

Executives who represent other elements of the Exchange community.

C. Fair Representation Requirements

As a registered national securities exchange, the NYSE must adhere to section 6(b)(3) of the Act,¹⁵ which requires the NYSE to assure a fair representation of its members in the selection of its directors and the administration of its affairs, and provide that one or more directors be representative of issuers and investors.¹⁶ In order to satisfy this fair representation obligation, the NYSE proposes to provide in its amended Constitution that the Industry Members of the Board of Executives would recommend to the Board candidates constituting 20% of the directors to be elected by the members of the Exchange, but in no event fewer than two directors.¹⁷ The Constitution would state that the Industry Members are required to propose persons who, in their opinion, are committed to serving the interests of the public and strengthening the Exchange as a public market, and will allow the Exchange to meet the fair representation requirements set forth in the Act.¹⁸

The Constitution would provide that the directors elected by Exchange members must include directors who will enable the Exchange to comply with the requirements of section 6(b)(3) of the Act.¹⁹ To this end, the proposed amendments also would require the Nominating & Governance Committee, in meeting its responsibilities to recommend candidates for Board membership, to propose candidates who are, in its opinion, committed to serving the interests of the public and strengthening the NYSE as a public securities market, at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning issuers and at least one of whom is intended to allow the Exchange to meet the requirements of section 6(b)(3) of the Act concerning investors.²⁰

The NYSE also proposes an amendment to permit members of the Exchange to propose, by petition, nominees for positions that are to be filled at the elections prescribed in the Exchange's Constitution.²¹ Specifically, any such nominee would be required to be endorsed by not less than forty members. No member would be permitted to endorse more than one nominee. However, not less than one hundred members would be permitted to propose, by petition, an entire ticket or any portion of a ticket. If the Board finds that an individual proposed by petition is eligible for election, then the individual would be deemed a nominee for the relevant office or position.

D. Committees

1. Committees Consisting Solely of Directors

The proposed amendments to the NYSE Constitution would provide for the appointment of two types of Standing Committees of the Exchange: (a) Standing Committees composed entirely of directors other than the CEO; and (b) Standing Committees that are joint committees composed of both directors other than the CEO and members of the Board of Executives. The Board would appoint the Standing Committees and their respective chairpersons at its annual organizational meeting, and the Board would be required to adopt a charter for each Standing Committee consistent with the duties of that committee as prescribed in the NYSE Constitution.²²

The amendments would provide for the appointment of four Standing Committees that would consist solely of directors other than the CEO and would report to the Board: (a) The Nominating & Governance Committee; (b) the Human Resources & Compensation Committee; (c) the Audit Committee; and (d) the Regulatory Oversight & Regulatory Budget Committee. Each of these Standing Committees could be combined with any other Standing Committee in this group, or be

subdivided into one or more Standing Committees.²³

The Nominating & Governance Committee would be responsible for: (a) Recommending to the Board candidates for Board membership; (b) recommending to the Board candidates for membership on the Board of Executives; (c) conducting the Board's annual governance review; (d) reviewing and recommending the Exchange's corporate governance guidelines; (e) establishing an appropriate process for, and overseeing the implementation of, the Board's self-assessments (including Board self-assessment, committee self-assessments and director assessments) and the Board of Executives' self-assessments; (f) recommending director compensation; and (g) succession planning for the Chairman and the CEO.

In addition to the criteria that the Nominating & Governance Committee would be required to follow in recommending candidates for the Board, discussed above,²⁴ the Committee also would be required to establish procedures to solicit the input of investors in equity securities and members of the Exchange regarding Board candidates.

The Nominating & Governance Committee also would be required to solicit input from the various Exchange communities regarding candidates for appointment by the Board to the Board of Executives. Consensus recommendations for candidates for the Board of Executives representing specialists, floor representatives, and lessor members²⁵ that are put forward by the respective representatives of these groups would be required to be forwarded to the Board as the recommendations of the Nominating & Governance Committee, unless and to the extent the committee determines that a candidate does not qualify for the position.

The Human Resources & Compensation Committee would be responsible for: (a) Reviewing and approving corporate goals and objectives relevant to the compensation

¹⁵ 15 U.S.C. 78f(b)(3).

¹⁶ See *supra* note 9.

¹⁷ NYSE Constitution, Article IV, Section 2. The Exchange has confirmed that the slate of candidates approved by the Board would constitute a full slate of candidates and 20% of that slate (but in no event fewer than two candidates) would be candidates proposed by the Industry Members. Telephone conversation between James F. Duffy, Senior Vice President and Associate General Counsel, NYSE, and Nancy J. Sanow, Assistant Director, Division, Commission, on December 10, 2003.

¹⁸ NYSE Constitution, Article V, Section 1.

¹⁹ NYSE Constitution, Article IV, Section 2.

²⁰ NYSE Constitution, Article IV, Section 12. The Nominating & Governance Committee also would be required to establish procedures to solicit the input of investors in equity securities and members

of the Exchange regarding Board candidates. See *infra* at note 24 and accompanying text.

²¹ NYSE Constitution, Article III, Section 1.

²² NYSE Constitution, Article IV, Section 12. The Commission notes that the reconstituted NYSE Board recently voted to further amend the Constitution to grant Standing Committees the authority to engage independent legal counsel and other advisors, but the committees may not use counsel or advisors who advise Exchange officers or employees. See Additional Amendments Letter, *supra* note . The Exchange confirms that the reconstituted Board also has the authority to engage independent legal counsel and other advisors. Telephone conversation between Darla C. Stuckey, Corporate Secretary, NYSE, and Nancy J. Sanow, Assistant Director, Division, Commission, on December 15, 2003.

²³ The Board could also constitute itself as a committee of the whole in respect of a Standing Committee consisting solely of directors. However, if the Board does so with respect to the activities of the four Standing Committees enumerated above, the CEO would be recused from such Board deliberations. The Commission notes that the reconstituted NYSE Board recently voted to further amend the Constitution to provide that the CEO would be recused from deliberations of the Board with respect to the four Standing Committees whether it is acting as the Board or as a committee of the whole. See Additional Amendments Letter, *supra* note 4.

²⁴ See *supra* note and accompanying text.

²⁵ See *supra* Section II.B.