

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60692; File No. SR-NYSEAmex-2009-57)

September 18, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Amex LLC, as Modified by Amendment No. 1, Amending Rule 36 – NYSE Amex Equities to Conform with Proposed Amendments to Corresponding NYSE Rule 36 to Permit the Use of Personal Portable or Wireless Communication Devices Off the Exchange Trading Floor and Outside Other Restricted Access Areas

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 August 27, 2009, NYSE Amex LLC (“NYSEAmex” or the “Exchange”) 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 Exchange. On September 17, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, 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 - NYSE Amex Equities (Communications Between Exchange and Members’ Offices) to conform with proposed amendments to corresponding NYSE Rule 36 submitted in a companion filing by the Exchange’s corporate affiliate, the New York Stock Exchange LLC (“NYSE”). This Amendment No. 1 supersedes the original filing in its entirety. Amendment No. 1 serves

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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.

<sup>4</sup> Amendment No. 1 supersedes and replaces the original filing in its entirety.

to clarify in the rule text the specific areas where employees of member organizations are permitted to use personal portable or wireless communications devices.<sup>5</sup> The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 to SR-NYSEAmex-2009-57 supersedes and replaces the original filing in its entirety.

The purpose of the proposed rule changes is to amend Rule 36 – NYSE Amex Equities (Communications Between Exchange and Members' Offices) to conform with proposed amendments to corresponding NYSE Rule 36 submitted in a companion filing by the Exchange's corporate affiliate, the NYSE.<sup>6</sup>

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<sup>5</sup> The Commission notes that the rule text makes clear that personal portable or wireless communication devices can only be used outside of the Trading Floor and all other restricted access areas.

<sup>6</sup> See SR-NYSE-2009-84. The Commission notes that the rule text makes clear that personal portable or wireless communication devices can only be used

## Background

As described more fully in a related rule filing<sup>7</sup>, NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the “Merger”). In connection with the Merger, the Exchange’s predecessor, the American Stock Exchange LLC, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC<sup>8</sup>, and continues to operate as a national securities exchange registered under Section 6 of the Act.<sup>9</sup> The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the “Equities Relocation”). The Exchange’s equity trading systems and facilities at 11 Wall Street (the “NYSE Amex Trading Systems”) are operated by the NYSE on behalf of the Exchange.<sup>10</sup>

As part of the Equities Relocation, NYSE Amex adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE

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outside of the Trading Floor and all other restricted access areas. See supra note 5.

<sup>7</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex-2008-62).

<sup>8</sup> NYSE Alternext US LLC was subsequently renamed NYSE Amex LLC. See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR-NYSEALTR-2009-24).

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63).

Amex Equities Rules to govern trading on the NYSE Amex Trading Systems.<sup>11</sup> The NYSE Amex Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1-1004 and the Exchange continues to update the NYSE Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

#### Proposed Conforming Amendments to NYSE Amex Equities Rules

As noted above, the Exchange proposes to amend Rule 36 – NYSE Amex Equities to conform with proposed amendments to corresponding NYSE Rule 36 submitted in a companion filing by the NYSE. As discussed in more detail below, the NYSE is filing the proposed rule changes to permit the use of personal portable or wireless communication devices off the NYSE Trading Floor. The Exchange is proposing to adopt the NYSE’s proposed rule changes, subject to such technical changes as are necessary to apply the changes to the Exchange.

#### Current Rule 36 – NYSE Amex Equities

Rule 36 – NYSE Amex Equities prohibits members and member organizations from establishing or maintaining any telephonic or electronic communication, including the usage of any portable or wireless communication devices (i.e. cellular phone, wireless pager, BlackBerry™, etc.), between the Floor and any other location without prior Exchange approval.

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<sup>11</sup> See Securities Exchange Act Release Nos. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63); 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR-NYSE-2008-106); 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR-NYSEALTR-2008-03); 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10); and 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR-NYSEALTR-2008-11).

Under Rule 36 – NYSE Amex Equities, notwithstanding the general prohibition on the use of portable or wireless communication devices, Floor brokers may use Exchange authorized and issued portable phones on the Floor to communicate with both member firms and non-members off the Floor, subject to certain restrictions. Floor brokers may not, however, use Exchange authorized and issued devices on the NYSE Amex Options Trading Floor (as defined in Rule 6A – NYSE Amex Equities).<sup>12</sup> See Rule 36 – NYSE Amex Equities, Supplementary Material .20 - .23.

Designated Market Makers (“DMMs”) may, subject to restriction, maintain at their posts telephone lines to the off-Floor offices of the DMM unit or the unit's clearing firm.<sup>13</sup> Such telephone lines may only be used to enter options or futures hedging orders through the DMM unit's off-Floor office or the unit's clearing firm, or through a member (on the Floor) of an options or futures exchange. These lines may not, however, be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities. DMMs are also permitted to use at their posts wired or wireless devices, including computer terminals or laptops, that are registered with the Exchange to communicate with their system algorithms. See Rule 36.30 – NYSE Amex Equities.

