



INVESTMENT COMPANY INSTITUTE

December 2, 2003

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: NYSE Governance and Management Structure (File No. SR-NYSE-2003-34)

Dear Mr. Katz:

The Investment Company Institute¹ is pleased to provide comments on the proposed rule change filed by the New York Stock Exchange to alter the governance and management structure of the Exchange.² Most significantly, the NYSE's proposal would amend and restate the NYSE's Constitution to establish a Board of Directors that would be independent from NYSE management, members, member organizations and listed companies.

The corporate governance and management structure of the Exchange is extremely important to our members, who are significant investors in securities of companies listed on the Exchange on behalf of millions of individual investors. We are therefore pleased that the NYSE has undertaken to implement much needed changes to its corporate governance structure, in particular, placing responsibility for governance, compensation, internal controls and supervision of regulation in a Board of Directors independent from owner-constituents.

Nevertheless, the Institute questions whether the proposed changes will achieve the goal of the NYSE's proposal – creating a governance structure that will better serve investors. This is because the proposal does not guarantee *any* investor representation on the NYSE Board and creates a Board of Executives comprised primarily of "sellside" representatives. We therefore recommend that the NYSE amend its proposal to guarantee investor representation on the Board and create a Board of Executives more balanced between the buy-side and sell-side. We urge the Commission not to approve the NYSE's proposal until, and unless, the NYSE implements such changes. Our specific comments follow.³

¹ The Investment Company Institute is the national association of the American investment company industry. Its membership includes 8,672 open-end investment companies ("mutual funds"), 603 closed-end investment companies, 107 exchange-traded funds and 6 sponsors of unit investment trusts. Its mutual fund members have assets of about \$6.946 trillion, accounting for approximately 95% of total industry assets, and 90.2 million individual shareholders.

² Securities Exchange Act Release No. 48764 (November 7, 2003), 68 FR 64380 (November 13, 2003) ("Release").

³ Given the brevity of the comment period (the bare minimum 21-day comment period, part of which falls over the Thanksgiving holiday) on such a significant change effecting the structure of the NYSE, we will limit our comments to the most significant aspects of the proposal, the NYSE Board of Directors and Board of Executives. We are

Board of Directors

Under the proposal, the new NYSE Board would consist of no less than six and no more than twelve members (as well as the NYSE Chairman and Chief Executive Officer) who will serve for terms of one year.

According to the Release, requiring Board independence from owner-constituents of the Exchange is intended to align the Board with the interest of investors – the Exchange’s “ultimate constituency.”⁴ It is therefore illogical that the NYSE Constitution does not guarantee *any* investor representation on the Board. Investor representation on the Board is now more important than ever, in view of the significant challenges facing the Exchange relating to governance, self-regulation and market structure.

The Institute therefore recommends that the NYSE Constitution be amended to explicitly reserve several Board seats for representatives of investors. Only in this manner do we believe the Exchange can truly ensure that the interests of investors will be represented on the Board. In addition, because institutional investors, such as mutual funds, submit a significant portion of the orders traded on the Exchange (on behalf of individual investors), we recommend that Board seats be set aside specifically for “representatives of significant investors of equity securities on the Exchange” (e.g., mutual funds, pension funds).⁵

Board of Executives

The newly created NYSE Board of Executives would consist of the Chairman of the Board, the Chief Executive Officer, and at least 20 but no more than 25 members appointed by the Board. Of these 20-25 members, the Board of Executives would include “at least four individuals who are either the chief executive or a principal executive officer of an institution that is a significant investor in equity securities, at least one of whom shall be a fiduciary of a public pension fund” (with the remaining members representing broker-dealers, the “floor,” lessor members and listed companies).⁶

disappointed that the Commission chose to provide the public with such a short comment period, which we believe is woefully inadequate to develop detailed, substantive and well-considered comments on the proposal.

⁴ See *Governance of the New York Stock Exchange* (NYSE Corporate Governance White Paper), May 2003, p.3 (“the investing public is the Exchange’s ultimate constituency” and the Exchange’s “own interests, and the interests of its member organizations and listed companies, must align with the interests of the investing public”).

⁵ We believe that investors also must have meaningful input into the Board’s nomination process. In particular, the proposal states that the Board’s Nominating & Governance Committee is required only to “establish procedures to solicit the input of investors in equity securities and members regarding Board candidates,” although it is unclear what these procedures will entail. We therefore urge the Board to establish procedures that will guarantee that investors have the opportunity to meaningfully participate in this process, including having the Committee solicit names of potential Board candidates from investors and groups representing investors.

⁶ We note that last week, the Exchange’s new Board approved an amendment to the Constitution (not included in the proposal) that would add a representative of individual investors to the Board of Executives. We commend the addition of such an individual to the Board of Executives.


We believe that the "buyside" should have a greater voice on the Board of Executives. The Board of Executives was established to advise the senior management and the Board of Directors on issues relating to, among other things, the evolution of NYSE market structure, NYSE operations, and market performance. In order to facilitate a meaningful debate on these important issues, there needs to be a more balanced representation on the Board of Executives between the buyside and sellside (not just between specific Exchange constituencies). We therefore urge the NYSE to assign more slots on the Board of Executives for buyside representatives.

In conclusion, the NYSE's proposal represents an important first step towards improving the Exchange's corporate governance structure. Nevertheless, we believe that if investors are not provided with an increased voice in the NYSE's governance structure, the NYSE's proposal would represent a classic missed opportunity to truly improve the workings of the Exchange.

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The Institute appreciates the opportunity to provide comments on the NYSE's proposal. If you have any questions regarding our comments, or would like any additional information, please contact me at (202) 326-5824 or Ari Burstein at (202) 371-5408.

Sincerely,


Amy B.R. Lancellotta
Senior Counsel

cc: The Honorable William H. Donaldson
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Cynthia A. Glassman
The Honorable Harvey J. Goldschmid

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