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Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Release No. 34-75288; File No. SR-NYSE-2015-27; Proposed Rule Change Amending the Eighth Amended and Restated Operating Agreement of the Exchange to Establish a Regulatory Oversight Committee as a Committee of the Board of Directors of the Exchange and Make Certain Conforming Amendments to Exchange Rules

Dear Mr. Fields:

NYSE LLC ("Exchange") has submitted proposed rule changes that would significantly alter the current structure for overseeing regulatory matters ("Proposal").[1] The Commission extended until Sept. 28 the time period for approval or disapproval of the Proposal.[2]

The Proposal would effectively eliminate the structural separation between the regulatory and business activities of the Exchange and replace it with a functional separation. The Proposal seeks to replace the role of NYSE Regulation, Inc. ("NYSE Regulation") with a committee of the Board of Directors of the Exchange ("Board") and a Chief Regulatory Officer ("CRO") who will be an employee of the Exchange. This functional separation, however, does not ensure adequate insulation of the regulatory function and, at a minimum, needs significant revision.

[1] Exchange Act Release No. 75288 (June 24, 2015), *available at* http://www.sec.gov/rules/sro/nyse/2015/34-75288.pdf

[2] Exchange Act Release No. 75659 (Aug. 11, 2015) (designating Sept. 28 as "the date by which the Commission shall either approve or disapprove or institute proceedings to determine whether to disapprove the proposed rule change")

I. Background

In many respect, the current Proposal seeks to reinstate a structure that had been in place but was abandoned because of the need to better insure greater separation of regulatory and business functions. Prior to the merger between the NYSE and Archipelago Holdings, the regulatory function of the Exchange was located in a division of the NYSE.[3] In an effort to ensure a separation of the regulatory and market functions, the Exchange gave oversight of the regulatory function to a CRO[4] who was appointed by the Board of the Exchange.[5] The Board consisted entirely of independent directors, excepting only the CEO.[6]

Independent oversight was enhanced by the creation of the Regulatory Oversight & Regulatory Budget Committee. Consisting entirely of independent directors, the RORBC had substantive authority with respect to the regulatory mission, including the power to determine the "plan, budget, and staffing proposals" for the regulatory group.[7]

The NYSE also took steps to insulate the CRO from "undue management pressure."[8] The CRO could not be selected by the CEO,[9] had the authority to appoint other "regulatory officers," and had "no formal reporting relationship with the CEO, except for limited administrative purposes."[10] The CRO reported "directly" to the RORBC.[11]

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[3] Exchange Act Release No. 53073 (Jan. 6, 2006) ("After the Merger, NYSE Regulation will operate as a separate not-for-profit entity, rather than as a division of NYSE Group.").

[4] *See* Exchange Act Release No. 48946 (Dec. 17, 2003) ("The Chief Regulatory Officer would be responsible for the management and administration of the regulatory functions of the Exchange.").

[5] Exchange Act Release No. 49345 (March 1, 2004) ("The Board shall appoint the Chairman, the Chief Executive Officer, and the Chief Regulatory Officer.").

[6] *See* Exchange Act Release No. 48946 (Dec. 17, 2003) ("The amended Constitution provides for a smaller board, composed of independent directors (other than the CEO).").

[7] *See* Exchange Act Release No. 48946 (Dec. 17, 2003) ("The Regulatory Oversight & Regulatory Budget Committee also would determine annually the Exchange's regulatory plan, budget, and staffing proposals, and would be responsible for assessing the Exchange's regulatory performance and recommending compensation and personnel actions involving senior regulatory personnel to the Board's Human Resources & Compensation Committee for action.").

[8] Exchange Act Release No. 49345 (March 1, 2004) ("The Commission also believes that the proposed Constitutional changes relating to the NYSE's Chief Regulatory Officer, including the explicit authority of the Chief Regulatory Officer to appoint other regulatory officers, and the clarification of the authority of the Exchange's CEO regarding regulatory matters, are designed to further insulate the Exchange's regulatory function from undue management pressures.").

[9] *See* Exchange Act Release No. 48946 (Dec. 17, 2003) ("the CEO would not appoint the Chief Regulatory Officer, and could not participate in executive sessions of the Board.").

