6.75).

The applicability of split-price priority under NYSE Arca Rule 6.75(h) to transactions effected under proposed

<sup>20</sup> See note 10 *supra*.

<sup>21</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>22</sup> In this regard, the Commission notes that proper surveillance is an essential component of any telephone access policy to an Exchange Floor.

<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 200.30-3(a)(12).

<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)(iii).

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