Control on the New York Mercantile Exchange: Seat Ownership, Membership, and Voting Rights

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NOTE

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I. INTRODUCTION

The New York Mercantile Exchange ("NYMEX" or "Exchange") functions as the world's principal market for energy futures and options and offers trading in crude oil, heating oil, gasoline, natural gas, propane, platinum, and palladium. On August 3, 1994, the Exchange acquired the Commodity Exchange, Inc. ("COMEX") and now offers additional trading in gold, silver, copper, and in the Eurotop 100 index. Traders on the Exchange floor buy and sell these commodities through the open outcry method, whereby bids and offers are shouted by traders standing around a trading ring. Each of these traders holds a seat, or membership, which allows him the right to transact business on the trading floor, and also affords him the privilege to vote for the Exchange Board of Directors ("Board") and on Exchange policy. This NYMEX seat,
therefore, represents a valuable economic interest, since it permits its holder to actively trade in the highly speculative NYMEX markets, while bestowing membership privileges upon him.

Similar to other exchanges in the United States, including the New York Stock Exchange, NYMEX members' rights are established and governed by not-for-profit corporation law, exchange by-laws, and exchange rules. NYMEX operates under the New York Not-for-Profit Corporation Law ("N-PCL") which sets out the basic structure for the Exchange, but which leaves it certain autonomy concerning its operation and treatment of Exchange participants. For example, NYMEX by-laws and rules establish the requirements for Exchange membership. In addition, NYMEX is regulated by the Commodity Futures Trading Commission ("CFTC") which must approve all NYMEX by-laws and rules, including those which pertain to membership.

Exchange members hold seats in their names, that is, they are listed in Exchange records as retaining all membership privileges. A

7. See 2 N.Y.S.E. Guide (CCH) (Certificate of Incorporation).
9. See id. ¶ 103 (Eligibility Criteria and Procedures).
(A) The Board may adopt, from time to time, Rules relating to criteria for eligibility for membership and procedures for becoming a member and any requirements or procedures for the acquisition or transfer of a membership as it may determine.
(B) The Board may adopt, from time to time, Rules relating to eligibility and application procedures for Floor Members as it shall determine.
Id.
10. See id. ¶ 1501, Rule 2.00 (Personal Requirements).
(A) Every Member and every applicant for membership must be the greater of either eighteen (18) years of age or the minimum age of majority required to be responsible for his contracts in each jurisdiction in which the Member or applicant conducts business.
(B) Every applicant must have, in the opinion of the Membership Committee and of the Board, good character, commercial standing and business experience.
(C) No person who has been employed by the Exchange shall be eligible for membership until six (6) months after he has ceased to be an employee; provided, however, the Membership Committee, based on the recommendation of the President, may waive, in its sole discretion, all or any part of such six (6) month period.
Id.
12. In 1995, 749 members held 816 seats, demonstrating that these members possessed more than one seat in each of their names. See N.Y. MERCANTILE EXCH., NYMEX/PETROGUIDE 7 (1996) [hereinafter NYMEX/PETROGUIDE].
13. See infra Part II.
NYMEX seat may be transferred by sale or lease, which conveys membership upon the purchaser or lessee. In a typical situation, the holder of a membership might lease a seat, thereby capitalizing on the economic value of the membership without having to sell a seat. Prior to 1991, a seat lessor did not lose NYMEX membership upon the leasing of a seat, because he still needed to retain at least one seat before leasing out another seat to someone else. However, on April 22, 1991, the Board approved Rule 2.70(D) which allows the lease of one's last or only seat and thereby creates a class of NYMEX "Equity Holders." By virtue of Rule 2.70(D), these persons maintain their ownership interest in their Exchange seat, but lose their membership privileges, including their voting rights.

The disenfranchisement issue provoked an Equity Holder to attempt to enjoin a March 21, 1995 Board election because she did not have the right to vote in that election. The plaintiff, Goldie Blanksteen, leased her three NYMEX seats in order to receive monthly rental payments, but believed that she should have the right to vote by virtue of her ownership of the seats. The district court denied her request for a preliminary injunction, finding that the plaintiff leased her seats with "full knowledge of [Rule 2.70(D)]." Although the Equity Holders did not succeed in enjoining the Board election in Blanksteen v. N.Y. Mercantile Exchange, the court's decision may not have terminated the Equity Holders' prospects of retaining their right to vote.

This Note analyzes the legal validity of NYMEX Rule 2.70(D), which strips seat owners of their voting rights. Part II provides an historical overview of the Exchange and describes the passage of Rule

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14. A potential buyer or lessee learns of available seat values by scanning the posted offers. See Heidi A. Schuessler, Getting in on the Ground Floor, FUTURES, May 1995, at 34-35.
15. See N.Y. Mercantile Ex. Guide, supra note 1, ¶ 1686, Rule 2.70(D) (Leases of Memberships). The term "Equity Holder" is used throughout this Note to refer to those seat owners who have leased their last or only seat.
16. See id.
18. See id. at 365.
19. Id.; see also infra Part III.
20. The Board sought and received from the law firm of Rogers & Wells a legal opinion concerning the legality of revoking the voting rights of Equity Holders. The opinion concentrated on the definition of "member" in the NYMEX by-laws and rules, and found that "member" refers to "regular members [seat owners]) or persons to whom regular members have assigned their voting rights." Legal Opinion on NYMEX Voting Rights Issue Suggest Potential Conflict in Defining Exchange Member Status, SEC. WK., Mar. 27, 1995, at 8. In other words, "[e]ven if a member leased out all his seats, . . . if the by-laws 'were read literally, both persons interested in a single seat in these situations would have a vote.'" Id.
2.70(D) which classifies Equity Holders as nonmembers. Part III explains NYMEX's unique treatment of Equity Holders as compared with that of other exchanges in the nation. Part IV draws an analogy between the Equity Holders of this not-for-profit corporation and the shareholders of a corporation under corporate common law, as they relate to corporate control. Finally, Part V sets forth proposals that are directed toward satisfying the interests of Equity Holders, lessees, and the Exchange, in lieu of giving sole voting power to either Equity Holders or lessees. Ultimately, this Note asserts the proposition that as owners of NYMEX seats, Equity Holders deserve the right to participate in Exchange affairs. Without this right, they lose their control over decisions of Exchange management as well as their capacity to protect their ownership interest.

II. NYMEX MEMBERSHIP AND THE RIGHT TO VOTE

A. NYMEX Background and the Passage of Rule 2.70(D)

Before analyzing the rights of Equity Holders, it is necessary to consider the fundamental requirements for membership status under the N-PCL and NYMEX by-laws and rules. According to the NYMEX charter, the Exchange operates as a Type A, not-for-profit corporation and, as such, structures its membership by-laws pursuant to the N-PCL. However, nowhere in the NYMEX by-laws or rules does it explicitly state that a lessee or an Equity Holder is a "member.""  

