

Act in that it is designed to promote just and equitable principles of trade.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The proposed rule change will impose no burden on competition.

*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. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, D.C. 20549. 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 at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-CHX-95-17 and should be submitted by August 18, 1995.

**IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change**

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with section 6(b)(5)<sup>7</sup> and Section 11(b)<sup>8</sup> of the Act. The Commission believes that proposed interpretation and policy<sup>9</sup> of Rule 37 should further the objectives of Section 6(b)(5) and Section 11(b) through pilot program procedures designed to allow stops, in minimum variation markets, under limited circumstances that offer primary market price protection for customers whose

orders are granted stops, while still adhering to traditional auction market rules of priority and precedence.

In the orders approving the pilot procedures,<sup>9</sup> the Commission asked the CHX to study the effects of stopping stock in a minimum variation market. The Exchange has submitted to the Commission several monitoring reports regarding its pilot program. The Commission believes that the monitoring reports, especially the latest report, provide useful information regarding the effectiveness of the program during the pilot period. The Commission, however, finds that additional time is necessary to evaluate carefully and comprehensively the information provided by the Exchange and the CHX's use of its pilot procedures. Accordingly, the Commission believes that it is reasonable to extend the pilot program until October 21, 1995, to avoid compromising the benefit that investors might receive under Rule 37, as amended, while the Commission is deciding whether to grant permanent approval of the pilot program.<sup>10</sup>

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice of filing thereof. This will permit the pilot program to continue on an uninterrupted basis. In addition, the procedures the Exchange proposes to continue using are the identical procedures that were published in the **Federal Register** for the full comment period and were approved by the Commission. No comments were received at that time.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-CHX-95-17) is hereby approved on a pilot basis until October 21, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>9</sup> See *supra*, note 1.

<sup>10</sup> See Securities Exchange Act Release No. 35910 (June 28, 1995), 60 FR 34563 (July 3, 1995) (notice of filing of proposed rule change relating to permanent approval of CHX's pilot program for stopping stock in minimum variation markets).

<sup>11</sup> 16 U.S.C. 78s(b)(2) (1988).

<sup>12</sup> 17 CFR 200.30-3(a)(12) (1994).

[Release No. 34-36015; File No. SR-NYSE-94-34]

**Self-Regulatory Organizations; Notice of Filing of Amendment No. 2 to Proposed Rule Change by New York Stock Exchange, Inc. Relating to Amendment of Exchange Rule 92**

July 21, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 13, 1995, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("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**

As originally filed,<sup>1</sup> the proposed rule change extended the applicability of Rule 29 to trades by a member or member organization on any market center and provided a limited exemption to permit member organizations to trade along with their customers when liquidating a block facilitation position. Amendment No. 1 to SR-NYSE-94-34 expanded the purpose section of the original filing.<sup>2</sup> This Amendment No. 2 to SR-NYSE-94-34 revises the proposed rule change to specifically exclude transactions in securities not listed on the NYSE, transactions by a member organization acting in the capacity of a specialist or market maker on a regional exchange, to the extent that a principal trade is effected and immediately liquidated at the same price to a customer on that exchange. An additional limited exemption also would allow a member or member organization to trade along with a customer when engaging in bona fide arbitrage or risk arbitrage provided certain conditions are met.<sup>3</sup>

The following is the text of the proposed rule change marked to reflect all of the proposed changes to the current rule. Additions to the current

<sup>1</sup> The filing was published for public comment in Securities Exchange Act Release No. 35139 (December 22, 1994), 60 FR 156 (January 3, 1995). The Commission published notice of an extension of the comment period in Securities Exchange Act Release No. 35274 (January 25, 1995), 60 FR 6330 (February 1, 1995).

<sup>2</sup> Amendment No. 1 was included in the original publication for public comment. See Securities Exchange Act Release No. 35139, *supra* note 1.

<sup>3</sup> 17 CFR 240.19c-3 (1994).

<sup>7</sup> 15 U.S.C. 78f (1988 & Supp. V 1993).

<sup>8</sup> 15 U.S.C. 78k (1988).

rule are in italics and deletions are in brackets.

**Rule 92: Limitations on Members' Trading Because of Customers' Orders**

(a) No member shall (1) personally buy or initiate the purchase of any security on the Exchange for his own account or for any account in which he, his member organization or any other member, allied member or approved person, in such organization or officer thereof, is directly or indirectly interested, while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security in the unit of trading for a customer, or (2) personally sell or initiate the sale of any security on the Exchange for any such account, while he personally holds or has knowledge that his member organization holds an unexecuted market order to sell such security in the unit of trading for a customer.

