

required of issuers listed on the Exchange.<sup>98</sup> Thus, the NYSE's own Audit Committee will be held to the same degree of independence and appropriate conduct that the NYSE requires of its listed companies.

The Commission also believes that the responsibilities assigned to the Regulatory Oversight & Regulatory Budget Committee should support and enhance the independence of the NYSE's regulatory regime. As noted above, this Committee is responsible for overseeing the Exchange's regulatory program. It is the Commission's view that this Committee should play a particularly important role in making certain that the Exchange possesses a strong and independent regulatory program.

Finally, the Commission also believes that the composition and operation of the Regulation, Enforcement & Listing Standards Committee which, among other things, is charged with hearing appeals of disciplinary determinations, complies with the Act's requirement to provide for a fair procedure for the disciplining of member and persons associated with members. This Joint Committee will be composed of both directors (other than the CEO) and members of the Board of Executives, including at least one Industry Member; moreover, a majority of the members voting on a matter subject to a vote of this Committee must be directors. Committee action on appeals of disciplinary determinations will require that a majority of members voting on the action must be independent directors, but the Committee must include at least one Industry Member, which means that there will be representation and input by at least one NYSE member.<sup>99</sup>

One commenter expressed concern about the composition of certain NYSE committees, while another commenter called for greater disclosure of information by key committees. In addition, several commenters advocated that the NYSE increase the transparency of its own operations. The Commission believes that the amendments regarding NYSE Committees should improve the governance of the NYSE and the transparency of its processes. The amended Constitution explicitly outlines the responsibilities and duties of several key committees. This increased disclosure of the decision-making processes and the bases for

Committee actions should benefit the Exchange, its constituencies, and investors. The Commission recognizes that for the most part SROs in the past were not required to adhere to high standards of transparency. The Commission plans to continue to work with the NYSE and other SROs to improve their level of transparency.

#### *F. Amendments to the Constitution*

The Commission believes that the ability of directors to amend certain specified provisions of the Constitution without member approval should help streamline the Exchange's governance processes. Through this revision, the Board should be able to respond quickly and decisively if a revision to the specified provisions of the Constitution is considered appropriate and the majority of directors votes in favor of such change. The Commission believes that this kind of flexibility for directors is an appropriate tool to address potential governance weaknesses.

#### **VI. Conclusion**

In light of the serious governance issues recently confronted by the Exchange and the need for immediate reform measures, the NYSE's proposal is designed to address concerns about the independence of the Board of Directors and to assure the independence of the NYSE's regulatory function from the market function. The Commission believes that the proposed changes to the NYSE Constitution strengthen and improve the Exchange's governance structure. Among other things, under the amended Constitution, the independent Board will be responsible for monitoring the Exchange's governance processes, assessing whether further changes are warranted, and recommending appropriate action.

The Commission believes that the revised NYSE governance structure is one, but not the only, model for SRO governance consistent with the Act that would provide independence between the business side of the Exchange and its regulatory operations. Other self-regulatory structures or allocations of regulatory duties among SROs may offer advantages and disadvantages in terms of expertise, effectiveness, responsiveness, costs and, ultimately, investor protection. In considering the NYSE proposal, some commenters have advocated the complete separation of market and SRO functions. In the Commission's view, the complete structural separation of the NYSE's—or any other SRO's—regulatory function cannot be accomplished by an individual SRO, but would require

Commission or Congressional action on a market-wide basis.

The Commission is considering a regulatory initiative to assess possible steps to strengthen the framework for the governance of SROs. In addition, the Commission will continue to consider ways to improve the transparency of the governance procedures of all SROs. In this context, some of the transparency topics the Commission may examine include increasing the disclosure of information relating to compensation of SRO directors, officers and employees; regulatory performance (e.g., number of enforcement actions); types and amounts of fines levied; financial information and financial results; and the operation of key committees.

Finally, the Commission believes that the NYSE Board should continue to monitor and evaluate the Exchange's governance structure and processes on an ongoing basis, and propose further changes as appropriate, including whether the positions of Chairman and CEO should be separated permanently.

For the foregoing reasons, the Commission finds that the proposed rule change, File No. SR-NYSE-2003-34, is consistent with the Act and rules and regulations thereunder, applicable to a national securities exchange, and in particular with sections 6(b)(1), 6(b)(3), 6(b)(5) and 6(b)(7) of the Act.<sup>100</sup>

It is therefore ordered, pursuant to section 19(b)(2) of the Act that the proposed rule change, File No. SR-NYSE-2003-34, be, and hereby is, approved.

By the Commission.

**Margaret H. McFarland,**  
*Deputy Secretary.*

#### **Exhibit A—List of Comments Letters as of December 12, 2003 NYSE Amended and Restated Constitution and Corporate Governance Proposal (NYSE-2003-34)**

1. Letter from Ralph S. Saul to Jonathan G. Katz, Secretary, Commission, dated November 12, 2003 ("Saul Letter").
2. Letter from Junius W. Peake, Monfort Distinguished Professor of Finance, Kenneth W. Monfort College of Business, University of North Colorado, to Jonathan G. Katz, Secretary, Commission, dated November 22, 2003 ("Peake Letter").
3. Letter from Sean Harrigan, President, Board of Administration, California Employees' Retirement System ("CalPERS"), to William H. Donaldson, Chairman, Commission, dated November 6, 2003 ("CalPERS Letter").
4. Letter from Gary Andersen to Commission, dated November 6, 2003 ("Andersen Letter").
5. Letter from Robert G. Merrill to William H. Donaldson, Chairman, Commission, dated November 7, 2003 ("Merrill Letter").

<sup>100</sup> 15 U.S.C. 78f(b)(1), (b)(3), (b)(5), and (b)(7).

<sup>98</sup> NYSE Constitution, Article IV, Section 12(a)(3).

<sup>99</sup> The Commission further notes that members of the Board of Executives have been added to the list of persons or entities that can call for a review by the Board of a determination by an Exchange hearing panel regarding a disciplinary proceeding. NYSE Constitution, Article IX, Section 6.