could be attributed to the position established by the trade versus the reasonably anticipated impact the trade at the close will have on the closing price. Generally, however, trades after 3:40 p.m. will be considered executed ''near the close.''[8]

Second, the Memorandum states that if a member has knowledge of an imminent block order, the member should not effect any transactions in that stock with the intention of reversing the position subsequently by participating on the contra-side of the block transaction. The Memorandum further provides that a person should not disclose to any other person trading strategies or customers' orders so that the person may take advantage of the information for his or her personal benefit or for the benefit of the member organization.[9]

Finally, the Memorandum reminds members that they are required to establish and maintain procedures reasonably designed to review facilitation activities for compliance with Exchange rules and federal securities laws. It also states that members must ensure that trading strategies engaged in by their proprietary traders to facilitate customers' orders have an economic basis and are not engaged in to mark the close or to mark the value of a position, and that before any at the close customer orders are transmitted to the Floor of the Exchange, members accepting such orders must exercise due diligence to learn the essential facts relative to these orders.

III. Summary of Comments

The Commission received one comment letter on the proposed rule change on behalf of six NYSE-member firms (the ''Comment Letter'').[10] The issues raised therein and the NYSE response are discussed below.[11]

The Comment Letter noted that, because the rule change would preclude NYSE members from effecting proprietary transactions for the 20 minutes prior to the close, the proposal would result in additional risk for such members when facilitating customer block transactions at the closing price. As a result of this added risk exposure, it was argued that the costs to customers in executing such transactions would increase. In its response, the NYSE recognized that the proposal could produce additional risk for proprietary facilitation, but stated that the transactions after 3:40 p.m. bear *de minimis* risk because they are made in close proximity to a trade at the close that most likely would have a profitable impact on the prior transactions. In addition, the Exchange asserted that the rule change is consistent with the existing prohibitions against frontrunning, and that the 3:40 p.m. cut-off time was included to avoid confusion over what transactions generally would be considered ''near the close.''

The Comment Letter stated that the proposed rule appears to remove the Exchange's burden of proving manipulative intent on the part of a member that entered an order after 3:40 p.m., without ''immunizing'' transactions executed before that time. The Comment Letter asserted that because transactions occurring before 3:40 p.m. could still be deemed ''near the close,'' the proposed rule change provides the Exchange with a high degree of prosecutorial discretion, making the proposal inconsistent with Section 6(b) (6) and (7) of the Act.[12] Additionally, the Comment Letter stated that predicating the prohibition against proprietary orders upon whether a member entered a market at the close order that ''can reasonably be expected to impact the closing price'' would require firms to predict the impact of future trades. The NYSE responded that it believes it is appropriate to use the proposed standard because it provides flexibility for judgmental errors. The NYSE also noted that this is the same standard used in frontrunning cases to assess compliance with just and equitable principles of trade.

Finally, the Comment Letter pointed out that the NYSE has not provided empirical support for restricting proprietary trading near the close. It also asserted that the transactions that would be prohibited represent actual customer demand, as opposed to orders by firms intended to take advantage of customer orders. The Comment Letter suggested that instead of the proposed interpretation, the Exchange should impose a requirement that members make full disclosure to their customers before undertaking transactions of this kind. In response, the Exchange stated that the empirical basis for its belief is demonstrated in patterns of trading that the Exchange has reviewed. The Exchange also asserted that disclosure to customers, even when the proprietary trade has a minimal impact, would be ineffective. According to the NYSE, the transactions in question may be effected due to the probability of immediate profitability, and they would, in any event, be based on an unfair informational advantage over other market participants. In addition, the NYSE asserted that, while the proprietary orders are initiated because of customer interest, those proprietary orders also would not be entered but for the knowledge of customer orders.

IV. Discussion

After careful consideration of the Comment Letter and the NYSE response thereto, the Commission has decided to approve the proposed rule change. For the reasons discussed below, 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 the requirements of Sections 6(b) (5), (6), and (7).[13]

The Commission notes that two of the topics discussed in the Memorandum are restatements of current Exchange policy. Specifically, The Memorandum's discussion of trading based upon information of an imminent customer transaction and the requirement that members maintain procedures reasonably designed to review facilitation activities for compliance with Exchange rules and federal securities laws are consistent with Exchange Rule 476 and previous NYSE interpretations issued pursuant to that Rule.[14] The Commission continues to believe that these policies are consistent with the Section 6(b)(5) requirement that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative

[8] The Memorandum notes that members will not be precluded from executing customer orders on an agency basis at any time, including at or near the close. The Memorandum, however, cautions that this does not preclude the Exchange from determining that such activity might be a violation of the anti-manipulation provisions of the Act or Exchange rules. *See* 15 U.S.C. 78i(a) and j(b) (1988); NYSE Rule 476.

[9] The Memorandum notes, however, that this would not preclude a member organization from soliciting interest to trade with the contra-side of a block in the normal course of engaging in block facilitation activities.

[10] *See* letter from Roger Blanc, Willkie Farr & Gallagher, dated March 2, 1995 (representing Bear, Stearns & Co. Inc.; CS First Boston Corporation; Goldman, Sachs & Co.; Morgan Stanley & Co. Incorporated; PaineWebber Incorporated; and Saloman Brothers Inc.) (''Comment Letter'').

[11] *See* NYSE Letter, *supra* note 6. According to the NYSE, the proposed rule change was reviewed and approved by the Exchange's Upstairs Traders Advisory Committee, Institutional Trading Advisory Committee, Market Performance Committee, and Quality of Markets Committee prior to filing with the Commission.

[12] 15 U.S.C. 78f(b) (6) and (7) (1988).

[13] 15 U.S.C. 78f(b) (5), (6), and (7).

[14] *See, e.g.*, NYSE Information Memo Number 89–53 (November 27, 1989).