[10] Indeed, additional steps were taken to ensure that the CEO had no involvement in the regulatory oversight process. *See* Exchange Act Release No. 48946 (Dec. 17, 2003) ("the reconstituted NYSE Board voted to further amend the Constitution, subject to Commission approval, to clarify that the CEO's responsibilities are subject to the specific provisions in the Constitution regarding the segregation of the regulatory functions of the Exchange.").

[11] Exchange Act Release No. 48946 (Dec. 17, 2003) ("The NYSE has proposed to create a Chief Regulatory Officer who reports directly to the Board's Regulatory Oversight & Regulatory Budget Committee.").

With the transformation of the NYSE into a for profit company,[12] the functional separation was deemed insufficient.[13] The NYSE replaced the approach with a structural separation. The RORBC was replaced with NYSE Regulation,[14] a New York non-profit.[15] The responsibilities of the CRO were assumed by the chief executive officer of NYSE Regulation.

During the comment process, a spirited debate arose over the effectiveness of the approach. Some suggested that the regulatory function was incompatible with a "for profit" motive and that NYSE Regulation should be spun off.[16] Others accepted the proposed structure but called for additional changes designed to reduce the possible influence of the public holding company over the regulatory function.[17]

The Commission approved the proposed structure but only with a number of prophylactic safeguards designed to insulate the regulatory function from the commercial interests of the holding company. Fundamentally, NYSE Regulation remained a non-profit, obviating the obligation of directors to act in the business interests of the holding company.[18] In addition, the board of NYSE Regulation was made up entirely of independent directors (save only the CEO)[19] and a majority of the board could not be directors from the holding company.[20] The latter restriction meant that the directors of the holding company could "not by themselves . . . control any decisions of the board." [21]

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[12] Exchange Act Release No. 53382 (Feb. 27, 2006) ("The merger had the effect of 'demutualizing' NYSE, Inc., by separating equity ownership from trading privileges, and converting it to a for-profit entity.").

[13] Exchange Act Release No. 53382 (Feb. 27, 2006) ("To the extent that there is a concern that profit motives may override the incentive to have a well-regulated market, . . . the NYSE has proposed an overall structure, with several specific safeguards, designed to allow the exchange's regulatory program to function independently from its market operations and other commercial interests.").

[14] Exchange Act Release No. 53073 (Jan. 6, 2006) ("NYSE Regulation's sole member under the New York Not-for-Profit Corporation Law and thereby sole voting equity holder will be New York Stock Exchange LLC."). The Exchange was the "sole voting equity holder" of NYSE Regulation.

[15] Exchange Act Release No. 53073 (Jan. 6, 2006) ("The NYSE Regulation board of directors will perform all the functions of the current regulatory oversight committee").

[16] Exchange Act Release No. 53382 (Feb. 27, 2006) ("IBAC requests that the Commission consider spinning off NYSE Regulation as separate not-for-profit entity completely independent of NYSE Group, while CalPERS recommends a model that has complete separation between the regulatory and non-regulatory functions, such as the enterprise model for the Public Company Accounting Oversight board.").

[17] *See* Exchange Act Release No. 53382 (Feb. 27, 2006) ("The SIA and TBMA recommend that the NYSE be required to create greater structural separation by reducing or eliminating NYSE Group representation on the New York Stock Exchange LLC and NYSE Regulation boards and by permitting direct member representation on those boards.").

[18] *See Oberly v. Kirby,* 592 A.2d 445, 462 (Del.1991)(Where an entity is "created for a limited charitable purpose rather than a generalized business purpose, those who control it have a special duty to advance its charitable goals and protect its assets.").

[19] Exchange Act Release No. 53382 (Feb. 27, 2006) ("all directors on the board of NYSE Regulation (other than its chief executive officer) will be required to be independent of management of NYSE Group and its subsidiaries, as well as of members and listed companies. In addition, a majority of the members of the NYSE Regulation board must be directors that are not also directors of NYSE Group.").

[20] Exchange Act Release No. 55003 (Dec. 22, 2006) ("This not-for-profit wholly-owned subsidiary of the Exchange is governed by a board of directors all of whom meet the independence policy applied to the board of NYSE Group, Inc. . . . . and a majority of whom do not serve on any other board within the NYSE Group").

