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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80375; File No. SR-NYSEMKT-2017-16)

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rule 36 – Equities to Permit Exchange Floor Brokers to Use Non-Exchange Provided Telephones on the Floor

April 4, 2017

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on March 22, 2017, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 Rule 36 – Equities to permit Exchange Floor brokers to use non-Exchange provided telephones on the Floor and make related changes modeled on the rules governing telephone use on the Exchange’s options trading floor and on the options trading floor of its affiliate NYSE Arca, Inc. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

The Exchange proposes to amend Rule 36 – Equities (Communication Between Exchange and Members’ Offices) (“Rule 36”) to permit Exchange Floor brokers to use non-Exchange provided telephones on the Floor (the “Floor”)<sup>4</sup> and make related changes modeled on the rules governing telephone use on the Exchange’s options trading floor and on the options trading floor of its affiliate NYSE Arca, Inc. (“NYSE Arca”).

Background

Overview of Rule 36 Requirements

Rule 36 governs the establishment of telephone or electronic communications between the Floor and any other location, which requires Exchange approval. Supplementary Material .20, .21 and .23 to Rule 36 outline the conditions under which Floor brokers are permitted to use Exchange authorized and provided portable telephones with the approval of the Exchange. The

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<sup>4</sup> Rule 6 – Equities defines the Floor as the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, and also means the telephone facilities available in these locations.

Exchange adopted these provisions of Rule 36 in 2008 when it was acquired by NYSE Euronext.<sup>5</sup>

Pursuant to Rule 36.20(a), with Exchange approval, Floor brokers may maintain a telephone line or use Exchange authorized and provided portable phones, which permit a non-member off the Floor to communicate with a member or member organization on the Floor. Subject to the exception contained in Rule 36.23, discussed below, Rule 36.20(a) expressly prohibits the use of a portable telephone on the Floor other than one authorized and issued by the Exchange.<sup>6</sup>

The use of Exchange authorized and issued portable phones is governed by Rule 36.21, which provides that when using an Exchange authorized and provided portable phone, a Floor broker:

- (i) may engage in direct voice communications from the point of sale on the Floor to an off-Floor location;
- (ii) may provide status and oral execution reports as to orders previously received, as well as “market look” observations as historically have been routinely transmitted from a broker’s booth location;
- (iii) must comply with Exchange Rule 123(e) – Equities;
- (iv) must comply with all other rules, policies, and procedures of both the Exchange and the federal securities law, including the record retention

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<sup>5</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63). The Exchange’s Rule 36 was modeled on the New York Stock Exchange LLC’s (the “NYSE”) version of Rule 36. See *id.*, 73 FR at 58996 & n.24.

<sup>6</sup> The last sentence of Rule 36.20(a) provides that the Exchange will approve the maintenance of telephone lines only at the booth location of a member or member organization.

requirements, as set forth in Exchange Rule 440 – Equities and SEC Rules 17a-3 and 17a-4;<sup>7</sup> and

(v) may not use call-forwarding or conference calling. Exchange authorized and provided portable phones used by Floor brokers shall not have these capabilities.

Rule 36.21(b) further provides that Floor brokers and their member organizations must implement procedures designed to deter anyone calling their portable phones from using caller ID block or other means to conceal the phone number from which a call is being made.

Members and member organizations are required to make and retain records demonstrating compliance with such procedures.

Rule 36.21(c) provides that Floor brokers may not use an Exchange authorized and issued portable phone used to trade equities while on the NYSE Amex Options Trading Floor.

Rule 36.23 provides that, notwithstanding any other provision of Rule 36, members and employees of member organizations may use personal portable communications devices outside the Trading Floor<sup>8</sup> consistent with Exchange Rules and the federal securities laws and the rules thereunder, and are prohibited from using personal portable or wireless communications devices while on the NYSE Amex Options Trading Floor.<sup>9</sup> The Rule further provides that those members and employees of member organizations that are also registered to trade options on

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<sup>7</sup> See 17 CFR 240.17a-3; 17 CFR 240.17a-4.

