

## 303A.00 Corporate Governance Standards

### 303A.00 Introduction

#### General Application

Companies listed on the Exchange must comply with certain standards regarding corporate governance as codified in this Section 303A. Consistent with the NYSE's traditional approach, as well as the requirements of the Sarbanes-Oxley Act of 2002, certain provisions of Section 303A are applicable to some listed companies but not to others.

#### Equity Listings

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

##### Controlled Companies

A listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company is not required to comply with the requirements of Sections 303A.01, 303A.04 or 303A.05. Controlled companies must comply with the remaining provisions of Section 303A.

Disclosure Requirement: A controlled company that chooses to take advantage of any or all of these exemptions must comply with the disclosure requirements set forth in Instruction 1 to Item 407(a) of Regulation S-K.

##### Limited Partnerships and Companies in Bankruptcy

Due to their unique attributes, limited partnerships and companies in bankruptcy proceedings are not required to comply with the requirements of Sections 303A.01, 303A.04 or 303A.05. However, all limited partnerships (at the general partner level) and companies in bankruptcy proceedings must comply with the remaining provisions of Section 303A.

##### Closed-End and Open-End Funds

The Exchange considers the significantly expanded standards and requirements provided for in Section 303A to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940, given the pervasive federal regulation applicable to them. However, closed-end funds must comply with the requirements of Sections 303A.06, 303A.07(a), 303A.07(b), 303A.08 and 303A.12 with the following exceptions. A closed end fund is not required to comply with the director independence requirements of Section 303A.02 incorporated into Section 303A.07 (a). A closed end fund is also not required to comply with the Disclosure Requirements in Section 303A.07(a), when a director serves on multiple boards in the same fund complex as such service will be counted as one board for purposes of Section 303A. In addition, a closed-end fund is not required to make the audit committee charter required by Section 303A.07(b) available on or through its website.

Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that act, are required to comply with all of the provisions of Section 303A applicable to domestic issuers other than Section 303A.02 and the Section 303A.02 director independence requirements incorporated into 303A.07(a). For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and

303A.09, a director of a business development company shall be 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.

As required by Rule 10A-3 under the Exchange Act, open-end funds (which can be listed as Investment Company Units, more commonly known as Exchange Traded Funds or ETFs) are required to comply with the requirements of Sections 303A.06 and 303A.12(b) and (c).

Rule 10A-3(b)(3)(ii) under the Exchange Act requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters. In view of the external management structure often employed by closed-end and open-end funds, the Exchange also requires the audit committees of such companies to establish such procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the management company, as well as employees of the management company. This responsibility must be addressed in the audit committee charter.

#### Other Entities

Except as otherwise required by Rule 10A-3 under the Exchange Act (for example, with respect to open-end funds), Section 303A does not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities (such as those described in Sections 703.19 and 703.20). To the extent that Rule 10A-3 applies to a passive business organization, listed derivative or special purpose security, such entities are required to comply with Sections 303A.06 and 303A.12(b).

#### 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 Exchange Act Rule 12b-2 are not required to comply with Section 303A.02(a)(ii) and the second paragraph of the Commentary to Section 303A.02(a). However, smaller reporting companies must comply with all applicable requirements under Section 303A.05, with the exception of Section 303A.05(c)(iv).

#### **Preferred and Debt Listings**

Section 303A does not generally apply to companies listing only preferred or debt securities on the Exchange. To the extent required by Rule 10A-3 under the Exchange Act, all companies listing only preferred or debt securities (including securities listed under Sections 703.21 and 703.22) on the NYSE are required to comply with the requirements of Sections 303A.06 and 303A.12(b) and (c).

#### **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 director independence standards with respect to compensation committees contained in Section 303A.02 (a)(ii) and the second paragraph of the Commentary to Section 303A.02(a).

## Compliance Dates

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

### *A Company Listing in Conjunction with an Initial Public Offering*

A company will be considered to be listing in conjunction with an initial public offering as follows:

- For purposes of Section 303A other than Sections 303A.06 (which incorporates Exchange Act Rule 10A-3 by reference) and 303A.12(b), a company will be 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.
- For purposes of Sections 303A.06 and 303A.12(b), a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions of Rule 10A-3(b)(1)(iv)(A) under the Exchange Act, namely, that the company was not, immediately prior to the effective date of a registration statement, a reporting company that was required to file reports with the SEC pursuant to Sections 13(a) or 15(d) of the Exchange Act.