   "Corporation" or "domestic corporation" means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

Id. (footnote omitted). Section 201(b) defines Type A as:

Type A—A not-for-profit corporation of this type may be formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional, commercial, industrial, trade or service association.

Id. § 201(b).

22. See id. § 601(a); see also id. § 601(b). Membership may be shown by "[s]uch method, including but not limited to the foregoing, as is prescribed by the certificate of incorporation or the by-laws." Id. § 601(c)(4).

23. "The term 'Member' shall mean Members of the Exchange and Member Firms." N.Y. Mercantile Ex. Guide, supra note 1, ¶¶ 951, 1060 (Definitions).
Rather, they set forth the personal requirements for membership which include approval from the Membership Committee of the Exchange ("Membership Committee") and certain financial requirements. In addition, the rules grant a member the right to lease his seat according to Rule 2.70. In summary, Rule 2.70 entitles a member-owner to lease an Exchange seat to a standing member or a member-elect, whereby the seat owner retains the ownership interest and the right to appreciation and/or depreciation of the seat value. Rule 2.70 explains that the lessees receive all membership privileges except for the pro rata share of any Exchange distribution which passes to the Equity Holders. It is interesting to note once again that neither the by-laws nor the rules define a lessee as a "member," but state only that lessees are entitled to "rights of membership."

The N-PCL defers to the by-laws of the not-for-profit corporation regarding the members' right to vote, whereby the Exchange gives each member one vote "regardless of the number of memberships such Member may hold." Thus, more votes are generated when owners of multiple seats lease their seats.

Through a seat market which has developed over time, a potential acquirer of a seat may gain possession of a NYMEX membership by purchase or lease. Seat prices fluctuate primarily due to changes in trading activity; increased trading volume and attention to NYMEX's
markets cause an upward swing in seat prices. Conversely, decreased volatility negatively affects seat value. Therefore, the law of supply and demand, as indicated by trading volatility, dictates the direction of seat prices.

B. The NYMEX Seat Lease Agreement

As evidenced by such wide fluctuations in seat values, investing as much as $600,000 in a NYMEX seat through a purchase may be a risky proposition. Therefore, leasing a seat from a seat owner is an alternative method of gaining a NYMEX membership. Once consummated, the lease transfers membership privileges from the lessor to the lessee for that particular seat, provided that the lessee satisfies the qualifications for membership included in the by-laws and rules of the Exchange.

The lease agreement takes the form of a written document which is filed with the Exchange. Regarding the terms of the lease, the lessor

31. See Barbara Boydston, Seats Prices at Futures and Commodities Marts Reach All-Time Highs in 1994, WALL ST. LETTER, Dec. 26, 1994, at 1. "A Nymex spokeswoman attributed seat highs to record 1994 trading volume and increased trading opportunities since the Nymex merged with the Commodity Exchange earlier this year." Id. at 14; see also Membership Update, supra note 6, at 23.

32. In December 1989, NYMEX seats had decreased in value by 40% from May 1989. See Price of Nymex Seat Hits a Nearly 2-Year Low, CHI. TRIB., Dec. 13, 1989, § 2, at 2. In 1992, COMEX's seat price dropped to $43,000, as its trading volume dropped to 50,000 contracts per day. In 1993, volume increased to 75,000 contracts per day, leading to a seat value increase of $90,000. See Michael Quint, Comex and Nymex Reach Accord on Merger Proposal, N.Y. TIMES, Aug. 21, 1993, § 1, at 35.

33. See supra note 6; see also Floyd Norris, A Stock-Trading Seat Is More and a Gold-Trading Seat Less These Days, N.Y. TIMES, Feb. 6, 1996, at D1. On February 5, 1996, a New York Stock Exchange seat sold for $1.25 million, exceeding the previous record high of $1.15 million which was set on September 21, 1987. See id. This previous record did not sustain itself because about one month later, on October 26, 1987, after the stock market crashed, seat prices plummeted 39% to $625,000. See id.

34. Many other exchanges also provide leasing opportunities to gain access to stock or commodities markets. A member of the Minneapolis Grain Exchange approved of the seat lease system. "It's an attractive, mutually beneficial scenario . . . . It's helped create a dynamic mix here. Being among the smallest of the exchanges, we now have a core of veteran traders and a group of younger traders, and people are learning from each other." Schuessler, supra note 14, at 34 (quoting Minneapolis Grain Exchange representative Albert Maruggi).

35. See supra notes 9-10 and accompanying text.

36. The provisions of the NYMEX Membership Lease Agreement include the following:

1. Lease: Lessor hereby leases the Membership to Lessee and grants to Lessee the rights and privileges to use the Membership in accordance with and subject to the Rules of NYMEX. Lessee hereby accepts said lease and the rights, privileges and obligations pertaining thereto in accordance with and subject to the Rules of NYMEX. . . .
and lessee may agree upon an amount and duration which is acceptable to both parties. For the purposes of this Note, however, it is important to recognize that the lessor and lessee may not amend or modify the lease in order to give certain membership rights back to an Equity Holder. 37

III. NYMEX'S UNIQUE EQUITY HOLDER STATUS

A. Lease Agreement on Other Exchanges

NYMEX has created a situation not faced by other exchanges by allowing the lease of one's last or only seat. 38 For example, the New York Cotton Exchange requires a member to retain at least one seat before leasing another to someone else. 39 It also does not allow a lessee to vote. 40 Other exchanges have similarly been averse to diluting member-owner control power. In 1994, the Chicago Mercantile Exchange ("CME") entertained the idea of equalizing the voting rights of CME memberships with the International Money Market ("IMM") member-

6. Ownership and Use: The Lessor shall retain beneficial ownership of the Membership; provided, however, that the Lessor who leases his last or sole membership shall not be entitled to (i) receive any insurance benefits bestowed upon Members, (ii) earn continuous service credits in connection with the Members' Retention and Retirement Plan, (iii) Member rates for any trades, (iv) the right to vote that is set forth in the By-Laws of the Exchange, and (v) serve on the Board of Directors.

7. Voting Rights: During the term of this Agreement, the Lessee may exercise all voting rights pertaining to the Membership.

13. Liability: Lessor shall be jointly and severally liable for amounts not to exceed in total the current value of the Membership for any obligation of the lessee to the Exchange or any obligation of the lessee to others arising out of the transaction of business on the Exchange which is based upon a claim accruing during the term of this Agreement.

17. Other Rights of Membership: The Lessor and Lessee shall be entitled to only those rights of Membership as are set forth in Rule 2.70.

NYMEX Membership Lease Agreement (on file with the New York Mercantile Exchange Membership Services).


39. See N.Y. Cotton Exchange Rule 6.04(a)(1) (Leasing of Membership Interests) (on file with the New York Cotton Exchange). Member is defined as "a person who is the holder of record of one or more memberships." Id.

