

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 58	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2012 - * 49 Amendment No. (req. for Amendments *)
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Proposed Rule Change by New York Stock Exchange
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>			
			Rule					
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	19b-4(f)(1) <input type="checkbox"/>	19b-4(f)(2) <input type="checkbox"/>	19b-4(f)(3) <input type="checkbox"/>	19b-4(f)(4) <input type="checkbox"/>	19b-4(f)(5) <input type="checkbox"/>	19b-4(f)(6) <input type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

Proposal to Amend Sections 303A.00 and 303A.02a and 303A.05 of the Exchanges Listed Company Manual to comply with the requirements of Securities and Exchange Commission Rule 10C 1

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name * John	Last Name * Carey
Title * Vice President NYSE Regulation	
E-mail * jcarey@nyx.com	
Telephone * (212) 656-5640	Fax (212) 656-2223

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 09/25/2012	
By Janet McGinness (Name *)	Corporate Secretary (Title *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

NYX Janet McGinness,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

Form 19b-4 Information (required)

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change (required)

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) New York Stock Exchange LLC (“NYSE” or the “Exchange”) proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange’s Listed Company Manual (the “Manual”) to comply with the requirements of Securities and Exchange Commission (“Commission” or “SEC”) Rule 10C-1.¹ The text of the proposed rule changes is set forth in Exhibit 5 attached hereto.
- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The board of directors of NYSE Regulation, Inc. approved the proposed rule change on July 23, 2012. In addition, senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange's governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

John Carey
Vice President -- Legal
NYSE Regulation, Inc.
(212) 656-5640

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The Exchange proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Manual to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 303A.00, 303A.02(a) and 303A.05 will not become operative until July 1, 2013. Consequently, the existing text of these sections will remain in the Manual until June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended provisions of

¹ 17 CFR 240.10C-1.

those sections will be included in the Manual with introductory text indicating that the revised text does not become operative until July 1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”)² added Section 10C to the Securities Exchange Act of 1934.³ Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C’s compensation committee and compensation adviser requirements. On June 20, 2012, to comply with the requirements of Section 10C, the Commission adopted new Rule 10C-1, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.

Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, Rule 10C-1(b)(1)(ii)⁴ requires the exchanges to consider relevant factors including, but not limited to: (i) the source of the director’s compensation, including any consulting, advisory or other compensatory fees paid by the listed company; and (ii) whether the director has an affiliate relationship with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. Rule 10C-1(a)(4)⁵ requires that the rule filing submitted to the SEC by each exchange in connection with the adoption of the rules required by Rule 10C-1 must include a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange’s consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.

The Exchange’s director independence standards are set forth in Section 303A.02. Section 303A.02(a) provides that no director qualifies as “independent” unless the board of directors affirmatively determines that the director has no material relationship with the listed company (directly or as a partner, shareholder or officer of an organization that has a relationship with the company).⁶ In addition,

² Pub. L. No. 111-203, 124 Stat. 1900 (2010).

³ 15 U.S.C. 78j-3.

⁴ 17 CFR 240.10C-1(b)(1)(ii).

⁵ 17 CFR 240.10C-1(a)(4).

⁶ Commentary to Section 303A.02(a) notes that it is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to “listed company” would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, the commentary

Section 303A.02(b) provides that a director may not be deemed to be independent if such director has a relationship with the listed company which violates any one of five “bright line” tests.⁷ Section 303A.02(b) will continue to be applicable to

states that it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, the Exchange believes that, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. The Exchange does not view the ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

⁷ The following are the “bright line” tests set forth in Section 303A.02(b):

- (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company.
- (ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).
- (iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.
- (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.
- (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and 303A.09, a director of a business development company is considered to be independent if he

independence determinations in relation to compensation committee service, as compensation committee members will be required to be independent under the Exchange's general board independence standards set forth in Section 303A.02, in addition to the independence requirements proposed specifically for compensation committee service.

The Exchange proposes to amend Section 303A.02(a) of the Manual to adopt proposed Section 303A.02(a)(ii),⁸ which would require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to, the two factors explicitly enumerated in Rule 10C-1(b)(ii). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, commentary to proposed Section 303A.02(a)(ii) provides that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 303A.02(a)(ii) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),⁹ the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be

or she is not an "interested person" of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

⁸ As proposed, the current text of Section 303.02(a) would become Section 303A.02(a)(i).

⁹ Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

independent from management.¹⁰ Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing “bright line” independence standards as set forth in Section 303A.02(b) of the Manual are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 303A.02(a) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of “bright line” tests in Section 303A.02(b). The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 303A.02(a)(ii), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

Rule 10C-1(b)(2)¹¹ requires exchange rules to mandate that compensation committees must have broad authority to engage advisers to assist in their performance of the committee's functions. Specifically, exchange rules must mandate that:

- (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; and
- (ii) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee.

Rule 10C-1(b)(3)¹² requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

¹⁰ See Adopting Release at 38428.

¹¹ 17 CFR 240.10C-1(b)(2).

¹² 17 CFR 240.10C-1(b)(3).

The required powers of the compensation committee under Rule 10C-1(b)(2) and (3) as set forth above are in significant part already required by the NYSE's existing compensation committee listing standard, as they are required elements of the compensation committee charter as set forth in Section 303A.05(b). In the interests of clarity and emphasis, the Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as a proposed new subsection (c) of Section 303A.05. The Exchange proposes to remove the comparable requirements currently in Section 303A.05(b) commentary and replace them with a provision stating that the compensation committee charter must provide that the committee has all of the powers specified in new subsection (c).

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹³ provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

- (i) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- (ii) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- (iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- (iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- (v) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- (vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

¹³

17 CFR 240.10C-1(b)(4).

Accordingly, the Exchange proposes to include in proposed Section 303A.05(c) a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 303A.05(c) would not include any specific additional factors for consideration, as the Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),¹⁴ the Exchange proposes to include in Section 303A.05(c) an explicit statement that nothing in Section 303A.05(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed in Section 303A.05(c) would specify that the compensation committee need not engage in an analysis of the independence factors before consulting with or obtaining advice from in-house legal counsel.

Cure Periods

Rule 10C-1(a)(3)¹⁵ requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. The Exchange proposes to amend Section 303A.00 to adopt this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of the director's reasonable control. However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

¹⁴ 17 CFR 240.10C-1(b)(2)(iii).

¹⁵ 17 CFR 240.10C-1(a)(3).

Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).¹⁶ Consistent with the transition periods approved by the SEC for inclusion in Section 303A at the time of its original adoption,¹⁷ the Exchange proposes to amend Section 303A.00 to provide that listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new Section 303A.02(a)(ii) compensation committees independence standards . Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards.

