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May 8,2003

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Self Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Relating to Corporate Governance
File No. SR-NYSE-2002-33

Dear Mr. Katz:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to offer the following comments on proposed amendments that the New York Stock Exchange ("NYSE") is making to its Listed Company Manual (the "Manual"). The NYSE submitted these proposed rule changes to the SEC for approval pursuant to Section 19 of the Securities Exchange Act of 1934 and the SEC is soliciting comments on the proposals from interested parties. The proposals are part of an effort by the NYSE to improve corporate governance and ensure the independence of directors as a result of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

In general, the NYSE proposals and corporate governance are of strong interest to the ICBA and its members. However, we feel that the proposed changes made by the NYSE do not take into account the disproportionate impact the proposed rules would have on smaller companies such as community banks. For those community banks who are NYSE-listed companies, the new rules will make it more difficult to attract and retain qualified individuals as directors. The result will be that many of the smaller banks and bank holding companies who are already listed companies may decide to de-list from the Exchange rather than comply with the new requirements and others who are not listed companies will be even less interested in becoming a NYSE-listed company.

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[1] *ICBA is the primary voice for the nation's community banks, representing 5,000 institutions at nearly 17,000 locations nationwide. Community banks are independently owned and operated and are characterized by attention to customer service, lower fees and small business, agricultural and consumer lending. ICBA's members hold more than $486 billion in insured deposits, $592 billion in assets and more than $355 billion in loans for consumers, small businesses and farms. They employ nearly 239,000 citizens in the communities they serve.*

Independent Directors and the Definition of Independence

The NYSE proposes to amend Section 303A of the Manual to require that a majority of the board of directors of NYSE listed companies be "independent directors" as that term is defined in that section. The NYSE believes that requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest,

ICBA generally supports the concept of requiring independent directors on the boards of NYSE-listed companies. We agree that independent directors play an important role in assuring investor confidence and that through the exercise of independent judgment, they act on behalf of investors to maximize shareholder value in the companies they oversee, and guard against conflicts of interest. However, we recommend that some accommodation be made for smaller companies similar to what the NYSE has provided for controlled corporations. For instance, the NYSE should propose that companies that have smaller public floats (e.g., less than $75 million) would only be required to have a specified percentage (but less than a majority) of their directors meet all the requirements of the proposed definition of independence. Alternatively, the NYSE could propose that these smaller companies would only be required to have a majority of their boards composed of directors who are not currently employed by the company. This would give some relief to smaller companies while helping to restore investor confidence.

Under the proposed "independent director" definition, the board of each NYSE-listed company must affirmatively determine that no material relationship exists (directly or indirectly) between the listed company and the director. The basis for a board determination that a relationship is not material must be disclosed in the company's annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10-K filed with the SEC.

In addition, a director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service is presumed not to be independent until five years after he or she ceases to receive more than $100,000 per year in such compensation. A listed company's board may negate this presumption with respect to a director if the board determines (and no independent director dissents) that, based upon the relevant facts and circumstances, such compensatory relationship is not material. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. Any affirmative determination of independence made by the board in these circumstances must be specifically explained in the listed company's proxy statement, or, if the company does not file a proxy statement, in the company's annual report filed on Form 10-K with the SEC.

Under the proposed rules, there are three different relationships which will automatically disqualify a director from being considered independent. First, a director who is

affiliated with or employed by, or whose immediate family member **is** affiliated with or employed in **a** professional capacity by, a present or former internal or external auditor of the company would not be "independent" until five years after the end of either the affiliation or auditing relationship.

Secondly, **a** director who **is** employed, or whose immediate family member **is** employed, **as** an executive officer of another company where any **of** the listed company's present executives serves on that company's compensation committee would not be considered "independent" until five **years** after the end of such service or the employment relationship.

Finally, **a** director who is an executive officer or an employee, or whose immediate family member is **an** executive officer, **of** another company **(A)** that accounts for at least 2% **or** $1 million, whichever is greater, of the listed company's consolidated gross revenues, or (B) for which the listed company accounts for at least 2% or $1 million, whichever is greater, of such other company's consolidated gross revenues, in each case would not be considered "independent" until five years after falling below such threshold.

Community banks frequently have difficulty finding qualified directors willing *to* serve on boards and committees of boards. **As** directors of highly regulated entities, bank directors not only have responsibilities under corporate law and Sarbanes-Oxley but also under federal and state banking law and regulations. Many otherwise qualified individuals are often unwilling to assume the liability and effort that comes with being a bank director,

It will become even more difficult for community banks to find qualified directors if the NYSE adopts its proposed definition of "independent director" and there is no "safe harbor" that would cover ordinary banking transactions between the director (or organizations that the director is a partner, shareholder or officer **of)** and the listed company or **its** subsidiary bank. For community banks, frequently the individuals most qualified to serve as directors are local businessmen, **such** as merchants, farmers, professionals or small business owners. Those individuals are not only the most substantial members of the community, but they are also the most likely to be good and valued customers of the bank, and the best able to help the bank further its mission of **serving** its local community.