40. See id. Rule 6.04(g)(1).
ships. However, the CME membership defeated the plan, which fell short of the two-thirds majority required for approval. This proposal to balance voting rights on the CME evidenced issues that mirrored the debate concerning Equity Holders on NYMEX. CME members feared absentee ownership and wanted to retain control power based upon their superior financial stake in the exchange. In the end, the CME favored the members who invested the most money.

The New York Stock Exchange has avoided favoring either lessors or lessees by leaving the decision to convey voting rights to the parties involved. Thus, "under the lease agreement the lessor may retain the right to vote the leased membership or that right may pass to the lessee." Similarly, the American Stock Exchange allows for an irrevocable proxy to be given by the lessee to the lessor for voting purposes. NYMEX, however, continues to recognize the lessee vote and excludes Equity Holders from participating in Exchange affairs even though they have invested in the purchase of the Exchange seat.

Since NYMEX has refrained from giving the Equity Holders the power to retain their vote, as compared with other exchanges, a brief history of the leasing arrangement demonstrates the evolution of the lessor/lessee status and underscores the Exchange's basis for Rule 2.70(D). Prior to 1991, the lease arrangement could have been illustrated as follows: Suppose a member of the Exchange owned two seats. He used one seat to actively trade in NYMEX contracts. Since only one seat was needed for NYMEX membership purposes, he decided to lease his second seat and found a suitable lessee. The lease agreement was signed by lessor and lessee and filed with the Exchange. If the lessee was not already a member of the Exchange, he had to have been approved by the Membership Committee. Upon acceptance, the lessee became a full member of the Exchange as long as he leased a seat. However, the lessor still retained an ownership interest in this leased seat and remained a

41. See William Smith, Merc Mulls Expanded Financial Trade Role, CHI. SUN-TIMES, Oct. 25, 1994, at 47. The CME consists of 625 full memberships and 812 IMM members, but the CME members have three times the voting power. See id.
43. See Smith, supra note 41, at 47. John Damguard, President of the Futures Trading Association in Washington stated: "The guys that are sitting out there in Arizona leasing their seats love having the extra voting power." Id. Those who put forth the argument concerning NYMEX absentee ownership identified Equity Holders living Florida in their example. See infra note 54.
44. 2 N.Y.S.E. Guide, supra note 7, ¶ 1052 (Lessee Members).
45. See Model Special Transfer Agreement, Am. Stock Ex., at 5 (Irrevocable Proxy) (on file with the American Stock Exchange).
member of the Exchange by virtue of the seat that he owned and had not leased. This owner of the unleased seat would have been registered with the Exchange as a member, and the lessee of the owner’s leased seat would also have been a registered member. Before the lease, the owner possessed two seats, but only one membership existed. After the lease, the lessee gained a membership and the owner retained a membership from the unleased seat. Thus, two memberships were created.

Prior to 1991, determining membership posed no problems for the seat owners because they always held at least one membership in their names. However, in April 1991, the Board changed its policy and began to permit the leasing of one’s last or only seat on the Exchange. The Board realized that many seat owners might no longer desire to work on the Exchange, but would still want to retain their seat, a valuable asset. Consequently, the Board enacted Rule 2.70(D) which subjected those who were formerly members to sweeping changes as indicated by the text of the Rule:

A Member who, with respect to his last or sole membership, has leased to another either his regular trading privileges or his electronic trading privileges (“lessor”) shall not be entitled to member rates for trades executed for his account during any trading session to which he has leased to another his trading privileges. A Member who, with respect to his last or sole membership, has leased to another his regular trading privileges shall not be entitled to (i) serve on the Board of Directors, (ii) receive any life insurance and/or disability insurance benefits bestowed upon Members, (iii) the right to vote that is set forth in the By-Laws of the Exchange or (iv) earn continuous service credits in connection with the Member Retention and Retirement Plan; or (v) place orders for the execution of any futures or options contracts traded on the Exchange while present on the trading floor (except that, if properly registered as a clerk, such person may transmit customer orders for execution). However, a Member who has leased to another any or all of his trading privileges with respect to any of his memberships shall be entitled to receive the pro rata share of any other distribution of (i) the revenues, assets and proceeds of Exchange and (ii) the assets of the Exchange in the event of any liquidation,

46. See Interview with R. Patrick Thompson, President of the N.Y. Mercantile Exchange, in New York, N.Y. (Jan. 5, 1996). Mr. Thompson described that the Board understood the desire of a number of Exchange members to own their seats while also allowing others to use the seats for trading purposes. See id.
dissolution or winding up the affairs of the Exchange.\(^47\)

Those who lease their last or only seat are no longer described as members, but rather are termed “Equity Holders.”\(^48\)

**B. NYMEX Rationale for Equity Holder Status**

The birth of Equity Holder status seemingly benefits all parties because the Equity Holders receive rental payments from a seat that prior to Rule 2.70(D) could not be leased. At the same time, more lessees can more easily gain access to memberships through the newly increased pool of available seats. Therefore, Rule 2.70(D) creates a means for permitting more active traders on the Exchange and thus yields greater trading volume in NYMEX contracts without necessitating the creation of additional memberships.\(^49\) However, the positive financial incentive of leasing one’s last or only seat has stripped the Equity Holders of their voting rights. Without the right to vote, Equity Holders are not able to protect their investments in the Exchange because they are precluded from having a say in both the present operation and future prospects of the Exchange. Their Equity Holder status eliminates their influence, control, and power over Exchange matters.\(^50\)

Now that seat owners may lease their last or only seat, they are faced with the decision of either retaining their seat for full membership privileges or leasing their seat in order to receive monthly rental payments. As a result, three distinct possibilities emerge for a hypothetical owner of five NYMEX seats (which ultimately affect the number of eligible Exchange voters and number of eligible traders on the Exchange

\(^{47}\) N.Y. Mercantile Ex. Guide, *supra* note 1, ¶ 1686, Rule 2.70(D) (Leases of Memberships) (emphasis added).

\(^{48}\) Equity is defined as “A stockholders’ [sic] proportionate share (ownership interest) in the corporation’s capital stock and surplus. The extent of an ownership interest in a venture.” *BLACK’S LAW DICTIONARY* 540 (6th ed. 1990). The term “Equity Holder” or “equity owner” is not confined to NYMEX. At the end of 1995, a group of Chicago Mercantile Exchange members proposed creating an equity owners association in order to represent their needs as owners and to end their position as a “silent majority.” See Michael Ocrant, *CME Members Call for Creation of New Group to Express Their Needs, Desires and Frustrations*, SEC. WK., Dec. 18, 1995, at 6. However, this group did not complain of lost voting rights, but only joined to protect their livelihood in the trading profession. See id. at 6-7.

\(^{49}\) NYMEX currently holds 84 seats in its treasury which could be sold to raise money for the Exchange, if needed. See Interview with Daniel Rappaport, Chairman of the Board of the New York Mercantile Exchange, in New York, N.Y. (Feb. 6, 1996).

