

September 4, 2009

NYSE Proposes Amendments to Corporate Governance Listing Standards

On August 26, 2009, the New York Stock Exchange filed with the Securities and Exchange Commission a proposal to amend the corporate governance listing standards set forth in Section 303A of the NYSE Listed Company Manual.¹ The proposal clarifies certain of the current disclosure requirements, codifies various interpretations made since the rules were originally adopted and eliminates several NYSE disclosure requirements that overlap with the applicable requirements of Item 407 of Regulation S-K and instead incorporates the Item 407 requirements. The proposal also eliminates current Section 307.00 and redesignates current Section 303A.14 as Section 307.00. The proposed changes, if adopted, will become effective on January 1, 2010. As such, a listed company would be required to comply with the new requirements in its proxy statement for an annual meeting filed after December 31, 2009. Below is a summary of the significant rule changes included in the proposal.

Section 303A.00 - Introduction

- The proposed amendments clarify the NYSE requirements regarding when a company is considered to be a controlled company. The current rule defines a controlled company as a listed company of which more than 50% of the voting power is held by an individual, a group or another company. The proposed rule change makes clear that for control company purposes, the relevant voting power required is for the election of directors.
- In the proposed amendments, the controlled company exemption disclosure requirement is replaced by a requirement that a controlled company which avails itself of any or all of the available Section 303A controlled company exemptions must comply with the disclosure requirements in Instruction 1 to Item 407(a) of Regulation S-K.
- Under the current rules, companies that cease to be controlled companies may phase in majority independent boards and independent nomination and compensation committees on the same schedule as companies listing in conjunction with an initial public offering. The proposed amendments clarify the compliance dates for such a company, which dates run from the date that the company's status as a controlled company changes.
- The proposed amendments provide that if a listed company makes a required Section 303A disclosure in its annual proxy statement, or if the company does not file an annual proxy statement, in its annual report filed with the SEC, the listed company may incorporate such disclosure by reference from another document that is filed with the SEC to the extent permitted by applicable SEC rules.

¹ A copy of the filing (SR-NYSE-2009-89) is available on the NYSE website at www.nyse.com in the Regulation section under "NYSE" - "Rules & Interpretations" - "NYSE Rule Filings."

Section 303A.02 - Independence Tests

- In the proposed amendments, the Section 303A.02 independent director disclosure requirements are replaced with the disclosure requirements of Item 407(a) of Regulation S-K.
- Section 303A.02(b)(v) requires a listed company to disclose contributions made by such listed company to any tax-exempt organization in which any independent director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year from the listed company to the organization exceeded the greater of \$1 million or 2% of such tax-exempt organization's consolidated gross revenues. The proposed amendments provide a listed company with the option of continuing to make this disclosure in its annual proxy statement or annual report, as applicable, or in or through the company's website. If a company chooses the website disclosure option, the company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide its website address in such proxy statement or annual report.

Section 303A.03 - Executive Sessions

- The current rules require listed companies to hold regular meetings of non-management directors and recommend that companies schedule a meeting of independent directors at least once per year. The proposed amendments revise the commentary to reflect the preference of certain companies to hold regular executive sessions of independent directors only in lieu of meetings of non-management directors.
- In the proposed amendments, the NYSE clarifies that a listed company must disclose a method for all interested parties, *not only shareholders*, to communicate their concerns regarding the listed company to the presiding director or the non-management or independent directors as a group.
- Section 303A.03(a) requires a listed company to disclose a method for interested parties to communicate directly with the presiding director or the non-management or independent directors as a group. The proposed amendments provide a listed company with the option of continuing to make this disclosure in its annual proxy statement or annual report, as applicable, or in or through the company's website. If a company chooses the website disclosure option, such company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide its website address in such proxy statement or annual report.

Section 303A.05 - Compensation Committee

- The proposed amendments replace the Section 303A.05(b)(i)(C) compensation committee charter requirement for the compensation committee to produce a report with the requirement to prepare the disclosure required by Item 407(e)(5) of Regulation S-K.

Section 303A.07 - Audit Committee Additional Requirements

- In the proposed amendments, the Section 303A.07(a) requirement for the audit committee to maintain a minimum of three members is combined with the Section 303A.07(b) requirement that such audit

committee members satisfy the independence standards set forth in Section 303A.02 and, in the absence of an applicable exemption, Rule 10A-3(b)(1).

- The proposed amendments amend Section 303A.07 to clarify that the requirement that the board must determine that simultaneous service by an audit committee member on the audit committees of three or more public companies would not impair the ability of such member to effectively serve on the listed company's audit committee and that such determination be disclosed in the annual proxy statement or annual report, as applicable, applies regardless of whether the company has limited the number of audit committees on which such director may serve.
- The proposed amendments provide a listed company with the option of making the Section 303A.07(a) disclosure regarding service on more than three public company audit committees in its annual proxy statement or annual report, as applicable, or in or through the company's website. If a company chooses the website disclosure option, such company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide its website address in such proxy statement or annual report.
- In the proposed amendments, the Section 303A.07(c)(i)(B) audit committee charter requirement for the audit committee to prepare an audit committee report is replaced with the requirement to prepare the disclosure required by Item 407(d)(3)(i) of Regulation S-K.

