

Weil Briefing:

SEC Disclosure and Corporate Governance

December 7, 2009

NYSE Governance Rule Changes Take Effect January 1, 2010

On November 25, 2009, the Securities and Exchange Commission approved amendments to the New York Stock Exchange corporate governance listing standards that will become effective on **January 1, 2010**.¹ The text of the rule amendments is available on the NYSE website (<http://www.nyse.com>). This briefing summarizes the rule changes and provides tips on what you can do now to ensure that you comply with the revised rules come next year.

Highlights

The amendments:

- Expand the requirement to promptly notify the NYSE after any executive officer becomes aware of *any* non-compliance with NYSE corporate governance listing standards, not just material non-compliance as currently required
- Align the timing of disclosure of code of business conduct and ethics waivers with Form 8-K and eliminate NYSE disclosure requirements that are duplicative of those in Item 407 of SEC Regulation S-K
- Expand the ability of companies to use their websites rather than SEC filings to disclose certain governance information and eliminate the requirement that companies offer to provide free hard copies of posted governance documents
- Add new phase-in provisions applicable to spin-offs and carve-out IPOs that are comparable to those already in place for IPO companies, and new phase-in provisions applicable to companies ceasing to qualify as foreign private issuers (“FPIs”) that are aligned with the SEC’s phase-in provisions relating to the use of domestic forms and compliance with applicable reporting requirements by companies ceasing to qualify as FPIs

Expanded Notification Requirement

The NYSE has expanded Section 303A.12(b) to require that listed companies promptly notify the NYSE in writing after any executive officer becomes aware of *any* non-compliance (material or non-material) with the corporate governance listing standards contained in Section 303A, not just material non-compliance as currently required.

Disclosure Amendments and Clarifications

The amendments:

- **Disclosure of code of business conduct and ethics waivers:** Require disclosure of any code of business conduct and ethics waiver for an executive officer or director within four business days, instead of “promptly” (which is interpreted in the NYSE’s Frequently Asked Questions to mean two to three business days) per current Section 303A.10,² so as to align Section 303A with Form 8-K

- Note, however, that Section 303A requires disclosure of waivers for *all* executive officers and directors, while Form 8-K only requires disclosure of waivers relating to certain subject matters that are granted to certain officers (the principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions)
- The rule changes clarify that disclosure of the waiver must be made by distributing a press release, providing website disclosure or by filing a Form 8-K
- ***Company website disclosures:*** Permit the following disclosures to be included on a company's website as an alternative to inclusion in the proxy statement or Form 10-K (provided the proxy statement or annual report states that such disclosure is provided on the website and provides the website address):
 - Contributions from the company to any tax exempt organization where a director of the company serves as an executive officer and the contributions in any single fiscal year within the past three fiscal years exceeded the greater of \$1 million or 2% of such tax exempt organization's consolidated gross revenues
 - Any determination that simultaneous service of an audit committee member on more than three public company audit committees would not impair the ability of that member to effectively serve on the listed company's audit committee, whether or not the company has a policy limiting the number of audit committees on which its audit committee members serve to three or less
 - The name of the director who presides over executive sessions of independent directors or non-management directors, as applicable, or if the same person is not the presiding director at every meeting, the procedure by which a presiding director is selected for each executive session
 - The method for interested parties (not just shareholders) to communicate with the presiding director
- ***Incorporation of Item 407 of Regulation S-K disclosure requirements:*** Replace certain NYSE disclosure requirements relating to the controlled company exemption, categorical standards of director independence, the responsibility of the compensation committee to produce a compensation committee report and the responsibility of the audit committee to prepare an audit committee report with the comparable disclosure requirements in Item 407 of Regulation S-K
 - Note that this would permit the NYSE to take action against a company whose Item 407 disclosure is deficient (e.g., appending a "below compliance" indicator to the company's ticker symbol, issuing a public reprimand letter and/or delisting)
- ***Disclosure of submission of NYSE annual written affirmations:*** Eliminate the requirement in Section 303A.12(a) to disclose in the annual report whether a company has submitted to the NYSE an annual written affirmation as to compliance with the NYSE's corporate governance listing standards and any qualifications to that affirmation