\(^{50}\) See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 69-125 (1932) (discussing the evolution of corporate control from owners to those without ownership interest).
floor): (1) A member owns five seats and does not rent any of them. This person has just one vote and the four remaining seats are unused for both trading and voting purposes. (2) A member owns five seats and leases four of them. The member-owner has a vote, as well as the four lessees who are also members, thereby creating five votes. If the owner decides not to use this seat for trading, but rather reserves the membership in order to stay an eligible voter, only four seats are used for trading purposes. (3) A member owns five seats and leases all of them. According to Rule 2.70, the five lessee-members have votes and the owner of the seats, who has become an Equity Holder, has no vote. The five seats are used for trading purposes. Before the lease of his or her last seat, the owner was a member. However, by leasing the last seat, the owner loses membership rights and privileges.

Clearly from NYMEX’s perspective, the concept of ownership of an exchange seat is distinct from the concept of membership in the Exchange. An Equity Holder who once qualified as a member loses membership rights (including voting rights) by leasing out his or her last or only seat. A lessee does not own the seat, yet he obtains membership and voting rights. Can this be changed? Rule 2.70 created this situation and could be easily repealed by a vote of the Board, which does not call for membership approval.51 Nevertheless, as Rule 2.70 stands today, the Equity Holders lose membership as soon as their last or only seat is leased.

The reasons for conveying membership voting rights upon the lessees rest upon the notion that they deserve some measure of control over their workplace and livelihood.52 Such an argument proceeds with the understanding that the lessees are working on the trading floor and may have a better knowledge of the day-to-day needs of the Exchange than the absentee Equity Holders.53 Since Equity Holders in most cases are not physically working on the floor of the Exchange, they may not be as sympathetic to the needs of the traders using their seats.54

51. See N.Y. Mercantile Ex. Guide, supra note 1, ¶ 303(A) (Powers of the Board). “The Board may also adopt, amend, rescind or interpret the Rules of the Exchange and impose such fees, charges, dues and assessments, all as it deems necessary and appropriate.” Id.


53. See id.

54. See Interview with Ronald Comerchero, a former Director of the New York Mercantile Exchange, in New York, N.Y. (Oct. 11, 1995). Mr. Comerchero used as an example all Equity Holders living in Florida. They may decide that air conditioning is no longer needed and vote to
In addition, an "economic quid pro quo" argument can be made for a lessee vote because the traders on the Exchange are generating money for NYMEX. The Exchange receives a commission for every trade that is executed, and because the trading members are doing the day-to-day work that makes money for NYMEX, the Exchange may owe the lessees some voice in Exchange operations.  

Furthermore, politically and logistically, the sitting Board and Board candidates can reach the lessees more easily than the Equity Holders. Since the lessees are on the floor, they can be approached regarding their feelings and opinions concerning Exchange matters, thereby enabling the Board to better assess the various viewpoints concerning the trading environment.  

Conversely, the Board has a more difficult time contacting off-the-floor Equity Holders. In addition, election-conscious Board candidates can campaign more easily for votes from lessees. For example, lessee-Board candidates can rally support for their candidacy from other lessees.

C. The Lessor Perspective and the Blanksteen Case

The preceding reasons seemingly justify the transfer of all membership privileges. However, the right to vote should not be held exclusively in the hands of lessees because voting has been recognized by a leading authority as the most important aspect of ownership control. If the lessees have the right to vote, this control power shifts to non-owners, thus preventing the actual seat owners from wielding any control at all. This analysis, though, did not convince the district court to enjoin the Board's election in Blanksteen. The court rejected Blanksteen's

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55. See Defendant's Affidavit in Blanksteen, supra note 52, at 10.
56. At the same time, members on the Exchange floor can feel the effects of Board decisions in their daily work and can openly criticize Board action. When this happens, political accessibility to the membership electorate may backfire on the Board. For example, on February 2, 1995, the Board decided to delay the opening of gasoline trading until announcements were made by the state of New Jersey and the Environmental Protection Agency ("EPA") concerning New Jersey's refusal to comply with new EPA standards for oxygenation levels in gasoline sold in the state. One lessee-gasoline trader complained that the Board decision lacked membership consultation and contributed to the "callous and indifferent mood of an ever increasing political machine that holds us, the small locals and independent lessees, in contempt." Michael Ocrant, Several NYMEX Board Candidates Develop Theme Critical of Current "Political Machine" Running Exchange, SEC. WK., Mar. 20, 1995, at 6.
57. See BERLE & MEANS, supra note 50, at 69.
assertions of group boycott and denied recognition of her voting privileges as "part of the bundle of rights one receives by virtue of becoming an owner of a seat on the Exchange." Furthermore, Judge John Koeltl agreed with NYMEX concerning the plaintiff's delay in bringing an action due to the fact that she was aware of Rule 2.70 for four years before bringing suit. In his final analysis, Judge Koeltl summarized the arguments against implying an Equity Holder voice in Exchange decisions as follows:

The plaintiff was not in any way forced or coerced to lease her last seat and was therefore not forced to give up her right to vote. She chose to lease her last seat in order to gain the revenues of that lease. She disagrees with the policy that requires her to give up her right to vote when she leases her last seat, but the policy itself does not require her to give up the right. It presents her with a choice of either retaining her right to vote by retaining her last seat or giving up her right to vote and gaining the revenues from the lease of her last seat. Blanksteen has chosen the latter. She has thus demonstrated that she values the revenues from the lease of her last seat more highly than she values her right to vote. It would hardly be equitable for the plaintiff to have bargained for a lease which required her to cede her right to vote, to have received the income from that lease, and then to be granted a preliminary injunction to allow her to reclaim the right that she had leased to the lessee.

59. See Plaintiff's Memorandum at 2-6, Blanksteen, 879 F. Supp. at 363 [hereinafter Plaintiff's Memorandum in Blanksteen]. "'No by-law can be made which takes away from a stockholder a right which is vested in him at the time of the purchase of this stock.'" Id. at 10 (quoting Kinnan v. Sullivan County Club, 50 N.Y.S. 95, 97 (App. Div. 1898)). Group boycott is defined as follows: "A concerted refusal by traders to deal with other traders. Occurs when competitors combine to exclude a would-be competitor by threatening to withhold their business from firms that deal with the potential competitor." BLACK'S LAW DICTIONARY 704 (6th ed. 1990).

60. Plaintiff's Memorandum in Blanksteen, supra note 59, at 8 (citing Kinnan, 50 N.Y.S. at 97).

61. See Blanksteen, 879 F. Supp. at 367. One month later, Judge Koeltl ultimately dismissed Ms. Blanksteen's claim with prejudice. See Michael Ocrant, Federal Court Judge Dismisses Suit Against NYMEX That Sought to Reinstate Voting Rights of Seat Lessors, SEC. WK., Apr. 17, 1995, at 7. According to NYMEX records, the plaintiff leased her last membership in February 1993, after the amended effective date of December 27, 1992 for Rule 2.70(D). See Defendant's Affidavit in Blanksteen, supra note 52, at 11. NYMEX further argued that although the plaintiff received great economic benefit through leasing her seats, she could have retained at least one seat to remain a voting member. See id. at 2. Furthermore, NYMEX asserted that an injunction would damage its function and reputation as a world-wide market. See id. at 34.