In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 303A.00. Transition periods are available to: companies listing in connection with their initial public offerings (“IPOs”) or which did not have a class of common stock registered under the Exchange Act prior to the listing date;¹⁸ companies listing in connection with a spin-off or carve-out; companies listing upon emergence from bankruptcy; companies previously registered under Section 12(g) of the Exchange Act; and companies previously registered under Section 12(b) of the Exchange Act to the extent the national securities exchange on which they were listed did not have the same requirement; and companies that cease to qualify as a controlled company or a foreign private issuer. All of the foregoing categories of issuers (other than companies previously registered under Section 12(b) of the Exchange Act) would continue to be entitled to a transition under which the company must have: at least one independent member on its compensation committee by the listing date (or (i) in the case of an IPO, the earlier of the closing date of the IPO or five business days from the listing date, or (ii) in the case of a spin-off or carve-out, by the date the transaction closes); at least a majority of independent members on the compensation committee within 90 days of the listing date; and a fully independent compensation committee within one year of the listing date. A

¹⁶ See Adopting Release at 38444.

¹⁷ See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR-NYSE-2002-33).

¹⁸ For purposes of Section 303A other than Sections 303A.06 and 303A.12(b), a company is considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act.

company that ceases to qualify as a controlled company would continue to have a transition under which it must have at least one independent member on its compensation committee by the date its status changed, at least a majority of independent members on the compensation committee within 90 days of the date its status changed and a fully independent compensation committee within one year of the date its status changed. A company that ceases to be a foreign private issuer would continue to have a transition under which it must have a fully independent compensation committee within six months of the Foreign Private Issuer Determination Date.¹⁹ A company previously registered under Section 12(b) of the Exchange Act must satisfy the requirements of Section 303A within one year of the listing date to the extent the national securities exchange on which it was listed did not have the same requirements; and if the other exchange had a substantially similar requirement and the company was afforded a transition period that had not expired, the company has the same transition period as would have been available to it on the other exchange.

The Exchange proposes to exempt smaller reporting companies²⁰ from compliance with the proposed new independence requirements with respect to compensation committee service. Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the Exchange proposes to adopt a new transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 303A.02(a)(ii).²¹ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, (I) to have a committee composed entirely of members that meet the independence requirements of proposed Section 303A.02(a)(ii) within six months of the Smaller Reporting Company Determination Date and (II) to comply with Section 303A.05(c)(iv) as of the Smaller Reporting Company Determination Date. The Exchange also proposes to include a new subsection in Section 303A.00 specifying that smaller reporting companies are subject to proposed Section 303A.05(c) with the exception of proposed Section 303A.05(c)(iv) requirements

¹⁹ Section 303A.00 currently defines the “Determination Date” as the date at the end of a company’s second fiscal quarter on which it is required by SEC Rule 240.3b-4 to test its foreign private issuer status on an annual basis. The Exchange proposes to change this to the “Foreign Private Issuer Determination Date” so it is distinguished from the new “Smaller Reporting Company Determination Date”.

²⁰ As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

²¹ A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion *infra*.

with respect to the Compensation Committee's consideration of compensation consultant's independence from management. Under this approach, smaller reporting companies will effectively be subject to precisely the same requirements as is currently the case.

General Exemptions

Rule 10C-1(b)(5)²² provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies, and Rule 10C-1(b)(1)(iii)(A)²³ provides an automatic exemption from the compensation committee independence requirements for limited partnerships, companies in bankruptcy, open-end management investment companies registered under the Investment Company Act of 1940 ("1940 Act"). Rule 10C-1(b)(1)(iii)(A) also exempts from the compensation committee independence requirements any foreign private issuer that discloses in its annual report filed with the SEC the reasons that the foreign private issuer does not have an independent compensation committee.

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuer that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the NYSE's existing compensation committee requirements. Thus, as proposed, controlled companies, limited partnerships and companies in bankruptcy, closed-end and open-end funds registered under the 1940 Act, passive business organizations in the form of trusts (such as royalty trusts), derivatives and special purpose securities (such as those described in Sections 703.19 and 703.20 of the Manual), and issuers whose only listed equity security is a preferred stock, would be exempt. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees (e.g., passive business organizations in the form of trusts or issuers of derivative or special purpose securities); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

²² 17 CFR 240.10C-1(b)(5).

²³ 17 CFR 240.10C-1(b)(1)(iii)(A).

Section 303A.00 currently provides that foreign private issuers are permitted to follow home country practice in lieu of compliance with the Exchange's compensation committee listing standard. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),²⁴ from the proposed new compensation committee requirements to foreign private issuers that follow home country practice. The Exchange notes that Section 303A.11 requires foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. Foreign private issuers that are required to file an annual report on Form 20-F with the SEC must include their statement of significant differences in that annual report. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's website. As any foreign private issuer availing itself of the proposed exemption would have to disclose that fact in its statement of significant differences, the Exchange does not propose to require those companies to comply with the disclosure requirement of Rule 10C-1(b)(1)(iii)(A). While Section 303A.11 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 303A.05(c). The Exchange proposes to grant these issuers a general exemption from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1.

(b) Statutory Basis

The Exchange believes that the proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes

²⁴ 17 CFR 240.10C-1(b)(5)(i).

that the proposed rule change is consistent with Section 6(b)²⁵ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁶ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendments to its compensation committee listing standards are consistent with the protection of investors and the public interest in that they strengthen the independence requirements for compensation committee membership, provide additional authority to compensation committees and require compensation committees to consider the independence of compensation consultants.

The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers and smaller reporting companies are consistent with Section 10C and Rule 10C-1, for the reasons stated above in the “Purpose” section, including because (i) Rule 10C-1(b)(5)(ii) explicitly exempts smaller reporting companies and (ii) foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing NYSE listing requirements. The Exchange believes it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1. The Exchange believes that it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange’s compensation committee requirement, for the structural reasons discussed in the “Purpose” section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Exchange Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not solicited written comments on the proposed rule change. The Exchange has received two comment letters on the proposed rule change.²⁷ One commenter made the following points: (i) the Exchange should specify that the relevant factors for consideration with respect to compensation committee independence should include a consideration of fees received for service on the board itself; (ii) the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers; (iii) the additional factors to be considered for compensation committee independence should be considered as a part of general board independence determinations; and (iv) the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of board independence.

The Exchange does not believe that it is appropriate to consider board compensation as part of the compensation committee independence determination with respect to individual directors. Non-executive directors devote considerable time to the affairs of the companies on whose boards they sit and eligible candidates would be difficult to find if board and committee service were unpaid in nature. Consequently, independent directors of listed companies are almost invariably paid for their board and committee service. As all independent directors are almost certainly going to receive board compensation from the company and do so on terms determined by the board as a whole, the Exchange does not believe that an analysis of the board compensation of individual directors is a meaningful consideration in determining their independence for purposes of compensation committee service.