- **Availability of hard copies of governance documents:** Eliminate the requirement for companies to offer to provide free hard copies of committee charters, corporate governance guidelines and codes of business conduct and ethics to shareholders upon request
- **Statements of significant differences for FPIs:** Clarify that FPIs that are Form 20-F filers must include in the Form 20-F the statement of significant differences between the corporate governance practices followed by the company in its home country and the requirements of Section 303A applicable to U.S. companies

Phase-in Requirements

The NYSE has adopted corporate governance phase-in provisions applicable to:

- Companies listing in conjunction with a carve-out or spin-off transaction, which are comparable to existing phase-in provisions applicable to companies listing in conjunction with an IPO
- Companies that cease to qualify as a FPI, which are aligned with the SEC's phase-in provisions relating to the use of domestic forms and compliance with applicable reporting requirements by companies ceasing to qualify as FPIs

A summary of the NYSE's phase-in provisions is included in the Appendix.

Other Changes

The rule changes also:

- Clarify that the voting power test in the definition of "controlled company" relates to the election of directors, so that a "controlled company" is a 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
- Clarify that companies may comply with Section 303A.03 by holding regular executive sessions of independent directors instead of regular executive sessions of non-management directors
- Clarify that audit committee meetings may be conducted by telephone where permitted by applicable corporate law, but that polling of audit committee members in lieu of meetings is not permitted
- Broaden the requirement that listed companies maintain a publicly accessible website to apply to all companies subject to website posting requirements under any applicable provision of the NYSE Listed Company Manual (not just Section 303A)
- Revise Section 303A.06 to cross-reference the requirement in Rule 10A-3 under the Securities Exchange Act of 1934, as amended, to disclose reliance on certain exemptions to audit committee requirements contained in that rule
- Align Section 303A and the interim Written Affirmation form requirements with respect to the submission of an interim Written Affirmation upon the occurrence of certain events, by amending Section 303A.12(c) to require submission of the form "as and when required by the interim Written Affirmation form specified by the NYSE." Section 303A.12(c) previously required each listed company to submit an interim Written Affirmation form "each time a change occurs in the board or any of the committees subject to Section 303A", while the

interim Written Affirmation form requires the form to be submitted upon the happening of these events as well as upon changes relating to controlled company or FPI status

- Eliminate Section 307.00, which sets forth guidance regarding related party transactions and is duplicative of Section 314
- Grant a limited transition period to non-U.S. companies that lose their FPI status with respect to discretionary and formula equity based compensation plans that were not approved by shareholders in compliance with Section 303A.08 and were in place before the date the company ceased to qualify as a FPI (the “determination date”).³ The provisions permit additional grants to be made pursuant to these plans after the determination date without shareholder approval until the later to occur of six months after the determination date and the first annual meeting after the determination date, up to a maximum of one year after the determination date. In addition, grants may continue to be made without shareholder approval pursuant to formula plans from shares that were available before the determination date (i.e., based on formulaic increases that occurred prior to the determination date)
- Make certain amendments applicable to closed-end funds

What You Should Do Now

Although most of the NYSE’s rule amendments are clarifications that do not require action by companies, we advise taking the following steps to ensure compliance with the substantive changes:

- Review your disclosure controls and procedures and revise and provide training to ensure that executive officers are aware of the corporate governance requirements contained in Section 303A so that the company can make timely notification to the NYSE of any non-compliance (material or non-material) with Section 303A
- Review your proxy statement and website disclosures to ensure that you are in compliance with Item 407 of Regulation S-K and revised Section 303A, as failure to comply may have significant consequences
- Consider whether you want to continue offering to provide shareholders with hard copies of governance documents required to be posted on your website. Although this is no longer required, companies may want to continue this practice, particularly if they have a significant number of retail investors

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If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of the Firm's Public Company Advisory Group:

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¹ SEC Release No. 34-61067 (November 25, 2009); File No. SR-NYSE-2009-89 (August 26, 2009) and Amendment No. 1 (September 10, 2009). These amendments replace certain rule amendments that were proposed by the NYSE in 2005 and amended in 2007, but which were not approved by the SEC (SEC File No. SR-NYSE-2005-81 (November 23, 2005) and Amendment No. 2 (June 20, 2007)).