<sup>8</sup> Rule 6A – Equities defines the Trading Floor as the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the Main Room and the Buttonwood Room but does not include the areas in the Buttonwood Room designated by the Exchange for the trading of its listed options securities, which, for the purposes of the Exchange's Equities Rules is referred to as the “NYSE Amex Options Trading Floor,” or the physical area within fully enclosed telephone booths located in 18 Broad Street at the Southeast wall of the Trading Floor.

<sup>9</sup> Rule 6A(b) – Equities defines “NYSE Amex Options Trading Floor” as the areas in the “Buttonwood Room” designated by the Exchange where NYSE Amex-listed options are traded. See note 8, supra.

NYSE Amex are permitted to use personal portable or wireless communication devices while on the NYSE Amex Options Trading Floor in accordance with applicable Exchange options rules and regulations, including Rules 220 and 902NY.

Rules Governing Telephones on the NYSE Amex Options and NYSE Arca Options Trading Floors

The Exchange operates NYSE Amex Options, a physical options trading floor in New York, and the Exchange's affiliate NYSE Arca operates a physical options trading floor in San Francisco. NYSE MKT Rule 902NY (Admission and Conduct on the Options Trading Floor), governing phone use on the NYSE Amex Options Trading Floor, was adopted in 2009 and modeled on NYSE Arca Rule 6.2(h) (Admission to and Conduct on the Options Trading Floor).<sup>10</sup> Both exchanges allow Floor-based permit holders and their employees to use personal phones on the options trading floors subject to the same types of restrictions proposed for the Exchange. Neither NYSE MKT nor NYSE Arca provides exchange-issued and approved telephones for use on the options trading floors.

Specifically, NYSE MKT Rule 902NY(i)(1) and NYSE Arca Rule 6.2(h)(1) require permit holders to register, prior to use, any new telephones to be used on the options trading floor by sending a registered e-mail to the Operations Department, which includes the number of the telephone being registered.<sup>11</sup> Similarly, both rules require trading permit holder

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<sup>10</sup> See Securities Exchange Act Release No. 59939 (May 19, 2009), 74 FR 25779 (May 29, 2009) (SR-NYSEAmex-2009-17).

<sup>11</sup> On the NYSE Amex Options market, a permit holder is known as an "Amex Trading Permit Holder" or "ATP Holder," which is defined in Rule 900.2NY(5) as a natural person, sole proprietorship, partnership, corporation, limited liability company or other organization, in good standing, that has been issued an ATP. See also Rule 900.2NY(4) (defining "ATP" as a permit issued by NYSE MKT for effecting securities transactions on the Exchange's Trading Facilities, defined in Rule 900.2NY(81) as, among places, the Exchange's facilities for the trading of options 11 Wall Street, New York, NY). An ATP Holder must be registered as a broker or dealer. Similarly, on the NYSE Arca options

representatives to attest at the time of registration that they are aware of and understand the rules governing the use of telephones on the options trading floor. NYSE MKT Rule 902NY(i)(1) and NYSE Arca Rule 6.2(h)(1) provide that no trading permit holder or employee thereof may employ any alternative communication device (other than telephones as described herein) on the trading floor without prior approval of the respective exchange.<sup>12</sup>

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market, permit holders are OTP Holders or OTP Firms, which are defined in NYSE Arca Rules 1.1(q) and (r), respectively.

<sup>12</sup> The Exchange does not propose to include the requirements of Rule 902NY(i)(2) (Functionality) and NYSE Arca Rule 6.2(h)(2) (Functionality) or Rule 902NY(i)(3) (Requirements and Conditions) and NYSE Arca Rule 6.2(h)(3) (Requirements and Conditions) in its Rule 36.