The Exchange's existing director independence requirements require the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Commentary included in Section 303A.02(a) makes this explicit by stating that when the board is making an affirmative independence determination "the concern is independence from

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Both of these letters were addressed to NYSE Regulation, Inc. Neither author indicated that the comments related to just one of the three national securities exchanges owned by NYSE Euronext. Therefore, the Exchange is addressing those comments to the extent they are applicable to its existing rules and the proposed amendments.

management.” Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a part of the board’s general independence determinations for all independent directors. Section 303A.02(a) notes that “[I]t is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director’s relationship to a listed company” and that the board should therefore “broadly consider all relevant facts and circumstances” when making affirmative independence determinations. As such, the Exchange believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 303A.02(a) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

The second commenter proposed that the Exchange should require companies to make a public disclosure with respect to the factors considered by the compensation committee in reviewing the independence of compensation consultants, legal counsel and other compensation advisers. This commenter also proposed that the Exchange should require with respect to outside counsel hired by the compensation committee the same disclosure as is required by Item 407(e)(3)(iv) of Regulation S-K with respect to the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. The Exchange does not believe that it is necessary to establish additional disclosure requirements of this nature. Item 407 of Regulation S-K contains extensive disclosure requirements with respect to a listed company’s corporate governance and the Exchange’s own rules generally incorporate those requirements by reference where applicable. Moreover, with respect to disclosure of any conflicts of interest that may arise with respect to outside counsel hired by the compensation committee, the Exchange believes that the rigorous conflict of interest requirements applicable to attorneys adequately address such concerns. And the Exchange is mindful that requiring additional public disclosures regarding outside counsel could require a listed company to disclose information that otherwise may be protected by attorney-client privilege.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for

Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The Exchange is seeking to adopt the proposed amendments to its compensation committee listing standards to comply with the requirements of SEC Rule 10C-1.

9. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 2 – Comment Letters

Exhibit 5 – Proposed Rule Text

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NYSE-2012-49)

[Date]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange's Listed Company Manual to Comply with the Requirements of Securities and Exchange Commission Rule 10C-1

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on September 25, 2012, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange's Listed Company Manual (the "Manual") to comply with the requirements of Securities and Exchange Commission ("Commission" or "SEC") Rule 10C-1.⁴ The text of the proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 17 CFR 240.10C-1.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Manual to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 303A.00, 303A.02(a) and 303A.05 will not become operative until July 1, 2013. Consequently, the existing text of these sections will remain in the Manual until June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended provisions of those sections will be included in the Manual with introductory text indicating that the revised text does not become operative until July1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”)⁵ added Section 10C to the Securities Exchange Act of 1934.⁶ Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any

⁵ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

⁶ 15 U.S.C. 78j-3.

equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. On June 20, 2012, to comply with the requirements of Section 10C, the Commission adopted new Rule 10C-1, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.

Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, Rule 10C-1(b)(1)(ii)⁷ requires the exchanges to consider relevant factors including, but not limited to: (i) the source of the director's compensation, including any consulting, advisory or other compensatory fees paid by the listed company; and (ii) whether the director has an affiliate relationship with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. Rule 10C-1(a)(4)⁸ requires that the rule filing submitted to the SEC by each exchange in connection with the adoption of the rules required by Rule 10C-1 must include a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange's consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.

The Exchange's director independence standards are set forth in Section 303A.02. Section 303A.02(a) provides that no director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (directly or as a partner, shareholder or officer of an organization that

⁷ 17 CFR 240.10C-1(b)(1)(ii).

⁸ 17 CFR 240.10C-1(a)(4).

has a relationship with the company).⁹ In addition, Section 303A.02(b) provides that a director may not be deemed to be independent if such director has a relationship with the listed company which violates any one of five “bright line” tests.¹⁰ Section 303A.02(b)

⁹ Commentary to Section 303A.02(a) notes that it is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, the commentary states that it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, the Exchange believes that, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. The Exchange does not view the ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

¹⁰ The following are the “bright line” tests set forth in Section 303A.02(b):

- (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company.
- (ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).
- (iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.
- (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.

will continue to be applicable to independence determinations in relation to compensation committee service, as compensation committee members will be required to be independent under the Exchange's general board independence standards set forth in Section 303A.02, in addition to the independence requirements proposed specifically for compensation committee service.

The Exchange proposes to amend Section 303A.02(a) of the Manual to adopt proposed Section 303A.02(a)(ii),¹¹ which would require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to, the two factors explicitly enumerated in Rule 10C-1(b)(ii). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, commentary to proposed Section 303A.02(a)(ii) provides that the board should consider whether the director receives compensation from any person or entity that would impair

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- (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and 303A.09, a director of a business development company is considered to be independent if he or she is not an "interested person" of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

¹¹ As proposed, the current text of Section 303.02(a) would become Section 303A.02(a)(i).

his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 303A.02(a)(ii) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),¹² the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.¹³ Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives

¹² Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

¹³ See Adopting Release at 38428.

them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing "bright line" independence standards as set forth in Section 303A.02(b) of the Manual are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 303A.02(a) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of "bright line" tests in Section 303A.02(b). The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 303A.02(a)(ii), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

Rule 10C-1(b)(2)¹⁴ requires exchange rules to mandate that compensation committees must have broad authority to engage advisers to assist in their performance of the committee's functions. Specifically, exchange rules must mandate that:

- (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; and
- (ii) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any

¹⁴ 17 CFR 240.10C-1(b)(2).

compensation consultant, independent legal counsel and other adviser retained by the compensation committee.

Rule 10C-1(b)(3)¹⁵ requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

The required powers of the compensation committee under Rule 10C-1(b)(2) and (3) as set forth above are in significant part already required by the NYSE's existing compensation committee listing standard, as they are required elements of the compensation committee charter as set forth in Section 303A.05(b). In the interests of clarity and emphasis, the Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as a proposed new subsection (c) of Section 303A.05. The Exchange proposes to remove the comparable requirements currently in Section 303A.05(b) commentary and replace them with a provision stating that the compensation committee charter must provide that the committee has all of the powers specified in new subsection (c).

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹⁶ provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

¹⁵ 17 CFR 240.10C-1(b)(3).

¹⁶ 17 CFR 240.10C-1(b)(4).