(b) No member shall (1) personally buy or initiate the purchase of any security in the Exchange for any such account, at or below the price at which he personally holds or has knowledge that his member organization holds an unexecuted limited price order to buy such security in the unit of trading for a customer, or (2) personally sell or initiate the sale of any security on the Exchange for any such account at or above the price at which he personally holds or has knowledge that his member organization holds an unexecuted limited price order to sell such security in the unit of trading for customer.]

(a) *Except as provided in this Rule, no member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security on the Exchange or any other market center for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a "proprietary order"), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price.*

(b) *A member or member organization may enter a proprietary order while representing a customer order which could be executed at the same price, provided the customer's order is not for the account of an individual investor, and the customer has given express permission, including an understanding of the relative price and size of allocated execution reports, under the following conditions:*

(1) *the member or member organization is liquidating a position*

*held in a proprietary facilitation account, and the customer's order is for 10,000 shares or more; or*

(2) *the member or member organization is engaging in bona fide arbitrage or risk arbitrage transactions, and recording such transactions in an account used solely to record arbitrage transactions (an "arbitrage account").*

(c) The provisions of this Rule shall not apply to:

(1) [to] any purchase or sale of any security in an amount of less than the unit of trading made by an odd-lot dealer to offset odd-lot orders for customers; [or]

(2) [to] any purchase or sale of any security upon terms for delivery other than those specified in such unexecuted market or limited price order [.];

(3) *transactions by a member or member organization acting in the capacity of a market maker pursuant to Regulation 240.19c-3 of the Securities and Exchange Commission in a security listed on the Exchange; and*

(4) *transactions by a member or member organization acting in the capacity of a specialist or market maker on another national securities exchange, to the extent that a riskless principal trade is effected and immediately liquidated at the same price to a customer on that exchange.*

**Supplementary Material**

*.10 A member or employee of a member or member organization responsible for entering proprietary orders shall be presumed to have knowledge of a particular customer order unless the member organization has implemented a reasonable system of internal policies and procedures to prevent the misuse of information about customer orders by those responsible for entering such proprietary orders.*

*.20 This Rule shall also apply to a member organization's member on the Floor, who may not execute a proprietary order at the same price, or at a better price, as an unexecuted customer order that he or she is representing, except to the extent the member organization itself could do so under this Rule.*

*.30 For purposes of paragraph (b) above, the term "account of an individual investor" shall have the same meaning as the meaning ascribed to that term in Exchange Rule 80A. For purposes of paragraph (b)(1) above, the term "proprietary facilitation account" shall mean an account in which a member organization has a director interest and which is used to record transactions whereby the member organization acquires positions in the course of facilitating customer orders.*

*Only those positions which are recorded in a proprietary facilitation account may be liquidated as provided in paragraph (b)(1). For purposes of paragraph (b)(2) above, the terms "bona fide arbitrage" and "risk arbitrage" shall have the meaning ascribed to such terms in Securities Exchange Act Release 15533, January 26, 1979. All transactions effected pursuant to paragraph (b)(2) above must be recorded in an arbitrage account.*

[.10] *.40 A member who issues a commitment or obligation to trade from the Exchange through ITS or any other Application of the System shall, as a consequence thereof, be deemed to be initiating a purchase or sale of a security on the Exchange as referred to in this Rule.*

[.20] *.50 See paragraph (c)(i) of Rule 800 (Basket Trading: Applicability and Definitions) and paragraph 99 (Off-Hours Trading: Applicability and Definitions) in respect of the ability to initiate basket transactions and transactions through the "off-Hours Trading Facility" (as Rule 900 defines that term), respectively, notwithstanding the limitations of this Rule.*

**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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

**1. Purpose<sup>4</sup>**

Currently, Exchange Rule 92 provides that members may not trade for their own accounts at a price at which they hold executable customer orders. The Rule, by its express terms, does not apply to member organizations or to transactions by members and member organizations in market centers other than the exchange. The rule does not

<sup>4</sup>This discussion consolidates the "Purpose" discussion as submitted in SR-NYSE-94-34 and Amendment No. 1 thereto, see *supra* note 1, and also discusses additional amendments to Rule 92 being filed herein.

contain any exceptions for any types of proprietary transactions, including transactions where a member firm trades for its own account along with a customer's block-size order when liquidating a proprietary block facilitation position, or transactions involving bona fide arbitrage and risk arbitrage, even if the customer has given permission for the firm to trade along with the order.

