

NYSE Proposes Changes to Corporate Governance Requirements

September 2009

On August 26, 2009, the New York Stock Exchange (“NYSE”) submitted to the Securities and Exchange Commission (“SEC”), for its approval, a list of proposed changes aimed at (a) amending certain of the corporate governance requirements contained in current Section 303A of the NYSE’s Listed Company Manual (“Listed Company Manual”), and (b) eliminating current Section 307.00 of the Listed Company Manual.

The proposed amendments are intended to clarify some of the NYSE disclosure requirements, to include rule interpretations by the NYSE, to eliminate redundancy between the NYSE’s and the SEC’s corporate governance requirements by incorporating relevant disclosure required pursuant to Regulation S-K (“Regulation S-K”) promulgated under the Securities Act of 1933, as amended (“Securities Act”) and to make certain other administrative changes.

If approved by the SEC, the proposed rule amendments would go into effect beginning January 1, 2010.

PROPOSED AMENDMENTS TO SECTION 303A OF THE LISTED COMPANY MANUAL

Section 303A of the Listed Company Manual (“Section 303A”), which contains the corporate governance disclosure requirements applicable to NYSE listed companies, was approved for inclusion in the Listed Company Manual on November 4, 2003. On August 29, 2006, the SEC, as part of its rule changes concerning executive compensation, adopted current Item 407 of Regulation S-K (“Item 407”), which sets out the requirements and disclosure concerning reporting companies’ corporate governance generally (including director independence and the composition of certain committees of boards of directors) which, in some cases, are more comprehensive than what is required in Section 303A. Following the adoption of

Item 407, the NYSE stated in its submission to the SEC that it had received many questions for clarification concerning whether disclosure by a listed company which complied with the requirements of Item 407 would also satisfy the applicable requirements of Section 303A.

The NYSE’s proposed amendments to Section 303A would (a) eliminate any disclosure requirement currently included in both Section 303A and Item 407, and (b) incorporate directly the disclosure requirements of Item 407 into the Section 303A requirements. The NYSE stated in its submission to the SEC that it believes this approach will serve an “important purpose” by concluding that a listed company deficient in its Item 407 disclosure will also be deemed to be deficient in its disclosure to the NYSE, which will then have the ability to take appropriate actions against the deficient listed company. These actions could range from appending a below

compliance (BC) tag to the deficient listed company’s ticker symbol to delisting actions in “extreme” cases (the NYSE did not expand on what it would consider an “extreme” case in this scenario).

A discussion regarding certain of the proposed amendments to, and deletions from, Section 303A follows. The complete text of the NYSE’s submission to the SEC requesting approval for these amendments, containing the full list of proposed changes, can be found at [http://apps.nyse.com/commdata/pub19b4.nsf/docs/546B33FFED743CD08525761F004CB2C1/\\$FILE/NYSE-2009-89.PDF](http://apps.nyse.com/commdata/pub19b4.nsf/docs/546B33FFED743CD08525761F004CB2C1/$FILE/NYSE-2009-89.PDF).

Deleted Provisions

The table below sets forth a listing of the disclosure items in current Section 303A that are proposed to be eliminated and replaced with the referenced disclosure required under Item 407:

Current Section 303A Disclosure	Proposed New Disclosure from Item 407
“Controlled Company” exemption under Section 303A.00	Any “controlled company” relying upon an exemption from Section 303A disclosure must comply with Instruction 1 to Item 407(a)
Section 303A.02(a) independent director requirement	Listed companies must comply with Item 407(a) director independence requirements
Section 303A.07(c)(i)(B) audit committee report requirement	Listed companies must provide the report of the audit committee required pursuant to Item 407(d)(3)(i)
Section 303A.05(b)(i)(C) compensation committee charter report requirement	Listed companies must provide the “Compensation Committee Report” required pursuant to Item 407(e)(5)

Website Posting Requirement

The NYSE proposes to move the requirement that listed companies post their audit, compensation and nominating committee charters, corporate governance guidelines and code of business conduct and ethics on their corporate websites to a new section within each of the applicable subsections of Section 303A. The proposed new posting requirement section in Section 303A.07 will state that closed-end investment companies are not subject to the requirement with respect to the audit committee charters. The proposed changes would also limit disclosure to a statement by a listed company that these documents are posted on its website and providing the website address (the current requirement under Instruction 2 to Item 407 with respect to committee charters), and would eliminate the requirement in current Sections 303A.09 and 303A.10 that a listed company state that hard copies of the documents are available upon request.

Location of Certain Disclosures

Currently, Section 303A requires listed companies to make certain disclosures in their annual report filed with the SEC or in the proxy statement filed in connection with their annual stockholders' meeting.

Under the proposed amendments, listed companies will have the option of either continuing this practice or electing to make disclosures "on or through" their website. Listed companies electing to provide disclosure in this manner must disclose this fact in their annual report or proxy statement. This option would apply to the following disclosures:

Section 303A.02(b)(v) (concerning contributions to a tax-exempt organization in which an independent director serves as an executive officer).