IV. NOT-FOR-PROFIT CORPORATIONS COMPARED TO GENERAL CORPORATE PRINCIPLES

Despite the holding of the court in Blanksteen, a more general exploration of not-for-profit associations and general corporation principles shows that Equity Holders should nevertheless retain some right to participate in Exchange decisions even though they have willfully leased away their membership privileges because "[t]he purpose of [the not-for-profit] law is to give to lenders and mortgagees some measure of control."64

A. Control of Corporate Conduct

The fundamental right to vote represents the power to control corporate conduct, which holds true for not-for-profit corporations resembling general business corporations, or at least close corporations where the "control right is probably the most valuable and important right. In fact, it often is the only right that has any practical proprietary significance."66 If not-for-profit corporations are similar to business

63. See Zechariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 993 (1930). Professor Chafee analyzed the rights of membership in not-for-profit associations and suggested three causes of action upon expulsion from membership: deprivation of a property interest, breach of contract, and the tort of destruction of relation. See id. at 999-1010. He favored the tort action because he claimed that it encompasses the true relation of the member to the association. See id. at 1007-08.

On this view, the closest analogy to the position of the member of an association is to be found in the relation between a stockholder and a corporation, or between a partner and the partnership. Such relations are much more than contracts. The law of associations not for profit thus takes its natural place beside the law of business corporations and partnerships.

64. OLECK, supra note 63, at 707.


66. Evelyn Alicia Lewis, When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits, 73 N.C. L. REV. 1761, 1830 (1995). Lewis compares the rights of shareholders in publicly or broadly held corporations to closely held nonprofit corporations, concluding that "for most close corporation shareholders, the business provides a means for self-generated livelihood. The control right, rather than the residual claimant right or the transfer right, is the essential incident of ownership for this purpose." Id. at 1831 (footnote omitted).
corporations in terms of battles for control, perhaps it is appropriate to analogize Equity Holders to shareholders in a corporation. Since the Exchange operates as a not-for-profit corporation, it does not declare a dividend to its members. However, as in other corporations, the members vote for a board of directors to manage the Exchange. In addition, the Exchange publishes financial statements for membership perusal, and furnishes both lessees and Equity Holders with Exchange notices regarding membership meetings, transactions, rule changes, Exchange events, and other news that affects the Exchange and/or its membership and personnel. Similarly, corporate shareholders vote for corporate managers and receive corporate publications regarding information that may affect the value of their investment.

B. The Seat as a Proprietary Interest

Before the comparison can go further, an analysis of what these owners “own” must be performed. Usually, shareholders own a corporate share, or stock, which represents their investment in a corporation. An exchange seat, however, is not completely comparable with a corporate share because it is subject to an exchange’s rules and its possessor is open to exchange scrutiny before he or she is able to hold the seat. Furthermore, the nature of the seat is not easily comprehensible. Many

67. But see Defendant's Affidavit in Blankstein, supra note 52, at 32-33. In Blankstein, NYMEX argued that analogies to case law dealing with stockholders in business corporations cannot be drawn to not-for-profit corporations. NYMEX noted that “custom, usage and acquiescence can itself take the place of a formal by-law, i.e., can be deemed to constitute a binding requirement even if never formally codified into an adopted by-law.” Id. at 32 (citing Evans v. Southern Tier Masonic Relief Ass’n, 78 N.Y.S. 611 (App. Div. 1902)). NYMEX further argued that the case law upon which the plaintiff relied ignored N-PCL § 612, which provides that the certificate of incorporation or by-laws may “limit or define” voting rights. See id. at 32 n.28 (citing Yu v. Linton, 414 N.Y.S.2d 558 (App. Div. 1979); Kinnan v. Sullivan County Club, 50 N.Y.S. 95 (App. Div. 1898)).

68. See N.Y. Mercantile Ex. Guide, supra note 1, ¶ 209 (Notice of Meeting); id. ¶ 394 (Secretary; Assistant Secretary) (requiring these Exchange employees to keep official records of meetings and to notify members of certain Exchange matters); id. ¶ 1512, Rule 2.04 (Notice of Application; Obligations of Members) (apprising standing members of the application of members-elect).


70. See, e.g., Ketcham v. Provost, 141 N.Y.S. 437, 441 (App. Div. 1913) (holding that “[t]he seat cannot be sold by individuals. It is not transferable like a stock or bond; membership in the exchange is the right to participate as a member in a voluntary private organization.”); see also Gartner v. Pittsburgh Stock Exch., 93 A. 759, 760 (Pa. 1915) (holding that “[a] seat in such exchange is not property in the eye of the law; it is a mere creation of the board, to be held and enjoyed with all the limitations and restrictions which the Constitution and by-laws put upon it”).
cases that have dealt with the definition of a seat have been in the creditor-debtor context where the courts have found that the seat is subject to debts owed to the exchange and exchange’s members before it is attached by other creditors. In these cases, the courts classified the seat as a unique form of property, which falls under the auspices of the exchange mandate.

As owners of this type of property, Equity Holders can be compared with corporate shareholders, regarding their rights in the corporate organization. Adolf A. Berle, Jr. and Gardiner C. Means analyzed the position of owners of property and stock in the corporate structure, traced the evolution of corporate control, and expressed their concern that when control shifted from owners to managers, the owners’ interests were no longer represented.

Control of physical assets has passed from the individual owner to those who direct the quasi-public institutions, while the owner retains an interest in their product and increase. . . . There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership. Berle and Means observed that corporate activities are executed through the board of directors so that control in actuality lies in the hands of those who have the power to select the board. The authors identified five types of control, demonstrating that command and

72. See Hyde v. Woods, 94 U.S. 523, 525 (1876) (holding that a seat is property, but is “incumbered with conditions when purchased, without which it could not be obtained”); see also Board of Trade v. Johnson, 264 U.S. 1, 9 (1924) (affirming Hyde); Chicago Mercantile Exch. v. United States, 840 F.2d 1352, 1355-56 (7th Cir. 1988) (extending Hyde’s analysis to tax lien situations).
73. See Ulmann v. Thomas, 175 N.E. 192 (N.Y. 1931).
[T]o the extent that an exchange seat or membership includes rights which are transferable and the subject of purchase and sale, it constitutes property . . . .
. . . . In all cases the rights of members are dependent upon charter or by-laws. If such rights can be transferred to another and have a pecuniary value, then they constitute a form of property . . . .
Id. at 193-94.

74. See BERLE & MEANS, supra note 50.
75. Id. at 7-8.
76. See id. at 69.
77. See id. at 70. The five categories of control set forth by Berle and Means are as follows: (1) control through almost complete ownership where one individual or group of individuals owns all or most of the corporate stock; (2) majority control where an individual or group of individuals
power over corporate activity has shifted to non-owners and concluding that "control now appears as a separate, separable factor." From this perspective, the Equity Holders’ loss of control arguably is most similar to a voting trust or proxy arrangement, as Berle and Means pronounced in their categories of control. However, the Exchange rules provide for no such lessor-lessee arrangement.