The proposed amendments to Rule 92 make clear that the Rule applies only to transactions in NYSE-listed securities and extend the Rule's applicability to member organizations, and to transactions by members and member organizations in market centers other than the Exchange. The proposed amendments contain exemptions for liquidations of block facilitation transactions and for bona fide arbitrage and risk arbitrage, as discussed below. The proposed amendments also provide exemptions, as discussed below, for member organizations acting as market makers pursuant to Rule 19c-3 under the Act, or as regional stock exchange specialists or market makers. In addition, the proposed amendments provide an exemption for member organization proprietary transactions where the member organization has implemented information barrier procedures as discussed below.

#### *Applicability of Rule 92 to Member Organizations*

The proposed amendments to Rule 92 would broaden the Rule's applicability to all proprietary trading in NYSE-listed stocks when a member organization has an agency order capable of execution at the price at which a proprietary trade is effected. The Exchange understands that in most "trading along" situations, the same Floor Broker represents the agency and proprietary orders and, even if that was not the case, it would be unacceptable for a firm to enter a proprietary order with a different broker, who could then compete directly with the broker representing the member firm's customer. To better deal with the current trading environment and still meet the high standard of ethical conduct the Exchange expects of its membership when dealing with their customers, the focus of Rule 92 should be placed on the member organization itself. Rule 92 was drafted and promulgated prior to the advent of block positioning and the proliferation of upstairs proprietary position trading by member organizations, but the Rule reflects fundamental concepts, rooted in agency law, that an agent must place a customer's interest ahead of the agent's proprietary interest. The Exchange and

its constituent committees that reviewed the proposed amendments to the Rule believe it is appropriate to extend this emphasis on the priority of customer interest to the member organization itself, as well as to the organization's Floor members. While enforcement action has been taken regarding inappropriate proprietary trading vis-à-vis agency orders as violative of the NYSE Rule 476 prohibition against conduct inconsistent with just and equitable principles of trade, recent investigations drew the Exchange's attention to a practice of trading along with, but not ahead of, institutional customer orders with the consent of the consumer. When appropriate, the Exchange will continue to bring enforcement action for violations of Rule 476 in the context of inappropriate proprietary trading. The Exchange also believes that amending Rule 92 offers the best approach to addressing expectations on the subject of member organization proprietary trading in the context of block facilitation. The proposed amendments change the scope and focus of Rule 92 and strike an appropriate balance between block facilitation and customer protection.

#### *Applicability of Rule 92 to Transactions by Members and Member Organizations in Market Centers other than the Exchange*

The proposed amendments to Rule 92 extend the application of the Rule to transactions by a member or member organization in a market center other than the Exchange. The Exchange believes it is appropriate that the broad concepts of agency law and fiduciary duty codified in paragraph (a) of Rule 92 be made applicable to all agency representation, irrespective of market center. The exceptions provided in paragraphs (b) and (c) are intended to apply to transactions by members and member organizations on the Exchange. Other market centers may choose to adopt, or not adopt, comparable exceptions. The Exchange, as well as other self-regulatory organizations, has a long history of regulating activities involving, for example, sales practices and the trading of a diverse range of financial products which occur in other market centers. Many of these regulatory activities are conducted through the Intermarket Surveillance Group.

#### *Liquidation of Facilitation Positions*

The ability to liquidate a block facilitation position by trading along with a customer's block-size order is generally perceived by positioning firms and their institutional customers as a reasonable aspect of the block

facilitation business, provided there is disclosure to customers and customer consent. The inability to liquidate such positions in these circumstances may impede the block facilitation business, as firms may be reluctant to assume block facilitation positions if they cannot liquidate them, subject to appropriate safeguards, while representing customer orders.

The Exchange is proposing to amend Rule 92 to permit member organizations to trade along with a customer, when liquidating a block facilitation position, subject to the following conditions:

- The customer is not an individual investor;<sup>5</sup>
- The customer's order is for 10,000 shares or more;
- The customer has given express permission for the member organization to trade along with the order, including an understanding of the relative price and size of allocated execution reports;
- The member organization is liquidating a position acquired in the course of facilitating a block transaction; and
- The member organization's orders are for an account used to record transactions whereby the member organization acquires positions in the course of facilitating customer orders of 10,000 shares or more (a "proprietary facilitation account").

