

Weil Briefing: SEC Disclosure and Corporate Governance

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Director Independence Tests Revised By NYSE, NASDAQ and AMEX: More Directors Could Be Independent

The New York Stock Exchange (the “NYSE”), The NASDAQ Stock Market (“NASDAQ”), and the American Stock Exchange (“AMEX”) have modified certain “bright-line” tests for determining director independence under their listing standards. The revised tests are more lenient, and therefore more directors could be deemed independent. Listed companies should bring these changes to the attention of the nominating and corporate governance committee of the board of directors and may also need to revise their director independence guidelines and Director & Officer Questionnaires. Companies should consider whether directors previously deemed not to be independent could be independent under the amended standards. The rule amendments of the NASDAQ and AMEX were effective on August 8, 2008 and August 18, 2008, respectively, and the NYSE’s rule changes become operative beginning September 11, 2008.

Increased Director Compensation Threshold

The amendments by the NYSE, NASDAQ and AMEX increase the monetary threshold in the bright-line director independence test relating to director compensation. The threshold was increased to \$120,000 from \$100,000. As revised, with some exceptions, a director is not considered independent if he or she (or an immediate family member) receives more than \$120,000 in direct compensation during any 12-month period within the last three years. According to the stock exchanges, the amount was increased to be consistent with the dollar threshold for related person transactions that are disclosed under Item 404(a) of Regulation S-K. *See* Section 303A.02(b)(ii) of the NYSE Listed Company Manual; NASDAQ Rule 4200(a)(15)(B); Section 803(A)(2)(b) of the AMEX Company Guide.

Narrowed Auditor Affiliation Test

The NYSE also amended the bright-line director independence test relating to auditor affiliation with immediate family members of directors. The revised test no longer precludes a director of an NYSE-listed company from being deemed independent simply if his or her immediate family member is a current employee of the company’s independent auditor regardless of any specific personal involvement on the company’s audit. As noted by the NYSE, under the former test a director would not be independent if the director’s child took a staff position in the audit practice of the company’s external auditor upon graduation from college (even if the child is an entry-level employee, in a different region and has no involvement with the company’s audit). The

following immediate family members, however, are still covered by this bright-line independence test:

- current partners of the company's internal or external auditors;
- current employees of the audit firm and personally work on the company's audit; or
- within the last three years a partner or employee of the audit firm and personally worked on the company's audit during that time.

The modification of the NYSE auditor affiliation test for family members of directors now brings the NYSE standard closer to the standards previously adopted by NASDAQ and AMEX. See Section 303A.02(b)(iii) of the NYSE Listed Company Manual; NASDAQ Rule 4200(a)(15)(F); Section 803(A)(2)(f) of the AMEX Company Guide.

The complete text of the NYSE amendments is available on its website at [http://apps.nyse.com/commdata/pub19b4.nsf/docs/07DD57A6CC5EB6B9852574A40044CEEF/\\$FILE/NYSE-2008-75.pdf](http://apps.nyse.com/commdata/pub19b4.nsf/docs/07DD57A6CC5EB6B9852574A40044CEEF/$FILE/NYSE-2008-75.pdf). Information regarding the rule amendments by NASDAQ and AMEX are available on the SEC's website (NASDAQ at <http://www.sec.gov/rules/sro/nasdaq/2008/34-58335.pdf>; and AMEX at <http://www.sec.gov/rules/sro/amex/2008/34-58378.pdf>).

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