

703.16 of the Listed Company Manual). In addition, any Floor broker receiving orders from the public over portable phones must be properly qualified under Exchange rules to conduct such business (See, for e.g., Rules 342 and 345.) The use of a portable telephone on the Floor other than one authorized and issued by the Exchange is prohibited.

In the case of members or member organizations acting solely in connection with transactions in "baskets" (as Rule 800 (Basket Trading: Applicability and Definitions) defines that term), the Exchange may approve the maintenance of such telephone lines at the basket trading location. In all other instances, the Exchange will approve the maintenance of such telephone lines only at the booth location of a member or member organization. [The Exchange will not approve the use of a portable telephone on the Floor].

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, as amended, and discussed any comments it received on the proposed rule change, as amended. The text of these statements may be examined at the places specified in item IV below and is set forth in sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE rule 36 governs the establishment of telephone or electronic communications between the Exchange's Trading Floor and any other location. Rule 36.20 prohibits the use of portable telephone communications between the Trading Floor and any off-Floor location. The only way that voice communication can be conducted today by Floor brokers between the Trading Floor and an off-Floor location is by means of a telephone located at a broker's booth. Communications often involve a customer calling a broker at the booth for "market look" information. A broker may not use a portable phone currently in a trading Crowd at the point of sale to speak with a person located off the Floor.

The Exchange is proposing to amend NYSE rule 36 to permit a Floor broker to use an Exchange authorized and issued portable telephone on the Floor.

Currently, the Exchange does not permit the use of portable telephones on its 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 are routinely transmitted from a broker's booth location today. Use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange would continue to be prohibited.

Both incoming and outgoing calls would be allowed, provided the requirements of all other Exchange rules have been met. 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.⁴ In addition, Exchange rules require that any Floor broker receiving orders from the public over portable phones must be properly qualified to do direct access business under Exchange rules 342 and 345, among others.⁵

The Exchange would not permit portable communications at the point of sale for orders in Investment Company Units (as defined in Section 703.16 of the Listed Company Manual), also known as Exchange-Traded Funds (ETFs), since orders in ETFs can first be executed and then entered into FESC.⁶ Technical restraints would be developed to implement this policy,

⁴ 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).

⁵ For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, see Information Memo 01-41 (November 21, 2001), Information Memo 01-18 (July 11, 2001) (available on www.nyse.com/regulation/regulation.html), and Information Memo 91-25 (July 8, 1991).

⁶ See Securities Exchange Act Release No. 45246 (January 7, 2002), 67 FR 1527 (January 11, 2002) (SR-NYSE-2001-52) (discussing an exception to FESC that allows ETFs to be entered within 90 seconds of execution). See also Securities Exchange Act Release No. 46713 (October 23, 2002), 67 FR 66033 (October 29, 2002) (SR-NYSE-2002-48) (extending the exception until January 5, 2004).

thus preventing the use of portable phones where ETFs currently trade.

This proposal would be implemented as a six-month pilot from the date of Commission approval with a commitment by the Exchange to complete within three months of Commission approval a study of communications on the Exchange Floor, pursuant to a recommendation of an Independent Consultant retained by the Exchange.⁷

Under the current policy, an off-Floor customer can communicate with a broker in a trading crowd only in an indirect, second-hand fashion by calling a broker's booth and using the booth clerk as an intermediary. The Exchange believes that eliminating the current restriction against the use of portable telephones 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.⁸ By enabling customers to speak directly to a Floor broker in a trading crowd on an Exchange authorized and issued portable telephone, the proposed rule change would, in the Exchange's view, expedite and make more direct the free flow of information which today has to be transmitted somewhat more circuitously via the broker's booth.

Specialists are subject to separate restrictions in NYSE rule 36 on their ability to engage in voice communications from the specialist post to an off-Floor location.⁹ The Exchange's proposed amendment to NYSE rule 36 would not apply to specialists, who would continue to be prohibited from speaking from the post to upstairs trading desks or customers.

2. Statutory Basis

The Exchange represents that the statutory basis for this proposed rule change is the requirement under section 6(b)(5) of the Act¹⁰ that an exchange have rules that are designed to promote just and equitable principles of trade, to

⁷ See *In the Matter of New York Stock Exchange*, 70 S.E.C. Docket 106, Release No. 41574, 1999 WL 430863 (June 29, 1999).

⁸ See 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 the current prohibition against Floor brokers' use of cellular or cordless phones to make calls to persons located off the trading floor).

⁹ 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).

¹⁰ 15 U.S.C. 78f(b)(5).