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NYSE Proposed Amendments to Corporate Governance Listing Standards

On August 26, 2009, the New York Stock Exchange (NYSE) filed with the Securities and Exchange Commission (SEC) proposed amendments (which the NYSE further revised September 11, 2009) to the corporate governance listing standards originally adopted in 2003 and set forth in Section 303A of the NYSE Listed Company Manual (Section 303A). The proposed amendments, summarized below, are intended to clarify existing disclosure requirements, to incorporate applicable disclosure requirements of Item 407 of Regulation S-K, and to codify various interpretive positions the NYSE has taken under Section 303A since its original adoption. If approved by the SEC, the proposed amendments will become effective on January 1, 2010, and will govern the disclosures required in all listed company proxy statements filed after December 31, 2009.

Incorporation of SEC Corporate Governance Disclosure Requirements

Many NYSE disclosure requirements overlap those contained in Item 407 of SEC Regulation S-K, which has caused confusion and duplication of effort for covered companies. The NYSE proposal would eliminate overlapping disclosure requirements (including those related to controlled company exemptions (Section 303A.00), director independence (Section 303A.02(a)) and reports of listed company compensation committees (Section 303A.05(b)(i)(C)) and audit committees (Section 303A.07(c)(i)B)) by incorporating the SEC's disclosure requirements on these issues set forth in Item 407 of Regulation S-K by reference into Section 303A.

Non-Management Director Meetings and Communications Requirements

The proposed amendments clarify that holding regular executive sessions of independent directors satisfies the existing requirement of Section 303A.03 that non-management directors meet regularly. Additionally, the proposed amendments incorporate the NYSE's existing interpretive position requiring that listed companies establish and disclose a method for *all* interested parties – including employees and creditors, for example, and not just shareholders – to communicate their concerns regarding the listed company directly to the presiding director or the non-management directors as a group.

Audit Committee Requirements

The proposals would also clarify certain aspects of the NYSE audit committee requirements. First, the amendments would combine into a single paragraph (a) the existing requirements of Section 303.07(a) and (b) that the audit committee must have at least three members, all of whom satisfy both the general NYSE independence requirements of Section 303A.02 and, in the absence of an exemption, the SEC's additional independence requirements for audit committee members in Exchange Act Rule 10A-3(b)(1).

A corresponding “disclosure requirement” note would be added to Section 303A.06 to highlight that Rule 10A-3 requires listed companies to disclose any reliance on the rule's available exceptions, together with an assessment of whether and how such reliance could materially and adversely affect the audit committee's ability to act independently and otherwise satisfy the rule's requirements.

The NYSE's *Commentary* to Section 303A.07(a) currently requires that, “if an audit committee member simultaneously serves on the audit committees of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve to three or less,” the board of directors must determine – and disclose its determination – that such simultaneous service would not impair that member's ability to effectively serve on the listed company's audit committee. The proposals amend this language to clarify that the requirement for the board to make and disclose such determination applies irrespective of the company's own limitations.

Finally, additional *Commentary* clarifies that audit committee meetings may be held telephonically if permitted by applicable state corporate law, but polling of individual audit committee members in lieu of a meeting is not permitted.

Required Disclosures and Website Postings

If the amendments are approved, the following disclosures that are currently required to appear in either a listed company's annual proxy statement or annual report filed with the SEC may also be disclosed through the company's website:

Contributions made to any tax-exempt organizations in which an independent director of a listed company serves as an executive officer, if such contributions exceeded the greater of \$1 million or 2%

of the tax-exempt organization's consolidated gross revenues in any of the prior 3 years (Section 303A.02(b)(v)).

The identity of the director chosen to preside at executive sessions of the listed company's non-management or independent directors, or the process by which a presiding director is selected for each session if the same individual does not preside at each meeting (Section 303A.03).

The process by which interested parties may communicate concerns to the presiding director, or to the non-management or independent directors as a group (Section 303A.03).

The board's required determination that the service of an audit committee member on more than three public company audit committees does not impair such member's ability to serve effectively on the listed company's audit committee (Section 303A.07(a)).

The proposed amendments provide that, if such disclosures are made through a listed company's website, the company must so indicate in its proxy statement or in its annual report filed with the SEC and provide the website address. In addition, the proposed amendments would eliminate the requirement to make copies of specified board committee charters, corporate governance guidelines, and codes of business conduct and ethics available in print upon request, relying instead on a uniform website posting requirement coupled with a requirement that the listed company's annual proxy statement or annual report filed with the SEC state that such documents are available through the website and provide the website address.

The proposed amendments also clarify that if a listed company makes any disclosure required by Section 303A in its annual proxy statement or annual report filed with the SEC, it may do so by incorporating the information by reference from other documents previously filed with the SEC, to the extent permitted by SEC rules.

