

which are not confirmed or rejected as accepted and replacing "promptly" with "as soon as practicable under the prevailing circumstances," aim to maintain a degree of flexibility in the Rule to accommodate various situations occurring during the trading day. Given today's enormous volume of trading on the Floor (over 1 billion shares daily), the NYSE believes that it is not practical to impose an affirmative obligation on members to confirm each and every transaction where another member acted as principal, nor does the Exchange believe that it is practical for members to have to obtain the confirmations. Thus, if no action is taken by a member to confirm a transaction, the transaction would be deemed confirmed under the proposed Rule.¹⁰

In NYSE Rule 91.20, the Exchange is proposing to replace the term "should" with "must," to reflect the mandatory nature of the procedures outlined.

NYSE Rule 91.50 is proposed to be added to explain the rejection of specialist's principal transactions. The proposed language states that if there is a continued pattern of rejections of a specialist's principal transactions, a Floor Official may be called upon to require the broker to review his actions. However, if a customer gives instructions to his broker to reject trades with the specialist's name on the other side, this would be a conditional order and should not be entrusted to the specialist for execution.

The Exchange states that a Floor Official's reviewing a pattern of rejections of a specialist's principal transactions and requiring a broker to review his or her actions do not compromise the unconditional right of a broker to reject any trade where the specialist trades as principal. If a customer gives a continued pattern of rejection instructions to a Floor broker to reject any trade where the specialist acted as principal, a Floor Official would be able to review the appropriateness of the continued pattern of rejections by the broker, to make sure he is representing his customer as fiduciary and not giving the specialist, in effect, a kind of conditional order that is not recognized under Exchange rules. If a continued pattern of rejections does occur because the customer will not accept executions with the specialist as contra party, the Floor broker should represent the order himself or herself to ensure appropriate representation of the order in accordance with the broker's fiduciary responsibility to the customer. Because

the right to reject a trade pursuant to NYSE Rule 91 is unconditional, no disciplinary process would be triggered by the broker exercising his or her right to reject a trade.¹¹

NYSE Rule 95. Under NYSE Rule 95, an Exchange Floor broker cannot effect a transaction if that broker has discretion regarding the choice of security to be bought or sold, the total amount of the security to be bought or sold, or whether the transaction shall be a purchase or a sale. The Exchange is proposing to add material to NYSE Rule 95(a) making clear that members may not create an order or a material term of an order, but must receive an order from off the Floor, regardless of how familiar they are with a customer's strategy. This is a long-standing interpretation of NYSE Rule 95 and the Exchange believes is reasonably and fairly implied by the text of the existing Rule.

NYSE Rule 115A. NYSE Rule 115A, among other matters, provides procedures for members to confirm transactions on openings. The Rule provides in one place that members should confirm transactions as promptly as possible, and in another place states that a specialist shall not be responsible for losses if the broker does not return to the specialist's post within 30 minutes after the opening sale. The Exchange is proposing to add to the Rule a cross reference to make clear that while a broker should confirm a transaction as promptly as possible, the specialist is not responsible for losses thirty minutes after the opening. This is a simple cross-referencing point that the Exchange believes is reasonably and fairly implied by the text of the current Rule.

NYSE Rule 116. The Exchange is proposing three changes to NYSE Rule 116. Exchange Rule 116.20 would be revised to directly state a prohibition against a Floor broker "stopping" stock. This is not a new prohibition, as section 11(a) of the Act¹² and NYSE rules regulating on-Floor trading would have the effect of prohibiting a broker from effecting an on-Floor proprietary trade to execute the order at the "stop" price if other market interest traded with the bid or offer against which the broker's order was stopped and the broker was thus obligated to effect a proprietary trade to fulfill the "stop." The Exchange has consistently interpreted NYSE Rule 116.20 in this manner.

The Exchange is also proposing to amend NYSE Rule 116.30(3)(a) to make clear in the Rule that a specialist should "stop" an order in a minimum variation

market only when there is an imbalance in the quotation suggesting the likelihood of price improvement for the "stopped" order. This proposed rule change to NYSE Rule 116.30(3)(a) has been the Exchange's consistent interpretive position. In addition, the Exchange is proposing to add to NYSE Rule 116.40 a cross reference to new NYSE Rule 123C,¹³ which codifies in detail the Exchange's policies regarding execution of market-on-close and limit-on-close orders.

2. Statutory Basis

The NYSE believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,¹⁴ in general, and further the objectives of Section 6(b)(5),¹⁵ in particular, because it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change, as amended, 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

Written comments on the proposed rule change, as amended, were neither solicited nor received.

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 NYSE consents, the Commission will:

(A) By order approve such proposed rule change, as amended; or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

¹³ See Securities Exchange Act Release No. 46579 (October 1, 2002), 67 FR 63004 (October 9, 2002) (SR-NYSE-2002-31).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

¹¹ *Id.*

¹² 15 U.S.C. 78k(a).

¹⁰ *Id.*