NEW YORK STOCK EXCHANGE PROPOSES TO AMEND CERTAIN CORPORATE GOVERNANCE REQUIREMENTS

September 25, 2009

To Our Clients and Friends:

The New York Stock Exchange is proposing to amend certain of its corporate governance rules contained in Section 303A of the NYSE's listed company manual. The amendments would clarify certain existing disclosure requirements, codify certain interpretations made since the rules were adopted in 2003 and replace certain provisions with applicable disclosure requirements of Regulation S-K. The SEC has published notice to solicit comment on the proposed rule change; see SEC Release No. 34-60653, available at: http://www.sec.gov/rules/sro/nyse/2009/34-60653.pdf . The text of the proposed rule change is available at: http://www.nyse.com.

The proposed amendments generally do not alter the substantive provisions of Section 303A, which primarily focus on director independence and the duties and composition of the audit, nomination and compensation committees of the board. However, the amendments would modify the NYSE's related notice and disclosure requirements that may affect a listed company's disclosure and related policies and procedures. Listed companies should review their disclosure and corporate governance documents and procedures in light of the rules to determine necessary updates and should consult the rule change when preparing their next annual report or annual proxy statement filed with the SEC after January 1, 2010.

The proposed rules also (i) significantly clarify and update transition requirements for, among others, IPO companies and listed companies that cease to be "controlled" companies or lose their foreign private issuer status, (ii) address updates relating to requirements for closed-end funds and (iii) clarify that securities listed under Section 703.22 (securities linked to equity indexes, commodities and currencies) and under Section 703.21 (equity-linked debt securities) are more properly subject to the corporate governance requirements applicable to listed debt securities.

CORPORATE GOVERNANCE DISCLOSURES

In 2006, the SEC adopted Item 407 of Regulation S-K to consolidate and update disclosure requirements for director independence and related corporate governance items. Item 407 is largely redundant with and, in some instances, requires more detailed disclosure than is required by current Section 303A. The proposed rules eliminate each disclosure requirement of Section 303A that is also required by Item 407 of Regulation S-K and directly incorporate

the applicable disclosure requirements of Item 407. The NYSE noted that, in addition to eliminating redundancy between the two provisions, this incorporation is significant because listed companies whose Item 407 disclosure is deficient will be deemed to be out of compliance with NYSE rules and, as a result, subject to potential action for non-compliance by the NYSE.

The proposed rules include the following amendments:

- The general disclosure requirement in Section 303A.00 for controlled companies that take advantage of any corporate governance exemptions will be replaced by the similar disclosure requirements set forth in Instruction 1 to Item 407(a) of Regulation S-K.

- The commentary in Section 303A.02(a) regarding categorical standards of independence for board members will be replaced with the disclosure requirements set forth in Item 407(a) of Regulation S-K. This requires a specific discussion, by category or type, of transactions, relationships or arrangements that were considered by the board with respect to the independence determination as well as disclosure of which directors had relationships that fall within the categorical standards. Section 303A.00 currently requires more general disclosure regarding the categorical standards adopted.

- The Section 303A.05(b)(i)(C) compensation committee charter requirement to prepare a compensation committee report "as required by the SEC" is replaced by incorporating the disclosure required by Item 407(e)(5) of Regulation S-K.

- The Section 303A.07(c)(i)(B) audit committee charter requirement to prepare a report "as required by the SEC" is replaced by incorporating the disclosure required by Item 407(d)(3)(i) of Regulation S-K.

The proposed rules also include several changes that permit more liberal use of a listed company's website for purposes of disclosure. The proposed rules delete the current 303A.14 Website Requirement section and move the audit, compensation and nominating committee charter, corporate governance guidelines and code of business conduct and ethics website requirements to a new Website Posting Requirement section in each applicable subsection in 303A. To conform with Instruction 2 to Item 407 of Regulation S-K, the proposed rules specifically permit listed companies to disclose in their annual proxy statement or annual report that the applicable corporate governance documents are available on the company's website and provide the website and address. The proposed rules also eliminate the requirements in Sections 303A.09 and 303A.10 that a listed company make available hard copies of applicable charters, corporate governance guidelines and codes of

business conduct and ethics available upon request and disclose this fact. The NYSE acknowledged that such document production is unnecessary as they are required to be readily accessible on a listed company's website.

The proposed rules would permit listed companies to make certain additional disclosures currently required in an annual proxy statement or annual report on or through the company's website (with a cross reference contained in the company's annual proxy statement or annual report, as applicable), including:

- Section 303A.02(b)(v) disclosure with respect to contributions made to certain tax exempt organizations;
- Section 303A.03 disclosure regarding the identity of the director chosen to preside at executive sessions of non-management or independent directors;
- Section 303A.03 disclosure regarding the method for interested parties to communicate directly with the presiding director or non-management or independent directors as a group; and
- Section 303A.07(a) disclosure with respect to determinations of impairment of auditor committee member's service.

The amendments also clarify that if a listed company makes a required Section 303A disclosure in its annual report or annual proxy statement, it may incorporate this disclosure by reference to the extent permitted by applicable SEC rules.

CLARIFICATION OF COMPLIANCE DATES

The NYSE proposes to amend the introduction section of Section 303A.00 to clarify when certain types of companies listed on the NYSE are required to comply with the applicable requirements of Section 303A. In general, a listed company must be compliant on the date the company's securities first trade on the NYSE. However, the proposed rules contain updated phase-in requirements that apply to:

- listings in conjunction with an IPO, carve-out or spin-off transaction;
- listings upon emergence from bankruptcy;
- listings of securities previously registered on another national securities exchange or previously registered only pursuant to Section 12(g) of the Exchange Act;
- a listed company that ceases to qualify as a "controlled company;" and

- a listed company that ceases to qualify as a foreign private issuer.