Finally, the proposals would alter the NYSE's current position concerning the meaning of "prompt" disclosure to shareholders of any waiver of codes of business conduct and ethics granted to a listed company's directors or executive officers. The NYSE's current interpretive guidance would be replaced with an express requirement that such disclosure be made within four business days of such board or board committee action (to align with Item 5.05 of SEC Form 8-K), by either distributing a press release, providing website disclosure or filing a Current Report on Form 8-K with the SEC.

Requirements Applicable to Closed-End Funds

The proposals would amend the "Closed-End and Open-End Fund" section of the introduction to Section 303A to clarify that the corporate governance requirements applicable to closed-end funds include Sections 303A.06 (governing compensation committees), 303A.07(a)&(b) (governing audit

committee membership requirements and charters), 303A.08 (governing shareholder approval of equity compensation plans) and 303A.12 (governing compliance certifications), with the following exceptions:

A closed-end fund is not required to comply with the director independence requirements of Section 303A.02.

A closed-end fund is not required to make and disclose the determination required by Section 303A.07(a) when a director serves on multiple boards and audit committees in the same fund complex, as such service will be counted as one board for these purposes.

A closed-end fund is not required to post its audit committee charter on its web site.

Additional *Commentary* would also clarify that, for closed-end funds, the scope of the audit committee's required discussions with management and the fund's independent accountants would include the section "Management's Discussion of Fund Performance" – analogous to MD&A for other listed companies – only if the closed-end fund chooses to voluntarily include such section in its Form N-CSR filed with the SEC.

Transition Periods

Proposed amendments to Section 303A.00 would clarify certain rules regarding transition periods for compliance with NYSE corporate governance and related disclosure requirements applicable to companies listing as a result of initial public offerings, spin-offs and carve-outs, or upon emerging from bankruptcy, transferring from another market, ceasing to be a controlled company, or ceasing to be a foreign private issuer. The proposals also would amend Section 303A.08 of the Listed Company Manual (concerning shareholder approval of equity compensation plans) to specify the transition periods during which grants may continue to be made, without shareholder approval, under discretionary plans and formula plans of a foreign private issuer that were in place prior to the date when the listed company ceased to qualify as a "foreign private issuer" under SEC rules.

Definition of Controlled Company

Section 303A.00 currently defines a "controlled company" – for purposes of the "controlled company" exemption from Section 303A's requirements concerning nominating/corporate governance committees, compensation committees, and maintaining a majority of "independent" directors on the board – as a listed company of which greater than 50 percent of the voting power is held by an individual, a group or another company. The proposed amendments would revise that definition to apply only where greater than 50 percent of the voting power *for the election of directors* is held by an individual, a group or another company. This change would prevent listed companies from claiming

to be owned by a “group” where, for example, a shareholder agreement exists relating only to the disposition of assets.

Disclosure Requirements Related to Compliance Certifications

Finally, the proposals would alter the disclosure requirements of Section 303A.12 related to executive officer compliance certifications in two respects. First, the amendments would eliminate the potentially confusing requirement that each listed company include disclosures in its *current* annual report to shareholders concerning its filing of the CEO certifications required by NYSE and SEC for the *prior* fiscal year. The NYSE noted that the SEC certifications are now filed as exhibits to the periodic reports to which they relate, and investors receive timely notification of any material non-compliance with NYSE listing standards pursuant to Item 3.01 of SEC Form 8-K (as well as through the appending of a below compliance (“BC”) indicator to the listed company’s ticker symbol). Second, the proposed amendments require listed companies to provide written notice to the NYSE if any executive officer becomes aware of *any* non-compliance with the listed company corporate governance requirements of Section 303A of the Listed Company Manual, as opposed to the current requirement that such notice be given only in the event of “material” non-compliance.

Submitting Comments

Comments may be submitted to the SEC in support of, or in opposition to, these proposed amendments through the SEC’s internet comment form, via e-mail or via mail in triplicate, addressed to:

Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

All comment submissions, regardless of the method employed, must reference “File Number SR-NYSE-2009-89” in the subject line. The comment period ends on October 8, 2009.

What This Means to You

If the proposed amendments are approved by the SEC in the time frame projected by the NYSE, listed companies should be aware that some of the changes could affect proxy statement or annual report disclosure for the upcoming proxy season, and should therefore confirm compliance with the new rules. We would be pleased to counsel you through the upcoming proxy and annual reporting season, to ensure compliance with these and other aspects of the ever-changing regulatory landscape.

Contact Info

If you have any questions about the proposed amendments to Section 303A of the NYSE Listed Company Manual, please contact your Husch Blackwell Sanders attorney.

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