SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50625; File No. SR-NYSE-2004-41)

November 3, 2004

Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the New York Stock Exchange, Inc. and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and 3 Thereto to Amend Section 303A of the NYSE Listed Company Manual Relating to Corporate Governance

I. Introduction

On August 3, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change (SR-NYSE-2004-41) to amend certain provisions of Section 303A of the NYSE Listed Company Manual ("Listed Company Manual") regarding corporate governance standards for companies listed on the Exchange. On August 30, 2003, the NYSE submitted Amendment No. 1 to the proposal.[3] The proposed rule change, as amended by Amendment No. 1, was published for comment in the Federal Register on September 8, 2004.[4] The Commission received ten comment letters on the proposed rule change.[5] On October 28, 2004, the NYSE filed

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated August 27, 2004 ("Amendment No. 1").

4 See Securities Exchange Act Release No. 50298 (August 31, 2004), 69 FR 54328 ("Notice").

5 See Letters to Jonathan G. Katz, Secretary, Commission, from: Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, dated September 15, 2004 ("CII letter"); Dale McCormick, Maine State Treasurer, dated September 17, 2004 ("Maine Treasurer Letter"); Richard Curtis, Executive Director, Highway Patrol Retirement System, William Estabrook, Executive Director, Ohio Police and Fire Pension Fund, Laurie Hacking, Executive Director, Public Employees Retirement System of Ohio,

Amendment No. 2 to the proposed rule change.[6] On November 2, 2004, the NYSE filed Amendment No. 3 to the proposed rule change.[7] This order approves the proposed rule change, as amended by Amendment Nos. 1, 2, and 3. The Commission is granting accelerated approval of Amendment Nos. 2 and 3, and is soliciting comments from interested persons on those amendments.

Damon Asbury, Executive Director, State Teachers Retirement System of Ohio, James Winfree, Executive Director, School Employees Retirement System of Ohio, Keith Overly, Executive Director, Public Employees Deferred Compensation, dated September 21, 2004 ("Ohio Retirement System Letter"); Colin Melvin, Director–Corporate Governance, Hermes Investment Management Limited, dated September 22, 2004 ("Hermes Letter"); Joseph M. Huber, Senior Corporate Counsel, Federated Investors, Inc., dated September 27, 2004 ("Federated Letter"); Henry H. Hubble, Vice President, Investor Relations and Secretary, Exxon Mobil Corporation, dated September 28, 2004 ("ExxonMobil Letter"); Steve Odland, Chairman, President and CEO, AutoZone, Inc., and Chairman, Corporate Governance Task Force, Business Roundtable, dated September 29, 2004 ("Business Roundtable Letter"); Kay R.H. Evans, Executive Director, Maine State Retirement System, dated September 29, 2004 ("Maine Retirement System Letter"); Michael J. Holliday, Chair of the Committee, Committee on Securities Regulation of the Business Law Section of the New York State Bar Association, dated September 29, 2004 ("NYSBA Committee Letter"); and letter to William H. Donaldson, Chairman, Commission, from The Honorable Diana DeGette, The Honorable Edward Markey, and The Honorable Janice Schakowsky, Members of Congress, dated October 14, 2004 ("Representatives' Letter").

6 See letter from Mary Yeager, Assistant Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 28, 2004, and accompanying Form 19b-4 ("Amendment No. 2"). In Amendment No. 2, the NYSE withdrew a proposed change to the Commentary to Section 303A.02(b)(iii) that would have revised the definition of "immediate family member" for purposes of the bright line test relating to a director's relationships with the listed company's auditor. See also Section IV. below.

7 See letter from Mary Yeager, Assistant Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 2, 2004 ("Amendment No. 3"). In Amendment No. 3, the NYSE proposed to give listed companies until their first annual meeting after June 30, 2005 to replace a director who was independent under the NYSE's existing bright line test relating to relationships of a director or the director's immediate family member to the auditor of the company, but would not be under the revised rule. As originally proposed, the extension would have been granted until the first annual meeting after January 1, 2005. Amendment No. 3 also proposes to include this provision in the text of Section 303A.