The **ICBA** therefore urges that the NYSE adopt a safe harbor **from** the requirement that there be no material relationship between the director and the listed company or its subsidiary. This safe harbor should cover any extensions of credit to directors and their affiliated companies that are in accordance with the non-preferential lending requirements set out in the Federal Reserve Board's Regulation **O.** The safe harbor should also include the payment of money, including the payment **of** interest on deposits that were entered into in the ordinary course of business and was made on substantially **the** same terms as those prevailing at **the** time for comparable transactions with other non-affiliated persons. This would allow **an** independent **director** and family members to

establish deposit accounts and receive other banking products and services on the same terms and conditions offered to other customers of the bank without the concern that such banking transactions would disqualify the director from being independent.

Under Federal Reserve Regulation O, all bank extensions of credit made to directors and other insiders must be on substantially the same terms and conditions as comparable extensions to comparable borrowers. For instance, interest rates, collateral requirements, credit underwriting standards and repayment terms cannot be more favorable for insider borrowers. Also, Regulation O applies to extensions of credit made to companies that are related interests of the director. Regulation O also places quantitative limits on transactions that can be made to insiders. There are severe penalties for violating Regulation O and banks are constantly examined for compliance with this regulation.

Significantly, there is also precedent in Sarbanes-Oxley for making this exception and establishing this safe harbor, Under Section 402 of that law which prohibits a company from making a loan to an insider, an exception is made for consumer loans made in the ordinary course of business and on market terms, and for loans covered by Federal Reserve Regulation O.

In short, the ICBA urges the NYSE adopt a safe harbor rule which would allow banks and their directors (as well as the companies they are affiliated with) to continue to engage in ordinary banking activities without the concern that director independence may be impaired.

Audit Committee Independence

The NYSE has proposed that, in addition to satisfying the independence requirements under Section 303A of the Manual, audit committee members must satisfy the independence standards provided under Rule 10A-3(b)(1) under the Securities and Exchange Act of 1934—that is, they must not accept any consulting, advisory, or other compensatory fee from the company other than for board service, and they must not be an affiliated person of the company. Newly adopted SEC Rule 10A-3 makes it clear that while the prohibition on compensation reaches fees paid in connection with accounting, consulting, legal, investment banking, or financial advisory services, it does not prohibit compensation received for other non-advisory financial services, including lending, maintaining customer accounts or custodial and cash management services. ICBA requests that the NYSE follow the SEC's direction and determine that banking transactions in the ordinary course of business between banks and their directors and their affiliated companies would not constitute a material relationship that would impair an audit committee member's independence.

Five-Year Cooling-Off Period

The ICBA believes that the five-year cooling-off period is far to long and should be eliminated completely in situations involving family members. For instance, if a director is disqualified from being independent because a family member is working for the listed

company and is receiving more than $100,000 per year, independence should be restored once the family member's employment is terminated. Similarly, if a family member is an executive officer of another company that accounts for at least 2% or $1 million of the listed company's consolidated gross revenues, a director should be considered independent if the family member's employment with the other company is immediately terminated. The rules should not automatically presume that because a family member of a director had a relationship two or three years ago, the director cannot act independently.

Nom-Management Executive Sessions

The **ICBA** is also concerned that the NYSE's proposal to require non-management directors of listed companies to meet at regularly scheduled executive sessions without management will have a divisive effect among boards of listed companies and will deprive directors of guidance by management. The rationale for this requirement is to empower non-management directors to serve as a more effective check on management and to promote **open** discussion among non-management directors. However, holding such regular executive sessions may turn management directors and particularly the CEO into second-class board members and therefore may turn a collaborative atmosphere into an adversarial one. This requirement may make the CEO more reluctant to provide all the information he or she has on a subject to the board. Moreover, the CEO is frequently the director with the greatest in-depth knowledge about the business of banking and the operations of his or her particular bank and therefore excluding management directors like the CEO will make it more difficult for non-management directors to stay educated and informed about matters concerning the bank.

Conclusion

In conclusion, the **ICBA** hopes that the NYSE will take into consideration the needs of community banks as it considers changing its definition of independence and requiring that the majority of the directors on the boards of NYSE-listed companies be independent. These requirements need to be more flexible if community banks are to retain the best-qualified directors who will further the bank's mission of serving its local community. If you have any questions or need any additional information, please contact Chris Cole, ICBA's regulatory counsel at 202-659-8111 or Chris.Cole@icba.org.

Sincerely,

C. R. Cloutier

C.R. Cloutier
Chairman