

NYSE Proposes Modifications to Corporate Governance Listing Standards

Columbus

52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
tel 614.464.6400
fax 614.464.6350

Washington

1828 L Street N.W.
Eleventh Floor
Washington, D.C. 20036
tel 202.467.8800
fax 202.467.8900

Cleveland

1375 East Ninth Street
2100 One Cleveland Ctr.
Cleveland, Ohio 44114
tel 216.479.6100
fax 216.479.6060

Cincinnati

221 East Fourth Street
Suite 2000, Atrium Two
P.O. Box 0236
Cincinnati, Ohio 45201
tel 513.723.4000
fax 513.723.4056

Alexandria

277 South Washington St.
Suite 310
Alexandria, VA 22314
tel 703.837.6999
fax 703.549.4492

Akron

106 South Main Street
Suite 1100
Akron, Ohio 44308
tel 330.208.1000
fax 330.208.1001

Houston

700 Louisiana Street
Suite 4100
Houston, Texas 77002
tel 713.588.7000
fax 713.588.7050

On August 26, 2009, NYSE filed with the SEC a proposal to modify the NYSE corporate governance listing standards included in Sections 303A and 307 of the NYSE Listed Company Manual. The proposal clarifies certain of the current standards, codifies interpretations made since the standards were originally adopted and replaces certain NYSE disclosure requirements by incorporating applicable SEC disclosure requirements contained in Item 407 of SEC Regulation S-K. ***The changes are proposed to take effect on January 1, 2010.***

The major changes proposed would:

- Clarify that references to a listed company or other company relevant to the NYSE independence standards include any parent or subsidiary in a consolidated group with such company.
- Replace the NYSE independent director disclosure requirements with those of the SEC. As a result, while the current NYSE standards only require that listed companies disclose the categories of relationships that were per se deemed to be immaterial with respect to board independence, the SEC disclosure requirements go further, mandating that companies also disclose which directors had relationships falling within the categorical standards used by the board in determining independence.
- Provide a listed company with the option of holding regular executive sessions of just independent directors in lieu of regular meetings of non-management directors.
- Clarify that a listed company must disclose a method for all interested parties, not just shareholders, to communicate their concerns regarding the listed company to the presiding director or the non-management/independent directors as a group.
- Update the current NYSE requirement for the compensation committee to produce a report to reflect the disclosure required by the SEC regarding compensation of executive officers.
- Combine the NYSE requirements that the audit committee have a minimum of three members and that such audit committee members meet the NYSE independence standards.
- Clarify that the disclosure regarding the board's determination that simultaneous service of any audit committee member on more than three public company audit committees does not impair the member's ability to effectively serve on the listed company's audit committee is mandated ***whenever*** an audit committee member simultaneously serves on more than three public company audit committees.
- Clarify that telephonic conference calls constitute meetings of the audit committee if allowed by applicable corporate law, but that polling directors is not allowed in lieu of a meeting.
- Update the current NYSE requirement for the audit committee to produce a report to reflect the SEC's disclosure requirements.
- Eliminate the NYSE requirement for a listed company to disclose in its annual proxy statement or Form 10-K that its audit, nominating and compensation committee charters, corporate governance guidelines and code of business conduct and ethics are available in print to any shareholder who requests them.

For more information,
please contact your
regular Vorys attorney
or one of the following:

Adam K. Brandt
akbrandt@vorys.com
614.464.6426

Michael A. Cline
macline@vorys.com
614.464.5416

Elizabeth (Betsy) T. Farrar
etfarrar@vorys.com
614.464.5607

James H. Gross
jhgross@vorys.com
614.464.6231

Jason L. Hodges
jlhodges@vorys.com
513.723.8590

Roger E. Lautzenhiser
relautzenhis@vorys.com
513.723.4091

Ronald (Rocky) A. Robins
rarobins@vorys.com
614.464.6223

John M. Saganich
jmsaganich@vorys.com
216.479.6120

J. Bret Treier
jbtreier@vorys.com
330.208.1015

- Specify that any waiver of the code of business conduct and ethics granted to an executive officer or director must be disclosed to shareholders within four business days of such waiver and that the disclosure must be made by distributing a press release, providing website disclosure or filing a Current Report on Form 8-K with the SEC.
- Eliminate the NYSE requirement that a listed company disclose in its annual report whether it filed the certifications required by NYSE and Section 302 of the Sarbanes-Oxley Act.
- Specify that a listed company must notify NYSE in writing after any executive officer of the listed company becomes aware of *any* non-compliance with NYSE's corporate governance listing standards, as opposed to requiring notification only in the event of "material non-compliance" as provided by the current NYSE rule.

In addition, the NYSE standards currently require a listed company to make certain disclosures in the listed company's annual proxy statement or, if the listed company does not file an annual proxy statement, in the listed company's annual report filed with the SEC. NYSE proposes to amend these requirements to provide the option

of either continuing to provide these disclosures in the annual proxy statement or annual report, as applicable, or on or through the listed company's website. If website disclosure is chosen, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. The disclosure requirements affected would include:

- Disclosure regarding contributions made by a listed company to a tax-exempt organization in which any independent director serves as an executive officer if specified contribution amounts are exceeded.
- Disclosure regarding the presiding director for executive sessions of non-management directors or independent directors.
- Disclosure regarding the method for interested parties to communicate directly with the presiding director or the non-management/independent directors as a group.
- Disclosure with respect to the board's determination that the service of any audit committee member on more than three public company audit committees does not impair the ability of such audit committee member to serve effectively on the listed company's audit committee.

This client alert is for general information purposes and should not be regarded as legal advice.