

The NYSE represents that, in preparing the recommendations it made to the NYSE Board of Directors ("NYSE Board"), the Committee had the benefit of the testimony of 17 witnesses and written submissions from 21 organizations or interested individuals. The Committee also examined the excellent governance practices that many NYSE-listed companies have long followed. In addition, the Committee reviewed extensive commentary recommending improvement in corporate governance and disclosure, statements by the President of the United States and members of his Cabinet, as well as pending Commission proposals and legislation introduced in Congress.

On June 6, 2002, the Committee submitted its report and initial recommendations to the NYSE Board.⁴ The NYSE states that President Bush, then-Commission Chairman Harvey Pitt, members of Congress, CEOs of listed companies, institutional investors and state pension funds, organizations such as the Business Roundtable and the Council of Institutional Investors, and leading academics and commentators expressed strong support for the Committee's initiatives. The Committee also received insightful and practical suggestions for the improvement of its recommendations from experts within the NYSE, listed companies, institutional investors, outside organizations and interested individuals. In addition to many face-to-face meetings and telephone calls, the Exchange received over 300 comment letters.

Many of the commentators argued for, or sought, guidance from the Exchange at a level of detail inconsistent with the role that the Committee was asked to fulfill. However, where appropriate the Committee reflected cogent comments in clarifications and modifications to its recommendations.

Following approval of the NYSE Board of Directors on August 1, 2002, on August 16, 2002, the NYSE filed proposed rule changes to its corporate governance standards with the Commission (the NYSE Corporate Governance Proposals) which reflect the findings of the Committee. The proposals for new corporate governance listing standards for companies listed on the Exchange would be codified in a new Section 303A of the Manual.⁵

⁴ Report of the NYSE Corporate Accountability and Listing Standards Committee, June 6, 2002.

⁵ In its Report to the NYSE Board, the Committee set forth basic principles followed in many cases by explanation and clarification. The Exchange is proposing to adopt the recommendations as standards in substantially the form they were made

Subsequent to the original filing of the NYSE Corporate Governance Proposals, the Commission requested that the NYSE file separately proposed Section 303A(8) (relating to shareholder approval of equity-compensation plans) and the proposed amendment to NYSE Rule 452 (which would prohibit member organizations from giving a proxy to vote on equity-compensation plans absent specific instructions from a beneficial holder). The Exchange made this separate filing with the Commission on October 7, 2002.⁶

Significant Amendments From Original Proposals

In the NYSE Corporate Governance Proposals filed in August 2002, the Exchange proposed to continue its longstanding practice of permitting listed foreign private issuers to follow home country practice in lieu of the standards specified in Section 303A, subject only to the new requirement in proposed Section 303A(11) that such companies must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. However, as a result of the Sarbanes-Oxley Act of 2002⁷ ("Sarbanes-Oxley Act") and Rule 10A-3 ("Rule 10A-3") under the Act,⁸ the Exchange must propose standards that require that all listed companies have an independent audit committee and satisfy certain other requirements. For this reason, among others, the Exchange proposes to add a section entitled "General Application" to Section 303A to clarify how the

by the Committee and adopted by the NYSE Board. Accordingly, the format used states a basic principle, with the additional explanation and clarifications included as "commentary". The NYSE advises readers that the words "must" and "should" have been chosen with care when used. The use of the word "must" indicates a standard or practice with which companies would be required to comply. The use of the word "should" indicates a standard or practice that the Exchange believes is appropriate for most if not all companies, but failure to employ or comply with such standard or practice would not constitute a violation of NYSE standards.

While many of the requirements set forth in this new rule are relatively specific, the Exchange notes that it is articulating a philosophy and approach to corporate governance that companies would be expected to carry out as they apply the requirements to the specific facts and circumstances that they confront from time to time. Companies and their boards would be expected to apply the requirements carefully and in good faith, making reasonable interpretations as necessary, and disclosing the interpretations that they make.

⁶ See Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 (October 11, 2002) (SR-NYSE-2002-46).

⁷ Pub. L. 107-204, 116 Stat. 745 (2002).

⁸ See Securities Exchange Act Release No. 47654 (April 9, 2003).

proposed standards would apply to different kinds of listed entities.

The NYSE also proposes to include a subsection entitled "Effective Date/Transition Period" in the General Application section of Section 303A. The subsection amends certain of the effective dates originally proposed. NYSE notes, however, that at least certain of those effective dates will require further amendment. Certain of the requirements of proposed Section 303A(6), (7) and (12) reflect the requirements of the Sarbanes-Oxley Act and Rule 10A-3. The Commission's final rules implementing these provisions specify dates by which companies must comply with these requirements.⁹ NYSE represents that, of course, listed companies will be required to apply these particular standards in accordance with the transition periods adopted by the Commission, and the rules proposed herein will be amended as necessary to reflect those periods.

Proposed Section 303A(2) Regarding Director Independence

The Exchange has made a number of changes to its originally proposed definition of independence for board membership as a result of comments from the Commission, although not to the general rule that charges the board of directors to affirmatively determine independence.

In addition, the Exchange wishes to point out a matter that arises as a result of the enactment of the Sarbanes-Oxley Act and the Commission's implementing rules thereunder.

Immediate Family

Certain close family relationships preclude independence under the NYSE's proposed rule. The definition of "immediate family" is unchanged from that proposed in the NYSE's original filing, which in turn is the same as that employed in the NYSE's current rule regarding the independent audit committee.¹⁰

When the Commission proposed its rules implementing Section 301 of the Sarbanes-Oxley Act, it proposed to use a more limited concept of family. The Exchange defines "immediate family" as including "a person's spouse, parents, children, siblings, mothers-in-law and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than

⁹ Companies must comply with these provisions by the first annual meeting held after January 15, 2004, but in no event later than October 31, 2004. Foreign private issuers and small business issuers will have until July 31, 2005 to comply.

¹⁰ Section 303.02(A) of the Manual.