Section 303A.09 - Corporate Governance Guidelines and Section 303A.10 - Code of Business Conduct and Ethics

- The proposed amendments move the audit, compensation and nominating committee charter, corporate governance guidelines and code of business conduct and ethics website posting requirements to a new Website Posting Requirement section in each of the applicable subsections of Section 303A.
- The proposed amendments change the disclosure requirement regarding website postings to require only that a listed company disclose in its annual proxy statement or annual report that the applicable charters, corporate governance guidelines and code of business conduct and ethics are available on the company's website and provide the company's website address. This change will conform the NYSE's disclosure requirements for committee charters to the disclosures required in Instruction 2 to Item 407 of Regulation S-K.
- The proposed amendments eliminate the requirements of Sections 303A.09 and 303A.10 that a listed company disclose that hard copies of its charters, guidelines and code of business conduct and ethics are available in print upon request. The NYSE believes that this requirement is no longer necessary because the documents are readily accessible on a company's website.
- The proposed amendments to Section 303A.10 specify that any waiver of the code of business conduct and ethics granted to executive officers and directors must be disclosed to shareholders within four business days of such determination, and disclosure must be done by issuing a press release, providing website disclosure or filing a current report on Form 8-K, consistent with the four day reporting requirement of Item 5.05 of Form 8-K for waivers from codes of ethics. The NYSE will revise the current

two to three business day requirement in the answer to Question G-1 of the NYSE's Frequently Asked Questions accordingly.

Section 303A.12 - Certification Requirements

- Section 303A.12(a) requires listed companies to disclose that they filed the CEO certification required by the NYSE and any certifications required by the SEC in the following year's annual report. This requirement has caused significant confusion since the disclosure relates to filings that were made in the previous year. The proposed amendments eliminate this disclosure requirement, in particular, because subsequent to the adoption of the Section 303A.12(a) disclosure requirement, the SEC amended the exhibit requirements of Form 10-K to require that the SEC certification be included as an exhibit to the company's annual report filed with the SEC.
- The proposed amendments revise Section 303A.12(b) to specify that listed companies must notify the SEC, in writing, after any executive officer of the listed company becomes aware of *any* non-compliance with Section 303A. This differs from the current rule, which requires notification in the event of "material non-compliance."

Section 303A.14 - Website Requirement

- In the proposed amendments, the current Section 307.00, which provides guidance on related party transactions, is eliminated, as it is duplicative of Section 314 — Related Party Transactions and current Section 303A.14 is redesignated as Section 307.00. The related commentary clarifies that the requirement for a listed company to maintain a publicly accessible website applies to companies subject to website posting requirements under any applicable provision of the Listed Company Manual, not just Section 303A.

Comments on the proposed amendments may be submitted to the SEC until 21 days after the date the applicable proposal is published in the Federal Register. Information on submitting comments to the SEC can be found on the SEC's website at <http://www.sec.gov/rules/submitcomments.htm>.

**Our client alerts are for general informational purposes and should not be regarded as legal advice.
If you would like additional information or have any questions, please contact:**

Corporate

New York

Carlos T. Albarracín
+1 (212) 408-1081
calbarracin@chadbourne.com

Marc A. Alpert
+1 (212) 408-5491
malpert@chadbourne.com

A. Robert Colby
+1 (212) 408-5571
rcolby@chadbourne.com

William Greason
+1 (212) 408-5527
wgreason@chadbourne.com

Morton E. Grosz
+1 (212) 408-5592
mgrosz@chadbourne.com

Charles E. Hord, III
+1 (212) 408-5353
chord@chadbourne.com

Peter K. Ingerman
+1 (212) 408-5422
pingerman@chadbourne.com

Peter R. Kolyer
+1 (212) 408-5564
pkolyer@chadbourne.com

Alison H. Kronstadt
+1 (212) 408-8006
akronstadt@chadbourne.com

Sey-Hyo Lee
+1 (212) 408-5122
shlee@chadbourne.com

Jonathan M.A. Melmed
+1 (212) 408-1002
jmelmed@chadbourne.com

J. Allen Miller
+1 (212) 408-5454
amiller@chadbourne.com

Marc M. Rossell
+1 (212) 408-1057
mrossell@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

Kevin C. Smith
+1 (212) 408-1092
ksmith@chadbourne.com

London

Claude S. Serfilippi
+44 (20) 7337-8030
cserfilippi@chadbourne.com

Washington

Sean P. McGuinness
+1 (202) 974-5680
smcguinness@chadbourne.com