[21] Exchange Act Release No. 53382 (Feb. 27, 2006). The Board of NYSE Regulation currently has five directors, only one of which sits on the board of the holding company. *See* https://www.nyse.com/regulation

Insulation of the regulatory function was further enhanced by the committee structure of NYSE Regulation. NYSE Regulation had its own compensation and nominating committees.[22] The committees were made up of independent directors and could not include a majority of directors from the holding company. The nominating committee selected the non-affiliated directors on the board;[23] the compensation committee determined the compensation of NYSE Regulation employees, including, presumably, the CEO.[24]

Finally, the CEO of NYSE Regulation[25] was insulated from management of the holding company. The CEO reported only to the board of NYSE Regulation and not to any other officers of the holding company or its affiliates.[26]

II. The Proposed Changes

A. The NYSE Proposal

The Exchange proposes to alter the existing system of governance. The Proposal would replace a structural separation with a functional separation. Under the Proposal, NYSE Regulation would no longer play a role in the regulatory mission of the Exchange. The

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[22] Exchange Act Release No. 53382 (Feb. 27, 2006) ("the NYSE has proposed certain measures that are designed to ensure the independence of regulation from the NYSE's commercial interests. For example, NYSE Regulation will have its own compensation and nominating and governance committees, both of which must be composed of a majority of non-NYSE Group directors.").

[23] Exchange Act Release No. 53382 (Feb. 27, 2006) ("the non-NYSE Group directors on the NYSE Regulation board — which must be a majority of the board — will not be selected by NYSE Group or New York Stock Exchange LLC. Rather, they will be selected either by (1) the NYSE Regulation DCRC, which is composed of member representatives, or members, through a petition process, or (2) the NYSE Regulation nominating and governance committee, which must have a majority of non-NYSE Group directors. New York Stock Exchange LLC must appoint or elect such persons as directors.").

[24] Bylaws, Article III, Section 1(A) ("so long as Intercontinental Exchange, Inc. ('ICE') directly or indirectly owns all of the equity interest of New York Stock Exchange LLC and New York Stock Exchange LLC is the sole member of the Corporation, the member of the Corporation shall cause the Board of Directors of the Corporation to be comprised as follows: (1) the Chief Executive Officer of the Corporation shall be a Director; (2) a majority of the Directors shall be U.S. Persons and shall not be members of the board of directors of ICE, but shall qualify as independent under the independence policy of the Corporation (the 'Corporation Director Independence Policy' and each such director, a 'Non-Affiliated Director'); and (3) the remaining Directors shall be comprised of members of the board of directors of ICE that qualify as independent under the Corporation Director Independence Policy."), *available at* https://www.nyse.com/publicdocs/nyse/regulation/nyse/Seventh_Amended_and_Restated_Bylaws_of_NYSE_Regulation_Inc.pdf

[25] Exchange Act Release No. 53382 (Feb. 27, 2006) ("The chief executive officer of NYSE Regulation will function as the exchange's chief regulatory officer.").

[26] Exchange Act Release No. 53382 (Feb. 27, 2006) ("This position will report solely to the NYSE Regulation board and not to any other NYSE Group entity, although he or she may attend the board meetings of such other entities as deemed appropriate to carry out his or her responsibilities."). *See also* Exchange Act Release No. 55003 (Dec. 22, 2006) ("The chief executive officer of NYSE Regulation . . . reports only to the board of NYSE Regulation, and not to the chief executive or any other officer of NYSE Group."); Exchange Act Release No. 51524 (April 12, 2005) (noting that CRO "reports to the Board of Directors, rather than senior NYSE management").

delegation agreement would be terminated.[27] Instead, the Exchange would create a Regulatory Oversight Committee ("ROC") consisting of three independent directors annually appointed by the Board.[28] Directors may be removed by the Board for cause, with a failure to qualify as independent the only example of cause provided in the Proposal.

