SEC UPDATE

NYSE Proposes Further Amendments to Its Corporate Governance Listing Standards

Late last year, the NYSE filed with the SEC for approval proposed additional changes to its corporate governance listing standards. We set forth below a brief summary of the proposed amendments, which remain subject to the SEC comment process:

Director Independence Disclosure

The NYSE found many listed companies' 2005 disclosures of board determinations of director independence to be lacking sufficient detail and clarity. In response, the NYSE has proposed the following methodology to clarify the type of disclosure that listed companies must provide.

In order to have made a valid independence determination, a listed company must disclose for each independent director either that such director has no relationships with the listed company (other than being a director and, if relevant, a shareholder) or has only immaterial relationships with the listed company. In respect of immaterial relationships, the company must either:

- provide a specific description of such relationship, as well as the basis for the board's determination that such relationship does not preclude an independence determination; or

- in lieu of disclosing specific immaterial relationships, a board may determine that certain relationships are categorically immaterial and disclose the types of relationships that it has deemed to be categorically immaterial and need not disclose the specifics of any relationship that falls within such categories. No relationship subject to disclosure under S-K Item 404 may be treated as categorically immaterial.

Requirement for Meetings of Non-Management Directors

In recognition of the fact that some companies have expressed a preference to limit all executive sessions to independent directors, the proposed amendments state that regular executive sessions of a company's independent (rather than non-management) directors will satisfy the NYSE's intentions behind the requirement to hold meetings of non-management directors, and are therefore acceptable. Under the proposals, listed companies may satisfy the requirement to establish procedures for "interested parties" to communicate with the presiding director or the non-management directors as a group through procedures that provide for communication with the independent directors only.

Disclosure of Code-of-Conduct Waivers

Listed companies would be required to disclose waivers of their codes of conduct that are granted to directors and executive officers within four business days of such determination. Previously, the NYSE's

guidance required the waiver to be disclosed within two to three business days of the determination. Under the proposed amendments, disclosure must be made by distributing a press release, posting it on the company's website, or filing a Current Report on Form 8-K.

Notification of Non-Compliance with Corporate Governance Requirements

Under the proposals, CEOs would be required to notify the NYSE in writing promptly after any executive officer of the listed company becomes aware of *any* non-compliance with the NYSE's corporate governance standards, as opposed to requiring notification in the event of material non-compliance as provided by the current rule.

Corporate Governance Disclosures and Posting of Corporate Governance Documents on Websites

The proposed amendments (under a new provision 303A.14): (a) specifically require that companies have and maintain a website; (b) consolidate the requirements relating to proxy statement and website disclosure into one provision of the corporate governance standards and (c) eliminate the requirement that companies disclose in their proxy statements that their corporate governance documents are available on their websites.

The proposed amendments prohibit companies from incorporating required disclosures (as to controlled company status, independent directors, contributions to tax exempt organizations, presiding directors and determinations as to multiple audit committee members) in proxy statements or annual reports by reference to another document.

Disclosure of Certifications

The NYSE proposes to eliminate the requirement that listed companies disclose in their annual reports to shareholders that they have filed the annual NYSE corporate governance certification and the certifications required by the SEC to be included in their most recent annual report on Form 10-K. This requirement caused confusion because it related to filings that were made in the previous year. The requirement also became unnecessary as listed companies are required to include their SEC certifications as an exhibit to their annual report and must file a Current Report on Form 8-K in the event of a material non-compliance with NYSE listing standards.

Transition Periods for Companies Listing in Connection with IPOs

The proposed amendments eliminate the requirement that companies listing in connection with their initial public offering must be in compliance with the corporate governance listing standards as of the date of listing. Instead, the proposed amendments allow such companies until the earlier of the date of closing of the initial public offering or five business days after NYSE trading commences to be in compliance (the "Compliance Date").

The proposed amendments still allow companies listing in connection with their initial public offering to phase in their compliance with the NYSE's independent director requirements. Such companies must have one independent member on each of the audit, nominating and compensation committees by the Compliance

Date, a majority of independent directors on these committees within 90 days of listing and fully independent committees within one year. A majority of independent directors will be required within 12 months of listing.

The proposed amendments also allow companies listing in connection with initial public offerings to phase in their compliance with the three director minimum audit committee requirement on the same phase-in schedule as the independent director requirement. This is in contrast to the current NYSE requirement of having three directors on the audit committee upon listing.

The proposed amendments clarify that voluntary filers undertaking an IPO will not be eligible for the IPO phase-in rules for audit committee independence. However, previously reporting companies that list in connection with an IPO can phase in compliance with the three-person minimum on the same basis as other companies. However, such filers may not have non-independent directors on their audit committees at any time.

Other Proposed Changes

The proposed amendments would also:

- eliminate the choice that foreign private issuers have to disclose the significant differences between their corporate governance practices and NYSE requirements on their websites or in their annual reports, by requiring that disclosure be made on websites only;
- apply phase-in periods similar to those applicable to companies listing in connection with their initial public offering to (i) companies that lose their status as a foreign private issuer, (ii) companies that cease to qualify as a controlled company and (iii) companies that list upon emergence from bankruptcy;
- clarify that a "controlled" company is one in which 50% or more of the voting power for the election of directors, as opposed to 50% or more of the voting power, is held by an individual, a group or another company;
- revise the definition of "immediate family member" to exclude step-children that do not share a step-parent's home, or the in-laws of such step-children; and
- permit telephonic audit committee meetings, but prohibit polling of audit committee members.