The loss of control power denies the Equity Holders their right to protect their investment in the Exchange. Without their vote, they have no say in the election of directors who are commissioned to manage the affairs of the Exchange. Not only do these directors focus on general governance matters, but they also publicly represent the Exchange. The Exchange obviously benefits from competent directors who may adopt or amend rules by a simple majority vote of the entire Board. Equity

owns a majority of the stock which gives them legal control; (3) control through a legal device without majority ownership, which includes pyramiding (owning majority of stock of one corporation which holds a majority of stock of another corporation), use of non-voting shares (owning only a small class of shares with voting rights while others are disenfranchised), use of class of stock whose owners have excessive voting power, and a voting trust; (4) minority control where the individual or group owns more than others or is able to attract enough proxies from other owners for control; and (5) management control where the ownership of shares does not yield a control block so that proxy voting becomes the method for selecting the board of directors. See id. at 70-90.

Voting trusts in New York are permitted. See N.Y. Bus. Corp. Law § 621 (McKinney 1986); see also In re Morse, 160 N.E. 374, 378-79 (N.Y. 1928). But cf. Tankersley v. Albright, 514 F.2d 956, 969-70 (7th Cir. 1975) (refusing to uphold validity of common law voting trust); Brown v. McLanahan, 148 F.2d 703, 708-09 (4th Cir. 1945) (holding that there should be limitations on a trustee to approve damaging fundamental changes to the corporation). Voting trust is defined as "[t]he transfer of title by stockholders of shares of a corporation to a trustee who is authorized to vote the shares on their behalf." BLACK'S LAW DICTIONARY 1577 (6th ed. 1990). Voting agreements also allow a group of shareholders to combine their voting efforts. See Garson v. Garson, 481 N.Y.S.2d 162 (App. Div. 1984) (upholding the validity of a shareholders’ voting agreement even though the agreement was not in the articles of incorporation), aff’d sub nom. Garson v. Rapping, 489 N.E.2d 765 (N.Y. 1985).

See N.Y. Bus. Corp. Law § 609; Gunzburg v. Gunzburg, 422 N.Y.S.2d 577 (Sup. Ct. 1979) (holding that persons appointed by the shareholders were legitimate proxies and could vote on behalf of the shareholders), aff’d, 425 N.Y.S.2d 151 (App. Div. 1980). Proxy is defined as "[w]ritten authorization given by one person to another so that the second person can act for the first, such as that given by a shareholder to someone else to represent him and vote his shares at a shareholders’ meeting." BLACK’S LAW DICTIONARY 1226.

See Berle & Means, supra note 50, at 70.

This is contrasted with both the New York Stock Exchange, which provides for an agreement between lessor and lessee for conveyance of voting rights, and the American Stock Exchange, which provides for an irrevocable proxy. See supra notes 44-45.

The Board has wide discretion and can act without the need for membership consent. See N.Y. Mercantile Ex. Guide, supra note 1, ¶¶ 303(A) (Powers of the Board), 503 (Amendment of Rules).
Holders, who have a stake in the future of the Exchange by virtue of their investments in their seats, do not have an opportunity to choose candidates in Board elections whom they believe will best serve the Exchange. Decisions by the Board may ultimately affect the value of the seats, and the Equity Holders have no chance to elect into office the people who are making these decisions.

In addition to their lack of participation in Board elections, Equity Holders may also be affected by proposals presented to the current membership. For example, an amendment to a by-law requires a majority vote of the members voting.\textsuperscript{4} It could happen that lessee-members approve by-laws that prove to be detrimental to Equity Holders.\textsuperscript{8} The powerlessness of the Equity Holders would last until their lease with the lessee expires, at which time they could decide not to renew the lease, thereby preventing their lessees from approving anti-Equity Holder by-laws. The Equity Holders would need to reapply for membership\textsuperscript{6} and seek repeal of unfavorable by-laws. However, some actions taken by the Board and membership cannot be easily rescinded. For example, the Board and membership approved the acquisition of COMEX without Equity Holder consent.\textsuperscript{8} Although Rule 2.70(D) provides for monetary distributions to Equity Holders, it does not allow for Equity Holder approval of such a merger in the first place.\textsuperscript{8}

These problems that Equity Holders face without their right to vote are similar to the difficulties that shareholders would endure without their vote in other corporations. Sometimes shareholders must tolerate freeze-
out tactics. In other cases, the board of directors' decisions are protected by the business judgment rule. However, shareholders frequently have a valid claim when they are excluded from corporate matters which call for their views. Conversely, the Equity Holders have no role or recourse once their vote has been taken away. In Lord v. Equitable Life Assurance Society, the New York Court of Appeals analyzed the provision in Equitable's charter which gave policyholders the right to vote for a majority of the directors, while limiting the shareholders' right to vote for only a minority of directors. The court held that the right to vote cannot be separated from the property because it gives the property its value. "[T]he right of a stockholder to vote for directors is property, and he cannot be deprived of it without his consent, even by giving him what others might regard as a better substitute." In the context of Equity Holders, even though they are receiving substantial rental payments from the lessees and have voluntarily chosen to lease their membership, they are still the owners of the seat. Their

89. See, e.g., Coleman v. Taub, 638 F.2d 628 (3d Cir. 1981) (holding that the freeze-out of a group of shareholders in a close corporation benefitted the conduct of the business). See generally I.A. Martin Lipton & Erica H. Steinberger, TAKEOVERS & FREEZEOUTS, ch. 9 (1996); F. Hodge O'Neal, "Squeeze-Outs" of Minority Shareholders, chs. 3-6 (1975).


91. See, e.g., Eisenberg v. Flying Tiger Line, Inc., 451 F.2d 267 (2d Cir. 1971) (holding that the plaintiff could pursue a direct action against the corporation for excluding him and other shareholders from participation in corporate affairs, specifically the reorganization of the corporation after a merger).

92. See In re Bowman, 414 N.Y.S.2d 951, 953 (Sup. Ct. 1978). The [Friedman] court held that although a corporation may deal only with the registered stockholder for the purpose of voting, paying dividends, and giving notices and reports, it could not deprive the beneficial owner of the right to object that his investment in the corporation is being transposed to another corporation, or totally transformed.

Id. (citing In re Friedman, 54 N.Y.S.2d 45 (Sup. Ct. 1945)).

93. 87 N.E. 443 (N.Y. 1909).

94. See id. at 445.

95. See id. at 449.

96. Id. at 453; see also Lazar v. Knolls Coop. Section No. 2, 130 N.Y.S.2d 407, 411 (Sup. Ct. 1954) ("A stockholder cannot be made to accept generous considerations in exchange for his rights under the law.").