- (i) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- (ii) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- (iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- (iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- (v) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- (vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

Accordingly, the Exchange proposes to include in proposed Section 303A.05(c) a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 303A.05(c) would not include any specific additional factors for consideration, as the Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing

standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),¹⁷ the Exchange proposes to include in Section 303A.05(c) an explicit statement that nothing in Section 303A.05(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed in Section 303A.05(c) would specify that the compensation committee need not engage in an analysis of the independence factors before consulting with or obtaining advice from in-house legal counsel.

Cure Periods

Rule 10C-1(a)(3)¹⁸ requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the

¹⁷ 17 CFR 240.10C-1(b)(2)(iii).

¹⁸ 17 CFR 240.10C-1(a)(3).

occurrence of the event that caused the member to be no longer independent. The Exchange proposes to amend Section 303A.00 to adopt this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of the director's reasonable control. However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).¹⁹ Consistent with the transition periods approved by the SEC for inclusion in Section 303A at the time of its original adoption,²⁰ the Exchange proposes to amend Section 303A.00 to provide that listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new Section 303A.02(a)(ii) compensation committees independence standards . Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same

¹⁹ See Adopting Release at 38444.

²⁰ See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR-NYSE-2002-33).

approach in connection with the proposed changes to the compensation committee independence standards.

In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 303A.00. Transition periods are available to: companies listing in connection with their initial public offerings (“IPOs”) or which did not have a class of common stock registered under the Exchange Act prior to the listing date;²¹ companies listing in connection with a spin-off or carve-out; companies listing upon emergence from bankruptcy; companies previously registered under Section 12(g) of the Exchange Act; and companies previously registered under Section 12(b) of the Exchange Act to the extent the national securities exchange on which they were listed did not have the same requirement; and companies that cease to qualify as a controlled company or a foreign private issuer. All of the foregoing categories of issuers (other than companies previously registered under Section 12(b) of the Exchange Act) would continue to be entitled to a transition under which the company must have: at least one independent member on its compensation committee by the listing date (or (i) in the case of an IPO, the earlier of the closing date of the IPO or five business days from the listing date, or (ii) in the case of a spin-off or carve-out, by the date the transaction closes); at least a majority of independent members on the compensation committee within 90 days of the listing date; and a fully independent compensation committee within one year of the listing date. A company that ceases to qualify as a controlled company would continue to

²¹ For purposes of Section 303A other than Sections 303A.06 and 303A.12(b), a company is considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act.

have a transition under which it must have at least one independent member on its compensation committee by the date its status changed, at least a majority of independent members on the compensation committee within 90 days of the date its status changed and a fully independent compensation committee within one year of the date its status changed. A company that ceases to be a foreign private issuer would continue to have a transition under which it must have a fully independent compensation committee within six months of the Foreign Private Issuer Determination Date.²² A company previously registered under Section 12(b) of the Exchange Act must satisfy the requirements of Section 303A within one year of the listing date to the extent the national securities exchange on which it was listed did not have the same requirements; and if the other exchange had a substantially similar requirement and the company was afforded a transition period that had not expired, the company has the same transition period as would have been available to it on the other exchange.

The Exchange proposes to exempt smaller reporting companies²³ from compliance with the proposed new independence requirements with respect to compensation committee service. Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the

²² Section 303A.00 currently defines the “Determination Date” as the date at the end of a company’s second fiscal quarter on which it is required by SEC Rule 240.3b-4 to test its foreign private issuer status on an annual basis. The Exchange proposes to change this to the “Foreign Private Issuer Determination Date” so it is distinguished from the new “Smaller Reporting Company Determination Date”.

²³ As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

Exchange proposes to adopt a new transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 303A.02(a)(ii).²⁴ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, (I) to have a committee composed entirely of members that meet the independence requirements of proposed Section 303A.02(a)(ii) within six months of the Smaller Reporting Company Determination Date and (II) to comply with Section 303A.05(c)(iv) as of the Smaller Reporting Company Determination Date. The Exchange also proposes to include a new subsection in Section 303A.00 specifying that smaller reporting companies are subject to proposed Section 303A.05(c) with the exception of proposed Section 303A.05(c)(iv) requirements with respect to the Compensation Committee's consideration of compensation consultant's independence from management. Under this approach, smaller reporting companies will effectively be subject to precisely the same requirements as is currently the case.

General Exemptions

Rule 10C-1(b)(5)²⁵ provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies, and Rule 10C-1(b)(1)(iii)(A)²⁶ provides an automatic exemption from the compensation committee independence requirements for limited partnerships, companies in bankruptcy, open-end management investment companies registered under the Investment Company

²⁴ A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion *infra*.

²⁵ 17 CFR 240.10C-1(b)(5).

²⁶ 17 CFR 240.10C-1(b)(1)(iii)(A).

Act of 1940 (“1940 Act”). Rule 10C-1(b)(1)(iii)(A) also exempts from the compensation committee independence requirements any foreign private issuer that discloses in its annual report filed with the SEC the reasons that the foreign private issuer does not have an independent compensation committee.

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuer that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the NYSE’s existing compensation committee requirements. Thus, as proposed, controlled companies, limited partnerships and companies in bankruptcy, closed-end and open-end funds registered under the 1940 Act, passive business organizations in the form of trusts (such as royalty trusts), derivatives and special purpose securities (such as those described in Sections 703.19 and 703.20 of the Manual), and issuers whose only listed equity security is a preferred stock, would be exempt. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees (e.g., passive business organizations in the form of trusts or issuers of derivative or special purpose securities); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange

believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

Section 303A.00 currently provides that foreign private issuers are permitted to follow home country practice in lieu of compliance with the Exchange's compensation committee listing standard. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),²⁷ from the proposed new compensation committee requirements to foreign private issuers that follow home country practice. The Exchange notes that Section 303A.11 requires foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. Foreign private issuers that are required to file an annual report on Form 20-F with the SEC must include their statement of significant differences in that annual report. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's website. As any foreign private issuer availing itself of the proposed exemption would have to disclose that fact in its statement of significant differences, the Exchange does not propose to require those companies to comply with the disclosure requirement of Rule 10C-1(b)(1)(iii)(A). While Section 303A.11 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant

²⁷ 17 CFR 240.10C-1(b)(5)(i).

difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 303A.05(c). The Exchange proposes to grant these issuers a general exemption from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1.

2. Statutory Basis

The Exchange believes that the proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes that the proposed rule change is consistent with Section 6(b)²⁸ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁹ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating

²⁸ 15 U.S.C. 78f(b).

²⁹ 15 U.S.C. 78f(b)(5).

transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendments to its compensation committee listing standards are consistent with the protection of investors and the public interest in that they strengthen the independence requirements for compensation committee membership, provide additional authority to compensation committees and require compensation committees to consider the independence of compensation consultants.

