

Corporate and Securities Update

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New York Stock Exchange Amended Corporate Governance Requirements

On January 1, 2010, the New York Stock Exchange's amendments to its corporate governance requirements became effective.¹ These rule changes are applicable to disclosures made during the 2010 proxy season. This alert provides a brief summary of the amendments to the NYSE's corporate governance requirements² and a list of action items which a NYSE listed company should be implementing in connection with the 2010 proxy season.

The new rules:

- replace certain disclosure requirements with references to Item 407 of Regulation S-K (for example, specific disclosure requirements related to independent directors, as well as references to audit committee and compensation committee reports now just reference the disclosures required by Item 407);
- allow companies to hold regular executive sessions of only independent directors as an alternative to holding regular executive sessions of only non-management directors;
- make certain technical changes to NYSE rules related to the audit committee membership;

- provide that companies must disclose waivers granted to an executive officer or director from the company's code of business conduct and ethics within four business days (as opposed to "promptly") of the determination by the company to grant such waiver;
- eliminate certain disclosures related to the CEO/CFO certifications;
- require that the CEO notify the NYSE after any executive officer of the company becomes aware of any non-compliance (as opposed to "material non-compliance") with the NYSE's corporate governance standards; and
- increase the number of disclosures that may be provided through a company's website in lieu of including disclosure in the proxy statement or Form 10-K.

In light of these rule changes, it is recommended that NYSE-listed companies consider taking the following steps, to implement and comply with the rule changes described above.

1. See the SEC Release No. 34-61067 at <http://www.sec.gov/rules/sro/nyse/2009/34-61067.pdf>. In addition, the NYSE has provided additional guidance concerning its amended corporate governance requirements in Updated FAQs Regarding Final Corporate Governance Listing Standards (Section 303A Final Rules), which can be accessed at http://www.nyse.com/pdfs/FINAL_FAQ_NYSE%20Listed%20Company%20Manual%20Section%20303A_updated_1_4_10.pdf.

2. This alert does not provide a summary of amendments related to controlled companies, foreign private issuers, certain phase-in periods as well as certain technical changes to the NYSE listing standards.

1. Review Disclosures Related to Independent Directors

Under the amended rules, the NYSE requires that a listed company must comply with the existing disclosure requirements contained in Item 407(a) of SEC Regulation S-K with respect to disclosing the independence of its directors. The disclosure requirements of Item 407(a) are very similar to the NYSE's prior rule. Under Item 407(a), a public company is required to:

- identify each director that is independent under independence standards applicable to the company;
- identify each member of a compensation, nominating or audit committee that is not independent, if applicable;
- if the company uses its own definition of independence, disclose whether such definition is available on the company's website and, if so, provide the website address; and
- for each director that is identified as independent, describe any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) of Regulation S-K related to transactions with related persons.

Under the prior NYSE rules, a listed company was required to disclose the names of independent directors and the basis for the board's determination that such directors were independent in the company's proxy statement or Form 10-K. In addition, if the board adopted categorical standards to assist it in making determinations of independence, such standards were required to be disclosed, as well as whether directors meet such standards. If the board concluded that a director with a business relationship that did not meet the categorical standards was independent, the board must have disclosed the basis for its determination.

Persons responsible for proxy statement/Form 10-K disclosures of a NYSE listed company should review the company's disclosure regarding director independence and evaluate whether any changes are necessary to reflect the revised rules.

2. Evaluate Whether the Company Should Switch from Regular Executive Sessions of Non-Management Directors to Executive Sessions of Independent Directors

The NYSE listing standards require non-management directors of a listed company to meet at regularly scheduled executive sessions without management. Under the amended rules, the company may satisfy this require-

ment by holding regular executive sessions of only independent directors. However, if the company chooses to hold regular sessions of all non-management directors, it should still hold an executive session which includes only independent directors at least once a year.

The board of directors of a NYSE listed company should evaluate whether the company should continue to hold executive sessions of only non-management directors or change this structure to implement executive sessions of only independent directors. From a planning perspective, the person responsible for establishing the meeting schedule should be made aware of any changes the board determines to make in this regard.

3. Review Policy Related to Audit Committee Memberships

Under the amended rules, if an audit committee member simultaneously serves on the audit committees of more than three public companies, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and disclose such determination. Previously, the board had to make such disclosure only if the company did not limit the number of audit committees on which the audit committee member serves to three or less. This rule change provides an opportunity for the board to reexamine its policies with regard to service on other boards and audit committees and make the appropriate changes to implement this rule change. In regard to determining whether service on another audit committee would impair the ability of the director to effectively serve on the company's audit committee, consideration must be given to the size and complexity of the business of the other companies, for which the audit committee member serves on the audit committee, the time commitment required for audit committee service and whether such other companies are in the same industry as your company, as well as other work related commitments of the company's audit committee member.