II. Description of the Proposed Rule Change

On November 4, 2003, the Commission approved Section 303A of the Listed Company Manual, which sets out the Exchange's corporate governance requirements applicable to listed companies.[8] In the instant proposal, the Exchange proposes certain clarifying and substantive changes to Section 303A, described in detail below.[9]

Definition of Independent Director

Section 303A.02 of the Listed Company Manual sets forth a definition of "independent director" for purposes of the Exchange's corporate governance standards for listed companies, which, among other things, includes a series of bright line tests that directors must satisfy in order to be eligible to be deemed independent for purposes of board and committee membership. Many of the proposed changes relate to these independence tests.

As an initial matter, the Exchange proposes to amend Section 303A.02(a) of the Listed Company Manual to clarify that companies are required to identify which of their directors have been deemed independent. The Exchange also proposes to amend Section 303A.02(b)(i) to add a definition of the term "executive officer," and to amend other provisions throughout Section 303A by including use of this term.

Additionally, the Exchange proposes to amend the Commentary to Sections 303A.02(b)(i) and (ii), which set forth bright line tests of independence for directors who are, or whose family members are, current or former employees or recipients of compensation from a listed company, to state that service as an interim executive officer (and not only an interim

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8 See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR-NYSE-2002-33).

9 The proposed rule change also includes various technical and stylistic revisions to the language of Section 303A. See Notice.

Chairman or CEO, as currently provided) will not trigger the look-back provisions in those sections.

The Exchange further proposes to amend Section 303A.02(b) to reformulate the wording of the bright line independence tests to provide more clarity with respect to how the applicable look-back periods should be applied. In particular, with respect to Section 303A.02(b)(ii), the Exchange proposes to amend the rule text to state that a director is not independent if the director "has received or has an immediate family member who has received, during any twelve-month period within the last three years, more than $100,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service)."[10]

The NYSE is also proposing a change to Section 303A.02(b)(iii), the bright line test relating to relationships of a director or the director's immediate family member to the auditor of the company ("Director-Auditor Relationship Test"). Section 303A.02(b)(iii) currently provides that: "A director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company is not 'independent' until three years after the end of the affiliation or the employment or auditing relationship." An "immediate family member" is defined currently for all the independence tests in Section 303A.02(b) to include "a person's spouse, parents, children,

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[10] This language would replace the current rule text, which provides: "A director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), is not independent until three years after he or she ceases to receive more than $100,000 per year in such compensation."

siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home."

The Exchange proposes to revise this standard to provide that a director is not independent if: "(A) The director or an immediate family member is a current partner of a firm that is the company's internal or external auditor; (B) the director is a current employee of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or (D) the director or an immediate family member was within the last three years (but is no longer) a partner or employee of such a firm and personally worked on the listed company's audit within that time."

In the proposed rule change as published in the Notice, NYSE also proposed to revise the definition of "immediate family member" for purposes of the Director-Auditor Relationship Test. In Amendment No. 2, NYSE withdrew this proposed revision.[11]

As amended by Amendment No. 3, the proposal would give listed companies until their first annual meeting after June 30, 2005 to replace a director who was independent under the NYSE's existing Director-Auditor Relationship Test, but would not be under the revised rule.[12]

The Exchange proposes to revise the Commentary to Section 303A.02(b)(v), the bright line test regarding, among other things, the independence of a director who held, or whose immediate family held, certain positions in a company that received payments from the listed company. The revised language would state that contributions made to tax exempt organizations shall not be considered "payments" under the test. The proposed change is meant to clarify that

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11 See Amendment No. 2.

12 As originally proposed, the extension would have been granted until the first annual meeting after January 1, 2005. See Amendment No. 3, which also proposes to include this provision in the text of Section 303A.

payments to a charitable organization related to a listed company's business relationship with that organization would be subject to the test.[13]

Requirements for Non-Management Directors

The Exchange proposes to revise Section 303A.03(b) of the Listed Company Manual to clarify that a non-management director must preside over each executive session of the non-management directors, although the same director is not required to preside at all executive sessions of the non-management directors.[14]

Requirements for Compensation Committees

The Exchange proposes to revise Section 303A.05(b)(i)(B) of the Listed Company Manual to clarify, among other things, that the non-CEO compensation regarding which a compensation committee must make recommendations to its board is that of the executive officers. The Exchange also proposes to make clear that nothing in the aforementioned provision is intended to preclude the board from delegating its authority over the matters that this provision addresses to the compensation committee.

Duties of the Audit Committee

The Exchange proposes to revise Section 303A.07(c)(iii)(B) of the Listed Company Manual to add that the audit committee of a listed company must meet to review the company's financial statements and must review the company's specific Management's Discussion and Analysis ("MD&A") disclosures.