97. In Blanksteen, the court viewed the plaintiff as preferring rental income over her right to vote. See Blanksteen v. New York Mercantile Exch., 879 F. Supp. 363, 365 (S.D.N.Y. 1995). However, this "better substitute" does not transcend the priority of voting rights over the property. See Lord, 87 N.E. at 453.
valuable investment can only be protected through their vote in Exchange matters.

Thus, the right of control through voting power is of extreme importance to both Equity Holders and corporate shareholders, but the Equity Holder and stockholder analogy is obviously imperfect because a NYMEX membership empowers those using the seat to provide the trading activity on the Exchange.\footnote{98} In fact, in the words of NYMEX President R. Patrick Thompson, the members of the Exchange “are the business of the Exchange”\footnote{99} so that without the seat owners or lessees using the seats, no market exists. Therefore, NYMEX functions as a result of the active role taken by the members on the floor of the Exchange.

Furthermore, the federal government places additional regulations on the Exchange as a marketplace through the CFTC, which regulates the nation’s markets and approves actions taken by the various exchanges, but does not help in defining a NYMEX member. According to the Commodity Exchange Act, a member of a contract market “means an individual, association, partnership, corporation, or trust owning or holding membership in, or admitted to membership representation on, a contract market or given members’ trading privileges thereon.”\footnote{100} The language “owning or holding membership in” does not dispel the ambiguity concerning membership status between Equity Holders and lessees because both parties fall within this definition.\footnote{101}

Although NYMEX has given membership privileges to lessees, their membership rights only endure for the length of the lease. Upon termination of the lease, the Equity Holders may either renew the lease with the prior lessee, decide to lease to someone else, reapply for membership,\footnote{102} or take no action.\footnote{103} Taking away the voting rights

\footnote{98} Although some members choose not to actively participate in NYMEX markets, contract trades can only be executed by Exchange members. See N.Y. Mercantile Ex. Guide, supra note 1, ¶ 1560, Rule 2.20 (Floor Trading Privileges).
\footnote{99} Interview with R. Patrick Thompson, President of the New York Mercantile Exchange, in New York, N.Y. (Jan. 5, 1996). For example, even in close corporations where the shareholders function in managerial positions and have a significant role in the operation of the corporation, they would not be considered the “business” of the corporation.
\footnote{100} 7 U.S.C. § 1a(15) (emphasis added).
\footnote{101} Although some exchanges have formed additional classes of membership, NYMEX continues to recognize only one category of membership, but can form additional classes without voting rights. See N.Y. Mercantile Ex. Guide, supra note 1, ¶ 101 (Number of Memberships).
\footnote{102} Under Rule 2.73(b), an Equity Holder does not automatically regain membership once the lease is terminated. He or she must reapply for membership, unless exempted by the chairman of the Membership Committee. See id., ¶ 1695, Rule 2.73 (Lease of Sole Membership). If denied
of Equity Holders may cause them to reapply for membership each time an important issue is put to the Membership Committee, especially an issue that affects the value of the seat, such as a merger or acquisition. In *Blanksteen*, the Exchange argued that the Board’s power would be questioned and market activity would be affected if the election was delayed. However, intense tumult and confusion may be created if an Equity Holder reapplies for membership every time an important issue is presented to the membership.

V. PROPOSALS

NYMEX Chairman Daniel Rappaport stated that he believes the best situation would be one in which only active traders own an Exchange seat, thus eliminating both Equity Holders and lessees. In fact, the Exchange has implemented policies to achieve this result by encouraging the purchase of NYMEX memberships through a seat financing program and reducing Exchange fees for seat owners. Although readmission to membership, the seat could be sold pursuant to paragraphs 888-91 of the by-laws. It is interesting to observe that paragraph 891(4) seems to classify an Equity Holder as a member. "[T]he term Member shall not include lessees, but shall mean the beneficial owner of such membership." *Id.* ¶ 891(4) (Disposition of Proceeds).

103. However, doing nothing would not benefit the Equity Holder owner because he or she would not receive any rental payments and would be barred from trading on the floor. The membership rights of that seat would be dormant.

104. See Defendant’s Affidavit in *Blanksteen*, supra note 52, at 34.

105. The Equity Holders are entitled to reapply for membership after the expiration of the lease. However, important issues may arise during the term of the lease. In addition, each Equity Holder’s lease expires at different times. It is possible, though, to anticipate an important referendum, such as a merger vote. The Equity Holder then would have the lease expire in expectation of such a vote, giving him or her enough time to both reapply for membership and vote.

106. See Interview with Daniel Rappaport, Chairman of the New York Mercantile Exchange, in New York, N.Y. (Feb. 6, 1996). Mr. Rappaport fears that if Equity Holder status continues throughout one’s life until eventual death, one’s heirs will become owners. These heirs most likely have no knowledge or relation to the Exchange, but may demand a vote. This would disrupt Exchange activity and hinder the marketplace. To preempt this scenario, Mr. Rappaport offers two alternatives: (a) require Equity Holders to give up their seats within a certain amount of years after making the decision to become an Equity Holder, or (b) allow Equity Holders to keep their seats for life and then require heirs to give up the seats within a certain number of years if they decide not to use them to actively trade themselves. See Interview with Daniel Rappaport, Chairman of the New York Mercantile Exchange, in New York, N.Y. (Sept. 27, 1996).


(A) Up to sixty (60) percent of the cost of acquisition of the first NYMEX Division membership purchased by an individual who has been a NYMEX Division Member, COMEX Division Member or Permit Holder on the NYMEX Division for at least one year immediately prior to the filing of an application pursuant to this Rule 2.56...
the measures have sought to reduce the magnitude and possibly eliminate the Equity Holder-lessee issue, the present NYMEX by-laws and rules allow for both the ownership of seats by non-traders and the use of the seats by non-owners. A compromise may be reached, though, enabling the Equity Holders to protect their ownership interests while simultaneously giving active participants—the lessees—a role in Exchange policy-making.

The following hypothetical by-law changes demonstrate various ways of representing both the Equity Holder and lessee interests.

(1) According to Exchange by-laws, the Board may create additional classes of members as long as they do not have voting rights. A by-law change is needed in order for the Board to give voting rights to the Equity Holders as a different membership class. A by-law change requires a membership vote which includes lessees as voters. The lessees may be open to such a compromise because the Board could easily change Rule 2.70, take the vote away from the lessees, and give it back to the Equity Holders. The lessees would more likely prefer a system that gives them a vote shared with the Equity Holders rather than face the alternative of having no vote at all. Consequently, giving the Equity Holders a proportionate vote is a possibility. The hypothetical by-law may be financed in accordance with a seat financing program sponsored by the Exchange.

(B) Upon Board approval and issuance of a loan certificate, the borrower shall execute a financing agreement and related documentation on forms approved by the Exchange.

Id.