These amendments consist of a new subsection under Section 303A.00 entitled "Compliance Dates." The proposed rules generally codify existing NYSE rules and market practice; however, they do contain some significant updates. For example, the NYSE noted in its proposing release that there have been a number of inquiries as to what constitutes a "group" for purposes of the controlled company definition, and, in response, has proposed to amend the definition to make it clear that, in order to be deemed a controlled company, more than 50% of the voting power *for the election of directors* must be held by an individual group or another company. The NYSE also proposes to modify its transition rules relating to foreign private issuers to take into consideration changes in Rule 3b-4 of the Securities Act (which enables a foreign private issuer to test its eligibility once a year), and accommodates this by tying the Section 303A compliance periods to the determination date for foreign private issuer status which occurs on an annual basis at the end of the company's most recently completed second fiscal quarter.

With respect to IPO issuers, the proposed rules, among other things, codify the advice of the staff of the SEC that a company that voluntarily files reports under the Securities Act may take advantage of the IPO transition rules under Exchange Act Rule 10A-3 and clarifies that a company that was required to file periodic reports with the SEC immediately prior to listing (*e.g.*, because it had a registration statement declared effective within the current fiscal year even if it would be a voluntary filer in the following fiscal year) is precluded from including non-independent directors on its audit committee during the one-year phase-in period provided for IPO issuers.

A company that falls or may fall into any of the above categories should review the amended NYSE rules closely to confirm that it is complying with the current rules.

OTHER AMENDMENTS

Meetings of Non-Management Directors

The NYSE noted in the proposing release that some companies have expressed a preference for holding regular executive sessions of independent directors only as opposed to the current requirement of Section 303A.03 for regular sessions of non-management directors. The proposed rules include revised commentary to specifically permit this approach, as the NYSE believes it satisfies the intention of the rule. In addition, the proposed rules include revised commentary to clarify that *all* interested parties, not just shareholders, must be able to communicate their concerns to the presiding director, or the non-management or independent directors as a group.

Requirements for Audit Committees

Section 303A.06 requires a listed company to have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act. The proposed rules supplement the commentary to Section 303A.06 to include a specific reference to the subsections of Rule 10A-3 that require disclosure when a listed company relies on certain exceptions to the independence requirements contained in that rule.

Section 303A.07 mandates that a listed company must have an audit committee consisting of at least three members, each of whom satisfy the independence standards of Section 303A.02 and Rule 10A-3(b)(1). The proposed rules amend Section 303A.07(a) to clarify that, if an audit committee member simultaneously serves on the audit committees of more than three public companies, then the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and disclose this determination, regardless of whether the listed company limits the number of audit committees on which its audit committee members serve to three or less as the rule previously indicated.

Shareholder Approval of Equity Compensation Plans – Transition Periods for Foreign Private Issuers

Section 303A.08 requires a listed company to submit equity compensation plans, and material amendments thereto, to the vote of shareholders; however, foreign private issuers are exempt from this requirement. The proposed rules supplement Section 303A.08 to grant a limited transition period to a listed company that ceases to qualify as a foreign private issuer with respect to discretionary plans and formula plans that do not comply with Section 303A.08 that were in place prior to the date that its status changed. This transition period would end upon the later to occur of six months after the date as of which the company fails to qualify for foreign private issuer status and the company's first annual meeting after this determination date. In addition, the proposed rules clarify when formula plans may continue to be used after the end of this transition period, subject to certain specified amendments. Under the current rules, the ability of a foreign private issuer to continue to make additional grants after this status change without shareholder approval is not addressed.

Code of Business Conduct and Ethics

The NYSE's current guidance on Section 303A.10 provides that when a waiver of the code of business conduct and ethics is granted to an executive officer or director, this waiver must be disclosed to shareholders within two to three business days of the board's determination. The NYSE is proposing to specify that the waiver must be disclosed to shareholders within four business days of such determination and that disclosure must be made by distributing a press release, providing website disclosure or by filing a current report on Form 8-K with the SEC. This approach conforms with the requirements of Item 5.05 of Form 8-K.

Foreign Private Issuer Disclosure

The NYSE proposes to update Section 303A.11 to conform to Item 16G of Form 20-F, which requires a foreign private issuer that is required to file an annual report on Form 20-F with the SEC to disclose the significant differences between the corporate governance practices followed by the company in its home country and the requirements of Section 303A applicable to public companies in its Form 20-F. Currently, the NYSE rules provide a choice between disclosing such differences in the Form 20-F or through the listed company's website. Foreign private issuers that file a form other than Form 20-F may choose to disclose via their website so long as they disclose that fact in their annual report filed with the SEC.

NYSE Certification Requirements

The NYSE proposes to eliminate the requirement in Section 303A.12(a) that listed companies disclose that they filed the CEO certification required by the NYSE and any certifications required by the SEC in the following year's annual report. In the proposing release, the NYSE noted that investors otherwise have access to this information as the SEC certifications are now filed as an exhibit to Form 10-K, investors now have adequate notification of all material non-compliance with the NYSE's listing standards via the requirement in Item 3.01 of Form 8-K that companies timely disclose any noncompliance with Exchange Act rules and the NYSE has a program of appending a "below compliance" indicator to the ticker symbol of issuers that are non-compliant with the NYSE's corporate governance standards.

The NYSE also proposes to revise Section 303A.12(b) to specify that listed companies must notify the NYSE in writing after any executive officer becomes aware of *any* non-compliance with Section 303A. The current rule calls for such notification only in the event of *material* non-compliance.

Please do not hesitate to call us if you have any questions or to discuss the rule changes generally.

Alan H. Paley
+1 212 909 6694
ahpaley@debevoise.com

Anne C. Meyer
+1 212 909 7441
acmeyer@debevoise.com