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NYSE EURONEXT

VIA EMAIL AND FEDERAL EXPRESS

January 10, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SR-NYSE-2012-49, SR-NYSEMKT-2012-48 and SR-NYSEArca-2012-105

Dear Ms. Murphy:

NYSE Euronext wishes to respond to comment letters received by the SEC in connection with the publication in the Federal Register of notices with respect to the rule filings submitted in compliance with SEC Rule 10C-1 by the three stock exchanges owned by NYSE Euronext, the New York Stock Exchange LLC ("NYSE"),[1] NYSE MKT LLC ("NYSE MKT")[2] and NYSE Arca, Inc. ("NYSE Arca" and, together with the NYSE and NYSE MKT, the "NYSE Exchanges").[3] Seven letters were received by the SEC in relation to the NYSE proposal and one letter was received in relation to the NYSE Arca proposal. As the comments raised in these letters are in substance applicable to all three proposals, this response will address them on behalf of all of the NYSE Exchanges.

A letter was submitted with respect to the NYSE proposal by Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer of Ameriprise Financial, Inc. ("Ameriprise"). Ameriprise expressed concern that the proposed amendments could be interpreted as requiring compensation committees to rely solely on independent legal counsel and other advisers and to preclude them from engaging non-independent legal counsel or advisers or from receiving advice from legal counsel or advisers engaged by management. Ameriprise also expresses concern that the proposed rules could be read as requiring the compensation committee to have sole responsibility for the appointment, compensation and oversight of all compensation advisers, including those retained by management, rather than only those compensation advisers retained by the committee itself. The NYSE Exchanges note that they have all submitted to the SEC amendments to their respective rule filings to

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1 See Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (SR-NYSE-2012-49).

2 See Securities Exchange Act Release No. 68007 (October 9, 2012), 77 FR 62576 (October 15, 2012) (SR-NYSEMKT-2012-48).

3 See Securities Exchange Act Release No. 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (SR-NYSEArca-2012-105).

include in the proposed rule text provisions stating that: (i) nothing in the proposed rules requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting a compensation adviser; and (ii) the compensation committee may select any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in the proposed rules. The proposed rules address only the role of the compensation committee with respect to the selection of compensation advisers retained by the compensation committee itself and they are not intended to require that all compensation advisers hired by the company must be retained by the compensation committee; nor do the NYSE Exchanges believe that this is a distinction that is unclear in reading the text of the proposed rules.

The Ameriprise Letter also notes that the proposed rule text does not limit the requirement that the committee must consider the independence of any proposed advisers only to those advisers engaged to provide advice on executive compensation matters and states that this is the extent to which that requirement is mandated by Rule 10C-1. It points out that the committee may engage advisers in connection with the committee's other responsibilities, such as "succession planning, the review and discussion with management of the Compensation Discussion and Analysis, or oversight of broad-based employee pension or benefit plans."[4] However, Rule 10C-1 and the SEC's adopting release[5] refer only to compensation consultants generally without carving our consultants retained by the compensation committee with respect to matters other than executive compensation. Consequently, the NYSE Exchanges proposed rules conform to this requirement. Notwithstanding the foregoing, the NYSE Exchanges have amended their proposed rules to provide that the compensation committee need not conduct an independence analysis with respect to any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

A letter was submitted by Wilson Sonsini Goodrich & Rosati ("WSGR"). The WSGR letter asserts that proposed Section 303A.05(c)(iv) is overly broad in that it appears to require the compensation committee to undertake an independence analysis with respect to any outside counsel consulted by the committee, including any regular outside counsel to the company consulted on matters such as SEC filing requirements or federal tax issues associated with equity compensation plans. However, the NYSE Exchanges believe this outcome is dictated by Rule 10C-1, which excludes only in-house legal counsel from the requirement to conduct an independence analysis with respect to any legal counsel consulted

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[4] The Society of Corporate Secretaries & Governance Professionals in its letter discussed below expresses similar concerns about how broadly the independence assessment requirement should be applied.

[5] See Securities Exchange Act Release No. 34-67220 (June 20, 2012, 77 FR 38422 (June 27, 2012) (the "Adopting Release").

by the compensation committee, including the company's regular securities or tax counsel. In this regard, the adopting release provides that "[the exemption of in-house counsel from the independence analysis] will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer."[6]

Three letters were submitted with respect to the NYSE proposal that argue that the independence test should be strengthened. These letters were from J. Robert Brown, Jr. (a professor at the University of Denver Sturm College of Law), the AFL-CIO and the International Brotherhood of Teamsters ("IBT"). A similar letter was also received with respect to the NYSE Arca proposal from Jeff Mahoney, General Counsel of the Council of Institutional Investors ("CII").

Brown, the AFL-CIO, IBT and CII all argue that relationships between the director and the senior executives of the listed company should be included as an explicit factor for consideration in compensation committee independence determinations. The NYSE Exchanges note that the existing independence standards of the NYSE Exchanges all require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence. Commentary to Section 303A.02(a) explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT and NYSE Arca have always interpreted their respective director independence requirements in the same way. Consequently, the NYSE Exchanges do not believe that any further clarification of this requirement is necessary.

