acts, and, in general, to protect investors and the public.

Similarly, the proposed Memorandum's description of the types of proprietary trading near the close that may, in certain circumstances, constitute a violation of just and equitable principles of trade is reasonably designed to address potential trading abuses that might occur when members are facilitating customer block or program orders. The Commission agrees with the NYSE that the conduct addressed in the Memorandum—trading with knowledge of impending large at the close orders—could prove detrimental to market integrity. The proposed guidelines for such trading near the close are consistent with long standing prohibitions against frontrunning. Moreover, the NYSE restrictions on block facilitation activities near the close are very limited in scope and should provide helpful guidance to members.

For the reasons discussed below, the Commission also believes the Comment Letter's criticisms of the proposal are adequately addressed. First, it is unnecessary for the NYSE to conduct further empirical studies before adopting this proposal. The NYSE represents that it has observed instances of block facilitation trading by its members that results in closing prices that disadvantage customers. 15 In addition, as previously mentioned, the Memorandum is an elaboration of existing prohibitions against frontrunning. Thus, the NYSE is merely providing guidance on the types of conduct that already constitute a violation of just and equitable principles of trade under its rules.

Second, the Commission does not believe that simply requiring disclosure to customers sufficiently will protect customers or preserve market integrity. As the NYSE has indicated, the conduct addressed in this proposal affects not only the facilitation member's customer, but also all other market participants. The NYSE member still would have an informational advantage over the rest of the market even after full disclosure to its customer.

Third, the Comment Letter considers the Memorandum's guidance as a blanket prohibition against certain proprietary trading after 3:40 p.m., the designated cut-off time. The Memorandum, however, only restricts post-3:40 p.m. trading in limited circumstances. The Memorandum states that a member, when positioning itself to facilitate a customer transaction to be

Fourth, the Commission does not agree with the Comment Letter's assertion that the proposed regulation of proprietary trading near the close, defined generally as after 3:40 p.m., provides the Exchange with excessive prosecutorial discretion. The 3:40 p.m. cut-off is intended to provide members with *more* guidance as to prohibited conduct under the NYSE rules. At the same time, the 3:40 p.m. cut-off is not intended to operate as a "safe-harbor." The cut-off guideline provided in the Memorandum does not preclude the Exchange from determining that certain transactions before 3:40 p.m. were executed "near the close." The Commission agrees with the NYSE that the standard for determining which transactions are executed "near the close" must be flexible and take into consideration factors unique to the market for a particular security. The Commission therefore believes the proposed standard for determining when an execution is "near the close" is appropriate and even though it may cover transactions effected before the designated cut-off time.

Fifth, the Comment Letter suggests that the proposed standard would relieve the Exchange from proving manipulative intent for transactions executed after 3:40 p.m. The NYSE, however, seeks to address conduct that could enable block positioners to benefit from an unreasonable informational advantage over other market participants. The Commission believes that it is reasonable for the NYSE to adopt a position to reduce the likelihood of members trading to their own advantage based on customer information. This position still requires proof that the at the close order reasonably could be expected to affect the closing price.

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, <sup>17</sup> that the proposed rule change (SR–NYSE–94–45) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.  $^{18}$ 

## Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95–14795 Filed 6–15–95; 8:45 am]

[Release No. 34–35836; File No. SR-PSE-95–11]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Stock Exchange, Inc., Relating to the Number of Trading Posts That May Be Included as Part of Each Market Maker's Primary Appointment Zone

June 9, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on April 7, 1995, the Pacific Stock Exchange Incorporated ("PSE" 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 PSE proposes to increase the number of trading posts that may be included as part of each market maker's primary appointment zone.

## 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.

made after the close at the closing price, should not trade for its own account "near the close" (after 3:40 p.m.) if it intends to execute an at the close order that reasonably can be expected to impact the closing price of the security. The Memorandum does not prohibit proprietary trading after 3:40 p.m., only a limited type of proprietary trading when in possession of a form of non-public, material market information.

<sup>17 15</sup> U.S.C. 78s(b)(2) (1988).

<sup>18 17</sup> CFR 200.30-3(a)(12) (1994).

<sup>1 15</sup> U.S.C. 78s(b)(1) (1988).

<sup>&</sup>lt;sup>15</sup> See NYSE Letter, supra note 6.<sup>16</sup> See Comment Letter, supra note 10.