² NYSE Listed Company Manual Section 303A Corporate Governance Listing Standards Frequently Asked Questions, Section G, Question 1 (February 13, 2004).

³ Rule 3b-4 of the Exchange Act requires that a company test its status as a foreign private issuer on an annual basis at the end of its most recently completed second fiscal quarter.

NYSE Corporate Governance Transitional Provisions (As Amended)

<i>Event</i>	<i>Majority of Independent Directors</i>	<i>Independent Audit Committee</i>	<i>Number of Audit Committee Members</i>	<i>Independent Compensation & Nominating Committees</i>	<i>Website Posting of Committee Charters, Governance Guidelines & Code of Conduct</i>
IPO	Within 1 year of “listing date” (regular way or when-issued)	At least 1 independent member by listing date Majority of independent members within 90 days of effective date of registration statement Fully independent committee within 1 year of effective date of registration statement No non-independent members permitted during phase-in if company required to file periodic reports with SEC before listing	1 member by listing date 2 members within 90 days of listing date 3 members within 1 year of listing date	At least 1 independent member on each committee by earlier of date IPO closes or 5 business days from listing date Majority of independent members on each committee within 90 days of listing date Fully independent committees within 1 year of listing date	By earlier of date IPO closes or 5 business days from listing date
Carve-out or spin-off transaction	Same as for IPO	Same as for IPO	Same as for IPO	At least 1 independent member on each committee by date transaction closes Majority of independent members on each committee within 90 days of listing date Fully independent committees within 1 year of listing date	By date transaction closes
Emergence from bankruptcy	Same as for IPO	Fully independent committee by listing date unless Rule 10A-3 exemption available	3 members by listing date	At least 1 independent member on each committee by listing date Majority of independent members on each committee within 90 days of listing date Fully independent committees within 1 year of listing date	By listing date

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Transfers from another market -- previously registered pursuant to Section 12(b) of Exchange Act	Within 1 year of listing date to extent exchange on which it was listed did not have same requirement If substantially similar requirement on other exchange, other exchange's transition period (if any)	Same as for emergence from bankruptcy	Within 1 year of listing date to extent exchange on which it was listed did not have same requirement If substantially similar requirement on other exchange, other exchange's transition period (if any)	Within 1 year of listing date to extent exchange on which it was listed did not have same requirement If substantially similar requirement on other exchange, other exchange's transition period (if any)	Within 1 year of listing date to extent exchange on which it was listed did not have same requirement If substantially similar requirement on other exchange, other exchange's transition period (if any)
Transfers from another market -- previously registered pursuant to Section 12(g) of Exchange Act	Same as for IPO	Same as for emergence from bankruptcy	Same as for IPO	Same as for emergence from bankruptcy	Same as for emergence from bankruptcy
Cease to qualify as a controlled company	Within 1 year of date of status change	Already required to comply	Already required to comply	At least 1 independent member on each committee by date of status change Majority of independent members on each committee within 90 days of date of status change Fully independent committees within 1 year of date of status change	By date of status change
Cease to qualify as a foreign private issuer	Within 6 months of date it fails to qualify as a foreign private issuer -- tested at end of most recently completed second fiscal quarter ("determination date")	Members must comply with NYSE independence requirements (in addition to Rule 10A-3 independence requirements) within 6 months of determination date	3 members within 6 months of determination date	Within 6 months of determination date	Within 6 months of determination date