

SEC Approves NYSE Amendments to the Corporate Governance Standards Applicable to Listed Companies

In November 2009, the Securities and Exchange Commission (the “SEC”) approved certain amendments (the “Amendments”)¹ to the New York Stock Exchange Listed Company Manual (the “NYSE Manual”)², which had been proposed by the New York Stock Exchange LLC (“NYSE”) on August 26, 2009. The Amendments will take effect on January 1, 2010 and are summarized below.

Amendments

- *Conform Disclosure Requirements with Regulation S-K:* In an effort to minimize duplicative corporate governance disclosure requirements between the NYSE Manual and Item 407 of Regulation S-K, the Amendments replace certain disclosure requirements in Section 303A of the NYSE Manual relating to corporate governance standards for listed companies with the applicable requirements of Item 407 of Regulation S-K³. Compliance with such requirements is specifically included for disclosure relating to director independence, controlled company exemptions under Section 303A and reports for the audit and compensation committees.
- *Website Posting and Disclosure Requirements:* Certain documents previously required to be provided in hard copy upon request — committee charters, corporate governance guidelines and code of business conduct and ethics — may now be provided through the company’s website. If disclosure is made on the website, the website address must be included in the proxy statement or in the company’s Form 10-K. In addition, certain other disclosures may be referenced in the proxy statement or Form 10-K and made on the company’s website, including contributions by the company to tax exempt organizations affiliated with independent directors, a method for contacting the presiding director at executive sessions and any determination that a member of the audit committee’s service on more than three public company audit committees does not impair his or her ability to effectively serve the company.⁴

¹ See SEC Order Approving Proposed Rule Change, Release No. 34-61067 (available at <http://www.sec.gov/rules/sro/nyse/2009/34-61067.pdf>); Notice of Filing of Proposed Rule Change, Release 34-60653 (available at <http://www.sec.gov/rules/sro/nyse/2009/34-60653.pdf>).

² See NYSE Manual (available at <http://www.nyse.com/regulation/nyse/1220033210208.html>).

³ See Regulation S-K, 17 C.F.R. § 229.407.

⁴ The Amendments clarify that this determination must be made regardless of any policy the company may

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- *Executive Sessions:* The Amendments clarify that the requirement for executive sessions of the board of directors may be satisfied by meetings of non-management directors or independent directors. In any event, independent directors should meet at least once a year. The Amendments also highlight that the method provided for communicating with the presiding director or the group of directors must be for all interested parties and not just for shareholders.
- *CEO Certification:* Companies are no longer required to disclose that they filed the CEO certificate required by the NYSE or that they were in compliance during the previous year. However, companies will be required to notify the NYSE in writing if at any time an officer becomes aware of any non-compliance, as opposed to “material” non-compliance as previously required.
- *Code of Conduct Waivers:* Any waiver of a company’s code of business conduct and ethics granted to executive officers and directors must be disclosed within four business days of such determination by either a distributing a press release, providing website disclosure or in a Form 8-K filed with the SEC.⁵
- *Related Party Transactions:* The NYSE has eliminated its related party transaction policy contained in Section 307 of the NYSE Manual.
- *Audit Committee Meetings:* With respect to the requirement for audit committees to meet to discuss annual and quarterly financial statements, the NYSE clarifies that telephonic conference calls constitute meetings for the purposes of compliance, but polling directors does not.
- *Website Requirements:* Companies’ websites must be accessible from the United States, must clearly indicate, in English, the location of the documents required to be posted and must provide the ability to print such documents in English.
- *Controlled Companies:* Clarifies that an issuer is deemed to be a controlled company if more than 50% of the voting power for the election of directors is held by an individual, group or company.
- *Foreign Private Issuer Governance Differences:* Foreign private issuers must include the statement of significant corporate governance differences in Form 20-F if the issuer is required to

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have with respect to such a director serving on more than three audit committees.

⁵ There is a similar requirement in Item 5.05(b) of Form 8-K that requires disclosure of the grant of a waiver to a company’s principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions from any provision of a code of ethics as described in Item 406(b) of Regulation S-K.

file a Form 20-F. For those foreign private issuers that are required to file a Form 40-F or Form 10-K, the disclosure may be made in that form or on the company's website.

- *Foreign Private Issuer Equity Compensation Plans:* Companies that cease to be foreign private issuers will have at least six months to seek shareholder approval of their equity compensation plans, but no longer than one year. Regardless, a plan in existence prior to the company losing its status as a foreign private issuer may still be valid in some circumstances.

Clarifying Compliance Dates for Newly Listed Companies

The Amendments clarify that the listing date, the date on which newly listed companies must be in compliance with the rules, is the date when the company's securities first trade on the NYSE, either regular-way trading or "when-issued" trading. However, a company listing under certain circumstances will be allowed a transition period to be in compliance with Section 303A.

Companies listing in conjunction with an initial public offering ("IPO") are permitted, under the Amendments, to appoint the first independent director member of its audit committee by the earlier of the date that the IPO closes or five business days from the listing date. Only one audit committee member is required to be in place as of this date; however, the company must have two audit committee members within ninety days of the listing date and three within a year of the listing date.

A similar phase-in period is now available for a company listing in conjunction with a spin-off or carve-out transaction.⁶ In addition to the audit committee phase-in period, the Amendments outline a phase-in period for the nominating and compensation committees that is similar to that allowed under the current rules for a company listing in conjunction with an IPO.

For companies previously registered pursuant to Section 12(g), a majority independent board is required within one year of the listing date. Nominating and compensation committees are subject to the same phase-in period as companies listed in conjunction with an IPO. Only independent members would be allowed on the audit committee during this period, but these companies would be permitted the same phase-in period for the size requirement as described above.

⁶ A company listing upon emerging from bankruptcy or a company previously relying on the controlled company exemption may not rely on this phase-in period and will still be required to have a minimum of three members on its audit committee from the listing date or the date of the status change, as applicable.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Banks Bruce at 212.701.3052 or bbruce@cahill.com.

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