Rule 902NY(i)(2) and NYSE Arca Rule 6.2(h)(2) prohibit maintenance of an open line of continuous communication whereby a person not located in the trading crowd may continuously monitor the activities in the trading crowd, and covers intercoms, walkie-talkies and any similar devices. Similarly, Rule 902NY(i)(3)(A) and NYSE Arca Rule 6.2(h)(3)(A) provide that only quotations that have been publicly disseminated may be provided over telephones in trading areas. In today's largely automated trading environment on the Exchange, where pricing decisions have moved away from market participants on the Trading Floor and there is greater availability to all market participants of real-time trade and quote information, importing these requirements into Rule 36 would serve no purpose. The traditional trading "crowd" at the DMM post has virtually disappeared, and along with it much of the informational imbalance that existed prior to the implementation of Regulation NMS. The Exchange also believes that these requirements would be incompatible with current Rule 36, which explicitly permits Floor brokers to engage in direct voice communication from the point of sale on the Floor to an off-Floor location and, more importantly, provide status and oral execution reports as to orders previously received, as well as "market look" observations as historically have been routinely transmitted from a broker's booth location.

Further, Rule 902NY(i)(3)(B) and NYSE Arca Rule 6.2(h)(3)(B) require telephone orders to be entered directly to the trading zone (NYSE MKT) or trading post (NYSE Arca) only during outgoing telephone calls that are initiated from the trading crowd (NYSE MKT) or option posts (NYSE Arca), and that all such orders be immediately recorded in the Electronic Order Capture System (EOC). For the same reasons noted above, the Exchange believes that importing these requirements into Rule 36 would serve no purpose. Moreover, comparable Exchange system entry requirements to those in Rule 902NY(i)(3)(B) and NYSE Arca Rule 6.2(h)(3)(B) are set forth in Rule 123(e) – Equities.

Rule 902NY(i)(3)(C) and NYSE Arca Rule 6.2(h)(3)(C) provide that the relevant exchange may require the taping of any telephone line into the trading zone (NYSE

Further, NYSE MKT Rule 902NY(i)(4)(A) and NYSE Arca Rule 6.2(h)(4)(A) provide that permit holders and employees of permit holders may use their own cellular and wireless phones to place calls to any person at any location (whether on or off the trading floor). Neither exchange prohibits or restricts the use of conference call or call forwarding features by permit holders and their employees when using personal cellular and wireless phones on the trading floor.

NYSE MKT Rule 902NY(i)(5) and NYSE Arca Rule 6.2(h)(5) also provide that permit holders must maintain records of the use of telephones and all other approved alternative communication devices, including logs of calls placed, for a period of not less than three years, the first two years in an accessible place. Both exchanges reserve the right to inspect such records pursuant to NYSE MKT Rule 31 and NYSE Arca Rule 10.2, respectively.

NYSE MKT Rule 902NY(i)(6) and NYSE Arca Rule 6.2(h)(6) provide that each exchange may deny, limit or revoke the registration of any telephone used on the trading floor

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MKT) or trading post (NYSE Arca) or may require permit holders to provide for the tape recording of a dedicated line in the trading zone or trading post at any time. Rule 902NY(i)(3)(C) and NYSE Arca Rule 6.2(h)(3)(C), however, relates to the taping of land lines, not cellular or wireless phones. Accordingly, the Exchange does not propose to include this requirement in Rule 36.

Finally, the Exchange does not propose to include the requirements found in Rule 902NY(i)(4)(B) and (C) and NYSE Arca Rule 6.2(h)(4)(B) and (C) in its Rule 36. Rule 902NY(i)(4)(B) and NYSE Arca Rule 6.2(h)(4)(B) provide that Floor brokers and permit holders may receive orders over their phones subject to the provisions of Rule 902NY(i)(3)(B) and NYSE Arca Rule 6.2(h)(3)(B), respectively, and that telephonic orders entered from off the Trading Floor must be placed with a person located in an ATP Holder booth. Similarly, Rule 902NY(i)(4)(C) and NYSE Arca Rule 6.2(h)(4)(C) provide that Floor brokers receiving orders from a permit holder representative on the Trading Floor may immediately represent that order in the trading crowd provided that such orders are immediately recorded in EOC. As noted, current Rule 36 already contemplates that Floor brokers can accept orders via telephone consistent with NYSE MKT rules, including the requirement in NYSE MKT Rule 123(e) – Equities to first record order details in an electronic system on the Floor before representing or executing the order.

