

between the Trading Floor and an off-Floor location was by means of a telephone located at a broker's booth. These communications often involved a customer calling a broker at the booth for "market look" information. Prior to the Pilot, 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 Floor.

The Exchange is proposing to extend the Pilot for an additional six months, expiring on June 16, 2004. The Pilot would amend NYSE Rule 36 to permit a Floor broker to use an Exchange authorized and issued portable telephone on the 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 have historically been routinely transmitted from a broker's booth location. Use of a portable telephone on the Exchange Floor other than one authorized and issued by the Exchange would continue to be prohibited.

Furthermore, both incoming and outgoing calls would continue to 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.⁶ 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.⁷ Furthermore, since the Exchange currently permits 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"),⁸ and the Pilot would allow for the use of portable phones for orders in ETFs, orders in ETFs would also be subject to the same FESC requirements as orders in any other security listed on the Exchange.

As noted above, under the policy prior to the Pilot, an off-Floor customer could communicate with a broker in a trading crowd only in an indirect way by calling a broker's booth and using the booth clerk as an intermediary. The Exchange believes that the extension of the Pilot 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.⁹ By enabling customers to speak directly to a Floor broker in a trading crowd on an Exchange authorized and issued portable telephone, the Exchange believes that the proposed rule change would expedite and make more direct the free flow of information, which, prior to the Pilot, had to be transmitted somewhat more circuitously via the broker's booth.

The Exchange also notes that 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.¹⁰ The 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.

Pilot Program Results

Since the Pilot's inception, the Exchange represents that there have been approximately 800 portable phone subscribers. In addition, with regard to portable phone usage, for a sample week of July 28, 2003 through August 1, 2003, an average of 19,611 calls per day were originated from portable phones, and an average of 3218 calls per day were received on portable phones. Of the calls originated from portable phones, an average of 18,116 calls per day were internal calls to the booth, and 1495 calls per day were external calls. Thus, over 90% of the calls that originated from portable phones were internal calls to the booth. With regard to received calls, of the 3218 average calls per day received, an average of 1351 calls per day were external calls, and an average of 1867 calls per day were internal calls received from the booth. Thus, approximately 58% of all received calls were internally generated, and 42% were calls from the outside.

Therefore, the Exchange believes that the Pilot appears to be successful in that there is a reasonable degree of usage of portable phones, but as noted above, there have been no regulatory, administrative, or other technical problems associated with their usage. The Exchange believes that the Pilot appears to facilitate communication on the Floor without any corresponding drawbacks. Accordingly, the Exchange believes it is appropriate to extend the Pilot for an additional six months, expiring on June 16, 2004.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act¹¹ in general, and furthers the objectives of section 6(b)(5) of the Act¹² 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. 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 may take place.

⁶ 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).

⁷ For more information regarding Exchange requirements for conducting a public business on the Exchange Floor, see Information Memos 01-41 (November 21, 2001), 01-18 (July 11, 2001) (available on www.nyse.com/regulation/regulation.html) and 91-25 (July 8, 1991).

⁸ Previously, under an exception to NYSE Rule 123(e), orders in ETFs could first be executed and then entered into FESC. However, in SR-NYSE-2003-09, the Exchange eliminated the exception to NYSE Rule 123(e) for ETFs, and, as part of its proposal in SR-NYSE-2002-11, allowed the use of portable phones for orders in ETFs. See Securities Exchange Act Release No. 47667 (April 11, 2003), 68 FR 19063 (April 17, 2003). NYSE Rule 123(e) provides that all orders in any security traded on the Exchange be entered into FESC before they can be represented in the Exchange's auction market.

⁹ See, e.g., Securities Exchange Act Release No. 43493 (October 30, 2000), 65 FR 67022 (November 8, 2000) (SR-CBOE-00-04) (expanding the Chicago Board Options Exchange, Inc.'s existing policy and rules governing the use of telephones at equity option trading posts by allowing for the receipt of orders over outside telephone lines, from any source, directly at equity trading posts), and 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 current prohibitions against Floor Brokers' use of cellular or cordless phones to make calls to persons located off the trading floor).

¹⁰ 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).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).