

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;⁵
- 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

⁵ 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.