Under Rule 36 – NYSE Amex Equities, the use of all other portable or wireless communication devices on the Floor is prohibited.

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<sup>12</sup> All members and member firm employees who use an Exchange authorized and issued portable phone must execute a written acknowledgement as to the usage of the phone and authorizing the Exchange to receive data and records related to incoming and outgoing calls. See NYSE Information Memos 08-40 (August 14, 2008) and 08-41 (August 14, 2008) (concerning the use of Exchange authorized and issued portable phones on the Floor, incorporated by reference in joint NYSE/NYSE Amex Information Memo 08-66 (December 22, 2008)).

<sup>13</sup> The role of DMMs and their obligations on the Exchange adopted pursuant to the Merger are described in Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46).

The prescriptions of Rule 36 – NYSE Amex Equities must be viewed in conjunction with Rules 6 – NYSE Amex Equities (“Floor”) and 6A – NYSE Amex Equities (“Trading Floor”). Under Rule 6 – NYSE Amex Equities, the term “Floor” is defined as having the same meaning given that term under the Act. The Exchange has issued interpretive guidance that the “Floor” includes 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, the telephone facilities available in these locations, the areas outside the “Blue Line” (member and member organization booths adjacent to the trading Floor), and any area reserved primarily for members, including members’ lounges and bathrooms.<sup>14</sup>

In addition, under recently adopted Rule 6A – NYSE Amex Equities, the Equities “Trading Floor” is within the area of the “Floor” and defined as “the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the ‘Main Room’ and the ‘Garage.’” In accordance with Rule 6A – NYSE Amex Equities, the Equities Trading Floor does not, however, include the areas where NYSE Amex-listed options are traded, commonly known as the “Blue Room” and the “Extended Blue Room” (the “NYSE Amex Options Trading Floor”).<sup>15</sup>

#### Proposed Rule Changes

<sup>14</sup> See NYSE/NYSE Amex Information Memo 08-66 (December 22, 2008).

<sup>15</sup> Pursuant to the definitions of “Floor” and “Trading Floor” in Rules 6- and 6A – NYSE Amex Equities, and corresponding NYSE Rules 6 and 6A, the NYSE Amex Equities and NYSE Trading Floors overlap and thus references in the proposed rule text as well as in the 19b-4 to “Equities Trading Floor” include the NYSE Trading Floor. See Securities Exchange Act Release No. 59480 (March 2, 2009), 74 FR 10109 (March 9, 2009) (SR-NYSEALTR-2009-21) (adopting, *inter alia*, Rule 6A – NYSE Amex Equities). As noted above in footnote 4, the NYSE has proposed corresponding rule changes for its members and member organizations. See SR-NYSE-2009-84.

The Exchange proposes to amend Rule 36.23 – NYSE Amex Equities to permit members and member firm employees to use personal portable or wireless communications devices outside the Equities Trading Floor (i.e. outside the turnstiles or card swipe pads that electronically release locked doors to permit authorized entry).<sup>16</sup>

Although there are other areas on the Exchange’s premises where personal communications devices may be used by members and member firm employees (e.g., the cafeteria in 11 Wall Street), these areas are either too far from the Trading Floor to be practical or do not have adequate reception for such devices. Thus, due to the prescriptions of Rule 36 – NYSE Amex Equities and the broad definition of “Floor” under Rule 6 – NYSE Amex Equities, Exchange members and member firm employees are effectively required to leave the physical premises of the Exchange’s buildings and facilities in order to use their personal portable or wireless communications devices. Once outside, members and member firm employees may use their personal phones, BlackBerry™ or other devices to make personal calls and these conversations are not subject to the requirements of Rule 36 – NYSE Amex Equities. The requirement to leave the physical premises of the Exchange’s buildings and facilities to make personal communications can be overly burdensome, particularly during times of inclement weather. It is also burdensome to ask a member or member firm employee to go outside to make a personal call when there is no regulatory purpose for requiring personal calls to be made outside as opposed to inside the Exchange’s facilities.

The Exchange thus proposes to amend Rule 36.23 – NYSE Amex Equities to provide a limited exception permitting members and member firm employees to use

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<sup>16</sup> See supra note 5.

personal portable or wireless communications devices in designated areas of the Exchange's buildings and facilities that fall within the technical definition of the Floor under Rule 6 – NYSE Amex Equities, but that are outside the Trading Floor as defined under Rule 6A – NYSE Amex Equities. The proposed changes would permit members and member firm employees to use their personal communications devices in the hallways, stairwells, lobbies or members-only areas of the Exchange premises that are adjacent to the Equities and Options Trading Floors of the Exchange and the NYSE.<sup>17</sup> Specifically, such usage would be permitted in the lobby areas of the Exchange's facilities at 11 Wall Street, 6 and 18 New Street, and 2, 12, 18 and 20 Broad Street, as well as in the corridor in front of the interior elevator bank inside of 18 Broad Street. Again, it is important to note that a member would need to re-enter the Trading Floor from these areas through a restricted access point (i.e. turnstiles or card swipe pads that electronically release locked doors to permit authorized entry).<sup>18</sup>

