

is the first anniversary of Commission approval of the proposed rule change.⁵⁶

3. Separate Meetings for Board Members

NYSE proposes to require the non-management directors of each NYSE-listed company to meet at regularly scheduled executive sessions without management.⁵⁷

In addition, NYSE proposes to require listed companies to disclose a method for interested parties to communicate directly with the presiding director of such executive sessions, or with the non-management directors as a group.⁵⁸ Companies may utilize the same procedures they have established to comply with Rule 10A-3(b)(3).⁵⁹

4. Nominating/Corporate Governance Committee

NYSE proposes to require each listed company to have a nominating/corporate governance committee composed entirely of independent directors.⁶⁰ The NYSE also proposes to require such committee to have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual performance evaluation of the nominating/corporate governance committee ("NYSE Nominating/Corporate Governance Committee Provision").⁶¹ The NYSE further proposes to clarify that the committee would be required to identify individuals qualified to become board members, consistent with the criteria approved by the board.⁶²

5. Compensation Committee

NYSE proposes to require each listed company to have a compensation committee composed entirely of independent directors.⁶³ The NYSE also proposes to require the compensation committee to have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual

performance evaluation of the compensation committee ("NYSE Compensation Committee Provision").⁶⁴ The Compensation Committee also would be required to produce a compensation committee report on executive compensation, as required by Commission rules to be included in the company's annual proxy statement or annual report on Form 10-K filed with the Commission.⁶⁵ Further, the NYSE proposes to (1) delete the previously proposed statement that the compensation committee has the sole authority to determine the compensation of the chief executive officer ("CEO"),⁶⁶ and provide that either as a committee or together with the other independent directors (as directed by the board), the committee would determine and approve the CEO's compensation level based on the committee's evaluation of the CEO's performance;⁶⁷ and (2) add a provision to the commentary on this section indicating that discussion of CEO compensation with the board generally is not precluded.⁶⁸

6. Audit Committee

a. Composition

NYSE sections 303A(6) and 303A(7) would require each NYSE-listed company to have a minimum three-person audit committee composed entirely of directors that meet the independence standards of both NYSE section 303A(2) and Rule 10A-3.⁶⁹ The NYSE also proposes to delete the previously proposed commentary relating to NYSE section 303A(6) and replace it with the following: "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 with the opportunity to cure defects provided in Rule 10A-3(a)(3)."⁷⁰

In addition, the Commentary to NYSE section 303A(7)(a) would require that each member of the audit committee be financially literate, as such qualification is interpreted by the 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.⁷¹ In addition, at least one member of the audit committee would be required to have accounting or related financial management expertise, as the company's board interprets such qualification in its business judgment.⁷² The NYSE also proposes to clarify that 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 forth in Item 401(e) of Regulation S-K, a board may presume that such a person has accounting or related financial management experience.⁷³

If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, each board would be required to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and to disclose such determination.⁷⁴

b. Audit Committee Charter and Responsibilities

NYSE section 303A(7)(c) would require the audit committee of each listed company to have a written audit committee charter that addresses: (i) The committee's purpose; (ii) an annual performance evaluation of the audit committee; and (iii) the duties and responsibilities of the audit committee ("NYSE Audit Committee Charter Provision").

The NYSE Audit Committee Charter Provision provides details as to the duties and responsibilities of the audit committee that must be addressed. These include, at a minimum, those set out in Rule 10A-3(b)(2), (3), (4) and (5),⁷⁵ as well as the responsibility to

⁵⁶ See NYSE Amendment No. 2, *supra* note 6, and General Commentary to NYSE section 303A(2)(b).

⁵⁷ See NYSE section 303A(3).

⁵⁸ See Commentary to NYSE section 303A(3). In NYSE Amendment No. 2, *supra* note 1, the NYSE proposes to delete the previously proposed requirement that interested parties be able to communicate confidentially, in addition to directly, with such parties.

⁵⁹ See Commentary to NYSE section 303A(3).

⁶⁰ See NYSE section 303A(4)(a). See *infra* Section II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

⁶¹ See NYSE section 303A(4)(b).

⁶² See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(4)(b).

⁶³ See *infra* Sections II.B.12. concerning Controlled Companies and other entities that would be exempt from this requirement.

⁶⁴ See NYSE section 303A(5)(a).

⁶⁵ See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(5)(b)(i)(C).

⁶⁶ See NYSE Amendment No. 2, *supra* note 6, and NYSE section 303A(5)(a).

⁶⁷ *Id.*

⁶⁸ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(5).

⁶⁹ See NYSE sections 303A(6) and 303A(7). The Commission notes that new Rule 303A would incorporate various provisions of existing NYSE rules on corporate governance for listed companies, including, for example, requirements that an audit committee have a written charter and that such committee be comprised of at least three independent directors who meet certain financial literacy requirements.

⁷⁰ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(6).

⁷¹ See Commentary to NYSE section 303A(7)(a).

⁷² *Id.*

⁷³ See NYSE Amendment No. 2, *supra* note 6, and Commentary to NYSE section 303A(7)(a).

⁷⁴ *Id.*

⁷⁵ See NYSE section 303A(7)(c). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to cross-reference the sections of Rule 10A-3 that set forth the required duties and responsibilities of the audit committee, instead of detailing these requirements in NYSE Rule 303A as it had previously proposed.