

annually obtain and review a report by the independent auditor; discuss the company's annual audited financial statement and quarterly financial statements with management and the independent auditor; discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; discuss policies with respect to risk assessment and risk management; meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function), and with independent auditors; review with the independent auditors any audit problems or difficulties and management's response; set clear hiring policies for employees or former employees of the independent auditors; and report regularly to the board.⁷⁶

7. Internal Audit Function

NYSE section 303A(7)(d) would require each listed company to have an internal audit function.⁷⁷

8. Corporate Governance Guidelines

NYSE section 303A(9) would require each listed company to adopt and disclose corporate governance guidelines. The following topics would be required to be addressed: director qualification standards; director responsibilities; director access to management and, as necessary and appropriate, independent advisors; director compensation; director orientation and continuing education; management succession; and annual performance evaluation of the board.⁷⁸ Each company's website would be required to include its corporate governance guidelines and the charters of its most important committees, and the availability of this information on the Web site or in print to shareholders would need to be referenced in the company's annual report on Form 10-K filed with the Commission.⁷⁹

9. Code of Business Conduct and Ethics

NYSE section 303A(10) would require each listed company to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and to promptly disclose any waivers of the code for directors or executive officers.⁸⁰ The commentary to this section sets forth the most important topics that should be

addressed, including conflicts of interest; corporate opportunities; confidentiality of information; fair dealing; protection and proper use of company assets; compliance with laws, rules and regulations (including insider trading laws); and encouraging the reporting of any illegal or unethical behavior. Each code would be required to contain compliance standards and procedures to facilitate the effective operation of the code. Each listed company's Web site would be required to include its code of business conduct and ethics, and the availability of the code on the website or in print to shareholders would need to be referenced in the company's annual report on Form 10-K filed with the Commission.⁸¹

10. CEO Certification

NYSE section 303A(12)(a) would require the CEO of each listed company to certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE's corporate governance listing standards. This certification would be required to be disclosed in the company's annual report or, if the company does not prepare an annual report to shareholders, in the company's annual report on Form 10-K filed with the Commission.⁸²

In addition, NYSE section 303A(12)(b) would require the CEO of each listed company to promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of the new requirements.⁸³

11. Public Reprimand Letter

NYSE section 303A(13) would allow the NYSE to issue a public reprimand letter to any listed company that violates an NYSE listing standard.⁸⁴

12. Exceptions to the NYSE Corporate Governance Proposals

The NYSE proposes to exempt any listed company of which more than 50% of the voting power is held by an individual, a group or another company ("Controlled Company") from the requirements that its board have a

majority of independent directors, and that the company have nominating/corporate governance and compensation committees composed entirely of independent directors. A company that chose to take advantage of any or all of these exemptions would be required to disclose that choice, that it is a Controlled Company, and the basis for the 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 filed with the Commission.⁸⁵ Limited partnerships and companies in bankruptcy proceedings also would be exempt from requirements that the board have a majority of independent directors and that the issuer have nominating/corporate governance and compensation committees composed entirely of independent directors.⁸⁶

The NYSE considers the requirements of section 303A to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940 ("Investment Company Act")⁸⁷, given the pervasive federal regulation applicable to them. However, the NYSE proposes that registered closed-end management investment companies ("closed-end funds") would be required to: (1) Have a minimum three-member audit committee that satisfies the requirements of Rule 10A-3; (2) comply with the requirements of the NYSE Audit Committee Charter Provision; and (3) comply with the certification and notification provisions regarding non-compliance.⁸⁸ Closed-end funds also would be excluded from the disclosure requirement relating to an audit committee member's simultaneous service on more than three audit committees, but would be subject to the requirement for the board to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee.⁸⁹

The NYSE also proposes to require business development companies, which are a type of closed-end management investment company defined in section 2(a)(48) of the

⁸¹ See Commentary to NYSE section 303A(10).

⁸² See NYSE section 303A(12)(a).

⁸³ See NYSE section 303A(12)(b). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify that the notification would be required to be in writing.

⁸⁴ See NYSE section 303A(13). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify that this lesser sanction was not intended for use in the case of companies that fail to comply with the requirements of Rule 10A-3. See Commentary to NYSE section 303A(13).

⁸⁵ See NYSE section 303A—General Application—Equity Listings—Controlled Companies.

⁸⁶ *Id.*

⁸⁷ 15 U.S.C. 80a-1 *et seq.*

⁸⁸ See NYSE section 303A—General Application—Equity Listings—Closed-End and Open End Funds.

⁸⁹ *Id.* See also NYSE Amendment No. 2, *supra* note.

⁷⁶ See NYSE section 303A(7)(c)(iii).

⁷⁷ See NYSE section 303A(7)(d).

⁷⁸ See Commentary to NYSE section 303A(9).

⁷⁹ *Id.*

⁸⁰ See NYSE section 303A(10).