A company listing in conjunction with its initial public offering is required to comply as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing 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, by the earlier of the date the initial public offering closes or five business days from the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the earlier of the date the initial public offering closes or five business days from the listing date, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must have at least one independent member on its audit committee that satisfies the requirements of Rule 10A-3 and, if applicable, Section 303A.02, by the listing date, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement.
- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.
- The company must comply with the internal audit function requirement of Section 303A.07(c) within one year of the listing date.

Note: the company may include non-independent directors on its audit committee during the phase-in period if it was not required to file periodic reports with the SEC

prior to listing. If it was required to file periodic reports with the SEC prior to listing, it is precluded from including non-independent directors on its audit committee during the phase-in period.

*A Company Listing in Conjunction with a Carve-out or Spin-off Transaction*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing 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, by the date the transaction closes.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the date the transaction closes, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must have at least one independent member on its audit committee that satisfies the requirements of Rule 10A-3 and, if applicable, Section 303A.02, by the listing date, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement.
- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.
- The company must comply with the internal audit function requirement of Section 303A.07(c) within one year of the listing date.

Note: the company may include non-independent directors on its audit committee during the phase-in period if it was not required to file periodic reports with the SEC prior to listing. If it was required to file periodic reports with the SEC prior to listing, it is precluded from including non-independent directors on its audit committee during the phase-in period.

*A Company that Lists Upon Emergence from Bankruptcy*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing 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, by the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the listing date, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section

303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.

- The company must comply with the three-person audit committee requirement of Section 303A.07(a) by the listing date.

*A Company Previously Registered Pursuant to Section 12(b) of the Exchange Act*

- The company must satisfy 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 requirement. If the other exchange had a substantially similar requirement and the company was afforded a transition period that had not expired, the company will have the same transition period as would have been available to it on the other exchange.
- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section 303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.

*A Company Previously Registered Pursuant to Section 12(g) of the Exchange Act*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing 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, by the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the listing date, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section 303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.
- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.

*A Company Ceases to Qualify as a Controlled Company*

To the extent a controlled company ceases to qualify as such, it 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 one year of the date its status changed.
- The company must satisfy the website posting requirements of Sections 303A.04 and 303A.05, if applicable, by the date its status changed.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the

date its status changed, at least a majority of independent members on each committee within 90 days of the date its status changed and fully independent committees within one year of the date its status changed.

#### *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 Exchange Act 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"). A smaller reporting company with a public float of \$75 million or more as of the last business day of its second fiscal quarter will cease to be a smaller reporting company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. The compensation committee of a company that has ceased to be a smaller reporting company shall be required to comply with Section 303A.05(c)(iv) as of six months from the date it ceases to be a smaller reporting company and must have:
  - one member of its compensation committee that meets the independence standard of Section 303A.02(a)(ii) and the second paragraph of the commentary to Section 303A.02(a) within six months of that date;
  - a majority of directors on its compensation committee meeting those requirements within nine months of that date; and

- a compensation committee comprised solely of members that meet those requirements within twelve months of that 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**

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.

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49); August 22, 2013 (NYSE-2013-40).

## **303A.01 Independent Directors**

Listed companies must have a majority of independent directors.

*Commentary:* Effective boards of directors exercise independent judgment in carrying out their responsibilities. Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest.

**Amended:** November 25, 2009 (NYSE-2009-89).

## **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.

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

**(b)** In addition, a director is not independent if:

**(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, <sup>1</sup> of the listed company.

*Commentary:* Employment as an interim Chairman or CEO or other executive officer shall not disqualify a director from being considered independent following that employment.

**(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).

*Commentary:* Compensation received by a director for former service as an interim Chairman or CEO or other executive officer need not be considered in determining independence under this test. Compensation received by an immediate family member for service as an employee of the listed company (other than an executive officer) need not be considered in determining independence under this test.



(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 with 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.

*Commentary:* In applying the test in Section 303A.02(b)(v), both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year of such other company. The look-back provision for this test applies solely to the financial relationship between the listed company and the director or immediate family member's current employer; a listed company need not consider former employment of the director or immediate family member.

*Disclosure Requirement:* Contributions to tax exempt organizations shall not be considered payments for purposes of Section 303A.02(b)(v), provided however that a listed company shall disclose either on or through its website or in its annual proxy statement, or if the listed company does not file an annual proxy statement, in the listed company's annual report on Form 10-K filed with the SEC, any such contributions made by the listed company to any tax exempt organization in which any independent director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year from the listed company to the organization exceeded the greater of \$1 million, or 2% of such tax exempt organization's consolidated gross revenues. If this disclosure is made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. Listed company boards are reminded of their obligations to consider the materiality of any such relationship in accordance with Section 303A.02(a) above.

