

this increase, FLEX Equity options represented a very small percentage of options transactions when compared to the standardized equity market. Further, although each of the Exchanges generally experienced an increase in trading activity and size of contracts during the pilot period, a very insignificant number of positions actually exceeded three times the standardized options position limit. Based on the above, the Exchanges concluded that the elimination of position and exercise limits for FLEX Equity options did not have any impact on the prices of the underlying stocks during the establishment or unwinding of FLEX Equity positions greater than three times the standard position limit.

Finally, given the size and sophisticated nature of the FLEX Equity options market, the reporting and margin requirements, and the fact that the pilot programs have run the past two years without incident, the Commission believes that eliminating position and exercise limits for FLEX Equity options on a permanent basis does not substantially increase manipulative concerns. The Commission continues to believe that the enhanced market surveillance of large positions should help the Exchanges to take the appropriate action in order to avoid any manipulation or market risk concerns. The Commission expects the Exchanges to take prompt action, including timely communication with the Commission and other marketplace self-regulatory organizations responsible for oversight of trading in FLEX options and the underlying stocks, should any unanticipated adverse market effects develop. In summary, because of the special nature of the FLEX Equity markets, the Commission believes that the Exchanges' proposals should be approved on a permanent basis. In permanently approving the proposals, the Commission believes that the distinctions between the FLEX Equity options market and the standardized equity options market, as described above, warrant the different regulatory applications of position and exercise limits under the Act.

The Commission finds good cause for approving the proposed rule changes prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Specifically, the Commission believes that because approval of the permanent approval of the proposals will allow the pilot programs to continue uninterrupted based on the same terms and conditions of original pilot, it is consistent with the protection of investors and the public interest to approve the proposed rule

changes on an accelerated basis. Further, a full 21-day comment period was provided and no comments were received. Accordingly, the Commission believes it is consistent with Section 6(b)(5) and Section 19(b)(2) of the Act to grant accelerated approval to the proposed rule changes.¹⁷

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule changes (SR-Amex-99-40; SR-PCX-99-41; SR-CBOE-99-59) be approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42224; File No. SR-NYSE-94-34]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 5 to Proposed Rule Change by the New York Stock Exchange, Inc. to Revise Exchange Rule 92, "Limitations on Members' Trading Because of Customers' Orders"

December 13, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 28, 1999, the New York Stock Exchange, Inc. ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") Amendment No. 5 to the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

As originally filed in 1994, the proposed rule change would amend Exchange Rule 92 ("Rule 92") to permit NYSE member organizations to trade along with their customers when such member organizations liquidate a block

facilitation position or engage in bona fide arbitrage or risk arbitrage. Amendment No. 5 to the proposal clarifies the limited exception for transactions effected to hedge a customer facilitation position, and provides further explanation of how the revised Rule 92 will operate.

The following is the text of the proposed rule change marked to reflect all of the proposed changes.³ Additions to the current text of Exchange Rule 92 appear in *italics* while deletions appear 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 on 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

³ As presented, the text of the proposed rule change incorporates all of the proposed changes made to the original rule proposal by Amendment Nos. 1, 2, 3, 4, and 5. See Securities Exchange Act Release Nos. 35139 (Dec. 22, 1994), 60 FR 156 (Jan. 3, 1995) (notice of filing of proposed rule change, including Amendment No. 1); 36015 (July 21, 1995), 60 FR 38875 (July 28, 1995) (notice of filing of Amendment No. 2); 37428 (July 11, 1996), 61 FR 37523 (July 18, 1996) (notice of filing of Amendment No. 3); 39634 (Feb. 9, 1998), 63 FR 8244 (Feb. 18, 1998) (notice of filing of Amendment No. 4). On November 22, 1999, the Exchange submitted a technical correction to Amendment No. 5 to better identify the cumulative proposed changes to Exchange Rule 92. See Electronic mail message from Donald Siemer, Director, Market Surveillance, Exchange, to Michael L. Loftus, Special Counsel, Division of Market Regulation, Commission, dated November 22, 1999.

¹⁷ 15 U.S.C. 78f(b)(5) and 78s(b)(2).

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

limited price order to sell such security in the unit of trading for a 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 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;

(2) the member or member organization is creating a bona fide hedge ("hedge") and (i) the creation of the hedge, whether through one or more transactions, occurs so close in time to the completion of the transaction precipitating such hedge that the hedge is clearly related; (ii) the size of the hedge is commensurate with the risk it offsets; (iii) the risk to be offset is the result of a position acquired in the course of facilitating a customer's order; and (iv) the customer's order is for 10,000 shares or more;

(3) the member or member organization is modifying an existing hedge and (i) the size of the hedge, as modified, remains commensurate with the risk it offsets; (ii) the hedge was created to offset a position acquired in the course of facilitating a customer's order; and (iii) the customer's order is for 10,000 shares or more; or

(4) 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 Securities and Exchange Commission Rule 19c-3 in a security listed on the Exchange;

(4) transactions by a member or member organization acting in the capacity of a specialist or market maker on another national securities exchange; and

(5) transactions made to correct bona fide errors.