The ROC "would have the responsibility to independently monitor the Exchange's regulatory operations."[29] Specifically, the ROC "shall oversee" the Exchange's:

- "regulatory and self-regulatory organization responsibilities and evaluate the adequacy and effectiveness of the [Exchange's] regulatory and self-regulatory organization responsibilities; assess the [Exchange's] regulatory performance; and advise and make recommendations to the Board or other committees of the Board about the Company's regulatory compliance, effectiveness and plans"

In addition, the ROC must:

- "review the regulatory budget" for the Exchange "and specifically inquire into the adequacy of resources available in the budget for regulatory activities",
- "meet regularly with the Chief Regulatory Officer in executive session"
- "in consultation with the Chief Executive Officer of the Company, establish the goals, assess the performance, and recommend the compensation of the Chief Regulatory Officer"; and
- keep the Board informed with respect to the foregoing.

The Proposal also provides for the creation of a Committee for Review ("CFR"), a committee characterized as a "subcommittee" of the ROC and appointed annually by the Board. The CFR reviews disciplinary and listing decisions and acts in an advisory capacity. The CFR consists of independent directors and other individuals appointed by the Board.

In explaining these proposed reforms, the Exchange noted that the changes were similar to those implemented by other self-regulatory organizations[30] and therefore consistent with "industry peers."[31] The Exchange further stated that the changes in the Proposal "would ensure the continued independence of the regulatory process."

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[27] Exchange Act Release No. 75288 (June 24, 2015) ("The Exchange proposes to terminate the Delegation Agreement and delete Rule 20, which sets forth the delegation to its subsidiaries NYSE Regulation and NYSE Market (DE) of the Exchange's regulatory and market functions, respectively.").

[28] Operating Agreement, Proposed Section 2.03(h)(ii) ("The Board shall, on an annual basis, appoint the Regulatory Oversight Committee").

[29] Exchange Act Release No. 75288 (June 24, 2015) ("The proposed ROC would have the responsibility to independently monitor the Exchange's regulatory operations.").

[30] The Exchange has mostly justified the change by pointing to similar arrangements at other SROs. *See* Exchange Act Release No. 75288 (June 24, 2015) (describing the proposed ROC as "similar in composition and functions to the approved ROCs of other SROs").

[31] Indeed, with respect to the ROC, the Proposal essentially tracks the language used by NASDAQ in its bylaws. *See* NASDAQ Bylaws, Article III, Section 5.

B. Analysis of the Proposal

The Exchange concedes that that the Proposal entails the replacement of a "structural separation" between the regulatory and market functions[32] with a functional separation.[33] The functional separation proposed by the Exchange does not, however, ensure sufficient insulation of the regulatory function from the commercial interests of the holding company.

First, unlike NYSE Regulation, the Exchange is a "for-profit" entity. The NYSE at one time expressed the belief that the not-for-profit status of NYSE Regulation would "facilitate NYSE Group and its subsidiaries in managing conflicts between their business and regulatory objectives, maintaining regulatory standards and complying with the obligations of the exchange subsidiaries as registered national securities exchanges and self-regulatory organizations . . . ."[34] These benefits, presumably, will be lost by the transfer of regulatory responsibilities to a for-profit entity.

Second, NYSE Regulation has a board that consists entirely of independent directors, excepting only the CEO. The operating agreement of the Exchange does not impose a similar requirement.

Third, NYSE Regulation employs a number of safeguards designed to limit the influence of the holding company that are missing from the functional model proposed by the Exchange. Most noticeably, NYSE Regulation limits the number of directors from the holding company who can sit on its board to less than a majority,[35] an arrangement that "assures that the non-affiliated directors remain completely free from any suggestion that their interests in serving NYSE Regulation might at time conflict with a duty to [the holding company] or one of its affiliates."[36]

The Board of the Exchange, in contrast, can include a super-majority of directors from the holding company. The operating agreement requires that the Board consist of at least a majority of independent directors from the holding company.[37] Moreover, only 20% of the

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[32] Exchange Act Release No. 75288 (June 24, 2015) ("In a corporate structure such as the one the Exchange is proposing, where there is not a complete structural separation of the Exchange's regulatory and market functions, a CRO reporting to an independent ROC adds a 'significant degree of independence' that should 'insulate' regulatory activity from economic pressures and potential conflicts of interest.").

[33] Exchange Act Release No. 75288 (June 24, 2015) ("The Exchange proposes to functionally separate its regulatory function from its business lines.").