*General Commentary to Section 303A.02(b):* An "immediate family member" includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. When applying the look-back provisions in Section 303A.02(b), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become incapacitated.

In addition, references to the "listed company" or "company" include any parent or subsidiary in a consolidated group with the listed company or such other company as is relevant to any determination under the independent standards set forth in this Section 303A.02(b).

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49).

<sup>1</sup>For purposes of Section 303A, the term "executive officer" has the same meaning specified for the term "officer" in Rule 16a-1(f) under the Securities Exchange Act of 1934.

### 303A.03 Executive Sessions

To empower non-management directors to serve as a more effective check on management, the non-management directors of each listed company must meet at regularly scheduled executive sessions without management.

*Commentary:* To promote open discussion among the non-management directors, companies must schedule regular executive sessions in which those directors meet without management participation. "Non-management" directors are all those who are not executive officers, and includes such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason.

Regular scheduling of such meetings is important not only to foster better communication among non-management directors, but also to prevent any negative inference from attaching to the calling of executive sessions. A non-management director must preside over each executive session, although the same director is not required to preside at all executive sessions.

While this Section 303A.03 refers to meetings of non-management directors, listed companies may instead choose to hold regular executive sessions of independent directors only. An independent director must preside over each executive session of the independent directors, although the same director is not required to preside at all executive sessions of the independent directors.

If a listed company chooses to hold regular meetings of all non-management directors, such listed company should hold an executive session including only independent directors at least once a year.

*Disclosure Requirements:* If one director is chosen to preside at all of these executive sessions, his or her name must be disclosed either on or through the listed company's website or in its annual proxy statement or, if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC. If this disclosure is made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. Alternatively, if the same individual is not the presiding director at every meeting, a listed company must disclose the procedure by which a presiding director is selected for each executive session. For example, a listed company may wish to rotate the presiding position among the chairs of board committees.

In order that all interested parties (not just shareholders) may be able to make their concerns known to the non-management or independent directors, a listed company must also disclose a method for such parties to communicate directly with the presiding director or with those directors as a group either on or through the listed company's website or in its annual proxy statement or, if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC. If this disclosure is made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. Companies may, if they wish, utilize for this purpose the same procedures they have established to comply with the requirement of Rule 10A-3 (b)(3) under the Exchange Act regarding complaints to the audit committee, as applied to listed companies through Section 303A.06.

**Amended:** November 25, 2009 (NYSE-2009-89).

### 303A.04 Nominating/Corporate Governance Committee

**(a)** Listed companies must have a nominating/corporate governance committee composed entirely of independent directors.

**(b)** The nominating/corporate governance committee must have a written charter that addresses:

**(i)** the committee's purpose and responsibilities - which, at minimum, must be to: identify individuals qualified to become board members, consistent with criteria approved by the board, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; develop and recommend to the board a set of corporate governance guidelines applicable to the corporation; and oversee the evaluation of the board and management; and

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

*Commentary:* A nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees. The committee is also responsible for taking a leadership role in shaping the corporate governance of a corporation.

If a listed company is legally required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors need not be subject to the nominating committee process.

The nominating/corporate governance 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. In addition, the charter should give the nominating/corporate governance committee sole authority to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm's fees and other retention terms.

Boards may allocate the responsibilities of the nominating/corporate governance 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.

*Website Posting Requirement:* A listed company must make its nominating/corporate governance committee charter available on or through its website. If any function of the nominating/corporate governance 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 nominating/corporate governance committee charter is available on or through its website and provide the website address.

**Amended:** November 25, 2009 (NYSE-2009-89).

### 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:

**(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.

**(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.

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 (i) in-house legal counsel; and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

Nothing in this Section 303A.05(c) requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser. The compensation committee may select or receive advice from any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in Section 303A.05(c)(iv)(A)—(F).

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49)

### 303A.06 Audit Committee

Listed companies must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act.

*Commentary:* The Exchange will apply the requirements of Rule 10A-3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34-47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies the opportunity to cure defects provided in Rule 10A-3(a)(3) under the Exchange Act.

**Disclosure Requirement:** Please note that Rule 10A-3(d)(1) and (2) require listed companies to disclose reliance on certain exceptions from Rule 10A-3 and to disclose an assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of Rule 10A-3.

**Amended:** November 25, 2009 (NYSE-2009-89).

### 303A.07 Audit Committee Additional Requirements

**(a)** The audit committee must have a minimum of three members. All audit committee members must satisfy the requirements for independence set out in Section 303A.02 and, in the absence of an applicable exemption, Rule 10A-3(b)(1).