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 apply to any agency or proprietary transaction effected on the Exchange if such transaction ("Exchange transaction") is part of a group of related transactions that together have the effects prohibited by the Rule, regardless of whether (i) one or more of the other related transactions were effected on other market centers; or (ii) the Exchange transaction by itself had such effects.

.30 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.

.40 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 direct 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) and (b)(4) above, the terms "bona fide hedge", "bona fide arbitrage" and "risk arbitrage" shall have the meaning ascribed to such terms in Securities

Exchange Act Release No. 15533, January 29, 1979. All transactions effected pursuant to paragraph (b)(4) above must be recorded in an arbitrage account.

.50 For purposes of paragraph (b)(2) above, a hedge will be deemed to be "clearly related" if either the first or last transaction comprising the hedge is executed on the same trade date as the transaction that precipitates such hedge. A member shall mark all memoranda of orders to identify each transaction creating or modifying a hedge as permitted under this Rule.

[.10] .60 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] .70 See paragraph (c)(i) of Rule 800 (Basket Trading: Applicability and Definitions) and paragraph (d)(ii) of Rule 900 (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 Exchange 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 and is set forth in Sections A, B, and C below.

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

1. Purpose

As reflected in the original filing and Amendment Nos. 1, 2, 3, and 4 thereto, the proposed rule change would establish limited exceptions to Rule 92 that permit NYSE member organizations to trade along with their customers when liquidating a block facilitation position, hedging a previously established facilitation position, or engaging in bona fide arbitrage or risk arbitrage. Amendment No. 4 to the filing proposed to extend the application of Rule 92 to trades effected by an NYSE member or member organization in

NYSE-listed securities, even if such trades occurred on other market centers (certain exceptions would be provided to over-the-counter market makers and specialists on regional exchanges).

a. Bona Fide Hedge Exception

The Exchange seeks to clarify the proposed exception from Rule 92 that would allow NYSE members or member organizations to trade along with a customer in the same security when the member or member organization engages in proprietary bona fide hedge transactions. Under the proposal, the creation of a bona fide hedge ("hedge") must occur so close in time to the completion of the transaction precipitating such hedge that the hedge is clearly related. A hedge will be deemed to be "clearly related" to the transaction precipitating the hedge if either the first or last transaction comprising the hedge is executed on the same trade date as the transaction that precipitates such hedge. In addition, the size of the hedge must be commensurate with the risk it offsets. The proposal also requires that the risk to be offset must result from a position acquired when the member or member organization facilitated a customer's order. Finally, the customer's order that the NYSE member or member organization trades along with must be for 10,000 shares or more.

The proposal also would permit NYSE members or member organizations to modify an existing hedge that was created to offset a position acquired in a customer facilitation transaction. The hedge, as modified, must remain commensurate with the risk it offsets, and the customer's order that the NYSE member or member organization trades along with must be for 10,000 shares or more.

b. Application of Rule 92 to Other Market Centers

The proposal prohibits NYSE members or member organizations from entering an order for their own or related accounts if the person entering the order has knowledge of a customer order capable of execution at the same price. Under Amendment No. 4 to the proposal, this prohibition would apply whether the trade for the customer or the NYSE member or member organization occurred on the Exchange or any other market center. Amendment No. 4 provides specific guidelines to help determine when Rule 92 would apply to proprietary or agency trades effected on another market center, including situations where neither segment nor "leg" of a customer

facilitation transaction occurred on the Exchange.

The Exchange seeks to further revise the proposed application of Rule 92. Specifically, the Exchange proposes to apply Rule 92 only in those situations where one or both trades (proprietary or agency) of a customer facilitation transaction are effected on the NYSE. If neither segment of a customer facilitation transaction occurs on the Exchange, Rule 92 would not apply.

c. Bona Fide Errors

The proposal also would permit NYSE members and member organizations to trade along with customers when effecting a transaction to correct a bona fide error.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)(5) of the Act⁴ in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, and, in general, protect investors and the public interest. The Exchange also believes that the proposed rule change will enable NYSE members and member organizations to add depth and liquidity to the Exchange's market, and help protect investors by requiring the express permission of customers in trading along situations.

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

The Exchange believes that the proposed rule change will not 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 did not solicit or received written comments 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 (ii) as to which the Exchange 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, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW, Washington, DC 20549-0609. Copies of the submissions, 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 persons, 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, at 450 Fifth street, NW, Washington, DC 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-NYSE-94-34 and should be submitted by January 10, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁵

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42225; File No. SR-NYSE-99-38]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the New York Stock Exchange, Inc. to Amend its Minor Rule Violation Plan

December 13, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 2, 1999, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange

⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78f(b)(5).