The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers and smaller reporting companies are consistent with Section 10C and Rule 10C-1, for the reasons stated above in the “Purpose” section, including because (i) Rule 10C-1(b)(5)(ii) explicitly exempts smaller reporting companies and (ii) foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing NYSE listing requirements. The Exchange believes it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt

from compliance with Rule 10C-1. The Exchange believes that it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange's compensation committee requirement, for the structural reasons discussed in the "Purpose" section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has not solicited written comments on the proposed rule change. The Exchange has received two comment letters on the proposed rule change.³⁰ One commenter made the following points: (i) the Exchange should specify that the relevant factors for consideration with respect to compensation committee independence should include a consideration of fees received for service on the board itself; (ii) the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers; (iii) the additional factors to be considered for

³⁰ Both of these letters were addressed to NYSE Regulation, Inc. Neither author indicated that the comments related to just one of the three national securities exchanges owned by NYSE Euronext. Therefore, the Exchange is addressing those comments to the extent they are applicable to its existing rules and the proposed amendments.

compensation committee independence should be considered as a part of general board independence determinations; and (iv) the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of board independence.

The Exchange does not believe that it is appropriate to consider board compensation as part of the compensation committee independence determination with respect to individual directors. Non-executive directors devote considerable time to the affairs of the companies on whose boards they sit and eligible candidates would be difficult to find if board and committee service were unpaid in nature. Consequently, independent directors of listed companies are almost invariably paid for their board and committee service. As all independent directors are almost certainly going to receive board compensation from the company and do so on terms determined by the board as a whole, the Exchange does not believe that an analysis of the board compensation of individual directors is a meaningful consideration in determining their independence for purposes of compensation committee service.

The Exchange's existing director independence requirements require the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Commentary included in Section 303A.02(a) makes this explicit by stating that when the board is making an affirmative independence determination "the concern is independence from management." Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a

part of the board's general independence determinations for all independent directors. Section 303A.02(a) notes that "[I]t is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company" and that the board should therefore "broadly consider all relevant facts and circumstances" when making affirmative independence determinations. As such, the Exchange believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 303A.02(a) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

The second commenter proposed that the Exchange should require companies to make a public disclosure with respect to the factors considered by the compensation committee in reviewing the independence of compensation consultants, legal counsel and other compensation advisers. This commenter also proposed that the Exchange should require with respect to outside counsel hired by the compensation committee the same disclosure as is required by Item 407(e)(3)(iv) of Regulation S-K with respect to the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. The Exchange does not believe that it is necessary to

establish additional disclosure requirements of this nature. Item 407 of Regulation S-K contains extensive disclosure requirements with respect to a listed company's corporate governance and the Exchange's own rules generally incorporate those requirements by reference where applicable. Moreover, with respect to disclosure of any conflicts of interest that may arise with respect to outside counsel hired by the compensation committee, the Exchange believes that the rigorous conflict of interest requirements applicable to attorneys adequately address such concerns. And the Exchange is mindful that requiring additional public disclosures regarding outside counsel could require a listed company to disclose information that otherwise may be protected by attorney-client privilege.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2012-49 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2012-49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at www.nyse.com. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2012-49 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Kevin M. O'Neill
Deputy Secretary

³¹ 17 CFR 200.30-3(a)(12).



August 2, 2012

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Re: Rule 10C-1

Ladies & Gentlemen:

As you know, the Securities and Exchange Commission ("SEC") recently promulgated Rule 10C-1. 17 CFR 240.10C-1.¹ Mandated by Section 952 of Dodd-Frank,² the Rule requires national securities exchanges to adopt listing standards that govern compensation committees. Among other things, the exchanges are obligated to propose standards that discuss the "factors relevant to compensation committee independence" and that include "the definition of independence applicable to compensation committee members". Rule 10C-1(a)(4), 17 CFR 240.10C-1(a)(4). The proposal must be promulgated within 90 days.

In defining relevant factors, the exchanges will need to take into account a number of matters. First, as Dodd-Frank requires, the exchanges should specify that the relevant factors include the fees paid by directors in return for service on the board. Second, the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers. Third, the exchanges should clarify that the relevant factors apply to the consideration of independence for all directors, not just those serving on the compensation

¹ I was recently appointed to, and elected Secretary of, the Investor Advisory Committee created by the Securities and Exchange Commission. See <http://www.sec.gov/news/press/2012/2012-58.htm>. Please note that the opinions expressed in this letter are my own and do not reflect the views of the Commission or the Investor Advisory Committee.

² See Section 952, Pub. L. No. 111-203, 124 Stat. 1900 (2010). A copy of the final legislation is here: <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

committee. Finally, the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of director independence.

I. Existing Factors

In mandating the development of “relevant factors,” Congress in Section 10C specified two of them. These included: (A) The source of compensation of a member of the board of directors of an issuer, including any consulting, advisory or other compensatory fee paid by the issuer to such member of the board of directors; and (B) Whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.³

This is not the first time that Congress has expressed concern over the compensation received by directors or their affiliations. Section 10A of the Exchange Act, a provision adopted in Sarbanes Oxley, prohibited directors who had certain affiliations or who received certain types of compensation from serving on the audit committee.⁴ These mandates were implemented in Rule 10A-3. 17 CFR § 240.10A-3.

Dodd-Frank, however, took a different approach. Congress did not impose substantive standards for membership on the compensation committee. Instead, Congress merely required consideration of “relevant factors.” The approach allowed Congress to take a broader view toward the matters that must be considered in determining director independence.

This shift in approach can be seen by comparing the language in Section 10A and Section 10C. Section 10A prohibits a director from serving on the audit committee if he or she accepts “any consulting, advisory, or other compensatory fee from the issuer . . .”⁵ Under the express language, the disqualifying payment must come from the issuer and must resemble consulting or advisory fees. It does not include fees paid to directors for their service on the board.

Section 10C, in contrast, contains much broader language. The provision requires consideration of the “source of compensation of a member of the board of directors of an issuer . . .”⁶ The provision is not limited to compensation paid by the issuer. Nor is it restricted to payments that resemble consulting or advisory fees.⁷ Instead it applies to *all* compensation paid to a director.

Fees paid for service on the board are a form of compensation. *See* Item 402 of Regulation S-K, 17 CFR § 229.402 (providing for disclosure of fees in a table labeled “director compensation”). As a result, the broad language of Section 10C requires that these fees be included within the list of relevant factors. Even without the language in Section 10C, directors’

³ 15 U.S.C. § 78j-3.

⁴ 15 U.S.C. § 78j-1.

⁵ 15 U.S.C. § 78j-1.