*Commentary:* Each member of the audit committee must be financially literate, as such qualification is interpreted by the listed company's board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise, as the listed company's board interprets such qualification in its business judgment. While the Exchange does not require that a listed company's audit committee include a person who satisfies the definition of audit committee financial expert set out in Item 407(d)(5)(ii) of Regulation S-K, a board may presume that such a person has accounting or related financial management expertise.

Because of the audit committee's demanding role and responsibilities, and the time commitment attendant to committee membership, each prospective audit committee member should evaluate carefully the existing demands on his or her time before accepting this important assignment.

**Disclosure Requirement:** If an audit committee member simultaneously serves on the audit committees of more than three public companies, 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 must disclose such determination either on or through the listed company's website or in its annual proxy statement or, if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC. If this disclosure is

made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address.

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

**(i)** the committee's purpose - which, at minimum, must be to:

**(A)** assist board oversight of (1) the integrity of the listed company's financial statements, (2) the listed company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the listed company's internal audit function and independent auditors (if the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the charter must provide that the committee will assist board oversight of the design and implementation of the internal audit function); and

**(B)** prepare the disclosure required by Item 407(d)(3)(i) of Regulation S-K;

**(ii)** an annual performance evaluation of the audit committee; and

**(iii)** the duties and responsibilities of the audit committee - which, at a minimum, must include those set out in Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act , as well as to:

**(A)** at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the listed company;

*Commentary:* After reviewing the foregoing report and the independent auditor's work throughout the year, the audit committee will be in a position to evaluate the auditor's qualifications, performance and independence. This evaluation should include the review and evaluation of the lead partner of the independent auditor. In making its evaluation, the audit committee should take into account the opinions of management and the listed company's internal auditors (or other personnel responsible for the internal audit function). In addition to assuring the regular rotation of the lead audit partner as required by law, the audit committee should further consider whether, in order to assure continuing auditor independence, there should be regular rotation of the audit firm itself. The audit committee should present its conclusions with respect to the independent auditor to the full board.

**(B)** meet to review and discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including reviewing the listed company's specific disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations";

*Commentary:* Meetings may be telephonic if permitted under applicable corporate law; polling of audit committee members, however, is not permitted in lieu of meetings.

With respect to closed-end funds, Section 303A.07(b)(iii)(B) requires that the audit committee meet to review and discuss the fund's annual audited financial statements and semi-annual financial statements. In addition, if a closed-end fund chooses to voluntarily include the section "Management's Discussion of Fund

Performance" in its Form N-CSR, then the audit committee is required to meet to review and discuss it.

**(C)** discuss the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies;

*Commentary:* The audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be done generally (i.e., discussion of the types of information to be disclosed and the type of presentation to be made). The audit committee need not discuss in advance each earnings release or each instance in which a listed company may provide earnings guidance.

**(D)** discuss policies with respect to risk assessment and risk management;

*Commentary:* While it is the job of the CEO and senior management to assess and manage the listed company's exposure to risk, the audit committee must discuss guidelines and policies to govern the process by which this is handled. The audit committee should discuss the listed company's major financial risk exposures and the steps management has taken to monitor and control such exposures. The audit committee is not required to be the sole body responsible for risk assessment and management, but, as stated above, the committee must discuss guidelines and policies to govern the process by which risk assessment and management is undertaken. Many companies, particularly financial companies, manage and assess their risk through mechanisms other than the audit committee. The processes these companies have in place should be reviewed in a general manner by the audit committee, but they need not be replaced by the audit committee.

**(E)** meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;

*Commentary:* To perform its oversight functions most effectively, the audit committee must have the benefit of separate sessions with management, the independent auditors and those responsible for the internal audit function. As noted herein, all listed companies must have an internal audit function. These separate sessions may be more productive than joint sessions in surfacing issues warranting committee attention. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the committee must meet periodically with the company personnel primarily responsible for the design and implementation of the internal audit function.

**(F)** review with the independent auditor any audit problems or difficulties and management's response;

*Commentary:* The audit committee must regularly review with the independent auditor any difficulties the auditor encountered in the course of the audit work, including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management. Among the items the audit committee may want to review with the auditor are: any accounting adjustments that were noted or proposed by the auditor but were "passed" (as immaterial or otherwise); any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement; and any "management" or "internal control" letter issued, or proposed to be issued, by the audit firm to the listed company. The review should also include discussion of the responsibilities, budget and staffing of the listed company's internal audit function. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the review should include discussion of management's plans



with respect to the responsibilities, budget and staffing of the internal audit function and its plans for the implementation of the internal audit function.

