

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51217; File No. SR-NYSE-2004-54)

February 16, 2005

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Amendments to the NYSE Constitution and the Adoption of an Independence Policy of the NYSE Board of Directors

I. Introduction

On September 17, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to implement certain amendments to its Constitution. The proposed rule was published for comment in the Federal Register on January 14, 2005.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange has proposed amendments to its Constitution with respect to the new governance architecture that was approved by the Commission and implemented by the Exchange in December 2003.⁴ The Exchange also has proposed an Independence Policy for its Board of Directors (“Board”), which contains standards that NYSE directors must meet to be considered independent.

The proposed changes to the NYSE Constitution are summarized below:

- The Board would have the flexibility to move up its annual meeting of members

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51015 (January 11, 2005), 70 FR 2688.

⁴ See Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003).

to make it closer to the end of the Exchange's fiscal year, which coincides with the calendar year, and also to give the Board more flexibility with respect to the timing necessary to report its director nominations to the Exchange's membership, but without reducing the current time period for members to propose nominations by petition.

- The Chief Executive Officer ("CEO") would be recused from participating in any Board review of decisions made by Exchange staff, officers or committees.
- The CEO would be prohibited from requiring reviews of disciplinary decisions and would be recused from participating in Board reviews of any disciplinary decisions.
- In the event the Chairman of the Board is also not the CEO, the CEO would be permitted to serve as Chairman of the Board of Executives, to call meetings of the Board of Executives, and to determine when circumstances require shorter notice of meetings of the Board of Executives than otherwise provided for that group.
- Members of the Board of Executives would be barred from serving on the Hearing Board in light of their participation on the Regulation, Enforcement & Listing Standards Committee.
- The qualifications of the floor member representatives on the Board of Executives would be revised to include any individual, other than a specialist, who spends a substantial amount of time on the Exchange floor, in order to reflect the Exchange's entire non-specialist floor member constituency as it currently exists.
- The current requirement that the Board and the Board of Executives have two plenary sessions a year would be replaced by a requirement that each member of

the Board attend at least three Board of Executives meetings annually and the Chairman would make an Annual Report on the Exchange's activities solely to the Board of Executives.

- A reference to "Nominating Committee" would be revised to reflect the change in name to "Nominating & Governance Committee."
- The Nominating & Governance Committee no longer would be required to conduct succession planning with respect to the Exchange's Chairman, because the Board now decides whether to separate the offices of Chairman and CEO and then selects the Chairman, if it determines to separate those offices.
- An erroneous reference to "Article VII, Section I" is corrected to refer to "Article VIII, Section 1."

In addition to the changes to the NYSE Constitution, the Exchange also has proposed an Independence Policy for the Board. The Independence Policy would apply to all members of the Board and would require the Board to make an independence determination with respect to each director upon his or her nomination or appointment to the Board and thereafter as the Board considers advisable, but no less frequently than annually. A director would be independent only if the Board determined that the director has no material relationship with the Exchange. In making a determination of independence, the Board would have to consider the special responsibilities of a director in light of the status of the NYSE as a New York non-profit corporation, as a self-regulatory organization, and as a national securities exchange subject to the Commission's supervision, as well as the specific independence qualification standards set forth in the proposed policy. The Independence Policy sets forth standards when a director would not be independent as a result of a relationship with the Exchange, Exchange members, member

organizations, non-member broker-dealers, or listed companies. Each director would be responsible for informing the Exchange promptly of any relationships that might bear on the determination of his or her independence. Any director who is no longer independent as a result of the existence of a relationship that violates the independence standards in the NYSE Constitution, or whom the Board determines is no longer independent under the Independence Policy, would be deemed to have tendered his or her resignation. Under Article IV, Section 2 of the NYSE Constitution, the Board is required to adopt specific standards relating to the independence determination, which are to be comparable to standards required of issuers listed on the Exchange, by effecting a rule change within the meaning of Section 19(b)(1) of the Act.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵ In particular, the Commission finds that, the proposed rule change is consistent with Section 6(b)(1) of the Act⁶ which requires that the exchange be “so organized and [have] the capacity to carry out the purposes of [the Act]” and to “enforce compliance by its members and persons associated with its members with the provisions of [the Act].” The Commission also finds that, the proposed rule change is consistent with Section 6(b)(3) of the Act,⁷ which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a

⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f(b)(1).

