

with—and thus from potentially improper influence by—the Exchange or the entities it regulates.

Several commenters expressed concerns about the composition of the Board, including the lack of investor or industry representation, and issues regarding the ability of the directors to operate effectively, given each director's time constraints and the relatively small number of times the Board is required to meet. The Commission believes that, at this point, the NYSE has taken steps designed to assure that the concerns of investors are adequately represented on the NYSE Board. The NYSE has proposed that its new board be independent of specific constituencies, most notably broker-dealer members of the Exchange. In this manner, the NYSE intends the Board to be able to consider the needs of the entire exchange community, including large and small investors, issuers, and securities firms. The Commission notes that the Nominating & Governance Committee will establish procedures to solicit the input of investors regarding Board candidates, and that the committee is explicitly required to nominate a director that represents investors, as discussed in more detail below.

In addition, some commenters expressed concern that permitting the Chairman and CEO to be the same person would result in too great a concentration of power, and some commenters advocated a formal separation of the two positions. The Commission notes that the NYSE has established constraints on the ability of a combined Chairman-CEO to influence decisions that should be made by persons independent of Exchange management. For example, the NYSE's proposal prohibits the CEO from participating in executive sessions of the Board so that, if there is a combined Chairman-CEO, a "lead director" must be designated to preside over executive sessions.⁸⁸ In the Commission's view, these structural changes are designed to help assure the independence of the Board from undue management pressures and, in the context of the amendments to the Constitution before the Commission, should be approved.

B. Board of Executives

The NYSE proposes to create a Board of Executives composed of from 20 to 25

individuals who are drawn from clearly defined segments of the NYSE constituencies, including representatives from the retail broker-dealer, specialist, floor broker, lessor member, institutional investor, and listed company communities. The Board of Executives' main role is to advise the CEO in his or her management of the Exchange's operations. The Industry Members of the Board of Executives, representing member organizations, specialist organizations and floor representatives, are to recommend candidates constituting 20% of the members to be elected, but no fewer than two directors.

A number of commenters questioned the efficacy of the Board of Executives and the composition of the Board of Executives, and several stated that a dual board structure is unnecessarily complex and offers few advantages.

The Commission believes that the NYSE's creation of a Board of Executives, composed of individuals from the various Exchange constituencies, is reasonable in the context of an independent Board of Directors. The Board of Executives provides a useful mechanism designed to assure that various Exchange stakeholders continue to have a voice in the decisions of the Exchange; yet the Board of Directors, the body charged with governance of the Exchange and regulation of its members, is independent. The Commission notes that the concept of self-regulation is based on the principle that regulation is most effective when it is done as close as possible to the regulated activity. That principle becomes strained, however, if those in charge of regulation are dependent or aligned with those engaged in the regulated activity. The NYSE has taken steps to address this concern by providing for a self-regulatory function reporting to an independent Board. The Commission believes that the Board of Executives is designed to strike an appropriate balance by allowing representatives of those groups that have a day-to-day stake in the affairs of the Exchange to continue to have a voice, but not the leading role, in the Exchange's governance.

C. Fair Representation

Section 6(b)(3) of the Act⁸⁹ imposes specific obligations on the NYSE as a registered national securities exchange to ensure that members are fairly represented in the selection of its directors and the administration of its affairs. The Commission believes that,

in this context, the NYSE's proposal is consistent with this mandate.

Under the amended Constitution, NYSE members would continue to elect the Board of Directors, other than the Chairman and the CEO. The ability to cast a vote for Board candidates ensures that members are involved in the selection of the NYSE directors, in compliance with section 6(b)(3).⁹⁰ Additionally, the amended Constitution would provide that the Industry Members of the Board of Executives, who represent different segments of the NYSE membership, including member organizations, specialist organizations, and floor representatives, have the right to designate 20% of the nominees elected by members to the Board (and in no event fewer than two directors).⁹¹ Accordingly, NYSE members not only elect all of the members of the Exchange Board, (excluding the Chairman and CEO), but they also have the ability to nominate no less than 20% of them. These nominations must satisfy the independence standards for the Board. In addition, the amended NYSE Constitution maintains a petition process that permits members to put forward nominees for elected positions, so long as the nominee or nominees receive a sufficient number of endorsements.⁹²

Furthermore, Industry Members are assured a role in the administration of the Exchange through their participation on the Board of Executives, which is empowered to advise the CEO in the management of the Exchange's operations. As members of the Board of Executives, Industry Members also will have the opportunity to participate on Joint Committees, including the Regulation, Enforcement & Listing Standards Committee, which is required to have at least one Industry Member. The amended NYSE Constitution also requires the Chairman to call a special meeting of the members upon written request of no less than one hundred members.⁹³

Finally, section 6(b)(3) of the Act requires the NYSE to have rules that ensure that one or more directors represent issuers and investors, and not be associated with a member of the exchange, broker, or dealer. The Commission believes that the NYSE proposal explicitly fulfills this mandate

⁸⁸ The Commission notes that, under an amendment to the Constitution recently approved by the reconstituted NYSE Board, the CEO would be recused from deliberations of the Board, whether it is acting as the Board or as a committee of the whole with respect to the activities of the four Standing Committees. See Additional Amendments Letter, *supra* note .

⁸⁹ 15 U.S.C. 78f(b)(3).

⁹⁰ 15 U.S.C. 78b(b)(3).

⁹¹ The Commission notes that the amended Constitution also would explicitly require the Industry Members to propose persons who, in their opinion, would allow the Exchange to meet the fair representation requirements set forth under section 6(b)(3).

⁹² NYSE Constitution, Article III, Section 1(c).

⁹³ NYSE Constitution, Article III, Section 4.