**(G)** set clear hiring policies for employees or former employees of the independent auditors; and

*Commentary:* Employees or former employees of the independent auditor are often valuable additions to corporate management. Such individuals' familiarity with the business, and personal rapport with the employees, may be attractive qualities when filling a key opening. However, the audit committee should set hiring policies taking into account the pressures that may exist for auditors consciously or subconsciously seeking a job with the listed company they audit.

**(H)** report regularly to the board of directors.

*Commentary:* The audit committee should review with the full board any issues that arise with respect to the quality or integrity of the listed company's financial statements, the listed company's compliance with legal or regulatory requirements, the performance and independence of the listed company's independent auditors, or the performance of the internal audit function. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the committee should review with the board management's activities with respect to the design and implementation of the internal audit function.

*General Commentary to Section 303A.07(b):* While the fundamental responsibility for the listed company's financial statements and disclosures rests with management and the independent auditor, the audit committee must review: (A) major issues regarding accounting principles and financial statement presentations, including any significant changes in the listed company's selection or application of accounting principles, and major issues as to the adequacy of the listed company's internal controls and any special audit steps adopted in light of material control deficiencies; (B) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects of alternative GAAP methods on the financial statements; (C) the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the listed company; and (D) the type and presentation of information to be included in earnings press releases (paying particular attention to any use of "pro forma," or "adjusted" non-GAAP, information), as well as review any financial information and earnings guidance provided to analysts and rating agencies.

*Website Posting Requirement:* A listed company must make its audit committee charter available on or through its website. A closed-end fund is not required to comply with this website posting requirement.

*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 audit committee charter is available on or through its website and provide the website address.

**(c)** Each listed company must have an internal audit function.

*Commentary:* Listed companies must maintain an internal audit function to provide management and the audit committee with ongoing assessments of the listed company's risk management processes and system of internal control. A listed company may choose to outsource this function to a third party service provider other than its independent auditor. While Section 303A.00 permits certain categories of newly-listed companies to avail themselves of a transition period to comply with the internal audit function requirement, all listed companies must have an internal

audit function in place no later than the first anniversary of the company's listing date.

*General Commentary to Section 303A.07:* To avoid any confusion, note that the audit committee functions specified in Section 303A.07 are the sole responsibility of the audit committee and may not be allocated to a different committee.

**Amended:** November 25, 2009 (NYSE-2009-89); August 22, 2013 (NYSE-2013-40).

### 303A.08 Shareholder Approval of Equity Compensation Plans

Shareholders must be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions explained below.

Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval, with the limited exemptions explained below.

#### Definition of Equity-Compensation Plan

An "equity-compensation plan" is a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an "equity-compensation plan" for these purposes.

However, the following are not "equity-compensation plans" even if the brokerage and other costs of the plan are paid for by the listed company:

- Plans that are made available to shareholders generally, such as a typical dividend reinvestment plan.
- Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
  - the shares are delivered immediately or on a deferred basis; or
  - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).

#### Material Revisions

A "material revision" of an equity-compensation plan includes (but is not limited to), the following:

- A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spin-off or similar transaction).
  - If a plan contains a formula for automatic increases in the shares available (sometimes called an "evergreen formula") or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval unless the plan has a term of not more than ten years.

This type of plan (regardless of its term) is referred to below as a "formula plan." Examples of automatic grants pursuant to a formula are (1) annual grants to directors of restricted stock having a certain dollar value, and (2) "matching contributions," whereby stock is credited to a participant's account based upon the amount of compensation the participant elects to defer.

- If a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval regardless of whether the plan has a term of not more than ten years.

This type of plan is referred to below as a "discretionary plan." A requirement that grants be made out of treasury shares or repurchased shares will not, in itself, be considered a limit or pre-established formula so as to prevent a plan from being considered a discretionary plan.

- An expansion of the types of awards available under the plan.
  - A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.
  - A material extension of the term of the plan.
  - A material change to the method of determining the strike price of options under the plan.
- A change in the method of determining "fair market value" from the closing price on the date of grant to the average of the high and low price on the date of grant is an example of a change that the Exchange would not view as material.
- The deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

Note that an amendment will not be considered a "material revision" if it curtails rather than expands the scope of the plan in question.

#### Repricings

A plan that does not contain a provision that specifically permits repricing of options will be considered for purposes of this listing standard as prohibiting repricing. Accordingly any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. This consideration will not apply to a repricing through an exchange offer that commenced before the date this listing standard became effective.

