

NYSE Proposes Changes to Corporate Governance Listing Standards

On August 26, 2009, the New York Stock Exchange LLC (NYSE) filed a proposal with the Securities and Exchange Commission to amend certain corporate governance standards in Section 303A of the NYSE Listed Company Manual. The proposed amendments are intended to clarify existing standards, codify various rule interpretations and eliminate and streamline certain disclosure requirements. We would like to draw your attention to a few of the changes and clarifications that appear in the proposed rule change.

A. Certification and Non-Compliance Notice Requirements

The proposed rules would eliminate the requirement that companies disclose in their annual reports that they have filed the CEO certification required by Section 303A.12(a). That certification states that the CEO is not aware of any violation of NYSE corporate governance listing standards. The certification would still have to be filed, but companies would not need to remember to include the disclosure in their annual reports. The proposed rule also would require companies to notify the NYSE after any executive officer becomes aware of any non-compliance with Section 303A; the existing rule requires notice of any “material” non-compliance.

B. Website Disclosure

The proposed rules also would allow companies to make certain disclosures on their websites that are currently required in the proxy statement or annual report. These disclosures include:

- The identity of the director chosen to preside at executive sessions of non-management or independent directors, or the procedure by which a presiding director is selected for each executive session;
- The method for interested parties to communicate directly with the presiding director or the non-management or independent directors as a group;
- Disclosure of certain contributions made to any tax exempt organization in which any independent director serves an executive officer; and
- Any determination by a board of directors that the service of any audit committee member on more than three public company audit committees does not impair the ability of such audit committee member to serve effectively on the company’s audit committee.

If a company elects to make these disclosures on its website, it must indicate that fact in its proxy statement or Form 10-K annual report, as applicable, and include the website address.

The proposed rules would also eliminate the requirement that companies disclose that hard copies of the audit, compensation committee and nominating committee charters, corporate governance guidelines, and code of business conduct and ethics will be made available in print upon request.

C. Meetings of Non-Management Directors

The proposed rules would codify the NYSE's view that holding regular executive sessions of independent directors satisfies the NYSE's requirement that non-management directors meet at regularly scheduled sessions without management. The proposed rules would also require that all interested parties, not just shareholders, must be able to communicate directly with the non-management directors as a group or the director that presides over non-management director meetings.

D. Consistency with Regulation S-K

The proposed rules would streamline disclosure requirements by replacing existing Section 303A requirements that are addressed in Item 407 of Regulation S-K with a direct reference to compliance with Item 407. Most notably, Section 303A.02(a), which allows the use of categorical standards for independence determinations, would be replaced by requiring compliance with Item 407(a). In the rule proposal, the NYSE notes its view that Item 407(a) requires more stringent disclosure than NYSE rules because it requires a company to disclose what the directors considered in making independence determinations, even relationships that fall into categorical standards that are determined not to be material.

E. Definition of Controlled Company

The proposed rules would revise the definition of "controlled company." Under current rules a "controlled company" is a listed company of which more than 50% of the voting power is held by an individual, a group or another company. Under the proposed rules, a listed company is deemed a control company only when more than 50% of the voting power for the election of directors is held by an individual, a group or another company. The addition of the phrase "election of directors" is intended to codify the NYSE's view that a shareholder agreement relating only to the disposition of assets would not be sufficient to qualify a company as a controlled company.

F. Phase in Requirements

The proposed rules would revise certain phase in requirements for companies listing in connection with an initial public offering, or that otherwise become subject to the NYSE listing standards.

G. Effective Date

If approved by the SEC, the rule changes would take effect on January 1, 2010.

Contact Information

If you would like to learn more about the proposed NYSE rule amendments, please contact your usual Ropes & Gray legal advisor.

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