whenever it determines that use of such device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or such device has been or is being used to facilitate any violation of the Act, as amended, or rules thereunder, or the rules of the respective exchange.

Finally, NYSE MKT Rule 902NY(i)(7) and NYSE Arca Rule 6.2(h)(7) provide that the respective exchanges assume no liability to permit holders due to conflicts between phones in use on the options trading floor or due to electronic interference problems resulting from the use of telephones on the trading floor.

#### Proposed Rule Change

The Exchange proposes to amend Rule 36 to permit Floor brokers to use any cellular or wireless telephone properly registered with the Exchange on the Floor, thereby eliminating the requirement that Floor brokers only use Exchange-approved and provided portable phones. The proposed changes are based on Exchange rules and NYSE Arca rules governing the use of cellular phones on the options trading floors of those exchanges and include proposed safeguards surrounding the use of non-Exchange issued devices modeled on the rules of the Exchange and its affiliate.

To effect these changes, the Exchange proposes the following amendments to Rule 36.20(a):

- First, the requirement for prior Exchange approval to utilize cellular or wireless telephones on the Floor would remain unchanged and would be strengthened by the Exchange's proposal to add the phrase "and subject to the registration requirements set forth in Supplementary Material .21" in the first sentence of subparagraph (a).

- Second, the Exchange proposes to delete the phrase “an Exchange authorized and provided portable” before the word “telephone” in the first sentence of subparagraph (a) and replace it with the term “a cellular or wireless.”<sup>13</sup> The Exchange also proposes a non-substantive grammatical change to replace the word “which” with “that” before the word “permits.”
- Third, the Exchange would change the reference to “portable” phones to “cellular or wireless” in the second sentence of subparagraph (a). The Exchange also proposes non-substantive changes at the end of the second sentence to replace a capital “S” with a lower case “s” in the word “See” and to delete the word “for” following the word “See” before “e.g.”
- Finally, in the last sentence of subparagraph (a), the Exchange would replace the word “portable” with “cellular or wireless.” The Exchange would also replace the phrase “authorized and issued by” with “registered with” before “the Exchange” and add the clause “as provided in .21 of this Rule” after “the Exchange” and before “is prohibited.”

To continue to enable the Exchange to regulate and control equipment and communications on the Floor, the Exchange proposes the following amendments to Rules 36.21 and 36.23, which are modeled on the options rules of the Exchange and its affiliate, which set forth the conditions under which Floor brokers would be permitted to use their own cellular or wireless telephones on the Floor.

- First, the Exchange proposes to replace “an Exchange authorized and provided portable” in the heading to Rule 36.21 with “a cellular or wireless” before

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<sup>13</sup> NYSE MKT Rule 902NY and NYSE Arca Rule 6.2(h) utilize the phrase “cellular and cordless.” The Exchange proposes to instead use the more modern synonym, “wireless.”

“phone.”