"Repricing" means any of the following or any other action that has the same effect:

- Lowering the strike price of an option after it is granted.
- Any other action that is treated as a repricing under generally accepted accounting principles.
- Canceling an option at a time when its strike price exceeds the fair market value of the underlying stock, in exchange for another option, restricted stock, or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

#### Exemptions

This listing standard does not require shareholder approval of employment inducement awards, certain grants, plans and amendments in the context of mergers and acquisitions, and certain specific types of plans, all as described below. However, these exempt grants, plans and amendments may be made only

with the approval of the listed company's independent compensation committee or the approval of a majority of the listed company's independent directors. Companies must also notify the Exchange in writing when they use one of these exemptions.

#### Employment Inducement Awards

An employment inducement award is a grant of options or other equity-based compensation as a material inducement to a person or persons being hired by the listed company or any of its subsidiaries, or being rehired following a bona fide period of interruption of employment. Inducement awards include grants to new employees in connection with a merger or acquisition. Promptly following a grant of any inducement award in reliance on this exemption, the listed company must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.

#### Mergers and Acquisitions

Two exemptions apply in the context of corporate acquisitions and mergers.

First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity-compensation awards to reflect the transaction.

Second, shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exemption applies to situations where a party that is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. A plan adopted in contemplation of the merger or acquisition transaction would not be considered "pre-existing" for purposes of this exemption.

Shares available under such a pre-existing plan may be used for post-transaction grants of options and other awards with respect to equity of the entity that is the listed company after the transaction, either under the pre-existing plan or another plan, without further shareholder approval, so long as:

- the number of shares available for grants is appropriately adjusted to reflect the transaction;
- the time during which those shares are available is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and
- the options and other awards are not granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or entities that were its subsidiaries immediately before the transaction.

Any shares reserved for listing in connection with a transaction pursuant to either of these exemptions would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the listed company's outstanding common stock and thus required shareholder approval under Listed Company Manual Section 312.03(c).

These merger-related exemptions will not result in any increase in the aggregate potential dilution of the combined enterprise. Further, mergers or acquisitions are not routine occurrences, and are not likely to be abused. Therefore, the Exchange considers both of these exemptions to be consistent with the fundamental policy involved in this standard.

#### Qualified Plans, Parallel Excess Plans and Section 423 Plans

The following types of plans (and material revisions thereto) are exempt from the shareholder approval requirement:

- plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code (e.g., ESOPs);
- plans intended to meet the requirements of Section 423 of the Internal Revenue Code; and
- "parallel excess plans" as defined below.

Section 401(a) plans and Section 423 plans are already regulated under the Internal Revenue Code and Treasury regulations. Section 423 plans, which are stock purchase plans under which an employee can purchase no more than \$25,000 worth of stock per year at a plan-specified discount capped at 15%, are also required by the Internal Revenue Code to receive shareholder approval. While Section 401(a) plans and parallel excess plans are not required to be approved by shareholders, U.S. GAAP requires that the shares issued under these plans be "expensed" (i.e., treated as a compensation expense on the income statement) by the company issuing the shares.

An equity-compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable Section 401(a) plan, Section 423 plan or parallel excess plan that the listed company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from shareholder approval under this section.

The term "parallel excess plan" means a plan that is a "pension plan" within the meaning of the Employee Retirement Income Security Act ("ERISA") that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a) to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may hereafter be enacted. A plan will not be considered a parallel excess plan unless (1) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limits that may hereafter be enacted); (2) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limits described in the preceding sentence and the limitation described in clause (3); and (3) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

#### Transition Rules

##### Initial Limited Transition Period

Except as provided below, a plan that was adopted before June 30, 2003 will not be subject to shareholder approval under this listing standard unless and until it is materially revised.

In the case of a discretionary plan (as defined in "Material Revisions" above), whether or not previously approved by shareholders, additional grants may not be made without further shareholder approval. In applying this rule, if a plan can be separated into a discretionary plan portion and a portion that is not discretionary, the non-discretionary portion of the plan can continue to be used separately, under the appropriate transition rule. For example, if a shareholder-approved plan permits

both grants pursuant to a provision that makes available a specific number of shares, and grants pursuant to a provision authorizing the use of treasury shares without regard to the specific share limit, the former provision (but not the latter) may continue to be used after the transition period, under the general rule above.

Similarly, in the case of a formula plan (as defined in "Material Revisions" above) that either (1) has not previously been approved by shareholders or (2) does not have a term of ten years or less, additional grants may not be made without further shareholder approval.

