

## SEC Approves Proposed Changes to NYSE Corporate Governance Requirements

December 2009

On November 25, 2009, the Securities and Exchange Commission (“SEC”) approved proposed rule changes containing amendments to the Listed Company Manual (the “Listed Company Manual”) of the New York Stock Exchange (“NYSE”), in the form initially proposed by the NYSE on August 26, 2009. The amendments had been proposed in order to (a) clarify some NYSE disclosure requirements, (b) include NYSE rule interpretations, (c) eliminate redundancy between the NYSE’s and the SEC’s corporate governance requirements by incorporating relevant disclosure required pursuant to Regulation S-K under the Securities Act of 1933, as amended, and (d) make certain other administrative changes. The effective date of the amendments is January 1, 2010.

For background, and a description of the NYSE’s initial proposed rule changes, please see our previous Securities Law Update, “NYSE Proposes Changes to Corporate Governance Requirements” (September 2009), which can be found at [http://www.burnslev.com/apps/uploads/publications/Securities\\_NYSE\\_Corporate\\_Gov\\_Requirement\\_Sept09.pdf](http://www.burnslev.com/apps/uploads/publications/Securities_NYSE_Corporate_Gov_Requirement_Sept09.pdf). The complete text of the SEC’s order approving the rule changes can be found at: <http://sec.gov/rules/sro/nyse/2009/34-61067.pdf>.

### APPROVED AMENDMENTS TO SECTION 303A OF THE LISTED COMPANY MANUAL

The approved amendments primarily affect the corporate governance and disclosure requirements applicable to NYSE listed companies included in Section 303A of the Listed Company Manual (“Section 303A”). The amendments eliminate certain disclosure requirements in Section 303A by direct incorporation by reference of comparable disclosure requirements from Item 407 of Regulation S-K (“Item 407”).

The table above sets forth a listing of the disclosure items in Section 303A, as amended, that are eliminated and replaced with the referenced disclosure required under Item 407.

Current Section 303A Disclosure	New Disclosure from Item 407
“Controlled Company” exemption under Section 303A.00	Any “controlled company” relying upon an exemption from certain of the Section 303A requirements must comply with Instruction 1 to Item 407
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)

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 is now located in new sections within each applicable subsection of Section 303A. Disclosure is now limited to a statement by a listed company that these documents are posted on its website and providing the website address. Listed companies need no longer state that hard copies of these documents are available upon request.

Listed companies may now elect to make the disclosures required under the Section 303A subsections listed below on their website, which election must be disclosed in their annual report or proxy statement:

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

The amendments include a new “Disclosure Requirements” subsection of Section 303A.00, stating that the section will now be interpreted to apply to any annual periodic disclosure form filed with the SEC by a listed company that is not required to file a Form 10-K with the SEC.

The introduction to Rule 303A will now state that companies listing with the NYSE in connection an initial public offering (“IPO”), spin-off or 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 (the “Exchange Act”) as of the listing date (these requirements are now incorporated into Section 303A.06 of the Listed Company Manual). “Listing date”, for this purpose, means 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. The amendments also allow phased-in compliance periods for (a) companies listing following an emergence from bankruptcy or as the result of a transfer from another market, (b) companies with securities registered pursuant to Section 12(g) of the Exchange Act, (c) companies that are former "controlled companies" (as defined in the amendments), and (d) listed companies that cease to qualify as a "foreign private issuer" under SEC rules.

Companies that were required to file periodic reports with the SEC prior to listing with the NYSE will not be able to include non-independent directors on their audit committees during the phase-in schedules.

Listed companies may now hold regular executive sessions of their independent directors (Section 303A.03 of the Listed Company Manual). This section now also clarifies that all interested parties, not only stockholders, must be able to communicate any concerns regarding a listed company to the presiding director or to the non-management or independent directors as a group.

Listed companies will now be required to disclose waivers of their codes of business conduct and ethics with respect to a director or executive officer (via press release, on the listed company's website or by filing a Current Report on Form 8-K with the SEC) within four business days of such waiver (Section 303A.10 of the Listed Company Manual).

The requirement to disclose the filing of a CEO certificate (as well as any certifications required by SEC rules) in a listed company's annual report for the following year will now be eliminated (Section 303A.12 of the Listed Company Manual).

Listed companies will now be required to notify the NYSE of any non-compliance with Section 303A (formerly, listed companies were only required to notify the NYSE in the event of any material non-compliance) (Section 303A.12(b) of the Listed Company Manual).

The amendments 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 other 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 whether the listed company limits the number of audit committees on which its audit committee members may serve (Section 303A.07 of the Listed Company Manual).

The amendments also clarify that the requirement to post certain items and disclosure on a listed company's website applies to posting requirements under Section 303A and under any other applicable provision of the Listed Company Manual. The items/disclosure must be accessible from the United States and clearly indicate, in English, the location of the documents required to be posted (which must also be printable in English) (new Section 303A.14 of the Listed Company Manual, formerly Section 303A.07).

#### **Practical Effect**

Listed companies should review, in advance of the upcoming proxy season, their existing proxy and corporate governance materials to update the Listed Company Manual section references therein. In addition, listed companies should assess whether they wish to take advantage of the new website disclosure option described above (and make the corresponding changes to their annual reports or proxy materials) and the ability to eliminate either or both of the disclosures regarding the CEO certificate in the annual report and the statement in the proxy materials that hard copies of committee charters and other corporate governance documents are available upon stockholder request.

*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 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.*

Burns & Levinson's Securities Law Group represents public and private companies, underwriters and investment banks, venture capital and investment funds, real estate investment funds, investment advisors, broker-dealers, stockholder groups and individuals in public and private securities offerings and transactions, SEC, FINRA and stock exchange compliance, corporate governance, fund formation and offerings, SEC enforcement and securities litigation.

#### THE SECURITIES LAW GROUP

**Josef Volman - Co-Chair**  
617.345.3895 | [jvolman@burnslev.com](mailto:jvolman@burnslev.com)

**Andrew Merken - Co-Chair**  
617.345.3740 | [amerken@burnslev.com](mailto:amerken@burnslev.com)

If you have any questions regarding this Burns & Levinson Securities Law Update, please contact one of the individuals named above.

If you would like to be added to or removed from the mailing list for Burns & Levinson Securities Law Updates or other Burns & Levinson publications, please call 617.345.3000 or send your name and email address to [clientservices@burnslev.com](mailto:clientservices@burnslev.com).

#### **ABOUT BURNS & LEVINSON'S SECURITIES LAW GROUP**

Burns & Levinson's attorneys have extensive experience representing public and private issuers, stockholder groups and individual investors. Our attorney team counsels clients on IPOs and follow-on offerings of equity, debt and other securities (including shelf registration takedowns), corporate acquisitions involving registered and restricted stock, mergers and acquisitions where one or both parties are publicly traded, private investment in public equity (PIPE) transactions, private placements, venture capital financings, and complex securities law transactions and issues, including corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance.

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 emerging growth companies to large public 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.

#### ***Underwriters and Investment Banks***

Our attorneys also represent underwriters in initial and follow-on public offerings and investment banks in private placements and mergers and acquisitions.