In addition, such usage would need to be consistent with all other Exchange Rules and/or federal securities laws, including, but not limited to, the requirements of Securities Exchange Act Release Nos. 33-7288 and 34-37182, concerning the “Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of

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<sup>17</sup> It is important to note that the NYSE Amex Options Trading Floor is within the restricted access perimeter that encompasses the NYSE and NYSE Amex Equities Trading Floors and thus member and member firm employees would not be permitted to use such devices in that space under the terms of the proposed Rule defining where such devices are permissible. See proposed Rule 36.23 – NYSE Amex Equities. In addition, while the Exchange's Options Rules permit NYSE Amex Options members to use personal communications devices on the NYSE Amex Options Trading Floor, those rules prohibit NYSE Amex Options members from using those devices on the Equities Trading Floor of the Exchange. See NYSE Amex Options Rule 902NY.

<sup>18</sup> The majority of the doors that require card swipe for entry are opaque.



Information.”<sup>19</sup> The Exchange represents that it will issue a notice to members that will, inter alia, remind them of their obligations under these releases. Finally, the Exchange proposes corresponding technical amendments to Rule 36.20.

In proposing this limited exception, the Exchange seeks to provide its members and member firm employees with a reasonable and comfortable space inside the physical confines of the Exchange’s buildings and facilities within which they may use their personal portable or wireless communication devices, without diminishing the ability to monitor and regulate their conduct. The Exchange believes that the distance afforded by allowing a DMM, for example, to use a personal portable or wireless communication device outside the turnstiles is, in essence, equivalent to requiring a DMM to leave the Exchange’s premises to do the same. Any time or place advantage to using such devices outside the turnstiles is significantly reduced by the fact that a DMM has no line of sight and no ability to hear trading activity on the Floor and the speed of electronic trading would likely render stale any information a DMM had prior to leaving his or her post on the Trading Floor.

In addition, the proposed amendments do not change the current obligations of members and member firm employees to use their personal portable or wireless communication devices consistent with Exchange Rules and federal securities laws. Floor brokers would still be limited to using only Exchange authorized and issued portable phones on the Equities Trading Floor and DMMs would still only be permitted to use registered telephone lines and/or wired or wireless devices at their posts, and all

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<sup>19</sup> See Securities Exchange Act Release Nos. 33-7288 and 34-37182 (May 9, 1996), 61 FR 24643 (May 15, 1996) (S7-13-96). See also FINRA Regulatory Notice 2007-59 (December 7, 2007), concerning the supervision of electronic communications.

such devices and communications would continue to be regulated by the Exchange. All other usage of portable or wireless communication devices on the Equities Trading Floor would continue to be prohibited.

Finally, the Exchange would still retain jurisdiction over its members and member firm employees to regulate conduct that is inconsistent with Exchange Rules and/or the federal securities laws (e.g., trading ahead, insider trading, market manipulation).

## 2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Act<sup>20</sup>, in that they are 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.

The Exchange believes that the proposed rule changes are consistent with these principles because they do not modify the current prescribed uses (and limitations thereof) of personal portable or wireless communications devices. Rather, they merely change where those devices may be used to reflect the reality of the current trading environment, in which any time and place advantage to using such devices outside the Equities Trading Floor and other restricted access areas is significantly reduced by the fact that a DMM or Floor broker has no line of sight or ability to hear trading activity on the Equities Trading Floor. The Exchange further believes that, given the current speed of Exchange systems and the marketplace, any information a DMM obtained prior to leaving his or her post would be rendered stale by the time the DMM is outside the

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<sup>20</sup> 15 U.S.C. 78f(b)(5).

turnstiles. As such, the location change for the use of personal portable or wireless communication devices in the current trading environment is consistent with the Exchange's current regulatory controls governing the used of personable portable or wireless communication devices on the Floor, which were previously approved by the Commission or submitted by the Exchange for immediate effectiveness.<sup>21</sup>

The Exchange further believes that the proposal will permit Exchange members and member firm employees to, within the existing regulatory framework at the Exchange, efficiently and effectively conduct business on the Equities Trading Floor and engage in personal communications while off the Equities Trading Floor.

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

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 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or

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<sup>21</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63); and Securities Exchange Act Release No. 59480 (March 2, 2009), 74 FR 10109 (March 9, 2009) (SR-NYSEALTR-2009-21).

(ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve 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-NYSEAmex-2009-57 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2009-57. 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 Web site (<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 inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 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-NYSEAmex-2009-57 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>22</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).