⁶ 15 U.S.C. § 78j-3(a)(3)(A)

⁷ While the language of Section 10C does refer to any “consulting, advisory, or other compensatory fee paid by the issuer,” they do not purport to be a definitive list of applicable payments.

fees would need to be included. Fees can amount to a material payment from the issuer,⁸ something the exchanges have recognized.⁹

The exchanges should, therefore, explicitly acknowledge that director compensation under Section 10C includes fees for service on the board and must be considered as a relevant factor. In addition, the listing standard should make clear that director fees must not be considered in isolation but in conjunction with other compensation paid by the issuer.¹⁰

II. Additional Factors

The factors listed in Section 10C are not exclusive. The exchanges may identify other “relevant factors” that must be considered in determining director independence.¹¹ In promulgating Rule 10C-1, the Commission set out a number of other factors that the exchanges should include in the relevant listing standard.

The Commission emphasized “that it is important for exchanges to consider other ties between a listed issuer and a director, in addition to share ownership, that might impair the director’s judgment as a member of the compensation committee.” Specifically, the Commission noted that the exchanges “might conclude that personal or business relationships between members of the compensation committee and the listed issuer’s executive officers should be addressed in the definition of independence.”¹²

It is particularly important that, in identifying the “relevant factors,” the exchanges make clear that they include any personal or business relationships between directors and executive officers. These types of relationships can impair independence,¹³ something at least one exchange has noted.¹⁴

⁸ Total compensation for directors can exceed \$1 million for service on the board. See Apple Proxy Statement (filed in 2011) (total compensation of two directors exceeded \$1 million), available at <http://sec.gov/Archives/edgar/data/320193/000119312511003231/ddef14a.htm>

⁹ See 303A.09 Corporate Governance Guidelines (“The board should be aware that questions as to directors’ independence may be raised when directors’ fees and emoluments exceed what is customary.”).

¹⁰ The rules of the exchanges permit the payment to independent directors of some non-fee compensation. See 303A.02 Independence Tests (“The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).”); see also Nasdaq Rule 5605(a)(2)(B).

¹¹ See Exchange Act Release No. 67220 (June 20, 2012) (“Section 10C gives the exchanges the flexibility to establish their own minimum independence criteria for compensation committee members after considering relevant factors, including the two enumerated in Section 10C(a)(3).”).

¹² Exchange Act Release No. 67220 (June 20, 2012).

¹³ See generally J. Robert Brown, Jr., *Disloyalty Without Limits: ‘Independent’ Directors and the Elimination of the Duty of Loyalty*, 95 KY L. Rev. 53 (2006-2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959434

¹⁴ See <http://www.theracetothebottom.org/independent-directors/the-nyse-and-the-problems-of-director-independence-the-non-t.html> (NYSE official said to have advised “that, in interpreting its rules, the NYSE believes relationships between a director and a member of senior management that are material to either party should be

At the same time, making the factor explicit will clarify an ambiguity in the rules of the exchanges. The NYSE only requires that boards, in determining director independence, consider whether the director has a material relationship “with the listed company . . .”¹⁵ The Nasdaq uses similar language.¹⁶

Some companies have apparently interpreted the language to suggest that independence does not require consideration of the business and personal relationships between directors and officers.¹⁷ Representatives of the NYSE have disagreed with this interpretation.¹⁸ Nonetheless, by making these factors explicit, the exchanges will avoid any erroneous interpretations of their existing listing standards.

III. Simplification

Currently the exchanges provide two different standards for director independence. Each of the exchanges has a definition applicable to all directors. With respect to directors who serve on the audit committee, however, there is a separate definition. *See* Rule 10A-3, 17 CFR 240.10A-3. To the extent that the exchanges limit the factors required by Section 10C to compensation committees, it will effectively be putting in place a third set of criteria for director independence.

The presence of three standards adds to the complexity of board membership. Moreover, it limits the ability of independent directors to sit on the various committees. Particularly when vacancies occur, boards may find themselves with an inadequate supply of directors who meet the standards for each respective committee.

The exchanges should, therefore, specify that the “relevant factors” must be considered when determining the independence of all directors on the board, not just those assigned to the compensation committee. Doing so will simplify the board structure and allow all independent directors to be eligible to sit on the compensation committee.

considered by a board of directors in its evaluation of a director’s independence.”). *See also* Commentary to NYSE Rule 303A.02(a) (with respect to director independence, “the concern is independence from management”).

¹⁵ *See* NYSE Manual 303A.02(a).

¹⁶ Nasdaq provides that independence can be lost by “having a relationship, which, in the opinion of the Company’s board of directors, would interfere with the exercise of independent judgment”. Nasdaq Rule 5605(a)(2), available at

http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F. Although not limited to relationships with the issuer, the accompanying interpretation of the standard provides that investors must have confidence that “individuals serving as Independent Directors do not have a relationship with the listed Company that would impair their independence.” IM-5605. Definition of Independence — Rule 5605(a)(2).

¹⁷ At least one NYSE traded company interpreted this language to mean that personal business relationships between directors and officers “generally are not relevant to the independence tests under the New York Stock Exchange rules because they do not create a material relationship between a director and the company.” *See* <http://www.theracetothetbottom.org/independent-directors/2010/6/1/the-nyse-and-the-problems-of-director-independence-the-plain.html>

¹⁸ *See supra* note 14.

The approach will also avoid an unnecessary negative implication. By limiting the relevant factors to directors serving on the compensation committee, the exchanges arguably create an implication that these factors need not be considered when determining director independence in other circumstances. This is inconsistent with existing interpretation and, as a result, may lead to boards mistakenly characterizing directors as independent.¹⁹

IV. Clarifications

In adopting Rule 10C-1, the SEC suggested in the adopting release that no single factor would determine director independence. *See* Exchange Act Release No. 67220 (June 20, 2012) (noting that the factors contained in Rule 10C-1 "should be considered in their totality and that no one factor should be viewed as a determinative factor of independence.").

The statement correctly notes that the factors should be examined in their totality. The exchanges should, however, clarify that a single factor can still result in the loss of independence. Thus, for example, a director might lose his or her independence based upon a material personal or business relationship with other directors or executive officers, irrespective of the application of the other factors. This clarifying interpretation will help boards avoid making erroneous determinations with respect to director independence.

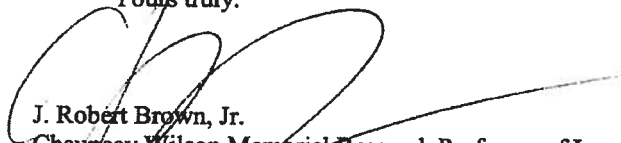
V. Conclusion

Director independence is a critical component of the existing system of corporate governance. By defining a rigorous and comprehensive set of "relevant factors" that must be considered by the board in determining director independence, the exchanges will fulfill the mandates of Dodd-Frank and better ensure investor confidence in the securities markets.