A shareholder-approved formula plan may continue to be used if it is amended to provide for a term of ten years or less from the date of its original adoption or, if later, the date of its most recent shareholder approval. Such an amendment would not itself be considered a "material revision" requiring shareholder approval.

In addition, a formula plan may continue to be used, without shareholder approval, if the grants after June 30, 2003 are made *only* from the shares available immediately before the effective date, in other words, based on formulaic increases that occurred prior June 30, 2003.

#### *Ongoing Transition Period for a Foreign Private Issuer Whose Status Changes*

To the extent that a listed foreign private issuer ceases to qualify as such under SEC rules (so that it is required to file on domestic forms with the SEC) and as a result of such change in status becomes subject to Section 303A.08 for the first time, such listed company will be granted a limited transition period 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 so that additional grants may be made after the date that its status changed without shareholder approval. This transition period will end upon the later to occur of:

- six months after the date as of which the listed company 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"); and
- the first annual meeting after the Determination Date,

but, in any event no later than one year after the Determination Date.

A shareholder-approved formula plan may continue to be used after the end of this transition period if it is amended to provide for a term of ten years or less from the date of its original adoption or, if later, the date of its most recent shareholder approval. Such an amendment may be made before or after the Determination Date, and would not itself be considered a "material revision" requiring shareholder approval.

In addition, a formula plan may continue to be used, without shareholder approval, if the grants after the date that the listed company's status changed are made only from the shares available immediately before the Determination Date, in other words, based on formulaic increases that occurred prior to the Determination Date.

**Amended:** November 25, 2009 (NYSE-2009-89).

### **303A.09 Corporate Governance Guidelines**

Listed companies must adopt and disclose corporate governance guidelines.

*Commentary:* No single set of guidelines would be appropriate for every listed company, but certain key areas of universal importance include director

qualifications and responsibilities, responsibilities of key board committees, and director compensation.

The following subjects must be addressed in the corporate governance guidelines:

- **Director qualification standards.** These standards should, at minimum, reflect the independence requirements set forth in Sections 303A.01 and 303A.02. Companies may also address other substantive qualification requirements, including policies limiting the number of boards on which a director may sit, and director tenure, retirement and succession.
- **Director responsibilities.** These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.
- **Director access to management and, as necessary and appropriate, independent advisors.**
- **Director compensation.** Director compensation guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate). The board should be aware that questions as to directors' independence may be raised when directors' fees and emoluments exceed what is customary. Similar concerns may be raised when the listed company makes substantial charitable contributions to organizations in which a director is affiliated, or enters into consulting contracts with (or provides other indirect forms of compensation to) a director. The board should critically evaluate each of these matters when determining the form and amount of director compensation, and the independence of a director.
- **Director orientation and continuing education.**
- **Management succession.** Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.
- **Annual performance evaluation of the board.** The board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively.

*Website Posting Requirement:* A listed company must make its corporate governance guidelines available on or through its 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 corporate governance guidelines are available on or through its website and provide the website address.

**Amended:** November 25, 2009 (NYSE-2009-89).

### **303A.10 Code of Business Conduct and Ethics**

Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.

*Commentary:* No code of business conduct and ethics can replace the thoughtful behavior of an ethical director, officer or employee. However, such a code can focus the board and management on areas of ethical risk, provide guidance to personnel to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, and help to foster a culture of honesty and accountability.

Each code of business conduct and ethics must require that any waiver of the code for executive officers or directors may be made only by the board or a board committee.

Each code of business conduct and ethics must also contain compliance standards and procedures that will facilitate the effective operation of the code. These standards should ensure the prompt and consistent action against violations of the code.

Each listed company may determine its own policies, but all listed companies should address the most important topics, including the following:

- **Conflicts of interest.** A "conflict of interest" occurs when an individual's private interest interferes in any way - or even appears to interfere - with the interests of the corporation as a whole. A conflict situation can arise when an employee, officer or director takes actions or has interests that may make it difficult to perform his or her company work objectively and effectively. Conflicts of interest also arise when an employee, officer or director, or a member of his or her family, receives improper personal benefits as a result of his or her position in the company. Loans to, or guarantees of obligations of, such persons are of special concern. The listed company should have a policy prohibiting such conflicts of interest, and providing a means for employees, officers and directors to communicate potential conflicts to the listed company.

- **Corporate opportunities.** Employees, officers and directors should be prohibited from (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information or position; (b) using corporate property, information, or position for personal gain; and (c) competing with the company. Employees, officers and directors owe a duty to the company to advance its legitimate interests when the opportunity to do so arises.