Disclosures of Guidelines and Codes and Methods of Communication

The Exchange proposes to amend Sections 303A.03, .09 and .10 of the Listed Company

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13 See Notice.

14 See proposed rule text as published in Notice for further proposed clarifications in this subsection.

Manual to specify that the relevant disclosures must be in the listed company's annual proxy statement (or, if the company does not file a proxy statement, then in the Form 10-K).

Foreign Private Issuer Disclosures

The Exchange proposes to revise Section 303A.11 of the Listed Company Manual to clarify that foreign private issuers are required to provide disclosure of the significant ways in which their actual corporate governance practices (as opposed to their home country practices, as in the current version) differ from those required of domestic companies under Section 303A.

Certifications and Affirmations

Section 303A.12 of the Listed Company Manual provides that each listed company CEO must certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE corporate governance listing standards. The Exchange proposes to amend this provision by adding the phrase "qualifying the certification to the extent necessary." Any qualifications would need to be included in the disclosure of the certification required under the provision. The Exchange also proposes to add new Section 303A.12(c) to require that a listed company submit annual Written Affirmations to the NYSE, in a form specified by the Exchange, regarding details of compliance or non-compliance with Section 303A, as well as interim Written Affirmations each time a change occurs to the board of any of the committees of the company that are subject to the provisions of Section 303A.

The proposed rule change would also amend the General Application section of Section 303A to specify that listed open-end management investment companies (which can be listed as Investment Company Units, more commonly known as Exchange Traded Funds or ETFs), foreign private issuers, and preferred and debt listed companies (to the extent such companies

must comply with Section 303A.06 of the Listed Company Manual) would be required to submit the annual and interim Written Affirmations.

III. Summary of Comments on the Proposed Rule Change

The Commission received ten comment letters on the proposed rule change. Four comment letters generally supported the objective of the proposed amendments, or specifically the proposed changes to the Director-Auditor Relationship Test,[15] although two of these commenters recommended revisions with respect to certain aspects of the proposal,[16] while a third urged the Exchange to consider further input before finalizing the amendments.[17] Six comment letters opposed the proposal, most specifically with respect to the Director-Auditor Relationship Test.[18] The following is a summary of comments set forth by topic:

A. Proposed Changes to Director-Auditor Relationship Test

Four comment letters supported the proposed changes to the Director-Auditor Relationship Test.[19] One commenter, for example, believed that the amendments are appropriate because "they focus on those relationships that have the potential to impact a director's

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15 See Business Roundtable Letter, ExxonMobil Letter, Federated Letter, NYSBA Committee Letter.

16 See Business Roundtable Letter, NYSBA Committee Letter.

17 See ExxonMobil Letter.

18 See CII Letter, Hermes Letter, Ohio Retirement Systems Letter, Maine Retirement Systems Letter, Maine Treasurer Letter.

19 See Business Roundtable Letter, ExxonMobil Letter, Federated Letter, NYSBA Committee Letter. Some of the comments related to the proposed revision to the definition of "immediate family member," which NYSE has withdrawn. See supra note 6.

independence."[20] Two commenters expressed the view that the changes, or aspects of them, would harmonize the NYSE's standards more closely with those of other markets.[21]

One commenter favoring the changes stated that "[b]ecause the current standard is so broadly drafted, it reaches a wide range of individuals, including individuals who never served on the listed company's audit."[22] The commenter noted that deeming a director as not independent based on this standard results in the loss of the director's ability to serve on the three key board committees, and added that the pool of accounting firms with the necessary expertise and resources to audit the financial statements of large, multinational companies is limited, and listed companies have limited options when selecting an auditor.

Commenters supporting the proposed changes believed that the amended standard would still reach those family member relationships that are the most likely to impact a director's independence,[23] and that the greater coverage of the current standard does not reach any relationship that is likely to meaningfully affect independence.[24] One commenter argued that "it seems strange that the current standard could deem directors not independent even though the auditor with a similar relationship to the company was deemed independent under the test applicable to it relative to the company."[25]

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20 See Business Roundtable Letter.

21 See Federated Letter, Business Roundtable Letter. One commenter added that the enumeration of specific relationships in the text of the standard would provide clarity to listed companies in applying the standard. Business Roundtable Letter.

