NYSE Faces Criticism for Planned Governance Policies

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NEW YORK (Dow Jones/AP) _ When the New York Stock Exchange unveiled its landmark acquisition of Archipelago Holdings Inc., Big Board Chief Executive John Thain pledged that the merged company would be a "model for best practices in corporate governance."

Critics, however, are already questioning whether the new company _ NYSE Group Inc. _ will fulfill that promise, pointing to a set of practices they view as unfriendly to shareholders.

NYSE Group disclosed its planned corporate structure _ including several policies that companies generally use to fend off would-be acquirers _ in preliminary merger documents last week. The company went so far as to list the provisions as a risk factor in its 828-page merger filing, noting they could delay or prevent unsolicited bids "that a stockholder might consider favorable."

The issue illustrates how the Big Board is facing a delicate balancing act: weighing the interests of its shareholders against the interests of the broader investing public. In the process, the exchange has sparked a debate over the place of shareholder rights at a company that sees itself as a "national asset," serving as a key gatekeeper for trading in billions of dollars of securities.

"Not all companies are created equal," said Michael Goldstein, a finance professor at Babson College and a former NYSE visiting academic. "It's in the national economic and security interest of the world's largest capital market to preserve the capacity for trading."

But critics argue that NYSE Group is being overly restrictive in embracing policies that limit shareholders' ability to influence the company and its board.

In at least two cases, the new company plans to adopt practices that appear tougher on shareholders than those now in place at Chicago-based Archipelago, the electronic stock-exchange operator.

For example, Archipelago currently allows shareholders to amend the company's bylaws or adopt new ones by a majority vote, according to the merger document. But NYSE Group will require an 80 percent vote for at least certain changes to its bylaws and certificate of incorporation _ the type of "supermajority" provision that has been criticized by governance experts as an unfairly high hurdle for investor activism.

These proposed policies appear designed "to give shareholders very little say and to give the board the decisive say in the company's corporate-governance arrangements," said Lucian Bebchuk, a professor at Harvard Law School and director of its corporate-governance program. A study co-authored by Bebchuk found that such takeover defenses tend to erode companies' market value, in part because they "make the board less accountable" to shareholders.

A Big Board representative would not comment on the record about the reasons for the proposed structure. An Archipelago spokeswoman, Margaret Nagle, referred questions to the NYSE.

Governance experts say NYSE Group's proposed structure has its merits _ such as having directors stand for election each year rather than using "staggered" multiyear terms like many other companies. And some NYSE Group policies are less onerous to shareholders than those at another publicly traded marketplace, Nasdaq Stock Market Inc. A Nasdaq spokeswoman declined to comment.

Critics acknowledge that avoiding an unwanted takeover is a legitimate goal for NYSE Group _ as well as for any other company that operates in the public interest. "It doesn't mean, though, that those companies are entitled to insulate themselves from all outside challenges or overtures," said Beth Young, a senior research associate at the Corporate Library, an independent research group.

For the NYSE, getting the governance issue right is particularly crucial because the exchange has run afoul of governance critics before. After Dick Grasso was ousted in 2003 as NYSE chairman amid an executive-pay scandal, the exchange overhauled practices such as the structure of its board, in large part staking its reputation on its commitment to good governance.