

## 1. Independence of Majority of Board Members

NYSE section 303A(1) of the NYSE Manual would require the board of directors of each listed company to consist of a majority of independent directors.<sup>39</sup> Pursuant to NYSE section 303A(2) of the NYSE Manual, no director would qualify as “independent” unless the board affirmatively determines that the director has no material relationship with the company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). The company would be required to disclose the basis for such determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company’s annual report on Form 10-K<sup>40</sup> filed with the Commission.<sup>41</sup> In complying with this requirement, a board would be permitted to adopt and disclose standards to assist it in making determinations of independence, disclose those standards, and then make the general statement that the independent directors meet those standards.<sup>42</sup>

## 2. Definition of Independent Director

In addition, the NYSE proposes to tighten its current definition of independent director as follows. First, a director who is an employee, or whose immediate family member is an executive officer, of the company would not be independent until three years after the end of such employment relationship (“NYSE Employee Provision”).<sup>43</sup> Employment as an interim Chairman or CEO would not disqualify a director from being considered independent following that employment.<sup>44</sup> Second, a director who receives, or whose immediate family member receives, more than \$100,000

per year in direct compensation from the listed company, except for certain permitted payments,<sup>45</sup> would not be independent until three years after he or she ceases to receive more than \$100,000 per year in such compensation (“NYSE Direct Compensation Provision”).<sup>46</sup>

Third, a director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company would not be independent until three years after the end of the affiliation or the employment or auditing relationship.<sup>47</sup>

Fourth, a director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company’s present executives serve on that company’s compensation committee would not be independent until three years after the end of such service or the employment relationship (“NYSE Interlocking Directorate Provision”).<sup>48</sup>

Fifth, a director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of \$1 million, or 2% of such other company’s consolidated gross revenues, would not be independent until three years after falling below such threshold (“NYSE Business Relationship Provision”).<sup>49</sup> The NYSE proposes to clarify this proposal with respect to charitable organizations by adding a commentary noting that charitable organizations shall not be considered “companies” for purposes of

the NYSE Business Relationship Provision, provided that the listed company discloses 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 Commission, any charitable contributions made by the listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, such contributions in any single year exceeded the greater of \$1 million or 2% of the organization’s consolidated gross revenues.<sup>50</sup>

The NYSE also proposes to clarify this proposal by adding commentary explaining that both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year, and that the look-back provision applies solely to the financial relationship between the listed company and the director or immediate family member’s current employer. A listed company would not need to consider former employment of the director or immediate family member.<sup>51</sup>

The NYSE proposes to define “immediate family member” to include 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.<sup>52</sup> The NYSE also proposes that references to “company” include any parent or subsidiary in a consolidated group with the company.<sup>53</sup>

The NYSE further proposes to revise the phase-in of the look-back requirement that the NYSE had previously proposed by applying a one-year look-back for the first year after adoption of these new standards.<sup>54</sup> The NYSE also proposes to change all of the look-back periods from five years to three years.<sup>55</sup> The three-year look-back would begin to apply from the date that

<sup>39</sup> See NYSE section 303A(1). See *infra* Section II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

<sup>40</sup> The NYSE proposes that for all provisions of NYSE section 303A that call for disclosure in a company’s Form 10-K, if a company subject to such a provision is not a company required to file a Form 10-K, then the provision shall be interpreted to mean the annual periodic disclosure form that the company files with the Commission. If a company is not required to file either an annual proxy statement or an annual periodic report with the Commission, the disclosure shall be made in the annual report required under NYSE section 203.01. See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—References to Form 10-K.

<sup>41</sup> See Commentary to NYSE section 303A(2)(a).

<sup>42</sup> *Id.*

<sup>43</sup> See NYSE section 303A(2)(b)(i). In NYSE Amendment No. 2, *supra* note, the NYSE proposes the NYSE Employee Provision.

<sup>44</sup> See Commentary to NYSE section 303A(2)(b)(i).

<sup>45</sup> Permitted payments would include 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. See NYSE section 303A(2)(b)(ii). In addition, compensation received by a director for former service as an interim Chairman or CEO would not be required to be considered. See Commentary to NYSE section 303A(2)(b)(ii). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add that compensation received by an immediate family member for service as a non-executive employee of the listed company would also not be required to be considered. In NYSE Amendment No. 2, *supra* note, the NYSE also proposes to revise various look-back provisions from five years to three years.

<sup>46</sup> See NYSE section 303A(2)(b)(ii). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to revise the NYSE Direct Compensation Provision to be a bright-line test, rather than a rebuttable presumption.

<sup>47</sup> See NYSE section 303A(2)(b)(iii).

<sup>48</sup> See NYSE section 303A(2)(b)(iv).

<sup>49</sup> See NYSE section 303A(2)(b)(v).

<sup>50</sup> See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(2)(b)(v).

<sup>51</sup> *Id.*

<sup>52</sup> See General Commentary to NYSE section 303A(2)(b). In NYSE Amendment No. 2, *supra* note 6, the NYSE proposes to add that when applying the look-back provisions in NYSE section 303A(2)(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.

<sup>53</sup> See NYSE Amendment No. 2, *supra* note 6, Commentary to NYSE section 303A(2)(a), and General Commentary to section 303A(2)(b).

<sup>54</sup> See NYSE Amendment No. 2, *supra* note 6, and General Commentary to NYSE section 303A(2)(b).

<sup>55</sup> See NYSE Amendment No. 2, *supra* note 6.