If you would like to discuss this matter further, please do not hesitate to contact me.

With best regards,

Yours truly,



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303-871-6254

¹⁹ *See supra* notes 9 & 14.

From: Robert M. Fields [<mailto:rmfields@rmfieldslaw.com>]
Sent: Monday, June 25, 2012 08:07 PM
To: Janice O'Neill
Subject: Listing Standards Mandated Under Section 952 of Dodd-Frank

Ms. O'Neill: As we briefly discussed last week, on June 20th of this year, the United States Securities and Exchange Commission (the "SEC") published Final Rules under Section 952 of Dodd-Frank dealing with the independence of members of compensation committees of listed issuers and with the independence of compensation consultants and legal counsel providing services to such compensation committees. Contained in the Final Rules is a requirement that the national securities exchanges promulgate listing standards enforcing certain provisions of Section 952.

Section 10C(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), enacted into law under Section 952 of Dodd-Frank, provides that compensation committees of listed issuers may select compensation consultants, legal counsel and other compensation advisors only after taking into account certain independence factors identified by the SEC. New SEC Regulation Section 240.10C-1 provides that the national securities exchanges must adopt listing standards requiring the listed issuers to consider such independence factors. I believe that the listing standards to be issued by the New York Stock Exchange, as well as by the other stock exchanges, should require the listed issuers to publicly disclose in their annual certification, a press release or other public statements how they are complying with the requirement to consider these independence factors.

From the prosaic requirement that automobile owners must show proof that they have obtained liability insurance before they can register their cars, to the more germane rule providing that that listed issuers must disclose the opinions of their independent auditors (in order to publicly establish that such audits actually took place), a common theme has evolved: In virtually all situations where a statute, regulation or other rule requires a person to engage in an action or activity, establishment of proof of the accomplishment of such action or activity is required. Accordingly, some mechanism should be established by the national securities exchanges to assure the SEC and investors that the requirements of Section 10C(b) of the Exchange Act have been carried out.

New SEC Regulation Section 229.407(e)(3)(iv) provides that certain publicly traded corporations must disclose in their annual proxy statements the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. I believe that there is no rational reason why the same standard should not apply to legal counsel engaged by compensation committees. Thus, I encourage the New York Stock Exchange to require, in its listing standards, that such additional disclosure must be made, either in a publicly-disclosed annual certification, press release or another publicly-issued statement.

Adequate disclosure would provide transparency to the compensation consultant and legal counsel selection process and would also provide useful information to investors (which, in the grand scheme of things, is what Congress is encouraging under Dodd-Frank). Nevertheless, the required disclosure need not be extensive or overly burdensome on the listed issuers. A paragraph generally describing how the listed issuers' compensation committees addressed the

requirements of Section 10C(b) of the Exchange Act, and whether or not they elected to utilize the services of independent consultants, legal counsel or other compensation advisors (and why they did or did not make such an election), should be sufficient. Furthermore, this disclosure need not be made on an annual basis. Once every five years (or more frequently in the event (i) the listed issuers engage one or more new consultants, legal counsel or other compensation advisors or (ii) relevant facts change) should suffice.

Thank you for your time and consideration of this matter. Please do not hesitate to contact me at your convenience if you have any questions or comments. If you would, kindly confirm your receipt of this message.

Robert M. Fields
Attorney at Law
(212) 905-2315

Text of the Proposed Rule Changes

The proposed changes to Section 303A of the Listed Company Manual will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the Listed Company Manual through June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended versions of those sections will also be included in the Listed Company Manual, with introductory text indicating that the revised text does not become operative until July 1, 2013. The rule text in this Exhibit 5 is marked to show how the rule text that will become operative on July 1, 2013, differs from the current rule text.

Additions are underscored. Deletions are [bracketed].

NYSE Listed Company Manual

* * * * *

The following will be the operative text of Section 303A effective through June 30, 2013:

Section 303A.00 Corporate Governance Standards

* * * * *

303A.00 Introduction

* * * * *

Compliance Dates

* * * * *

A Company Ceases to Qualify as a Foreign Private Issuer

To the extent a foreign private issuer ceases to qualify as such under SEC rules (so that it is required to file on domestic forms with the SEC), such company is required to comply with the Section 303A domestic company requirements as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within six months of the date as of which it fails to qualify for foreign private issuer status pursuant to SEC Rule 240.3b-4. Under SEC Rule 240.3b-4, a company tests its status as a foreign private issuer on an annual basis at

the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Determination Date").

- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, within six months of the Determination Date.
- The company must have fully independent nominating and compensation committees as required by Sections 303A.04 and 303A.05, if applicable, within six months of the Determination Date.
- The company's audit committee members must comply with the independence requirements of Section 303A.02, if applicable, within six months of the Determination Date.
- The company must comply with the three-person audit committee requirement of Section 303A.07(a) within six months of the Determination Date.
- The company must comply with the shareholder approval requirements of Section 303A.08 by the Determination Date, subject to the provisions in Section 303A.08 under the heading "Ongoing Transition Period for a Foreign Private Issuer Whose Status Changes."

Disclosure Requirements

If a listed company makes a required Section 303A disclosure in its annual proxy statement, or if the company does not file an annual proxy statement, in its annual report filed with the SEC, it may incorporate such disclosure by reference from another document that is filed with the SEC to the extent permitted by applicable SEC rules. If a listed company is not a company required to file a Form 10-K, then any provision in this Section 303A permitting a company to make a required disclosure in its annual report on Form 10-K filed with the SEC shall be interpreted to mean the annual periodic disclosure form that the listed company does file with the SEC. For example, for a closed-end management investment company, the appropriate form would be the annual Form N-CSR.

* * * * *

303A.02 Independence Tests

In order to tighten the definition of "independent director" for purposes of these standards:

- (a) No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either

directly or as a partner, shareholder or officer of an organization that has a relationship with the company).

Commentary: It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, as the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

Disclosure Requirement: The listed company must comply with the disclosure requirements set forth in Item 407(a) of Regulation S-K.

* * * * *

303A.05 Compensation Committee

- (a)** Listed companies must have a compensation committee composed entirely of independent directors.
- (b)** The compensation committee must have a written charter that addresses:
 - (i)** the committee's purpose and responsibilities - which, at minimum, must be to have direct responsibility to:
 - (A)** review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation;
 - (B)** make recommendations to the board with respect to non-CEO executive officer compensation, and incentive-compensation and equity-based plans that are subject to board approval; and
 - (C)** prepare the disclosure required by Item 407(e)(5) of Regulation S-K;
 - (ii)** an annual performance evaluation of the compensation committee.