108. See Memorandum from R. Patrick Thompson, President of the New York Mercantile Exchange, to NYMEX Clearing Members, Member Firms, Members, and Operations Managers (Jan. 26, 1996) (on file with the Hofstra Law Review). The Board approved a fee reduction for member firms or individuals who own their seats whereby their NYMEX trading fees were to be reduced by 12.5¢ per trade or 25¢ per round turn (a purchase offsetting a sale or vice versa). Lessees were to receive a smaller reduction of 2.5¢ per trade or 5¢ per round turn.


110. See NOT-FOR-PROFIT CORP. LAW § 616 (McKinney 1970).

(a) The certificate of incorporation or the by-laws may contain provisions specifying that any class or classes of members shall vote as a class in connection with the transaction of any business or of any specified item of business at a meeting of members, including amendments to the certificate of incorporation.

(b) Where voting as a class is provided in the certificate of incorporation or the by-laws, it shall be by the proportionate vote so provided or, if no proportionate vote is provided, in the election of directors, by a plurality of the votes cast at such meeting by the members of such class entitled to vote in the election, or for any other corporate action, by a majority of the votes cast at such meeting by the members of such class entitled to vote thereon.

(c) Such voting by class shall be in addition to any other vote, including vote by
may provide that the Equity Holders can vote on all matters presented to membership, or just those matters that most definitely affect the value of the seat, such as mergers, acquisitions, or seat splits.\textsuperscript{111}

(2) Another alternative is to effectuate a new class of lessee-members. The lessee-members could have a proportionate vote pursuant to N-PCL § 616. In this scenario, the Equity Holders retain all membership rights, excluding all trading privileges which are to be given to the lessees. The lessees are able to vote on all Exchange matters on a percentage basis, or just on issues that affect them as the day-to-day traders on the floor. Although the Board has the power to make Exchange rules without membership consent, some by-laws pertain to the daily operation of the Exchange. The lessees would be interested in having a voice in such Exchange mandates which affect their livelihoods.

Although granting a vote to both Equity Holders and lessees gives them a means of participation and control, limiting their vote to only those matters which affect their interests is a difficult concept to achieve. For example, the preceding hypothetical by-laws reserved for lessees, which increase trading activity, could affect the value of the seat. More demand could be created by such by-laws, causing an increase in seat value. Conversely, by-laws that limit trading activity could stifle demand for the seat and thereby lower seat value. Thus, Equity Holders would have an interest in voting on these by-laws. Lessees could also have an interest in some issues hypothetically reserved for the Equity Holders. An acquisition of another exchange, or a move to another site, could affect the lives of the lessees. For example, although acquiring another exchange provides for more opportunities through new markets, it could also lead to more competition among traders.\textsuperscript{112} Lessees may reject involvement of another exchange if asked for their input. In addition, moving the Exchange to another location could eliminate various lessees class, required by this chapter or by the certificate of incorporation or the by-laws as permitted by this chapter.

\textit{Id.}


112. \textit{See} Derek J. Caney, 'Anything Is Possible' at Deal-Minded Comex, \textit{AM. METAL MARKET}, Apr. 13, 1993, at 1. One source familiar with the NYMEX-COMEX negotiations voiced opposition to the merger. "'If you're a member of an exchange and you paid top dollar to lease a seat in the ring, how do you think you're going to react when (members from a formerly competing exchange) get access to that ring . . . . You don't want these guys coming in with equal status.'" \textit{Id.} at 8. A trader brought out another potential problem: "'It is not only the competition for the bids . . . . It's also that there's physically not enough room to stand around. It's cramped enough as it is.'" \textit{Id.}
who would not be able to relocate, especially if the Exchange was moved out of New York City.\textsuperscript{113}

(3) The composition of the Board could also be changed to accommodate the needs and interests of both Equity Holders and lessees. Currently, the Board consists of twenty-two people,\textsuperscript{114} but a by-law change which forms an additional class of membership (either Equity Holder-members or lessee-members) could lead to a revamped composition of the Board. A specific number of positions would be designated for Equity Holders and lessees.\textsuperscript{115} For example, the by-law could require that the chairman and vice-chairman be seat owners who have at least one seat in their respective names; five directors are seat owners with at least one seat in each of their names; five directors are Equity Holders; five directors are lessees; and five directors remain as public directors. Consequently, in this hypothetical by-law, all parties are represented on the Board.

VI. CONCLUSION

Notwithstanding the preceding proposals, the current Equity Holder situation on the Exchange demonstrates a striking divergence of ownership rights and control rights. The present effect of NYMEX Rule 2.70, whereby the lease of one's last or only seat on the Exchange disenfranchises Equity Holders, falls perfectly within the quandary which

\begin{itemize}
  \item \textsuperscript{113} NYMEX entertained proposals to move to New Jersey from its current location at Four World Trade Center, New York, N.Y. While possible, it would be unlikely for NYMEX to move out of the New York metropolitan area because of the thriving financial community located there. See Kirk Johnson, \textit{It May Be Near Wall Street, but Not Shouting Distance}, \textit{N.Y. Times}, July 14, 1995, at B5. In fact, the Exchange decided to construct a new site in Battery Park City in lower Manhattan. See Steven Lee Myers, \textit{Exchange to Build and Stay in Manhattan}, \textit{N.Y. Times}, Aug. 5, 1994, at B3. A real estate broker on Wall Street did not foresee a change of venue for NYMEX. "This is beyond just another tenant leaving the city of New York . . . . There was a reason why these exchanges were located in downtown and they go back to the foundation of the city—it just doesn't seem that it would be possible they'd move." \textit{Id.; see also As Vote Nears on NYMEX Building Site Board Comes Under More Pressure for Member Involvement in Decision}, \textit{Sec. Wk.}, Aug. 1, 1994, at 6.
  \item \textsuperscript{114} See \textit{N.Y. Mercantile Ex. Guide}, \textit{supra} note 1, \S 300 (Composition of Board) (providing for a chairman and vice-chairman who are members, fifteen “Member Directors,” and five “Public Directors” who are not members).
  \item \textsuperscript{115} Since the numbers of Equity Holders, seat-using members, and lessees constantly change, this proposal could lead to either an under- or over-representation of one or more classes of membership if a fixed number of Board seats rests in any given class. \textit{But see Michael Fritz, AG Pit Action Is Wilting: Traders Get Older as Financial Crops Shine}, \textit{Crain's Chi. Bus.}, Oct. 24, 1994, at 3. During the CME debate concerning equalization of voting rights among CME traders, former CME Chairman Leo Melamed proposed giving financial traders equal board representation. \textit{See id.}
\end{itemize}
Berle and Means so eloquently presented over sixty years ago: A division between control and ownership. Even though an Equity Holder has leased his membership privileges, he should not be forced to disclaim his ownership right of participating in the affairs of the Exchange.

The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of a new form of absolutism, relegating "owners" to the position of those who supply the means whereby the new princes may exercise their power.\textsuperscript{116}

\textit{Adam E. Faber}\textsuperscript{*}

\footnotesize
\textsuperscript{116} BERLE & MEANS, \textit{supra} note 50, at 124.

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