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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-81103; File No. SR-NYSE-2017-07; SR-NYSEMKT-2017-16)

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Order Granting Approval of Proposed Rule Changes, as Modified by Amendment No. 1, Amending NYSE Rule 36 and NYSE MKT Rule 36 – Equities to Permit Exchange Floor Brokers to Use Non-Exchange Provided Telephones on the Floor

July 7, 2017

I. Introduction

On March 31, 2017 and March 22, 2017, New York Stock Exchange LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”) (each of NYSE and NYSE MKT an “Exchange”), respectively, filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² proposed rule changes to permit Exchange floor brokers to use telephones not provided by the Exchange while on the Floor of the Exchange, and make related changes. The proposed rule changes were published for comment in the Federal Register on April 10, 2017.³ On May 24, 2017, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to either approve the proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.⁵ On July

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release Nos. 80374 (April 4, 2017), 82 FR 17306 (“NYSE Notice”); and 80375 (April 4, 2017), 82 FR 17302 (“NYSE MKT Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 80753 (May 24, 2017), 82 FR 25032 (May 31, 2017). The Commission designated July 9, 2017 as the date by which it shall approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

6, 2017, NYSE and NYSE MKT each filed Amendment No. 1 to its respective proposed rule change.⁶ The Commission received no comments on the proposed rule changes. This order grants approval of the proposed rule changes, each as modified by the respective Amendment No. 1.

II. Description of the Proposed Rule Changes, as Modified by Amendment No. 1

NYSE and NYSE MKT propose to amend NYSE Rule 36 and NYSE MKT Rule 36 – Equities, respectively, to permit Exchange floor brokers to use cellular or wireless telephones not provided by the Exchange while on the Floor⁷ of the Exchange.

Currently, with Exchange approval, a floor broker may maintain a telephone line or use an Exchange authorized and Exchange provided portable telephone, which permits a non-member off the Floor to communicate with a member or member organization on the Floor. Any floor broker receiving orders from the public over portable telephones must be properly qualified under Exchange rules to conduct such public business. Exchange rules prohibit the use of a portable telephone on the Floor other than one authorized and issued by the Exchange, with a limited exception that allows members and employees of member organizations to use personal

⁶ Each Amendment No. 1 clarified the expected implementation date of the respective proposed rule change. See infra note 29 and accompanying text. Amendment No. 1 is available on each Exchange’s Web site. Each Amendment No. 1 is not subject to notice and comment because it is a technical amendment that does not materially alter the substance of the proposed rule change or raise any novel regulatory issues.

⁷ The “Floor” means 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. See NYSE Rule 6; NYSE MKT Rule 6 – Equities.

portable telephones while outside of the Trading Floor⁸ but still on the Floor of the Exchange.⁹

NYSE and NYSE MKT propose to allow a floor broker to use a personal cellular or wireless telephone, rather than an Exchange authorized and Exchange provided telephone, to communicate with non-members located off the Floor, subject to Exchange approval and specified registration requirements. The use of a cellular or wireless telephone on the Floor other than one registered with the Exchange would be prohibited, subject to the existing exception for use of cellular or wireless telephones outside of the Trading Floor.¹⁰ NYSE and NYSE MKT would require floor brokers to register, prior to use, any cellular or wireless telephone to be used on the Floor by submitting a request in writing to the Exchange in an acceptable format. Floor brokers would be required to attest that they are aware of and understand the rules governing the use of telephones on the Floor.¹¹ No floor broker would be allowed to use any alternative

⁸ The “Trading Floor” means the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the “Main Room” and the “Buttonwood Room.” The Trading Floor does not include the areas in the “Buttonwood Room” designated by the Exchange where NYSE Amex-listed options securities are traded (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. See NYSE Rule 6A; NYSE MKT Rule 6A – Equities.

⁹ See NYSE Rule 36, Supplementary Material .20(a) and .23; NYSE MKT Rule 36 – Equities, Supplementary Material .20(a) and .23. NYSE MKT specifies that the Exchange will approve the maintenance of telephone lines only at the booth location of a member or member organization. See NYSE MKT Rule 36 – Equities, Supplementary Material .20(a).

¹⁰ See proposed NYSE Rule 36, Supplementary Material .20(a); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .20(a).