22 See Business Roundtable Letter.

23 Id.

24 See NYSBA Committee Letter.

25 Id.

Six comment letters, in contrast, opposed the proposed changes to the Director-Auditor Relationship Test,[26] believing it would weaken corporate governance standards and investor protections[27] and erode investor confidence.[28] These commenters believed, for example, that the changes would allow a director to qualify as independent notwithstanding "close relationships and/or employment ties"[29] and "obvious conflicts."[30]

In the view of some commenters, the proposed changes not only do not advance the goal of reducing corporate wrongdoing, "but could actually precipitate more malfeasance by opening the door to conflicts of interest, which could ultimately compromise a director's ability to protect the interest of shareholders."[31]

Specifically with regard to the proposed change to the look-back requirement of the test, which would make it applicable only to former partners and employees of an auditing firm who worked on the audit, some commenters believed that the change would only invite more conflicts of interest.[32] Commenters opposing the proposal further believed that justifying it as necessary in order to make NYSE's rules consistent with those of The Nasdaq Market ("Nasdaq") and the

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26 See CII Letter, Hermes Letter, Ohio Retirement Systems Letter, Maine Retirement Systems Letter, Maine Treasurer Letter; Representatives' Letter. Some of the comments related to the proposed revision to the definition of "immediate family member," which NYSE has withdrawn. See supra note 6.

27 See CII Letter, Maine Treasurer Letter, Ohio Retirement Systems Letter, Representatives' Letter.

28 See CII Letter, Hermes Letter, Ohio Retirement Systems Letter.

29 See Maine Retirement Letter.

30 See Maine Treasurer Letter.

31 See Representatives' Letter.

32 See Representatives' Letter.

American Stock Exchange ("Amex") was not appropriate,[33] and that NYSE should be enforcing the toughest standards rather than matching weaker ones.[34]

With regard to the proposed change in the definition of "immediate family member" for this test – subsequently withdrawn[35] – commenters noted that, under the proposal, a director would not be disqualified if his or her parent, child, sibling, mother- or father-in-law, son- or daughter-in-law, or brother- or sister-in-law, was, for example, a partner in the listed company's auditing firm.[36] Some commenters expressed concern that the change "would only work toward making directors less-independently minded, not more so."[37] These and other commenters believed that the proposed change would diverge significantly from other exchanges' standards.[38]

"The audit process is sacrosanct and should be above suspicion," stated one commenter generally.[39] "Any analysis," stated another, "should focus on whether directors or their relatives (broadly defined) have or have had an employment connection to the audit firm – regardless of their title or specific role at the firm."[40]

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33 See Ohio Retirement Systems Letter.

34 See CII Letter. See also Representatives' Letter.

35 See supra note 6.

36 See CII Letter, Maine Treasurer Letter, Ohio Retirement Systems Letter.

37 See Representatives' Letter.

38 Id. See also CII Letter, Ohio Retirement Systems Letter.

39 See Hermes Letter.

40 See CII Letter.

Some commenters also questioned why the NYSE is proposing to amend listing standards adopted less than a year ago after substantial discussion,[41] and believed that the current standards "have not been in place long enough to be declared unworkable."[42]

B. Proposed Amendment Concerning Look-Back Period for Compensation Test

One commenter expressed concern regarding the proposed change to clarify that the look-back prohibition on an independent director receiving more than $100,000 in compensation from the listed company per year applies to any twelve-month period within the last three years.[43] This commenter believed that a "rolling 12-months" test would entail an amount of work and burden of research for listed companies that is unwarranted for any incremental benefit it might provide. The commenter recommended that the test instead refer to payments in any of the last three fiscal years, following the format in the NYSE's test of independence with respect to payments made by or received from a company where a director is an employee, as well as in Commission rules for similar disclosure of transactions with directors and officers.

C. Proposed Amendment Concerning Audit Committee Responsibilities

One commenter addressed the proposed changes to the rules regarding audit committee responsibilities.[44] The commenter believed that the provision as proposed to be amended could be read to suggest that the audit committee should have greater involvement in reviewing MD&A disclosures relative to earnings releases. The commenter stated that this suggestion does not accurately reflect the current practices of audit committees, many of which, consistent with emerging best practices, review individual earnings releases prior to publication.

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41 See CII Letter, Maine Treasurer Letter.

42 See Maine Retirement Systems Letter.

43 See NYSBA Committee Letter.

44 See Business Roundtable Letter.

Additionally, the commenter maintained that the meaning of the proposal to require review of "specific" disclosures under MD&A is unclear. The commenter believed the proposed amendments should be accordingly modified.