- Second, the Exchange proposes a new subparagraph (a) to Rule 36.21 requiring Floor brokers to register, prior to use, any cellular or wireless telephone proposed to be used on the Floor by submitting a request in writing to the Exchange.<sup>14</sup> Proposed Rule 36.21(a) would further require that Floor brokers attest at the time of registration that they are aware of and understand the rules governing the use of telephones on the Floor.<sup>15</sup> Finally, separate from the registration and use of telephones, under the proposed Rule no Floor broker may employ any alternative communication device on the Floor (other than telephones as described in the proposed rule) without prior Exchange approval. The Exchange would thus retain the authority to review and approve any alternative communication device prior to use. The requirements in proposed Rule 36.21(a) are based on the requirements specified in NYSE MKT Rule 902NY(i)(1) and NYSE Arca Rule 6.2(h)(1), described above. The language of proposed Rule 36.21(a) is different than the other Exchange and NYSE Arca rules on which it is based because of the inclusion of conforming references to “Floor brokers,” “cellular or wireless telephone,” one reference to “devices” rather than “telephones,” and the use of “Floor” rather than “Trading Floor.” The proposed Rule also requires Floor

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<sup>14</sup> The Exchange does not propose to specify in the Rule that an email or other writing be sent to a specific Exchange department. Rather, the Exchange will specify where the email should be sent in regulatory guidance that the Exchange would issue following approval of this rule filing. The guidance would also specify that the registration email identify the telephone number of the phone being registered.

<sup>15</sup> A proposed attestation is attached as Exhibit 5A. The Exchange would also issue appropriate regulatory guidance regarding the use of portable phones on the Floor prior to the effective date of this rule filing.

brokers and not Floor broker “representatives” to attest.<sup>16</sup>

- Third, current subparagraph (a) of Rule 36.21 would become new subparagraph (b) and the Exchange would delete “an Exchange authorized and provided portable” before “phone,” replace it with “a cellular or wireless,” and add the phrase “on the Floor” after “phone.” The Exchange would also retain current subparts (i) – (iv) and delete current subpart (v), which prohibits the use of call-forwarding or conference calling. These requirements were added to the NYSE’s version of Rule 36 in 2006 and copied by the Exchange in 2008.<sup>17</sup> As noted above, the rules of the Exchange and NYSE Arca, both of which permit non-exchange issued telephones to be used on the options trading floors, do not contain similar prohibitions on call-forwarding or conference calling.

The Exchange believes that the current prohibitions on use of call-forwarding or conference calling are no longer necessary and that it would be consistent with the Act to eliminate these prohibitions. First, the prohibition on forwarding calls prevented Floor brokers from forwarding calls placed to an Exchange-issued device to a non-Exchange issued device. Once Floor brokers are able to use non-Exchange issued telephones, the rationale for the prohibition would no longer apply. Moreover, the Exchange believes that, if this feature were used to forward calls from one registered cell phone to another registered cell phone on the Floor,

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<sup>16</sup> See Rule 902NY(i)(1) and NYSE Arca Rule 6.2(h)(1) (imposing the attestation requirement on “ATP Holder representatives” and “OTP Holder and OTP Firm representatives”).

<sup>17</sup> See Securities Exchange Act Release No. 53213 (Feb. 2, 2006), 71 FR 7103 (Feb. 10, 2006) (SR-NYSE-2005-80) & note 5, *supra*. The Exchange also proposes a non-substantive change in proposed Rule 36.21(b)(ii) to correct punctuation by replacing the single quotes around “market look” with double quotes.

both phones would independently be subject to the obligations of proposed Rule 36 and therefore subject to Exchange jurisdiction. To the extent such calls are forwarded to a telephone that is not located on the Floor, Rule 36 would not apply to a telephone that was not physically present on the Floor. With respect to the call conferencing feature, current Rule 36.21 does not restrict with whom a Floor broker may communicate when using a portable phone at the point of sale. Moreover, if this feature were used, any records of such calls would be captured pursuant to paragraph (d) of Rule 36.21 below and would be available to the Exchange upon request.