[34] *See* Exchange Act Release No. 53073 (Jan. 6, 2006) ("The NYSE believes that NYSE Regulation's continued status as a not-for-profit entity will facilitate NYSE Group and its subsidiaries in managing conflicts between their business and regulatory objectives, maintaining regulatory standards and complying with the obligations of the exchange subsidiaries as registered national securities exchanges and self-regulatory organizations").

[35] Article III, Section 1, Bylaws of NYSE Regulation ("a majority of the Directors shall be U.S. Persons and shall not be members of the board of directors of ICE, but shall qualify as independent under the independence policy of the Corporation").

[36] Exchange Act Release No. 55003 (Dec. 22, 2006).

[37] *See* Operating Agreement, Proposed Section 2.03(a)(i) ("(1) a majority of the Directors of the Company shall be U.S. Persons and members of the board of directors of ICE that satisfy the independence requirements of the Company (the "Company Director Independence Policy" and each such member, a "ICE Independent Director");

Board must be non-affiliated directors. The remaining 30% of the Board can, therefore, be directors from the holding company and need not be independent.

Fourth, the use of a ROC provides little effective insulation for the regulatory function from the business activities of the holding company. While the ROC is assigned an oversight function for regulatory matters, it has little substantive authority. The ROC can assess, recommend, review and advise but has no actual ability to implement. Such authority rests with a Board that includes at least a majority of directors from the holding company.[38]

Fifth, the ROC has the authority only to "review," but not determine, the regulatory budget" and to "inquire" about, but not determine, "the adequacy of resources available in the budget for regulatory activities". The full Board, therefore, retains final authority over the regulatory budget, a significant potential source of influence.

Sixth, even if the ROC exercised meaningful oversight, its decision making process is not sufficiently insulated from the business activities of the holding company. While the directors on the ROC must be independent, they can also be directors currently on the board of the holding company. As a result, the entire membership of the ROC could be persons who are also directors of the holding company.

Seventh, the positon of CRO is also not adequately insulated from the commercial interests of the holding company. The structure does not rule out the possibility that the CRO will be subordinated to, and under the control of, the CEO of the Exchange, an officer appointed by a Board dominated by directors from the holding company. The CRO does report to the ROC but the ROC can only set goals and assess performance. The ROC lacks the authority to retain or dismiss the CRO. With respect to compensation, the ROC can make recommendations in consultation with the CEO but cannot actually set the amount.

Eighth, the creation of a Committee for Review does not effectively insulate the disciplinary review process from the possibility of commercial influences. The CFR is described as a subcommittee of the ROC. In fact, the CFR has no required relationship to the ROC.[39] The members are appointed not by the ROC but by the Board. While at least a majority of the members of the CFR must be independent directors of the Exchange, they need not be members of the ROC.[40] Nor is there a prohibition on independent directors of the holding company from serving on the CFR.

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and (2) at least twenty percent (20%) of the Directors shall be persons who are not members of the board of directors of ICE, but shall qualify as independent under the Company Director Independence Policy").

[38] The only apparent exception is the authority to "establish[] the goals" of the CRO but such authority may only be exercised "in consultation" with the CEO.

[39] Operating Agreement, Proposed Section 2.03(h) (iii)("The CFR will be responsible for reviewing the disciplinary decisions on behalf of the Board of Directors; reviewing determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange; and acting in an advisory capacity to the Board with respect to disciplinary matters, the listing and delisting of securities, regulatory programs, rulemaking, and regulatory rules, including trading rules.").

[40] Exchange Act Release No. 75288 (June 24, 2015) (CFR "would be composed of both Exchange directors that satisfy the independence requirements (i.e., any Exchange director, other than the chief executive officer) as well as persons who are not directors; the Exchange proposes that a majority of the members of the CFR voting on a matter subject to a vote of the CFR, however, must be directors of the Exchange.").

III. Necessary Revisions

The Proposal, therefore, does not ensure adequate separation of the regulatory and business missions of the NYSE. Indeed, the Proposal includes even fewer safeguards than were in place in 2003, before the advent of NYSE Regulation.