¹¹ See proposed NYSE Rule 36, Supplementary Material .21(a); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(a). NYSE and NYSE MKT submitted proposed attestations, each at Exhibit 5A. As explained in their proposals, according to NYSE and NYSE MKT, they would issue appropriate regulatory guidance regarding the use of personal cellular or wireless telephones on the Floor prior to the effective date of the proposed rule changes. See NYSE Notice, supra note 3, at 17309 n. 18; NYSE MKT Notice, supra note 3, at 17304 n. 15. According to NYSE and NYSEMKT, this regulatory guidance would specify where the written request to use a cellular or wireless

cellular or wireless telephone on the Floor without prior Exchange approval.¹²

NYSE and NYSE MKT explained that NYSE Arca, Inc. (“NYSE Arca”) and NYSE MKT allow floor-based permit holders and their employees to use personal cellular telephones while on the exchanges’ options trading floors.¹³ The Exchanges’ proposed restrictions (described further below) for the use of personal cellular telephones on their equity Floors are modeled after, with some exceptions, the rules of NYSE Arca and NYSE MKT concerning cellular telephone use on their options trading floors.¹⁴

Currently, when using an Exchange authorized and Exchange provided portable telephone, a floor broker: (i) may engage in direct voice communication 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 NYSE Rule 123(e) or NYSE MKT Rule 123(e) – Equities, as applicable; and (iv) must comply with all other rules, policies,

telephone should be sent and that the floor broker must provide the telephone number of the telephone being registered. See NYSE Notice, supra note 3, at 17309 n. 17; NYSE MKT Notice, supra note 3, at 17304 n. 14. NYSE explained that, for NYSE, the attestation and regulatory guidance would supersede a previously developed acknowledgement form and previous guidance. See NYSE Notice, supra note 3, at 17309 n. 18.

¹² See proposed NYSE Rule 36, Supplementary Material .21(a); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(a).

¹³ See NYSE Notice, supra note 3, at 17307-08; NYSE MKT Notice, supra note 3, at 17303.

¹⁴ See NYSE Notice, supra note 3, at 17307-08; NYSE MKT Notice, supra note 3, at 17303. See also NYSE Arca Rule 6.2(h); NYSE MKT Rule 902NY(i). According to NYSE and NYSE MKT, they did not propose to add certain requirements applicable to the NYSE Arca and NYSE MKT options trading floors that, according to the Exchanges, are not compatible with current practices on the NYSE and NYSE MKT equities trading floors that allow floor brokers to speak to individuals off the Floor and provide certain status reports and observations. See NYSE Notice, supra note 3, at 17308 n. 14; NYSE MKT Notice, supra note 3, at 17303 n. 12.

and procedures of both the Exchange and the federal securities laws, including record retention requirements.¹⁵ NYSE and NYSE MKT also require floor brokers and their member organizations to implement procedures designed to deter anyone calling their Exchange authorized and Exchange provided portable telephones from using caller ID block or other means to conceal telephone numbers.¹⁶ Under the proposals, NYSE and NYSE MKT would continue to apply these requirements when a floor broker uses a personal cellular or wireless telephone on the Floor.¹⁷

NYSE and NYSE MKT currently prohibit floor brokers from using call-forwarding or conference calling, and Exchange authorized and Exchange provided portable telephones do not have these capabilities.¹⁸ Under the proposals, NYSE and NYSE MKT would eliminate this restriction.¹⁹ According to NYSE and NYSE MKT, the prohibition on forwarding calls prevented floor brokers from forwarding calls to a non-Exchange issued device, and this goal of preventing floor brokers from forwarding calls from an Exchange-issued device to a non-Exchange-issued device would no longer be relevant if the floor brokers were using personal

¹⁵ See NYSE Rule 36, Supplementary Material .21(a)(i)-(iv); NYSE MKT Rule 36 – Equities, Supplementary Material .21(a)(i)-(iv). See also NYSE Rule 440; NYSE MKT Rule 440 – Equities; 17 CFR 240.17a-3; 17 CFR 240.17a-4.

¹⁶ See NYSE Rule 36, Supplementary Material .21(b); NYSE MKT Rule 36 – Equities, Supplementary Material .21(b). Members and member organizations must make and retain records demonstrating compliance with such procedures. See NYSE Rule 36, Supplementary Material .21(b); NYSE MKT Rule 36 – Equities, Supplementary Material .21(b).

¹⁷ See proposed NYSE Rule 36, Supplementary Material .21(b)(i)-(iv) and (c); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(b)(i)-(iv) and (c).

¹⁸ See NYSE Rule 36, Supplementary Material .21(a)(v); NYSE MKT Rule 36 – Equities, Supplementary Material .21(a)(v).