⁷ 15 U.S.C. 78f(b)(3).

member of the exchange, broker, or dealer. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act⁸ in that it is designed, among other things, to facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(7) of the Act,⁹ which, among other things, requires that the rules of a national securities exchange provide a fair procedure for the disciplining of members and persons associated with members.

The Commission notes that the proposed changes to the NYSE Constitution would prohibit the CEO from participating in any Board review of decisions by Exchange staff, officers or committees; from requiring reviews of disciplinary decisions; and from participating in reviews by the Board of disciplinary decisions. The Commission also notes that the proposed NYSE Constitution changes would allow the CEO to preside over meetings of the Board of Executives; to call meetings of the Board of Executives; and to determine when circumstances require shorter notice of meetings of the Board of Executives than otherwise provided. The Commission believes that these changes are designed, in a manner consistent with the Exchange's governance architecture, to clarify the role of the CEO and to bolster the separation of the business and regulatory functions of the Exchange. The Commission finds that these NYSE Constitution revisions are consistent with the Act. Further, the proposed rule change would eliminate the Chairman as a subject of mandated succession planning for the Nominating

⁸ 15 U.S.C. 78s(b)(5).

⁹ 15 U.S.C. 78s(b)(7).

& Governance Committee. In the Commission's view, this change is appropriate in light of the Board's authority to decide whether the offices of Chairman and CEO should be separated.

The Commission also notes that the proposed rule change would prohibit members of the Board of Executives from serving on the Exchange's Hearing Board in light of the fact that members of the Board of Executives currently serve on the Regulation, Enforcement & Listing Standards Committee, which has been delegated by the Board the responsibility to hear appeals of disciplinary matters considered by a Hearing Panel. The Commission notes that the Hearing Board would still consist of members and allied members of the Exchange who are not members of the Board or Board of Executives and registered employees and non-registered employees of members and member organizations. The Commission believes that prohibiting members of the Board of Executives from serving on the Hearing Board is consistent with the Act's requirements.

The Commission notes that the proposed rule change seeks to make several changes to the NYSE Constitution that would affect the administration of the Exchange. These changes include allowing the Board to schedule the annual meeting of members closer to the end of the Exchange's fiscal year; giving the Board more flexibility on the timing of submission of director nominations to the membership; and requiring Board members to attend at least three meetings of the Board of Executives annually instead of requiring two plenary sessions between the Board and the Board of Executives. While these changes are designed to provide the Board with greater flexibility in administering the affairs of the Exchange, particularly with respect to the annual meeting process, they require that the Board provide sufficient advance notice to members of the annual meeting to take into account the number of days for the filing of nomination petitions, the determination by the Board of petition candidates' eligibility, and

notice to members of the annual meeting. In the Commission’s view, these proposed changes are consistent with the Act. In addition, the Commission notes that the proposed rule change would allow the Board to appoint to the Board of Executives as a floor member representative any member, other than a specialist, who spends a substantial amount of time on the floor. Because this change is intended to reflect more accurately the entire constituency of floor members, other than specialists, who are eligible to serve on the Board of Executives, the Commission believes that this proposal is consistent with the Act.

Finally, the Commission notes that the NYSE has submitted an Independence Policy pursuant to the requirement of Article IV, Section 2 of the NYSE Constitution. This provision of the NYSE Constitution requires the Exchange to adopt standards for determining the independence of its directors, which are to be comparable to the standards required of the Exchange’s listed issuers, and to file such standards with the Commission as a proposed rule change under Section 19(b)(1) of the Act.¹⁰ The Commission believes that generally the NYSE’s Independence Policy comports with the independence standards required of the Exchange’s listed issuers, but the Exchange has tailored its policy to address its role as a self-regulatory organization and as a listed market.¹¹ The Commission recently proposed governance standards for national securities exchanges and registered securities associations, which, among other things, would require that a majority of the directors of an exchange or association be independent.¹² The SRO Governance Proposal also would set forth specific criteria for determining the independence of an exchange’s or association’s directors that are

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ The independence standards for NYSE listed issuers are found in Section 303A.00 of the NYSE Listed Company Manual.

¹² See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) (“SRO Governance Proposal”).

similar, but not identical, to the Exchange's Independence Policy. The Commission believes that, in the current context, the Exchange's proposed Independence Policy is consistent with the Act. The Commission notes, however, that the Exchange would have to conform its Independence Policy, as well as its Constitution and rules, to any rules the Commission may adopt with respect to the governance of exchanges and associations and the independence of their directors.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NYSE-2004-54) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland
Deputy Secretary

13 Id.

14 17 CFR 200.30-3(a)(12).