

## NYSE GOVERNANCE RULE CHANGES

In January, the SEC approved changes to the NYSE corporate governance listing standards that clarify certain disclosure requirements, codify existing exchange interpretations and, in an effort to coordinate with SEC rules, replace certain disclosure requirements with those contained in Item 407 of Regulation S-K. Item 407 requires disclosure regarding director independence and certain corporate governance matters. This year's proxy materials must comply with the new standards.

---

Some of the significant revisions to the NYSE listing standards include:

### **Corporate Governance Disclosure**

Previous listing standards required identification of independent directors and the basis for the independence determination. These standards, similar to those required by Item 407 of Regulation S-K, have been eliminated and revised to incorporate the applicable Item 407 requirement. The concept of categorical independence standards has been eliminated and replaced by the SEC rules. While duplicative of the Item 407 requirements, the NYSE has made clear that if a company is deficient with the required Item 407 disclosures, it is not in compliance with listing standards and the exchange may take appropriate actions, including delisting.

### **Website Postings**

Current listing standards require a listed company to post on its website the charters of the audit, compensation and nominating and corporate governance committees as well as the corporate governance guidelines and code of business conduct and ethics. The company must also state in the proxy material or annual report that these documents are posted on its website. The amended listing standards further require the disclosure of the company's website address in the proxy or annual report. In addition, the revised standards remove the requirement that the company state that the documents are available in hard copy to any shareholder who requests them. The company, however, may want to consider whether to continue this practice to maintain positive shareholder relations.

### **Notifications of Noncompliance**

One of the most significant revisions to the listing standards is the requirement that a listed company must notify the exchange in writing after an executive officer becomes aware of *any* non-compliance with corporate governance listing standards. Prior listing standards only required disclosure of any *material* non-compliance with the corporate governance listing standards.

### **Certifications**

Certifications are still required by the NYSE and the Sarbanes-Oxley Act but the listing standard requiring the company to disclose in the following year's annual report whether it filed the required certification is eliminated.

### **Independent Director Meetings**

The new standards allow for regular executive sessions of independent directors in satisfaction of the standard requiring regular executive sessions of non-management directors.

## Director Communications

A listed company must enable all interested parties, not just shareholders, to communicate concerns regarding the company to the presiding director or the non-management or independent directors as a group. In addition, the company may disclose on its website the method for such communication so long as the proxy statement or annual report states that the disclosure is available on the website and gives the website address.

## Waivers

Under the amended listing standards, the exchange has made clear that the company must disclose to shareholders any waiver from the code of business conduct and ethics granted to an executive officer or director within *four* business days of that decision. The disclosure may be made by press release, on the website or by filing a Form 8-K.

### *Recommended Actions:*

- Review committee charters and other governance documents to determine whether updates are necessary
- Ensure proxy disclosure accurately reflects the revised listing standards and is compliant with Item 407 of Regulation S-K to avoid NYSE sanctions
- Discuss whether to continue to provide printed copies of certain documents upon shareholder request
- Review the processes in place to ensure executive officers report to the CEO any non-compliance with corporate governance standards
- Review controls and procedures in place regarding waivers of the code of business conduct and ethics

If you have any questions, please contact Joseph P. Kubarek at 716.843.3862 or [jkubarek@jaeckle.com](mailto:jkubarek@jaeckle.com), Michael C. Donlon at 716.843.3881 or [mdonlon@jaeckle.com](mailto:mdonlon@jaeckle.com) or Kayla E. Klos at 716.843.3858 or [kklos@jaeckle.com](mailto:kklos@jaeckle.com).

This Jaeckle Alert, prepared by the attorneys at Jaeckle Fleischmann & Mugel, LLP, is intended for general information purposes only and should not be considered legal advice or an opinion on specific facts. For more information on these issues, contact one of the attorneys listed above or your existing Firm contact. Prior results do not guarantee a similar outcome. The invitation to contact is not a solicitation for legal work in any jurisdiction in which the contacted attorney is not admitted to practice. Any attorney/client relationship must be confirmed in writing.

© 2010. All Rights Reserved.