- Fourth, current subparagraph (b) would become proposed subparagraph (c).<sup>18</sup> The Exchange would also replace the word “portable” in proposed subparagraph (c) with “cellular or wireless.”
- Fifth, the Exchange proposes a new subparagraph (d) of Rule 36.21 providing that Floor brokers must maintain records of the use of telephones and all other approved communication devices, including logs of calls placed, for a period of not less than three years, the first two years in an accessible place, and that the Exchange reserves the right to periodically inspect such records. Proposed new subparagraph (d) is based on NYSE MKT Rule 902NY(i)(5) and NYSE Arca Rule 6.2(h)(5). Proposed Rule 36.21(d) is different than the NYSE MKT and NYSE Arca rules on which it is based because of the inclusion of conforming

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<sup>18</sup> Rule 36.21(b) provides that Floor brokers and their member organizations must implement procedures designed to deter anyone calling their portable phone from using caller ID block or other means to conceal the phone number from which a call is being made. Members and member organizations are required to make and retain records demonstrating compliance with such procedures.

references to “Floor brokers.” The last sentence of the proposed Rule also provides that the Exchange reserves the right to periodically inspect records pursuant to Rule 8210, which governs provision of information and testimony and inspection and copying of books, and is analogous to Rule 31 and NYSE Arca Rule 10.2.

- Sixth, current subparagraph (c) would become proposed subparagraph (e). The Exchange would also replace the phrase “an Exchange authorized and provided portable” in proposed subparagraph (e) with “a cellular or wireless.” The Exchange would also add the phrase “registered with the Exchange and” before “used to trade equities while on the NYSE Amex Options Trading Floor.”
- Seventh, the Exchange proposes a new subparagraph (f) that provides the Exchange with the ability to deny, limit or revoke registration of any device used on the Floor whenever it determines, in accordance with the procedures set forth in Rule 9558,<sup>19</sup> that use of such a device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or such device has been or is being used to facilitate any violation of the Act, as amended, the rules thereunder, or the Exchange’s rules. Proposed Rule 36.21(f) is based on Rule 902NY(i)(6). Proposed Rule 36.21(f) is different than the NYSE MKT and NYSE Arca rules on which it is based because of the inclusion of conforming references to “device” rather than “telephone” and “Floor” rather than “Trading Floor.” The proposed Rule also omits the reference to Rule 475 in Rule 902NY(i)(6) and the reference to NYSE Arca Rule 10.14 in NYSE Arca Rule

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<sup>19</sup> Rule 9558 relates to summary proceedings for actions authorized by Section 6(d)(3) of the Act.

6.2(h)(6). Rule 475 only applies to proceedings for which a written notice has been issued by the Exchange under the Rule prior to April 15, 2016; otherwise, Rule 9558, which is referenced in the proposed Rule, applies. Rule 9558 is also the closest Exchange analogue to NYSE Arca Rule 10.14.

- Eighth, the Exchange would adopt a new subparagraph (g) providing that the Exchange assumes no liability due to conflicts between phones in use on the Floor or due to electronic interference problems resulting from the use of telephones on the Floor. Proposed Rule 36.21(g) is based on Rule 902NY(i)(7) and NYSE Arca Rule 6.2(h)(7) and, except for conforming references to “Floor brokers” and “Floor” rather than “Trading Floor,” is identical to the NYSE MKT and NYSE Arca Rules.<sup>20</sup>
- Finally, the Exchange would replace three references to “personal portable” with “cellular” in current Rule 36.23. The Exchange would also add the clause “subject to .21(e) of this Rule” at the end of the last sentence in Rule 36.23.

The proposed changes to Rule 36, with the exception of current Rule 36.23, would not apply to Designated Market Makers, who would continue to be subject to Rules 36.30 and 36.31.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

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<sup>20</sup> The Exchange notes that proposed Rule 36.21(f) is similar to the rules of other exchanges that seek to limit or cap liability for losses arising from the use of an exchange’s facilities, systems, or equipment. See, e.g., Nasdaq Rule 4626 (Limitation of Liability); NYSE Arca Rules 2.8 (No Liability for Using Exchange Facilities) and 14.2 (Liability of Exchange); NYSE Arca Equities Rule 2.7 (No Liability for Using Trading Facilities) and 13.2 (Liability of Corporation). See generally NYSE MKT Rule 17 – Equities (Use of Exchange Facilities and Vendor Services) and 18 – Equities (Compensation in Relation to Exchange Failure).