In addition, the amended rules added a note reminding listed companies that SEC Rule 10A-3(d) requires disclosure of reliance on exemptions from Rule 10A-3 related to the independence standards, as well as an assessment of whether and how such reliance would materially affect the ability of the audit committee to act independently and to satisfy the other requirements of Rule 10A-3.

The amended rules also clarify that audit committee meetings may be telephonic if permitted under applicable corporate law. However, polling of audit committee members in lieu of meetings is not permitted. In addition to the NYSE limitation, the polling of committee members is likely not consistent with the exercise of the director's fiduciary duties as such process does not provide for a fulsome review and vetting of the issues.

Persons responsible for proxy statement/Form 10-K disclosures of a NYSE listed company should review the company's disclosure regarding audit committee membership and evaluate whether any changes are necessary to reflect the new rules.

4. Update Charters of the Compensation and Audit Committees

Under the prior NYSE rules, the charter of the compensation committee was required to include a reference to the committee's responsibility to produce a report on executive officer compensation to be included in the company's annual proxy statement or Form 10-K. The rules also required that the audit committee charter contain a similar requirement that the committee must prepare an audit committee report as required by the SEC to be included in the company's annual proxy statement. Under the amended rules, charters of the compensation committee and the audit committee must contain references to reports required by Item 407(e)(5), which is related to the compensation committee report, and Item 407(d)(3)(i), which outlines requirements for the audit committee report, as applicable.

Members of the compensation and audit committees of a NYSE listed company should review their respective charters and evaluate whether any changes are necessary to reflect the amended NYSE rules.

5. Review Method and Timing of Disclosing Waivers from Code of Business Conduct and Ethics

A listed company must disclose waivers granted to an executive officer or director from the company's code of business conduct and ethics within four business days (as opposed to "promptly" under the prior rules) of the determination by the board or board committee to grant the waiver. Such disclosure can be made through a press release, website or filing of a Form 8-K. The four business day requirement under the revised NYSE rules aligns the

timing of the disclosure with Item 5.05 of Form 8-K, which is required to be filed in connection with amendments to, or certain waivers from, the code of ethics applicable to the company's principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions.

Companies should consider utilizing their websites as a method of disclosure under the amended rules. In addition, the company's disclosure controls and procedures should be updated to ensure compliance with the procedures related to waivers from the company's code of business conduct and ethics.

6. Eliminate Disclosures Related to Certifications and Monitor Compliance with NYSE Rules

The amended rules eliminated the requirement to disclose in the company's annual report to shareholders or on Form 10-K, if it does not prepare an annual report to shareholders, the CEO's annual certification to the NYSE regarding compliance with NYSE's corporate governance standards, including any qualifications to such certification, and CEO/CFO certifications regarding the company's public disclosure (i.e., the certification required by Section 302 of the Sarbanes-Oxley Act of 2002).

In addition, the CEO must now notify the NYSE after any executive officer becomes aware of *any non-compliance* with NYSE's corporate governance standards (as opposed to notifying NYSE only in case of material non-compliance under the prior rules).

Compliance with the NYSE rules will have to be more closely monitored given the changes in this rule as now any non-compliance will have to be disclosed. The company's disclosure controls and procedures should be updated to address compliance with these requirements.

7. Review Procedures Related to Posting Corporate Governance Documents on the Company Website

Under the new rules, a company listed on the NYSE has an option to post certain disclosures on its website in lieu of disclosing this information in its annual proxy statement or Form 10-K, provided the company discloses in its proxy statement or Form 10-K that such information is available on its website and the website address. This website option applies to disclosures related to the following:

- contributions made by the company to any tax exempt organization in which an independent director serves as an executive officer, if within the preceding three years, contributions in any single fiscal year from the company to the organization exceeded the greater of \$1 million or 2% of such tax exempt organization's consolidated gross revenues;
- the name of the director chosen to preside at all executive sessions of the non-management or independent directors, or if the same director does not preside at every executive session, the method of choosing the presiding director for each session;
- the method for *all* interested parties (not just shareholders) to communicate directly with the presiding director or non-management/independent directors as a group; and
- the board's determination that the simultaneous service of any audit committee member on more than three public company audit committees does not impair the ability of such member to effectively serve on the company's audit committee.

In light of these rules, companies will likely consider adding such disclosures to their websites.

As under prior rules, the audit, compensation and nominating/corporate governance committee charters, corporate governance guidelines and code of business conduct and ethics are required to be posted on the listed company's website and the company is still required to disclose in its annual proxy statement or Form 10-K that such documents are available on the company's website. In addition, the company should also disclose its website address where these documents are posted. Although the company is no longer required to make these documents available in print to any shareholder upon request, such documents should be available in a printable version on the company's website.

Questions

Any person who has a question regarding the issues raised in this *Corporate and Securities Update* may obtain additional guidance from a member of our Public Companies Group (www.blankrome.com). ■

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