Commentary: In determining the long-term incentive component of CEO compensation, the committee should consider the listed company's performance and relative shareholder return, the value of similar incentive awards to CEOs at comparable companies, and the awards given to the listed company's CEO in past years. To avoid confusion, note that the compensation committee is not precluded from approving awards (with or without ratification of the board) as may be required to comply with applicable tax laws (i.e., Rule 162(m)). Note also that nothing in Section 303A.05(b)(i)(B) is intended to preclude the board from delegating its authority over such matters to the compensation committee.

The compensation committee charter should also address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to delegate to subcommittees); and committee reporting to the board.

Additionally, if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.

Boards may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a committee charter.

Nothing in this provision should be construed as precluding discussion of CEO compensation with the board generally, as it is not the intent of this standard to impair communication among members of the board.

Website Posting Requirement: A listed company must make its compensation committee charter available on or through its website. If any function of the compensation committee has been delegated to another committee, the charter of that committee must also be made available on or through the listed company's website.

Disclosure Requirements: A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its compensation committee charter is available on or through its website and provide the website address.

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The following will be the operative text of Section 303A effective commencing July 1, 2013:

303A.00 Introduction

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Equity Listings

Section 303A applies in full to all companies listing common equity securities, with the following exceptions:

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Foreign Private Issuers

Listed companies that are foreign private issuers (as such term is defined in Rule 3b-4 under the Exchange Act) are permitted to follow home country practice in lieu of the provisions of this Section 303A, except that such companies are required to comply with the requirements of Sections 303A.06, 303A.11 and 303A.12(b) and (c).

Smaller Reporting Companies

Listed companies that satisfy the definition of smaller reporting company in Regulation S-K, Item 10(f)(1) are not required to comply with Section 303A.02(a)(ii). However, smaller reporting companies must comply with all other applicable requirements under Section 303A.05, with the exception of Section 303A.05(c)(iv).

* * * * *

Transition Periods for Compensation Committee Requirements

Listed companies will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new standards with respect to compensation committees contained in Sections 303A.02(a)(ii) and 303A.05(c).

Compliance Dates

Companies listing on the NYSE are required to comply with all applicable requirements of Section 303A as of the date that the company's securities first trade on the NYSE (the "listing date") unless otherwise provided below.

* * * * *

A Company Ceases to Qualify as a Foreign Private Issuer

To the extent a foreign private issuer ceases to qualify as such under SEC rules (so that it is required to file on domestic forms with the SEC), such company is required to comply with the Section 303A domestic company requirements as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within six months of the date as of which it fails to qualify for foreign private issuer status pursuant to SEC Rule 240.3b-4. Under SEC Rule 240.3b-4, a company tests its status as a foreign private issuer on an annual basis at the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Foreign Private Issuer Determination Date").
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, within six months of the Foreign Private Issuer Determination Date.
- The company must have fully independent nominating and compensation committees as required by Sections 303A.04 and 303A.05, if applicable, within six months of the Foreign Private Issuer Determination Date.
- The company's audit committee members must comply with the independence requirements of Section 303A.02, if applicable, within six months of the Foreign Private Issuer Determination Date.
- The company must comply with the three-person audit committee requirement of Section 303A.07(a) within six months of the Foreign Private Issuer Determination Date.
- The company must comply with the shareholder approval requirements of Section 303A.08 by the Foreign Private Issuer Determination Date, subject to the provisions in Section 303A.08 under the heading "Ongoing Transition Period for a Foreign Private Issuer Whose Status Changes."

A Company Ceases to Qualify as a Smaller Reporting Company

Under SEC Rule 12b-2, a company tests its status as a smaller reporting company on an annual basis at the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Smaller Reporting Company Determination Date"). To the extent a smaller reporting company ceases to qualify as such under SEC rules, it is required, if applicable, to: (I) have a compensation committee of which all of the members meet the independence standard of Section 303A.02(a)(ii) within six months of the Smaller Reporting Company Determination Date; and (II) comply with Section 303A.05(c)(iv) as of the Smaller Reporting Company Determination Date.

* * * * *

Cure Period for Compensation Committee Independence Non-Compliance

If a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with prompt notice to the Exchange and only so long as a majority of the members of the compensation committee continue to be independent, may remain a member of the compensation committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.

Disclosure Requirements

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303A.02 Independence Tests

In order to tighten the definition of "independent director" for purposes of these standards:

(a) (i) No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).

(ii) In addition, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:

(A) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and

(B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.

Commentary: It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, as the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, the board should consider whether the director receives compensation from any person or entity that would impair

his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

(b) NO CHANGE

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303A.05 Compensation Committee

(a) Listed companies must have a compensation committee composed entirely of independent directors. Compensation committee members must satisfy the additional independence requirements specific to compensation committee membership set forth in Section 303A.02(a)(ii).

(b) The compensation committee must have a written charter that addresses:

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(ii) an annual performance evaluation of the compensation committee.

(iii) The rights and responsibilities of the compensation committee set forth in Section 303A.05(c).

Commentary: In determining the long-term incentive component of CEO compensation, the committee should consider the listed company's performance and relative shareholder return, the value of similar incentive awards to CEOs at comparable companies, and the awards given to the listed company's CEO in past years. To avoid confusion, note that the compensation committee is not precluded from approving awards (with or without ratification of the board) as may be required to comply with applicable tax laws (i.e., Rule 162(m)). Note also that nothing in Section 303A.05(b)(i)(B) is intended to preclude the board from delegating its authority over such matters to the compensation committee.

The compensation committee charter should also address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to delegate to subcommittees); and committee reporting to the board.

[Additionally, if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.]

Boards may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a committee charter.

Nothing in this provision should be construed as precluding discussion of CEO compensation with the board generally, as it is not the intent of this standard to impair communication among members of the board.

Website Posting Requirement: A listed company must make its compensation committee charter available on or through its website. If any function of the compensation committee has been delegated to another committee, the charter of that committee must also be made available on or through the listed company's website.

Disclosure Requirements: A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its compensation committee charter is available on or through its website and provide the website address.

(c) (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser.

(ii) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the compensation committee.

(iii) The listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

(iv) The compensation committee may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration, all factors relevant to that person's independence from management, including the following:

(A) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;

(B) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;

(C) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

(D) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;

(E) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and

(F) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

Commentary: Nothing in this Section 303A.05(c) shall be construed: (A) to require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

The compensation committee is required to conduct the independence assessment outlined in Section 303A.05(c)(iv) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house legal counsel.

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