

**MEMO# 16807**

November 21, 2003

# **SEC PUBLISHES NYSE PROPOSED RULE CHANGE RELATING TO THE EXCHANGE'S CORPORATE GOVERNANCE AND MANAGEMENT STRUCTURE**

[16807] November 21, 2003 TO: EQUITY MARKETS ADVISORY COMMITTEE No. 31-03 SEC RULES COMMITTEE No. 96-03 RE: SEC PUBLISHES NYSE PROPOSED RULE CHANGE RELATING TO THE EXCHANGE'S CORPORATE GOVERNANCE AND MANAGEMENT STRUCTURE

The SEC has published for comment a proposed rule change filed by the New York Stock Exchange amending and restating the NYSE's Constitution to alter the governance and management structure of the Exchange.<sup>1</sup> The most significant aspects of the NYSE's proposal are summarized below. Comments on the proposed rule change must be received by the SEC no later than December 5, 2003. If you have any comments on the proposed rule change, please provide them to the undersigned by phone at (202) 371-5408 or by e-mail at [aburstein@ici.org](mailto:aburstein@ici.org) no later than November 28. The NYSE's proposal would place responsibility for governance, compensation, internal controls and supervision of regulation in the hands of a Board of Directors that would be independent from NYSE management, NYSE members, member organizations and listed companies. The new Board would consist of eight members as well as the NYSE Chairman and Chief Executive Officer.<sup>2</sup> The initial Board would serve until June 2004. Thereafter, the entire Board would stand for election in June of each year. The Board of Directors would appoint a Board of Executives that would advise the CEO in his or her management of the operations of the Exchange. The Board of Executives would consist of the Chairman of the Board (who would be the Chairman of the Board of Executives), the Chief Executive Officer (if such individual is not also the Chairman), and at least 20 but no more than 25 members representing the major broker-dealers, the "floor," lessor members, 1 Securities Exchange Act Release No. 48764 (November 7, 2003), 68 FR 64380 (November 13, 2003) ("Release"). The NYSE's proposal can be found on the SEC's website at <http://www.sec.gov/rules/sro/34-48764.pdf>. NYSE members voted in favor of the amendments to the NYSE Constitution at a special meeting on November 18. <sup>2</sup> The Board would choose a Chairman and a CEO annually in June. The Release states that, if the Board identifies a person able to lead both it and the NYSE Board of Executives (see below) and to discharge the functions of chief executive, it may combine the two roles. Otherwise, it would select a different person for each role. <sup>2</sup> institutional investors and large public funds, and listed companies.<sup>3</sup> The members of the Board of Executives would serve for a term of one year and would meet at least six times a year to discuss Exchange performance, membership issues, listed company issues and public issues relating to market structure and performance. The Board of Directors also would

serve on several Board-level committees. Specifically, it is anticipated that the Board would have an Audit Committee and a Regulatory Oversight & Regulatory Budget Committee to ensure that proper controls and regulatory supervision are in place; a Human Resources & Compensation Committee to ensure that management is paid appropriately; and a Nominating & Governance Committee to ensure that the Board of Directors and Board of Executives function well and that appropriate people are nominated for the Board and appointed to the Board of Executives.<sup>4</sup> The Board also would appoint some of its members to committees (along with Board of Executives members) dealing with the Quality of Markets, Market Structure and Strategy, Finance, and appeals of disciplinary actions and de-listings. Finally, the transparency of the workings of the Board of Directors and the NYSE in general also would be increased. Among other things, prior to the Board's annual meeting, the NYSE would publish a proxy statement disclosing the Board Committee charters and the Committee reports on their activities for the year; membership on the Board, on the Board of Executives, and on the various standing and advisory Committees; the facts establishing each Board member's independence, including any non-director relationship between Board members and the NYSE itself and any material relationships among Board members; and Board compensation. In addition, the annual report of the Human Resources & Compensation Committee will detail compensation decisions for the top five NYSE officers, the existence of any contracts for these individuals and the compensation for the top management team as a whole. The Board of Directors also would detail the considerations that lead to membership on the Board of Executives, and the current membership. Ari Burstein Associate Counsel

3 In particular, according to the Release, the Board of Executives would consist of (i) at least six individuals who are either the chief executive or a principal executive officer of an NYSE member organization that engages in a business involving substantial direct contact with securities customers, (ii) at least two individuals who are either the chief executive or a principal executive officer of a specialist member organization, (iii) at least two individuals, each of whom spends a majority of his or her time on the Floor of the Exchange, and has as a substantial part of his or her business the execution of transactions on the Floor of the Exchange for other than his or her own account or the account of his or her member organization, but who shall not be registered as a specialist, (iv) at least two individuals who are lessor members who are not affiliated with a broker or dealer in securities, (v) 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; and (vi) at least four individuals who are either the chief executive or a principal executive officer of a listed company. 4 In particular, the Nominating & Governance Committee would be responsible for (i) recommending to the Board candidates for Board membership, (ii) recommending to the Board candidates for Board of Executives membership, (iii) conducting the Board's annual governance review, (iv) reviewing and recommending the Exchange's corporate governance guidelines, (v) establishing an appropriate process for, and overseeing implementation of, the Board's and the Board of Executives' self-assessments, (vi) recommending director compensation, and (vii) succession planning for the Chairman and Chief Executive Officer of the Exchange.

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