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October 9, 2009

Re: Comments on Proposed Rule Change, as Modified by Amendment No. 1, to Amend Certain Corporate Governance Requirements of the New York Stock Exchange

Release No. 34-60653

File No. SR-NYSE-2009-89

Elizabeth M. Murphy
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Dear Ms. Murphy:

We are submitting this letter in response to the solicitation by the Securities and Exchange Commission for comments on the Proposed Rule Change, as modified by Amendment No. 1, to Amend Certain Corporate Governance Requirements of the New York Stock Exchange. We appreciate the opportunity to comment on the proposed rule change and applaud the Commission and NYSE's efforts to improve the NYSE's corporate governance requirements. While we support the Commission and NYSE's efforts overall, we believe that the proposed change to delete the materiality qualifier from the notification requirement in Section 303A.12(b) of the NYSE Listed Company Manual ("LCM") would be impractical and inefficient to apply. We also believe that this proposed change is inconsistent with a fundamental premise of the U.S. securities laws—that investors need not be burdened with immaterial information and public companies should not be burdened with a duty to report inconsequential matters—and could ultimately confuse investors and dilute the significance of material instances of noncompliance. We discuss these concerns in more detail below.

1. The proposed rule change will be impractical and inefficient to comply with.

The proposed rule change would modify Section 303A.12(b) of the NYSE LCM by deleting the materiality qualifier as follows:

> "Each listed company CEO must 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 this Section 303A."

The rationale for this change is not explained in the proposed rule change release so it would appear that the change is being proposed based on the premise that any instance of noncompliance with the NYSE's corporate governance rules is material enough to require reporting. We can envision, however, relatively minor occurrences (such as a website glitch making a charter temporarily unavailable on a company's website) that would cause a company to be technically out of compliance with the NYSE rules for a short period of time. To require a listed company's CEO to report such a glitch to the NYSE in writing seems to ignore the practical day-to-day realities faced by listed companies as well as the broad array of duties and responsibilities already assumed by their executive officers.

In our experience, most NYSE listed companies have designed processes and procedures to comply with the NYSE corporate governance rules. They also have procedures in place to update the company's executive officers and CEO on material concerns, which allows these executives to become aware of significant issues. If the proposed rule change were approved, these procedures would need to encompass both the continuous monitoring of minor infractions and the reporting of them to the company's CEO so that the CEO could then report them to the NYSE. The utility of diverting a company's resources and its CEO's attention to minor instances of noncompliance with NYSE standards seems questionable.

Not only would such a notification requirement strain the listed company's resources, it would also impose an additional burden on the NYSE staff. We understand from public statements that once the NYSE staff becomes aware of an instance of potential noncompliance with its corporate governance rules, it is required to make its own determination as to whether a deficiency exists and begin its own notification procedures. The proposed change to Section 303A.12(b) would likely cause the NYSE staff to spend time reviewing and addressing notifications submitted to the NYSE for minute infractions of its corporate governance rules. We believe NYSE staff resources would be better allocated to material instances of noncompliance.

2. The proposed rule change will create confusion and dilute the impact of material instances of noncompliance.

The NYSE publishes a list of companies that are noncompliant with its corporate governance listing standards (deemed "BC") and disseminates a BC indicator over the consolidated tape for each such company. A company is added to the list seven business days after the NYSE notifies the company of the deficiency, unless the deficiency is cured in the meanwhile.

We understand that companies are added to the noncompliance list regardless of the materiality of the noncompliance. Therefore, once a company notifies the NYSE of any instance of noncompliance, as would be required under proposed Section 303A.12(b), the NYSE may be compelled to include the company on the list of noncompliant companies (after the proper notice period) and to disseminate a BC indicator for that company over the consolidated tape. Because the noncompliant company list and BC indicator give no further detail about the company's infraction or degree of noncompliance, investors may assume that a company is in danger of being delisted when only a relatively minor infraction exists. The listed company and NYSE staff will likely have to spend time and energy to dispel this mistaken assumption. At the same time, as more companies are given the BC indicator for minor infractions, investors may become overly accustomed to seeing this marker, causing them to overlook the significance of material instances of noncompliance.

3. Removing the materiality qualifier is inconsistent with a fundamental premise of the U.S. securities laws and the NYSE rules.

The underlying premise of the U.S. securities laws is that investors should receive all *material* information necessary for them to make informed investment decisions. This fundamental premise is documented in Sections 11 and 12 of the Securities Act of 1933 and in Rule 10b-5 under the Securities Exchange Act of 1934 and incorporated in many other Securities Act and Exchange Act rules and forms, as well as the NYSE rules.[1] As interpreted by the Supreme Court, a fact or omitted fact is material if there is a substantial likelihood that a reasonable investor would consider it significant in making an investment decision.[2] We believe this fundamental premise, which was originally contained in Section 303A.12(b), should be preserved. In any case, we do not believe it should be abandoned without an explanation of the benefits of such a change in light of the burdens and additional costs for companies. If an infraction of the NYSE corporate governance rules is immaterial enough that a reasonable investor is unlikely to consider it significant, we see no reason to require it to be reported to the NYSE in writing.

* * *

We appreciate the opportunity to participate in this process and would be pleased to discuss our comments or any questions the Commission or the NYSE may have with respect to this letter. Any questions about this letter may be directed to Michael Kaplan, Ning Chiu or Janice Brunner at 212-450-4000.

Very truly yours,

DAVIS POLK & WARDWELL LLP

[1] For example, Section 2 of the NYSE LCM is entitled "Disclosure and Reporting *Material* Information" (emphasis added) and Subsection 202.05 is entitled "Timely Disclosure of *Material* News Developments." (emphasis added) Subsection 202.05 of the LCM states, "a listed company is expected to release quickly to the public any news or information which might reasonably be expected to *materially* affect the market for its securities. This is one of the most important and fundamental purposes of the listing agreement which the company enters into with the Exchange." (emphasis added).

[2] *Basic Inc. v. Levinson*, 485 U.S. 224, 231-240 (1988).