The Exchange intends to inform members and member organizations that, although the amended rule does not outline a specific method of record keeping evidencing that a customer has given permission to trade along, the burden of proof to demonstrate that customer consent was obtained will fall on the member or member organization.

#### *Bona Fide Arbitrage and Risk Arbitrage Transactions*

The Exchange believes it would be appropriate for members and member organizations to be able to trade along with customers in bona fide arbitrage and risk arbitrage transactions, subject to the following conditions:

- The customer is not an individual investor;
- The customer has given express permission for the member organization to trade along with the order, including an understanding of the relative price and size of allocated execution reports; and
- The member organization's transactions are recorded in an account

<sup>5</sup> The Exchange believes that consent to trade along should be given by a market professional and therefore is limiting these exemptions to orders which are not for the account of an individual investor.

used solely to record arbitrage transactions (an "arbitrage account").

As with the exception for liquidation of block facilitation positions, the burden of proof to demonstrate that customer consent was obtained would fall on the member or member organization. The terms "bona fide arbitrage" and "risk arbitrage" would have the meaning ascribed to them in Securities Exchange Act Release No. 15533.<sup>6</sup>

#### *Exception for Market Makers*

The Exchange's proposal would exempt from Rule 92 transactions by a member organization acting in the capacity of a market maker pursuant to Rule 19c-3 under the Act,<sup>7</sup> and transactions by a regional exchange specialist or market maker, to the extent that a riskless principal trade is effected and immediately liquidated at the same price to a customer on that exchange.

#### *Information Barriers*

The amendments to Rule 92 provide that a member or employee of a member organization responsible for entering proprietary orders shall be presumed to have knowledge of a particular customer order unless the member organization has implemented a reasonable system of internal policies and procedures to prevent the misuse of information about customer orders by those responsible for entering such proprietary orders. Each member organization would have the flexibility to implement such procedures as it deemed appropriate to its own business operations.

#### 2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5) that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The proposed rule change will enable member organizations to add depth and liquidity to the Exchange's market, while continuing to provide customer protection through the requirement of customer approval for trading along situations.

<sup>6</sup> Securities Exchange Act Release No. 15533 (January 26, 1979).

<sup>7</sup> Rule 19c-3 under the Act provides that the rules of national securities exchanges may not impose off-board trading restrictions on securities listed after April 26, 1979.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

As the proposed amendments to Rule 92 would apply equally to all market centers with respect to trading by NYSE members and member organizations, 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*

The Exchange understands that the Commission has received comments on SR-NYSE-94-34 and Amendment No. 1 thereto from several self-regulatory organizations and member organizations. The Exchange believes that issues raised by these commentators are addressed herein, and in a letter from James E. Buck, Senior Vice President and Secretary of the Exchange, to Brandon Becker, Director of the Division of Market Regulation, dated March 15, 1995.<sup>8</sup>

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

Within 35 days of the publication of this notice in the **Federal Register** or within such other 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 (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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. 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

<sup>8</sup> This letter and all other comment letters received by the Commission regarding the NYSE's proposal are available in the Commission's public reference room in File No. SR-NYSE-94-34.

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 at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-94-34 and should be submitted by August 18, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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[Release No. 34-36009; File No. SR-NYSE-95-26]

#### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to an Extension of Its Pilot Program for Stopping Stock Under Amendments to Rule 116.30**

July 21, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78s(b)(1), notice is hereby given that on July 19, 1995, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("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 proposed rule change consists of a request to extend amendments to Rule 116.30, with respect to the ability of specialists to stop stock in minimum variation markets for three months until October 21, 1995.<sup>1</sup> The text of the

<sup>1</sup> The NYSE received approval to amend Rule 116.30, on a pilot basis, in Securities Exchange Act Release No. 28999 (Mar. 21, 1991), 56 FR 12964 (Mar. 28, 1991) (File No. SR-NYSE-90-48) ("1991 Approval Order"). The Commission subsequently extended the NYSE's pilot program in Securities Exchange Act Release Nos. 30482 (Mar. 16, 1992), 57 FR 10198 (Mar. 24, 1992) (File No. SR-NYSE-92-02) ("1992 Approval Order"); 32031 (Mar. 22,