D. Additional Comments

One commenter recommended additional changes to clarify other aspects of the proposal.[45] Some commenters believed that the new definition of "immediate family member" that NYSE had proposed for the Director-Auditor Relationship Test should be used uniformly for all the director independence tests in Section 303A.[46] In addition, some commenters took the opportunity to suggest other changes, or raise concerns with respect to other aspects of the NYSE's corporate governance listing standards, that are beyond the scope of the instant proposal. Finally, one commenter believed there was need for more general comment on the standards, and urged the Exchange to consider a broad range of input before finalizing the proposed amendments.[47]

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45 See NYSBA Committee Letter. The commenter included suggestions to: add language to subsection Section 303A.02(b)(v) to clarify the treatment of payments for property or services from or to tax-exempt organizations in ordinary course commercial transactions; revise the Commentary of that subsection, in consonance with the proposed change to the text of the rule, to refer to "each of the last three fiscal years" rather than the "last completed fiscal year," so as to avoid confusion; and revise the proposed changes to the text of Section 303A.05(b)(i)(B) to clarify the extent to which determinations of non-CEO compensation may be delegated by a company's board to its compensation committee. The commenter also urged that, for the sake of clarity, NYSE use a different phrase to define family member for purposes of the Director-Auditor Relationship Test.

46 See ExxonMobil Letter, NYSBA Committee Letter.

47 See ExxonMobil Letter.

IV. Amendment Nos. 2 and 3 to the Proposed Rule Change

In Amendment No. 2, the NYSE withdrew the proposed revision to the definition of "immediate family member" for purposes of the Director-Auditor Relationship Test, and addressed comments received concerning the proposed rule change.

With respect to the comments relating to the Director-Auditor Relationship Test, the Exchange referred to its statement in its original proposal noting that a number of NYSE listed companies are finding directors precluded from independence because of past personal or family member affiliation with an auditing firm, even though the person involved never worked on the listed company account. The Exchange stated that during the 2004 proxy season, it was contacted by a number of listed companies that noted what it believes is the problematic nature of the broad application of the current test, and provided examples of cases that arose in which directors were precluded from being deemed independent under the current Director-Auditor Relationship Test due to what the Exchange regards as its unintended broadness.

The NYSE stated that, in considering alternative approaches with respect to immediate family members, it noted that the Nasdaq and Amex listing standards are more targeted than the current NYSE standard, implicating, for example, only former partners or employees of the audit firm who worked on the company's audit. The NYSE stated that because the Nasdaq and Amex outside auditor bright line tests were subject to Commission review and public comment, the Exchange felt that adapting its bright line test to reflect their approach would be an appropriate and non-controversial change.

In response to a comment that the three-year look-back should apply to all former auditing partners and employees, as it does under the NYSE's current standard, and that a change to this standard would be "only inviting more conflicts of interest into the corporate

boardrooms,"[48] the Exchange responded that, "in fact, our proposal to cover all partners of the audit firm is a strengthening of its current standard, which only applies to partners or former partners who participate in the audit firm's audit, assurance or tax compliance (but not tax planning) practice." With respect the proposed revision to the "immediate family member" definition applicable to the Director-Auditor Relationship Test, NYSE noted comments supporting and opposing the proposal, and stated that, based on comments from the Commission staff and the public, it had determined to withdraw this specific amendment at this time.

Finally, the NYSE discussed comments on the additional proposed changes to Sections 303A.02(b)(ii), 303A.02(b)(v), 303A.05(b)(i)(B), 303A.07, 303A.08 and 303A.12. With regard to these comments, the NYSE stated that it will consider these suggestions as part of its ongoing review of Section 303A, but does not feel that additional clarifications or amendments to these sections are appropriate at this time.

In Amendment No. 3, NYSE revised the proposed applicability date of the amended Director-Auditor Relationship Test for certain listed companies, and included a proposed reference to this date in the text of Section 303A. NYSE stated: "Due to this proposed tightening of the independence test and to avoid a sudden change to the status of a current director, companies will have until their first annual meeting after June 30, 2005, to replace a director who was independent under the prior test but who is not independent under the current test."