- **Confidentiality.** Employees, officers and directors should maintain the confidentiality of information entrusted to them by the listed company or its customers, except when disclosure is authorized or legally mandated. Confidential information includes all non-public information that might be of use to competitors, or harmful to the company or its customers, if disclosed.

- **Fair dealing.** Each employee, officer and director should endeavor to deal fairly with the listed company's customers, suppliers, competitors and employees. None should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice. Listed companies may write their codes in a manner that does not alter existing legal rights and obligations of companies and their employees, such as "at will" employment arrangements.

- **Protection and proper use of listed company assets.** All employees, officers and directors should protect the listed company's assets and ensure their efficient use. Theft, carelessness and waste have a direct impact on the listed company's profitability. All listed company assets should be used for legitimate business purposes.

- **Compliance with laws, rules and regulations (including insider trading laws).** The listed company should proactively promote compliance with laws, rules and regulations, including insider trading laws. Insider trading is both unethical and illegal, and should be dealt with decisively.

- **Encouraging the reporting of any illegal or unethical behavior.** The listed company should proactively promote ethical behavior. The listed company should encourage employees to talk to supervisors, managers or other appropriate personnel when in doubt about the best course of action in a particular situation.



Additionally, employees should report violations of laws, rules, regulations or the code of business conduct to appropriate personnel. To encourage employees to report such violations, the listed company must ensure that employees know that the listed company will not allow retaliation for reports made in good faith.

*Website Posting Requirement:* A listed company must make its code of business conduct and ethics available on or through its 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 code of business conduct and ethics is available on or through its website and provide the website address.

To the extent that a listed company's board or a board committee determines to grant any waiver of the code of business conduct and ethics for an executive officer or director, the waiver must be disclosed to shareholders within four business days of such determination. 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.

**Amended:** November 25, 2009 (NYSE-2009-89).

### 303A.11 Foreign Private Issuer Disclosure

Listed foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards.

*Commentary:* Foreign private issuers must make their U.S. investors aware of the significant ways in which their corporate governance practices differ from those required of domestic companies under NYSE listing standards. However, foreign private issuers are not required to present a detailed, item-by-item analysis of these differences. Such a disclosure would be long and unnecessarily complicated. Moreover, this requirement is not intended to suggest that one country's corporate governance practices are better or more effective than another. The Exchange believes that U.S. shareholders should be aware of the significant ways that the governance of a listed foreign private issuer differs from that of a U.S. listed company. The Exchange underscores that what is required is a brief, general summary of the significant differences, not a cumbersome analysis.

*Disclosure Requirement:* A foreign private issuer that is required to file an annual report on Form 20-F with the SEC must include the 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. If the statement of significant differences is made available on or through the listed company's website, the listed company must disclose that fact in its annual report filed with the SEC and provide the website address.

**Amended:** November 25, 2009 (NYSE-2009-89).

### 303A.12 Certification Requirements

**(a)** Each listed company CEO must certify to the NYSE each year that he or she is not aware of any violation by the listed company of NYSE corporate governance listing standards, qualifying the certification to the extent necessary.

*Commentary:* The CEO's annual certification regarding the NYSE's corporate governance listing standards will focus the CEO and senior management on the listed company's compliance with the listing standards.

**(b)** Each listed company CEO must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any non-compliance with any applicable provisions of this Section 303A.

**(c)** Each listed company must submit an executed Written Affirmation annually to the NYSE. In addition, each listed company must submit an interim Written Affirmation as and when required by the interim Written Affirmation form specified by the NYSE.

**Amended:** November 25, 2009 (NYSE-2009-89).

### **303A.13 Public Reprimand Letter**

Last Modified: 11/03/2004The NYSE may issue a public reprimand letter to any listed company that violates a NYSE listing standard.

*Commentary:* Suspending trading in or delisting a listed company can be harmful to the very shareholders that the NYSE listing standards seek to protect; the NYSE must therefore use these measures sparingly and judiciously. For this reason it is appropriate for the NYSE to have the ability to apply a lesser sanction to deter companies from violating its corporate governance (or other) listing standards. Accordingly, the NYSE may issue a public reprimand letter to any listed company, regardless of type of security listed or country of incorporation that it determines has violated a NYSE listing standard. For companies that repeatedly or flagrantly violate NYSE listing standards, suspension and delisting remain the ultimate penalties. For clarification, this lesser sanction is not intended for use in the case of companies that fall below the financial and other continued listing standards provided in Chapter 8 of the Listed Company Manual or that fail to comply with the audit committee standards set out in Section 303A.06. The processes and procedures provided for in Chapter 8 govern the treatment of companies falling below those standards.

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