Section 303A.03 (concerning the identity of the director chosen to preside at executive sessions of non-management/independent directors).

Section 303A.03 (regarding the method established for interested parties to communicate with the presiding director or the non-management/independent directors as a group).

Section 303A.07(a) (concerning a board of directors' determination that the ser-

vice, by a member of its audit committee, on the audit committee of more than three public companies does not impair such member's ability to serve).

With respect to disclosures which may be provided in an annual report and are required of listed companies not required to file a Form 10-K with the SEC, the proposed amendments would include a new "Disclosure Requirements" subsection of Section 303A.00 stating that the section will be interpreted to apply to any annual disclosure form such listed company files with the SEC. As this position is already set out in the "References to Form 10-K" subsection of current Section 303A.00, this subsection would be eliminated as part of the proposed amendments.

Phase-In Compliance Periods

Currently the NYSE requires companies listing with the exchange in connection with an initial public offering ("IPO"), a spin-off or a carve-out to have at least one independent director on each of their audit, nominating and compensation committees of the board of directors as of the listing date. The remaining requirements with respect to independent members of the audit, nominating and compensation committees may be phased in over time. In its submission to the SEC, the NYSE acknowledged that common practice by companies in this situation is not to appoint independent directors until sometime after the listing date (but prior to the closing date of the transaction).

To that end, the NYSE proposes to amend the introduction to Section 303A to specify that companies listing with the NYSE in connection an IPO, a spin-off or a carve-out must be in compliance with the SEC's audit committee requirements in Rule 10A-3 under the Securities Exchange Act of 1934, as amended ("Exchange Act") as of the listing date (these requirements are incorporated into current Section 303A.06 of the Listed Company Manual). "Listing date", for this purpose, will be set as the first trading date for the company's securities on the NYSE. These companies would be then able to phase in compliance with applicable independence requirements and website posting requirements. Companies that were required to file periodic reports with the SEC prior to listing with the NYSE would not be able to include non-independent directors on their

audit committees during these proposed phase in schedules. The NYSE's submission to the SEC also proposes to allow phased-in compliance periods for companies listing following an emergence from bankruptcy, as the result of a transfer from another market, those with securities registered pursuant to Section 12(g) of the Exchange Act, former "controlled companies" (as defined under the proposed amendments) and listed companies that have ceased to qualify as a "foreign private issuer" under SEC rules.

Other Changes

Additional proposed amendments of note to Section 303A are summarized below.

Section 303A.03 (meetings of non-management directors). The NYSE proposes to (a) revise the commentary to this section to allow listed companies to hold regular executive sessions of their independent directors, and (b) clarify that all interested parties, and not only stockholders, must be able to communicate concerns regarding a listed company to the presiding director or to the non-management or independent directors as a group.

Section 303A.07 (audit committee requirements). The NYSE proposes to clarify that the disclosure regarding a listed company's board of directors determination that the service, by a member of its audit committee, on the audit committees of more than three public companies does not impair such member's ability to serve applies any time an audit committee member serves on the audit committee of more than three public companies, regardless of whether the listed company limits the number of audit committees on which its audit committee members may serve.

Section 303A.10 (code of business conduct and ethics). The NYSE proposes to amend the current language to require that listed companies disclose any waiver of its code of business conduct and ethics with respect to any director or executive officer within four business days of such waiver. This disclosure may be made via press release, on the listed company's website or by filing a Current Report on Form 8-K with the SEC.

Section 303A.12 (certification). The NYSE proposes to eliminate the current requirement that listed companies disclose the filing of the CEO certificate (as well as any

certifications required by SEC rules) in their annual report for the following year. The NYSE also proposes to revise Section 303A.12(b) to state that listed companies must notify the NYSE of any non-compliance with Section 303A (currently, listed companies are only required to notify the NYSE in the event of any “material” non-compliance).

Section 303A.14 (publicly-accessible website requirement). The NYSE proposes to eliminate current Section 303A.14 and renumber it as new Section 307.00, and to (a) clarify in the commentary to this section that the requirement of a listed company to post certain items and disclosure on its website applies to posting requirements under Section 303A and under any other applicable provision of the Listed Company Manual, and (b) require websites to be accessible from the United States and to clearly indicate, in English, the location of the documents required to be posted (which must also be printable in English).

This Securities Update was written by Donald J. Ellis, an Associate in Burns & Levinson’s Corporate Group.

Explanatory Notes:

This update is intended to provide a general summary and to call your attention to a number of proposed rule changes which may be of possible interest and relevance to you. It is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you or to serve as a substitute for legal advice.

Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these rule changes or want to learn more about our expertise in this area.

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In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting resales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

We have counseled clients both domestic and international, from high technology and life sciences to emerging growth companies, and are positioned to provide clients with timely, expert, efficient and cost effective advice that they need to meet their business objectives. We take a practical and proactive approach to the rapidly changing securities disclosure and corporate governance laws, providing our clients with timely updates, identifying specific situations in which the new laws will impact particular clients either operationally or structurally, and working with clients to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

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