Brown, the AFL-CIO and IBT all argue that director fees should be an explicit required factor in compensation committee independence determinations. As all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, the NYSE Exchanges do not believe that it is likely that director compensation would be a relevant consideration for compensation committee independence. However, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations. Therefore, to the extent that excessive board compensation might affect a director's independence, the proposed rules would require the board to consider that factor in its determination. Similarly, the AFL-CIO and IBT propose that the board should be explicitly required to consider related party transactions required to be disclosed under Item 404(a) of Regulation S-K (including transactions between the listed company and an entity which employs an immediate family member of a director other than as an executive officer) as factors relevant to compensation committee independence. The NYSE Exchanges believe that this is unnecessary as the NYSE Exchanges' existing director independence standards require boards to consider all material factors relevant to an independence determination, as do the specific compensation committee independence requirements of the proposed rules.

The AFL-CIO and IBT argue that the proposed rules should clarify that a single "relevant factor" may result in a loss of independence. The NYSE Exchanges have interpreted their existing general board independence standards as providing that a single relationship could be sufficiently material that it

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[6] See Adopting Release at 38433.

would render a director non-independent. The NYSE Exchanges are not aware that there has been any confusion with respect to this interpretation. Consequently, we do not believe it is necessary to include in the proposed rules a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the rules as drafted.

The CII letter proposes to add to the list of factors to be considered when determining an adviser is independent – whether the compensation committee consultants, legal counsel, or other advisers require that their clients contractually agree to indemnify them or limit their liability. The NYSE Exchanges do not believe that this is an appropriate addition. A relationship would affect an adviser's independence from management only if it gave rise to a concern that it would subject the adviser to influence by management. It is not apparent to the NYSE Exchanges why the existence of contractual indemnification and limitation of liability provisions would subject an adviser to any influence by management and, therefore, it is not clear how they are relevant to an independence determination The NYSE Exchanges express no view on the desirability or otherwise of such agreements.

In its letter to the SEC, the Society of Corporate Secretaries & Governance Professionals (the "Society") objected to the language in the proposed independence standard for compensation committee members which provides that the board "must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member." The Society believes that this requirement is vague and unnecessary in light of the comprehensiveness of the enumerated factors required to be considered in making that determination. The NYSE Exchanges disagree and believe that a requirement to consider all material relationships – and not only those enumerated in the rule – is essential, as it is impossible to foresee all possible kinds of relationships that might be material to a compensation committee member's independence. As it is not possible to enumerate explicitly all categories of material relationships in the rule, the NYSE Exchanges believe it is necessary for boards to consider whether any other material relationships exist.

Similarly, the Society proposes the deletion of the requirement that, in conducting its independence assessment with respect to any compensation adviser, the compensation committee must consider "all factors relevant to that person's independence from management." The Society believes that the six specific factors enumerated in the rule are comprehensive and that a broader investigation would be unduly burdensome. The NYSE Exchanges disagree. It is impossible to specifically enumerate every category of relationship which might be material to a compensation committee adviser's independence and it is therefore necessary for the compensation committee to conduct a more flexible analysis which would encompass any such material relationships not covered by the factors enumerated in the rule. Similarly, the NYSE Exchanges do not believe it is possible to follow the Society's alternative suggestion that any additional relevant factors should be included in the rule, as it is impossible to predict every category of relationship that might potentially arise that would be material to a compensation adviser's independence.

The Society requests guidance with respect to the frequency with which the compensation committee should undertake a new independence assessment with respect to any compensation adviser and proposes that the assessment should be undertaken on an annual basis. The NYSE Exchanges do not

propose to establish a specific required frequency of assessments. While an annual assessment may be sufficient in some cases, in other circumstances a more frequent review may be warranted.

The Society proposes that the proposed rules should include explicit cure provisions for all violations of the proposed rules and not only those violations arising when a compensation committee member ceases to be independent. The NYSE Exchanges do not believe that it is necessary or desirable to include specific cure provisions for all violations of the proposed rules. The NYSE Exchanges have existing policies and procedures that govern noncompliance with their rules generally and these provisions would apply to any events of noncompliance under the proposed rules. These provisions provide the NYSE Exchanges with the ability to grant noncompliant issuers a discretionary period within which to return to compliance. The determination of what is a reasonable cure period can only be made in light of the facts and circumstances of a specific event of noncompliance, so the Exchange does not believe that it is desirable to establish uniform cure periods under the proposed rules as suggested by the Society.

The Society expresses the view that the transition periods included in the proposed rules are too short and proposes that companies should have until the first fiscal year beginning on or after December 27, 2013 to comply with the new requirements. The NYSE Exchanges believe that the transition periods are sufficient to enable companies to become compliant on a timely basis in a manner that is not unduly burdensome. The proposed rules will become operative on July 1, 2013 and companies will not need to comply until the earlier of their first annual meeting after January 15, 2014 or October 31, 2014. As such, all companies will have at least 200 days to become compliant after the rules become operative. The NYSE Exchanges also note that the proposed transition period is identical to that used at the time of initial implementation of the NYSE's current board and committee independence requirements and the NYSE believes that the transition period was not unduly burdensome for companies at that time.

The only remaining letter was received from the Investment Company Institute ("ICI") with respect to the NYSE proposal. The ICI supported the NYSE's decision to provide a general exemption under its proposed rule to registered investment companies.

We appreciate the opportunity to respond to the comments received on these filings.

Sincerely,