¹⁹ See proposed NYSE Rule 36, Supplementary Material .21(b); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(b).

cellular telephones.²⁰ NYSE and NYSE MKT also noted that records of conference calls would be captured pursuant to the proposed recordkeeping requirements for floor brokers that, as explained further below, would require floor brokers to maintain records of their telephone use and such records would be available to the Exchange upon request.²¹

Currently, NYSE MKT prohibits floor brokers from using Exchange authorized and Exchange provided portable telephones that they use to trade equities while on the NYSE Amex Options Trading Floor.²² Under the proposal, NYSE MKT would retain this prohibition on using a telephone used to trade equities while on the options floor, thus requiring floor brokers to use a separate personal cellular or wireless telephone for equities versus options trading, as needed.²³

Additionally, NYSE and NYSE MKT would require floor brokers to maintain records of the use of telephones and all other approved devices, including call logs, for at least three years.²⁴ The Exchange could deny, limit, or revoke registration of any device used on the Floor upon a determination that use of such device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or that such device has been or is

²⁰ See NYSE Notice, supra note 3, at 17309; NYSE MKT Notice, supra note 3, at 17304.

²¹ See NYSE Notice, supra note 3, at 17309; NYSE MKT Notice, supra note 3, at 17304.

²² See NYSE MKT Rule 36 – Equities, Supplementary Material .21(c).

²³ See proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(e). NYSE MKT has proposed to add a cross-reference to this provision in its rule concerning general use of personal portable or wireless communication devices by members and employees of member organizations. See proposed NYSEMKT Rule 36 – Equities, Supplemental Material .23.

²⁴ See proposed NYSE Rule 36, Supplementary Material .21(d); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(d). Floor brokers would need to maintain the first two years of records in an accessible place. The Exchange would reserve the right to periodically inspect such records pursuant to NYSE Rule 8210 and NYSE MKT Rule 8210, respectively. See proposed NYSE Rule 36, Supplementary Material .21(d); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(d).

being used to facilitate any violation of the Act, as amended, or rules thereunder, or Exchange Rules.²⁵ Each Exchange states that it would assume no liability to floor brokers due to conflicts between telephones in use on the Floor or electronic interference problems resulting from the use of telephones on the Floor.²⁶

NYSE and NYSE MKT propose to replace references to “portable,” “personal portable,” or “Exchange authorized and provided portable” telephones with “cellular or wireless” telephones.²⁷ Finally, NYSE and NYSE MKT propose to make minor technical changes to the rules.²⁸

NYSE and NYSE MKT noted that they will announce the implementation date of the proposed rule changes in a Regulatory Bulletin at least 30 days in advance of such implementation date and that the proposed rules changes will become operative within 90 days of approval.²⁹ As of the implementation date, the Exchanges will no longer provide portable telephones to floor brokers.

II. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes, as modified

²⁵ See proposed NYSE Rule 36, Supplementary Material .21(e); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(f).

²⁶ See proposed NYSE Rule 36, Supplementary Material .21(f); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .21(g). According to NYSE and NYSE MKT, rules of other exchanges similarly limit or cap liability for losses arising from the use of an exchange’s facilities, systems, or equipment. See NYSE Notice, *supra* note 3, at 17310 n. 23; NYSE MKT Notice, *supra* note 3, at 17305 n. 20 (citing Nasdaq Rule 4626; NYSE Arca Options Rules 2.8 and 14.2; NYSE Arca Equities Rules 2.7 and 13.2).

²⁷ See proposed NYSE Rule 36, Supplementary Material .20, .21, and .23; proposed NYSE MKT Rule 36 – Equities, Supplementary Material .20, .21, and .23.

²⁸ See proposed NYSE Rule 36, Supplementary Material .20(a); proposed NYSE MKT Rule 36 – Equities, Supplementary Material .20(a) and .21(b)(ii).

²⁹ See Amendment No. 1, *supra* note 6.

by Amendment No. 1, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³⁰ In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,³¹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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.

NYSE and NYSE MKT propose to allow floor brokers to use personal cellular or wireless telephones on the Floor, instead of Exchange authorized and Exchange provided telephones, subject to Exchange approval and specified registration requirements. The Commission notes that NYSE Arca and NYSE MKT currently allow floor brokers to use personal cellular or wireless telephones on their options trading floors.³² The Commission further notes that floor brokers' use of personal cellular or wireless telephones will be generally subject to the existing regulatory framework pertaining to use of portable telephones on the Floor, with certain additions and one change as described further below. With respect to NYSE MKT, the Commission notes that if a floor broker conducts business on both the equities floor and the options floor, the floor broker would be required to maintain a separate personal cellular or wireless telephone for use on each floor.

When first approving NYSE floor brokers' use of Exchange authorized and Exchange provided portable telephones on the Floor on a pilot basis, the Commission noted that the

³⁰ In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³¹ 15 U.S.C. 78f(b)(5).

