

## 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

In the Original Order, the Commission approved the Exchange's amendment to NYSE Rule 36 to permit a Floor broker to use an Exchange authorized and provided portable telephone on the Floor to be implemented as a six-month pilot beginning on or about May 1, 2003. The Exchange also committed in the Original Order to complete a study of communications on the Exchange Floor within three months of implementation of the portable telephone pilot program, which would have been on or about August 1, 2003.<sup>4</sup> In addition, the Exchange committed to notify the Commission's Office of Compliance, Inspections & Examinations ("OCIE"), the Division of Market Regulation ("Division"), and the Exchange's membership within one week prior to the actual implementation date.

The Exchanges states that the implementation date in the Original Order (on or about May 1, 2003) was delayed pending the finalization of several contract issues with the provider of portable phone service. The Exchange now proposes to implement the six-month pilot program no later than June 23, 2003, with a commitment to complete the above-mentioned study no later than September 23, 2003. In addition, the Exchange reiterates its commitment to notify the Commission's OCIE, the Division, and the Exchange's membership one week prior to the actual implementation date.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>5</sup> in general, and furthers the objectives of Section 6(b)(5)

of the Act<sup>6</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.

### 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.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change, as amended, (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act,<sup>7</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>8</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 30-day delayed operative date of Rule 19b-4(f)(6)(iii).<sup>9</sup> The Exchange believes that waiver of this period will allow the Exchange to immediately implement the use of Exchange authorized and provided portable telephones on the Floor.

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 immediately effective.<sup>10</sup> The Commission believes that the waiver of the 30-day operative delay will allow the NYSE to immediately notify the public of the general timeframe to implement its proposal to allow Exchange provided and authorized portable telephones on the Floor, consistent with the protection of investors and the public interest.<sup>11</sup>

The Commission also reiterates its expectation from the Original Order that the NYSE complete, within three months of implementation of the portable telephones, a study of communications on the Exchange Floor, pursuant to a recommendation of an Independent Consultant retained by the Exchange,<sup>12</sup> and to provide notice to NYSE members, the Division, and OCIE one week prior to the pilot program's implementation. In addition to the study, the Commission, as noted in the Original Order, 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. If the NYSE decides to request permanent approval or an extension of the pilot, we would expect, in addition to the report due in three months, that the NYSE submit information documenting the usage of the phones, any problems that have occurred, and any advantages or disadvantages that have resulted.<sup>13</sup>

## 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written

<sup>10</sup> For purposes of only accelerating the operative date 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>11</sup> As previously stated in the Original Order, the Commission notes that should the NYSE be unable to implement the filing by June 23, 2003, it would have to submit a rule proposal under Section 19(b) of the Act to change the date.

<sup>12</sup> See *In the Matter of New York Stock Exchange*, 70 S.E.C. Docket 106, Release No. 41574, 1999 WL 430863 (June 29, 1999).

<sup>13</sup> This information along with any proposal to extend, or permanently approve, the pilot should be submitted at least two to three months prior to the expiration of the six-month pilot.

<sup>4</sup> See *infra* note 12.

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii).