

NYSE Corporate Governance Rule Changes to Take Effect January 1, 2010

The SEC has approved, in their entirety, the changes to the NYSE's corporate governance rules proposed by the NYSE last August. The new rules will take effect on January 1, 2010. For the most part, the changes should be welcome and fairly easy to comply with as they largely conform the NYSE corporate governance requirements to those in Item 407 of Regulation S-K.

Specifically, the amended rules:

Require Notification of Any Noncompliance. The amended rules require the CEO of a listed company to notify the NYSE in writing after any executive officer of the listed company becomes aware of "any noncompliance" with the NYSE corporate governance requirements in Section 303A. Previously, such notification was required only in the event of "any material noncompliance".

Modify Director Independence Disclosures. The amended rules maintain the current requirement to assess a director's independence in light of the NYSE's general independence definition and bright-line tests but replace the related disclosure requirements with a requirement to provide the director independence disclosures mandated by Item 407(a) of Regulation S-K. Accordingly, the NYSE rules will no longer refer to categorical standards. During a recent NYSE webcast, a NYSE staff member suggested that companies may continue to find categorical standards useful in assessing director relationships.

Clarify Requirements for Executive Sessions of and Communication with Independent Directors. The amended rules clarify that companies may satisfy the current requirement that listed companies hold regular meetings of non-management directors by holding regular executive sessions of independent directors. If a listed company chooses to hold regular meetings of all non-management directors, the listed company should hold an executive session including only independent directors at least once a year. The amended rules also provide that *all* interested parties, not just shareholders, must be able to communicate their concerns regarding the listed company to the presiding director, or the non-management or independent directors as a group.

Permit Certain Disclosures to be Made on a Company's Website. The amended rules give companies the choice of providing certain currently required disclosures in their annual proxy statement or annual report (consistent with the current rules) *or*, instead, through the company's website. These disclosures include:

- certain contributions made by the company to a tax-exempt organization in which an independent director serves as an executive officer;
- the director chosen to preside over executive sessions of non-management or independent directors and the procedure used to select that director if the director is not the same at each meeting;
- a method for interested parties to communicate directly with the presiding director or non-management or independent directors as a group; and
- the board's determination 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 listed company's audit committee.

If a company chooses to make this disclosure via its website, it must disclose this fact in its annual report or proxy statement and provide the website address.

Permit Website Posting of Charters, Guidelines and Codes. The amended rules also eliminate the NYSE requirement that companies provide paper copies of applicable charters, corporate governance guidelines and codes of business conduct and ethics upon request. Rather, companies will simply be required to disclose in their annual proxy statement, or if they do not file a proxy statement, in their annual report on Form 10-K, that the applicable charters, corporate governance guidelines and code of business conduct and ethics are available on the company's website and provide the company's website address.

Clarify the Controlled Company Definition. The amended rules clarify that, in order to qualify as a "controlled company" for purposes of the controlled company exemption from certain corporate governance requirements, more than 50% of a company's voting power *for the election of directors* must be held by an individual, group or another company. The NYSE is making this change to address instances where companies claimed to be a "controlled company" owned by a "group" as a result of a shareholder agreement relating only to the disposition of assets.

Provide a Transition Period for Issuers that Cease to Qualify as Foreign Private Issuers. To take into account SEC rule changes that allow companies to test their foreign private issuer status annually at the end of their second fiscal quarter, NYSE listed issuers that no longer qualify as foreign private issuers at the end of their second fiscal quarter will now have until the end of that fiscal year to meet the NYSE domestic company board and committee independence requirements. These issuers will also be granted a limited transition period to align their equity compensation plans with the NYSE's shareholder approval rules for domestic issuers.

Conform NYSE Code of Ethics Waiver Disclosure Requirements with SEC Requirements. Consistent with the Form 8-K requirement, the amended rules allow listed companies four days to disclose any waiver of code of business conduct and ethics granted to an executive officer or director (versus two to three days as is currently suggested under NYSE guidance).

Eliminate CEO Certification Disclosure Requirement. The amended rules eliminate the requirement that a company disclose in its annual report that it filed the CEO certification required by the NYSE and any certifications required by the SEC. The requirement to file the certifications remains the same.

- ▶ See the [NYSE Rule Filing](#) Outlining the Amendments to its Corporate Governance Rules and [Amendment No. 1](#) to that Filing.
- ▶ See the [SEC Order](#) Approving the NYSE Corporate Governance Rule Changes.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact

Ning Chiu	212 450 4908	ning.chiu@davispolk.com
Janice Brunner	212 450 4211	janice.brunner@davispolk.com

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