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Nancy Morris  
Secretary  
Securities and Exchange Commission  
100 "F" Street, NE  
Washington, DC 20549

Re: Exchange Act Release No. 55026  
(Dec. 29, 2006)

Dear Ms. Morris:

I write to raise concern about one aspect of the merger between the NYSE Group and Euronext. It concerns the erosion of the NYSE Group's independence policy that currently applies to its own board of directors.<sup>1</sup>

## I. Background

As you know, the NYSE substantially altered its system of corporate governance in 2003, putting in place a board consisting entirely of independent directors. The definition of independence went beyond that required for listed companies. The definition sought not only to define independence in terms of relationships with the NYSE but also with listed companies and registered broker-dealers.

This was deliberate. Independence of those regulated by the Exchange was a central part of the reform efforts. In responding to critics of the proposal, the interim Chairman and

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<sup>1</sup> The current policy was approved by the Commission in 2005. See Exchange Act Release No. 51217 (Feb. 16, 2005).

CEO of the NYSE emphasized the importance of the independent board (“In my view, the single most important feature of the proposed rule change is that, with the exception of the CEO, the BOD is completely independent.”), and its independence from industry influence (The proposals would place “responsibility for governance, Compensation and internal controls, as well as supervision for regulation, in the hands of a BOD that is independent both from Exchange management and from the members, member organizations and listed companies.”).<sup>2</sup>

These standards took on renewed importance when the NYSE became a for-profit, public company in early 2006. At that time, the NYSE expanded its independence policy. See Exchange Act Release No. 53382 (Feb. 27, 2006). Moreover, to insulate the regulatory function from for profit influence, a separate entity was formed (NYSE Regulation) and given an independent board of directors. As the CEO of the NYSE Group noted: “Every director of NYSE Regulation, except for Rick [Ketchum, the CEO of NYSE Regulation], will be independent of broker-dealers, New York Stock Exchange-listed companies and management of NYSE Group.” Testimony of John A. Thain, CEO, NYSE Group, before the Committee on Banking, Housing and Urban Affairs, US Senate, March 9, 2006.

## II. Merger with Euronext

In connection with the merger of Euronext, the NYSE Group has, for the first time, receded from this strong policy of independence. Reflecting the weaker independence policy of the Euronext Advisory Board,<sup>3</sup> the NYSE Group has proposed permanent modifications in its independence policy that presumably bring it into greater conformity with the Euronext approach.

First, the NYSE proposes “transitional rules,” which essentially place the existing independence policy in abeyance until 2008, at least for the European directors. The justification? “It is important that the former Euronext Supervisory Board members be permitted to serve on the initial Board of Directors of NYSE Euronext because of their depth of experience with the Euronext markets. The transition period is designed to allow for this.” Exchange Act Release No. 55026 n. 17 (Dec. 29, 2006). In other words, they should remain on the Board because they have market experience, something clear from the positions currently held by many of the directors.<sup>4</sup> That explanation would justify a complete elimination of the restriction on registered broker-dealers and listed companies and stands in contrast to the existing policy designed to reduce this type of influence. It also ignores the fact that directors can be found with “market experience” that otherwise meet the independence requirement.

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<sup>2</sup> See Letter from John S. Reed, Interim Chairman and CEO, Dec. 12, 2003, reprinted at <http://www.sec.gov/rules/sro/nyse200334.shtml>

<sup>3</sup> The policy can be found here: [http://www.euronext.com/file/view/0,4245,1626\\_53424\\_825137656,00.pdf](http://www.euronext.com/file/view/0,4245,1626_53424_825137656,00.pdf),

<sup>4</sup> The biographies can be found here: [http://www.euronext.com/editorial/wide/0,5371,1732\\_4436572,00.html](http://www.euronext.com/editorial/wide/0,5371,1732_4436572,00.html)

The NYSE Group has all but admitted that the policy will reduce the Board's independence by noting that the number of directors subject to this "transitional" policy will not be a majority. "Any potential issues created by the transition period are expected to be mitigated by the fact that, upon the consummation of the Combination, half of anticipated the board of directors of NYSE Euronext will be composed of former NYSE Group directors, all of which qualify as independent under the NYSE Group Independence Policy." Perhaps, but a strength of the NYSE Group Board has been an entirely independent board. The transitional Board will be far from that.

In addition to transitional rules, the NYSE Group proposes permanent modifications in its independence policy. In addition to one additional insider (the deputy CEO), the proposed changes would allow on the Board executive officers of listed companies (as long as they qualify as foreign private issuers), directors of affiliates of registered broker-dealers, and employees of foreign broker-dealers. Finally, the independence policy (as it exists now, and will exist after the merger) provides that directors not meeting the independence requirement are deemed to have submitted their resignation for consideration by the Board but does not require that the resignation be accepted.

The NYSE Group has recognized that some of these categories impact independence. As a result, executive officers of listed foreign private issuers and directors of broker-dealer affiliates cannot sit on the Board of NYSE Regulation, the non-profit regulatory subsidiary of New York Stock Exchange LLC. Similarly, the NYSE Group has conceded the need to limit the influence of these categories of directors. The total of Euronext executive officers, directors of broker-dealer affiliates, executive officers of "foreign private issuers," and transitional directors not qualifying as independent, "shall constitute no more than a minority of the total number of Directors of NYSE Euronext." Exhibit 5C of Exchange Act Release No. 55026 (Dec. 29, 2006).

Finally, the changes will impact the Board of NYSE Regulation. While some categories of directors cannot sit on the Board of NYSE Regulation, others can. Thus, for example, the CEO of a foreign private issuers not listed on the NYSE may sit on the Board of NYSE Regulation.<sup>5</sup> Upon completion of the merger with the NASD, NYSE Regulation will largely be left with enforcement of listing standards. Allowing CEOs of public companies to sit on this Board (even if incorporated in a foreign jurisdiction) reduces the appearance of independence.

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<sup>5</sup> As the proposed Independence Policy provides: "A Director is not independent if the Director is an executive officer of an issuer of securities listed on New York Stock Exchange LLC or [the Pacific Exchange] NYSE Arca, Inc., unless such issuer is a "foreign private issuer" as defined under Rule 3b-4 promulgated under the U.S. Securities Exchange Act of 1934, as amended (a "Foreign Private Issuer"). A Director who is an executive officer of a Foreign Private Issuer shall not per se fail to be independent. An executive officer of an issuer whose securities are listed on New York Stock Exchange LLC or NYSE Arca, Inc. (regardless of whether such issuer is a Foreign Private Issuer) cannot qualify as an independent director of New York Stock Exchange LLC, NYSE Market, Inc. or NYSE Regulation, Inc." Exhibit 5C of Exchange Act Release No. 55026 (Dec. 29, 2006).

### III. Conclusions

These changes represent a dramatic shift in policy for the NYSE Group. The Board of the combined entity will not have the same degree of independence as the current Board of the NYSE Group. This loss of independence may well impact the Board's ability to protect the interests of investors.

Moreover, the proposed changes are not adequately developed. They contain odd anomalies, such as the right of foreign issuers traded on the NYSE to have their CEO sit on the Board but not US issuers traded on the same exchange. They entail the creation of two classes of independent directors, one for the Board and another for NYSE Regulation (and other subsidiaries) but do not ensure that the Board of NYSE Regulation will remain independent.

Greater effort should be made to ensure the independence of the Boards of NYSE Euronext and NYSE Regulation. Alternatively, the Commission should revisit whether the residual regulatory authority (after the combination with the NASD) of NYSE Regulation should be removed from the NYSE.

With regards.

Yours truly,

J. (Jay) Robert Brown, Jr.  
Professor