V. Discussion

After careful consideration of the proposal and the comments received, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act

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48 See Representatives' Letter.

and the rules and regulations thereunder applicable to a national securities exchange,[49] and, in particular, with the requirements of Section 6(b) of the Act.[50] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5)[51] of the Act, which requires that the rules of a national securities exchange, among other things, be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

In the Commission's view, the proposed rule change provides appropriate clarification, and, in some cases, enhancement, of several of the corporate governance listing standards contained in Section 303A of the Listed Company Manual. For example, the proposed rule change clarifies that listed companies must identify which of their directors have been deemed independent; sets forth a definition of executive officer as used in these rules; rewords the look-back test regarding compensation received by a director or immediate family member in a manner that makes it easier to understand and apply; and specifies that only contributions to a tax-exempt organization are not to be considered "payments" for purposes of Section 303A.02(b)(v), but not payments to such organization made in the context of a business relationship.

The proposal further requires audit committees to meet to review and discuss their companies' financial statements and to review their companies' specific MD&A disclosures; clarifies the responsibilities of compensation committees with respect to non-CEO

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49 In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

50 15 U.S.C. 78f.

51 15 U.S.C. 78f(b)(5).

compensation; requires more meaningful disclosure by foreign private issuers regarding how their practices differ from the practices required of domestic companies; clarifies various disclosure requirements generally; and provides for the inclusion and disclosure of any qualifications to the certifications that CEOs submit to the NYSE. The addition of a provision requiring Written Affirmations from listed companies of their ongoing compliance with these standards should help assure that companies are meeting the requirements.

With respect to Section 303A.02(b)(iii), the Director-Auditor Relationship Test, the Commission notes that the proposed rule change, as amended, clarifies and tightens NYSE's standard of independence with respect to current relationships of a director or immediate family member with the listed company auditor, while more closely aligning the look-back provision of the test with similar provisions adopted by Amex and Nasdaq, which, unlike NYSE's current standard, apply a look-back test only to former partners or employees of the audit firm who personally worked on the audit.

For example, under the current NYSE standard, an immediate family member of a director who is "affiliated with or employed in a professional capacity by" the company's internal or external auditor would preclude the director from independence. As interpreted by the NYSE, under the current standard an immediate family member who is a current partner, but does not act in a "professional capacity" at the audit firm, would not impact the director's independence. Under the proposed revision, however, a director would not be considered independent if any of the director's immediate family members is a current partner of the audit firm. With respect to family members of a director who are current employees of the auditor, the proposed rule change clarifies, in consonance with NYSE's response to Frequently Asked Questions regarding its current rule, that the director is precluded from independence only if the

family member employee participates in the firm's audit, assurance, or tax compliance (but not tax planning) practice.

With respect to the look-back provision of the test, NYSE's current standard precludes a director from being considered independent if the director was affiliated with or employed by the auditor, or the director's immediate family member was affiliated with or employed in a professional capacity by the auditor, until three years after the end of the affiliation or relationship. NYSE is proposing to revise this provision so that the director is precluded from independence only when the director or his or her immediate family member was a partner or employee of the audit firm and personally worked on the listed company's audit within the three-year look back period. As noted by the NYSE, the Commission has previously approved analogous look-back provisions in the director-auditor relationship tests of other markets as consistent with the Act. The Commission further believes that approval of the proposed change in the NYSE standard is in accord with principles of fair competition and equal regulation of markets.

The Commission finds good cause for approving Amendment Nos. 2 and 3 before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The only revision to the original proposal made by Amendment No. 2 was the withdrawal of a proposed change to the definition of "immediate family member" for purposes of the Director-Auditor Relationship Test. The amendment proposes no new changes to the corporate governance standards for listed companies and raises no new regulatory issues. In Amendment No. 3, the NYSE proposed to give listed companies until their first annual meeting after June 30, 2005, rather than their first meeting after January 1, 2005, as set forth in the original proposal, to replace a director who was independent under the current test but who would not be independent

under the revised test. The amendment also would include this extension in the text of Section 303A. The Commission believes this extension of time for listed companies that based decisions on the current test of independence is reasonable, and acceleration of the amendment should help facilitate planning by listed companies.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 2 and 3 are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2004-41 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2004-41. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2004-41 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[52] that the proposed rule change (SR-NYSE-2004-41), as amended, be, and hereby is, approved and Amendment Nos. 2 and 3 are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[53]

J. Lynn Taylor
Assistant Secretary

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52 15 U.S.C. 78s(b)(2).

53 17 CFR 200.30-3(a)(12).