The Exchange for the most part asserts that the system is justified because it resembles those used by "industry peers." The Exchange does not address whether differences exist in the regulatory activities of these peers. One suspects that such differences exist.[41] Thus, the direct comparison to "industry peers" may not be appropriate. Moreover, the safeguards used by other exchanges have not always been identical to, and sometimes exceeded, those in the Proposal.[42]

Nor does the Proposal take into account other, more meaningful, models for structuring "independent" committees of the board. Listed companies must have audit[43] and compensation committees.[44] These committees do more than make recommendations or provide advice but have substantive decision making authority. In addition, they have the authority to determine their own funding.

One possible response to this Proposal would be to reject the premise that the structural separation of business and regulatory functions should be ended. Instead, the delegation agreement with NYSE Regulation could be left in place. This would allow the Exchange to seek modifications to, rather than replacement of, the existing system of governance. At a minimum, the Exchange should be required to do a better job explaining how functional separation will better protect the regulatory mission.

To the extent that the Commission accepts the premise that a functional model should replace a structural model, a number of changes should be made to strengthen the independence of the regulatory function.

First, the Commission should require that the Board of the Exchange consist entirely of independent directors, excepting only the CEO, and that the Board should not include any directors who are also directors of the holding company or any affiliates thereof.

Second, the Commission should require that the ROC consist entirely of independent directors (save for the CEO) who are not directors of the holding company.

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[41] The Exchange also relies on FINRA and has executed a regulatory service agreement with the SRO. The issue is not whether the Exchange relies on FINRA but the degree, particularly in comparison to "industry peers." *See* Exchange Act Release No. 68678 (Jan. 16, 2013) (proposal that would result in "[c]ertain key aspects of the Exchange's disciplinary proceedings" being retained and not assigned to FINRA).

[42] Exchange Act Release No. 50927 (Dec. 23, 2004) ("The Chief Regulatory Officer will be appointed by the Regulatory Oversight Committee [of the Amex Board] and will report directly to that Committee. The Exchange Board may remove the Chief Regulatory Officer only with the Regulatory Oversight Committee's advice and consent.").

[43] *See* Rule 10A-3, 17 CFR 240.10A-3.

[44] *See* Rule 10C-1, 17 CFR 240.10C-1.

Third, the Commission should give the ROC greater substantive authority, including irrevocably delegated authority over its budget and other critical functions. Rather than have the authority to "make recommendations to the Board or other committees of the Board about the Company's regulatory compliance, effectiveness and plans," the ROC should have the authority to determine these matters. The authority would provide the ROC with necessary autonomy over its budget and basic functions to avoid undue interference from the exchange's natural—and otherwise appropriate—business interests.

Fourth, the ROC should have far greater authority with respect to the CRO. Much the way Rule 10A-3 regulates the selection of auditing firms, the ROC should be "directly responsible" for the appointment and retention of the CRO.[45]

Fifth, again taking a page from Rule 10A-3, the ROC should be "directly responsible" not only for recommendations with respect to the compensation paid to the CRO but should have the authority to determine the CRO's compensation.

Sixth, the Board should be required to provide "the appropriate funding" for the regulatory function "as determined by" the ROC, including "[o]rdinary administrative expenses . . . necessary or appropriate" with respect to these functions.[46] The ROC in place before the merger with Archipelago had the authority to determine the budget for the regulatory group.[47]

Seventh, membership of the Committee for Review, as a subcommittee of the ROC, should be limited to members of the ROC and anyone appointed by the ROC.

Eight, the provision permitting removal "for cause" should be defined so as to restrict the ability of the Board of the Exchange to easily change the membership of the ROC.

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The holding company of the Exchange is a for profit company. Tension exists between the natural and appropriate commercial interests of this type of company and any regulatory mission. These tensions must be reduced through an appropriate governance structure. The Proposal, as currently configured, does not adequately address these concerns.

With regards.

Yours truly,

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[45] This is not an unusual structure. *See* Exchange Act Release No. 50057 (July 22, 2004) ("The [Amex] Exchange Board of Governors will have the power to remove the Chief Regulatory Officer only with the advice and consent of the Regulatory Oversight Committee.").

[46] Rule 10A-3(b)(5).

[47] *See supra* note 7.