

NYSE Submits Proposed Changes on Corporate Governance Issues to SEC

On November 23, 2005, the New York Stock Exchange filed a proposed rule change with the SEC to modify Section 303A of the NYSE Listed Company Manual, the Exchange’s corporate governance listing standards. The new rules are intended to clarify existing standards and codify various rule interpretations. We would like to draw your attention to a few of the clarifications and changes that appear in the proposed rule change, summarized in the table below.

Current Rule

Rule as Amended

Disclosure Requirements	
Listed companies are required to make various corporate governance disclosures in either their annual proxy statement or, if not filed annually, in the company’s annual report.	Clarification: Companies may not make these required disclosures by incorporating by reference into the annual proxy statement or annual report from another document.
Independent Directors	
Listed companies must disclose the identity of independent directors and the board’s basis for determining the director’s independence. In doing so, companies may create (and must disclose) categorical standards. Only deviations from these standards require specific disclosure.	<p>Clarification: Companies must disclose the name of each independent director and state whether the director has no relationship or an immaterial relationship with the company. If the director has an immaterial relationship, companies must specifically describe it and the basis for determining its immateriality. If a company has established categorical descriptions of relationships that the board has determined to be immaterial, it need not disclose immaterial relationships that fall within those categories. All other immaterial relationships must still be disclosed.</p> <p>Companies may not treat as categorically immaterial any relationship that must be disclosed pursuant to Item 404 of Regulation S-K. Thus, if there are any 404 relationships disclosed, they must be specifically described and addressed.</p>
In determining director independence, the term “immediate family” member includes a person’s spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law and anyone (other than domestic employees) who shares such person’s home.	Clarification: The term “immediate family” member does not include stepchildren who do not share a stepparent’s home or the in-laws of such stepchildren.



Audit Committee Meetings	
Audit Committees must meet to review and discuss annual audited financial statements and quarterly financial statements, including a review of the specific disclosures under MD&A.	Clarification: Meetings may be telephonic if permitted by state law, but polling of audit committee members in lieu of a meeting is not permitted.
Non-Management Director Meetings	
Non-management directors of listed companies must meet, without management, at regularly scheduled executive sessions.	Change: Listed companies now have the option of holding regular executive sessions of independent directors only, instead of non-management director meetings. If the company chooses to hold non-management director meetings, it should still hold an executive session of independent directors at least once a year.
Code of Conduct and Ethics	
Listed companies must adopt a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers. There was no definition of “promptly.”	Clarification: Listed companies must disclose any waiver to shareholders within four business days of its determination. This clarification simply lines up the time period for disclosure with the Form 8-K requirements. Such disclosure may be made by distributing a press release, providing website disclosure, or by filing a current report on Form 8-K with the SEC.
Notification of Violations	
CEOs of listed companies must notify the NYSE in writing after any executive officer becomes aware of any material non-compliance with the corporate governance provisions.	Change: CEOs of listed companies must now notify the NYSE of any non-compliance, whether material or not.
SOX Certifications	
Listed companies must disclose whether, in the previous year, they have filed the certifications required by Section 303A.12(a) and Section 302 of the Sarbanes-Oxley Act.	Change: Requirement eliminated.
Transition Periods	
Listing companies must be in compliance with corporate governance provisions by the earlier of their first annual meeting after January 15, 2004 or by October 31, 2004.	Change: Companies listing upon emergence from bankruptcy or that cease to be a controlled company are permitted to phase in majority independent boards and independent nominating and compensation committees over a one-year period. Companies that no longer qualify as foreign private issuers are permitted to phase in required independent audit, nominating and compensation committees over a one-year period.

Company Websites	
<p>The websites of listed companies must include their corporate governance guidelines and charters of their most important committees (including at least the audit, and if applicable, compensation and nominating committees).</p>	<p>Clarification: Listed companies must maintain a publicly accessible website that includes printable versions of the applicable charters of its compensation, nominating and audit committees, as well as its corporate governance guidelines and code of business conduct and ethics.</p> <p>Listed foreign private issuers are required to make required disclosures on their websites in English and accessible from the U.S.</p>

The rule proposals are subject to notice and comment by the SEC. Because some of the clarifications involve positions that the NYSE believes are reasonable interpretations of the existing rules, companies should consider applying them in advance of the final adoption.