the Act,<sup>21</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>22</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In particular, the Exchange believes that permitting Floor brokers to use any cellular or wireless telephone properly registered with the Exchange on the Floor and eliminating the requirement that Floor brokers only use Exchange-approved and provided portable phones are designed to prevent fraudulent and manipulative acts and practices and would be consistent with the public interest and the protection of investors because of the numerous safeguards surrounding the use of non-Exchange issued devices also proposed for inclusion in Rule 36. The proposed safeguards would include:

- requiring Floor brokers to register personal communication devices prior to use;
- attesting at the time of registration that they are aware of and understand the rules governing the use of telephones on the Floor;
- prohibiting employment of alternative communication devices on the Floor without prior Exchange approval;
- requiring Floor brokers to maintain records of the use of telephones and all other approved alternative communication devices, including logs of calls placed, for a period of not less than three years, the first two years in an accessible place, for inspection by the Exchange at any time; and

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<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

- empowering the Exchange to deny, limit or revoke registration of any device used on the Floor whenever it determines that use of such a device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or such device.

The Exchange believes that these proposed safeguards, modeled on the rules of the Exchange and its affiliate, establish an appropriate regulatory framework for supervising and monitoring use of communication devices on the Exchange's trading Floor consistent with the objectives of Section 6(b)(5) of the Act.

The Exchange further believes that deleting the current requirement in Rule 36 prohibiting the use of call-forwarding or conference calling would be consistent with the public interest and the protection of investors because, as noted above, such requirements are not currently in place on the NYSE MKT and NYSE Arca options trading floors. As noted above, the rationale for the prohibition was aimed at preventing Floor brokers from forwarding calls to non-Exchange issued phones and would be moot if Floor brokers are only using non-Exchange issued devices. If a call is forwarded from a registered cellular or wireless phone to another registered telephone (wired or not) on the Floor, the phone that received the calls would separately be subject to the obligations of proposed Rule 36 and therefore subject to Exchange jurisdiction. If a call is forwarded to a telephone located off of the Floor, Rule 36 would not be implicated because the person on the phone would not be physically located on the Floor. In addition, the Exchange believes that if Floor brokers use cellular or wireless telephones that include call conferencing features, any such use would be captured on the records of use of such telephones that Floor brokers would be required to maintain pursuant to proposed paragraph (d) of Rule 36.21.

The Exchange believes that including a provision in proposed Rule 36.21 providing that the Exchange assumes no liability to Floor brokers due to conflicts between phones in use on the Floor or due to electronic interference problems resulting from the use of telephones on the Floor removes impediments to and perfects the mechanism of a free and open market by adding transparency to the Exchange's rules regarding use of personal telephone equipment on Exchange premises.

The Exchange also believes that the proposed amendments to Rule 36 support the mechanism of free and open markets by continuing to provide a means for increased communication by Floor brokers to and from the Floor.

Finally, the Exchange believes that replacing the outdated word "portable" with "cellular or wireless" in Rule 36.20 and .21 and replacing "personal portable" with "cellular" in Rule 36.23 removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having obsolete and outdated references in the Exchange's rulebook. Similarly, the Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rulebook. The Exchange believes that eliminating obsolete and outdated references would be consistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete and outdated references will also further the goal of transparency and add clarity to the Exchange's rules.

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. The Exchange does not believe that the proposed rule change will impose any burden on competition because the proposed change relates to how Floor brokers are permitted to communicate on the Floor and proposes no change for other market participants. In addition, the Exchange does not believe that the proposed changes will impose any competitive burden because Floor brokers will operate in the same manner but with telephone equipment that is not Exchange-issued.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2017-16 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2017-16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NYSEMKT-2017-16, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).

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