³² See NYSE Arca Rule 6.2(h); NYSE MKT Rule 902NY(i). See also supra notes 13 and 14 and accompanying text.

Exchange would have access to all telephone records and that proper surveillance is an essential component of any telephone access policy to an Exchange trading floor.³³ NYSE and NYSE MKT propose that floor brokers would be required to maintain records of telephone use, including logs of calls placed, and that the Exchange would have the right to periodically inspect such records. The Commission expects that NYSE and NYSE MKT will provide guidance to floor brokers concerning these proposed rule changes that delineates the floor brokers' recordkeeping requirements (including specific steps floor brokers should take to fully comply with such requirements) and then institute adequate surveillance procedures to monitor these efforts.

As the Commission originally stated when first approving floor brokers' use of Exchange authorized and Exchange provided portable telephones, surveillance procedures are essential, and should help to ensure that floor brokers who are interacting with the public are authorized to do so and that orders are being handled in compliance with Exchange rules.³⁴ These requirements remain the same notwithstanding that, as noted in the proposals, the Floor has changed and is now a largely automated trading environment.

Essentially, the Exchanges' proposals deal with changes in ownership of the portable telephones. NYSE and NYSE MKT have amended their rules to address these changes by adding floor broker recordkeeping and other requirements within the existing regulatory structure of NYSE Rule 36 and NYSE MKT Rule 36 – Equities, respectively. The responsibility of the Exchanges, as self-regulatory organizations, to conduct surveillance and ensure

³³ See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048, 19050 (April 17, 2003) (SR-NYSE-2002-11).

³⁴ See id. For example, among others, NYSE Rule 123(e) and NYSE MKT Rule 123(e) – Equities require members and member organizations to record the details of an order in an electronic system immediately upon receipt. See NYSE Rule 123(e); NYSE MKT Rule 123(e) – Equities.

compliance with their rules remains the same, regardless of who owns the telephones. The Exchanges have assured us that they can fulfill their duties despite the change in ownership of the telephones and, based on that representation, we are approving the proposed rule changes.³⁵

NYSE and NYSE MKT propose specific registration requirements for the use of personal cellular or wireless telephones on the Floor, including an attestation that floor brokers are aware of applicable rules. The Exchange would have the ability to deny, limit, or revoke such registration.³⁶ The Commission believes that these registration requirements will allow the Exchanges to oversee floor brokers' use of personal cellular or wireless telephones. Further, NYSE and NYSE MKT propose to remove restrictions on the use of call forwarding and conference calling. The Commission believes that the initial reason for the restriction on the use of call forwarding is moot now that floor brokers will not use Exchange-issued telephones and the recordkeeping requirements described above should allow the Exchanges to monitor the use of conference calls.

Based on the foregoing, the Commission believes that the proposed rule changes present no novel regulatory issues and therefore finds the proposed rule changes to be consistent with the Act. The Commission believes that it is reasonable for NYSE and NYSE MKT to allow floor brokers to use personal cellular or wireless telephones on their equities Floors, subject to

³⁵ Notwithstanding any Regulatory Service Agreements with FINRA and the application of FINRA rules to floor brokers as registered broker dealers, the Exchanges retain legal responsibility for their regulation of their members on their Floor and their market and the performance of FINRA as a regulatory service provider. The Exchanges have represented that they can supervise and monitor the use of communications on their Floor and approval of the proposed rule changes is based, in part, on those representations and that the Exchanges' own surveillance and compliance responsibilities will be supported by that of FINRA. Each Exchange retains ultimate legal responsibility for the performance of its regulatory functions and to assure compliance by its members with the new rules. See 15 U.S.C. 78s(g).

³⁶ See supra note 25 and accompanying text.

Exchange approval, registration requirements, and a regulatory framework similar to that which currently exists for use of Exchange authorized and Exchange provided portable telephones on their equities Floors, and for the use of personal cellular telephones on options floors, in compliance with Exchange Rules and federal securities laws. The Commission expects that the Exchanges will monitor compliance with Exchange rules by floor brokers using personal cellular or wireless telephones on the Floor and will inform the Commission if they encounter unanticipated difficulties in enforcing their rules, and make any subsequent changes to their rules to address these issues, or otherwise find that the use of personal telephones raises regulatory concerns.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁷ that the proposed rule changes (SR-NYSE-2017-07 and SR-NYSEMKT-2017-16), each as modified by their respective Amendment No. 1, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Eduardo A. Aleman
Assistant Secretary

³⁷ 15 U.S.C. 78s(b)(2).

³⁸ 17 CFR 200.30-3(a)(12).

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