

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68011; File No. SR-NYSE-2012-49)

October 9, 2012

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No.1, Amending Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange's Listed Company Manual to Comply with the Requirements of Securities and Exchange Commission Rule 10C-1

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on September 25, 2012, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which filing was amended and replaced in its entirety by Amendment No. 1 thereto on October 1, 2012, and which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange's Listed Company Manual (the "Manual") to comply with the requirements of Securities and Exchange Commission ("Commission" or "SEC") Rule 10C-1.<sup>4</sup> The text of the proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> 17 CFR 240.10C-1.

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

This Amendment No. 1 to SR-NYSE-2012-49 (the "filing") amends and replaces in its entirety the Filing as originally submitted on September 25, 2012. Amendment No. 1 corrects a single error in the rule text in Exhibit 5 as originally filed. The error was in Section 303A.00 under the heading "Transition Periods for Compensation Committee Requirements."

The Exchange proposes to amend Sections 303A.00, 303A.02(a) and 303A.05 of the Manual to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 303A.00, 303A.02(a) and 303A.05 will not become operative until July 1, 2013. Consequently, the existing text of these sections will remain in the Manual until June 30, 2013 and will be removed immediately thereafter.<sup>5</sup> Upon approval of this filing, the amended provisions of those sections will be included in the Manual with introductory text indicating that the revised text does not become operative until July 1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")<sup>6</sup> added Section 10C to the Securities Exchange Act of 1934.<sup>7</sup> Section

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<sup>5</sup> The Commission notes that the Exchange will have to comply with Section 19(b) of the Act.

<sup>6</sup> Pub. L. No. 111-203, 124 Stat. 1900 (2010).

<sup>7</sup> 15 U.S.C. 78j-3.

10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. On June 20, 2012, to comply with the requirements of Section 10C, the Commission adopted new Rule 10C-1, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.

#### Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, Rule 10C-1(b)(1)(ii)<sup>8</sup> requires the exchanges to consider relevant factors including, but not limited to: (i) the source of the director's compensation, including any consulting, advisory or other compensatory fees paid by the listed company; and (ii) whether the director has an affiliate relationship with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. Rule 10C-1(a)(4)<sup>9</sup> requires that the rule filing submitted to the SEC by each exchange in connection with the adoption of the rules required by Rule 10C-1 must include a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange's consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.

The Exchange's director independence standards are set forth in Section 303A.02. Section 303A.02(a) provides that no director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed

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<sup>8</sup> 17 CFR 240.10C-1(b)(1)(ii).

<sup>9</sup> 17 CFR 240.10C-1(a)(4).

company (directly or as a partner, shareholder or officer of an organization that has a relationship with the company).<sup>10</sup> In addition, Section 303A.02(b) provides that a director may not be deemed to be independent if such director has a relationship with the listed company which violates any one of five “bright line” tests.<sup>11</sup> Section 303A.02(b) will continue to be applicable

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<sup>10</sup> Commentary to Section 303A.02(a) notes that it is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, the commentary states that it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, the Exchange believes that, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. The Exchange does not view the ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

<sup>11</sup> The following are the “bright line” tests set forth in Section 303A.02(b): (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company; (ii) 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 \$120,000 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); (iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time; (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee; (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues. For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and 303A.09, a director of a business development company is considered to be independent if he or she is not an "interested person" of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

to independence determinations in relation to compensation committee service, as compensation committee members will be required to be independent under the Exchange's general board independence standards set forth in Section 303A.02, in addition to the independence requirements proposed specifically for compensation committee service.

The Exchange proposes to amend Section 303A.02(a) of the Manual to adopt proposed Section 303A.02(a)(ii),<sup>12</sup> which would require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors 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, including, but not limited to, the two factors explicitly enumerated in Rule 10C-1(b)(ii). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, commentary to proposed Section 303A.02(a)(ii) provides that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between

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<sup>12</sup> As proposed, the current text of Section 303.02(a) would become Section 303A.02(a)(i).

the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 303A.02(a)(ii) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),<sup>13</sup> the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.<sup>14</sup> Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing "bright line" independence standards as set forth in Section 303A.02(b) of the Manual are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 303A.02(a) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of "bright line" tests in Section 303A.02(b). The Exchange believes that these

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<sup>13</sup> Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

<sup>14</sup> See Adopting Release at 38428.

requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 303A.02(a)(ii), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

#### Compensation Committee Advisers

Rule 10C-1(b)(2)<sup>15</sup> requires exchange rules to mandate that compensation committees must have broad authority to engage advisers to assist in their performance of the committee's functions. Specifically, exchange rules must mandate that:

- (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; and
- (ii) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee.

Rule 10C-1(b)(3)<sup>16</sup> requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

The required powers of the compensation committee under Rule 10C-1(b)(2) and (3) as set forth above are in significant part already required by the NYSE's existing compensation committee listing standard, as they are required elements of the compensation committee charter

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<sup>15</sup> 17 CFR 240.10C-1(b)(2).

<sup>16</sup> 17 CFR 240.10C-1(b)(3).

as set forth in Section 303A.05(b). In the interests of clarity and emphasis, the Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as a proposed new subsection (c) of Section 303A.05. The Exchange proposes to remove the comparable requirements currently in Section 303A.05(b) commentary and replace them with a provision stating that the compensation committee charter must provide that the committee has all of the powers specified in new subsection (c).

#### Compensation Adviser Independence Factors

Rule 10C-1(b)(4)<sup>17</sup> provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

- (i) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- (ii) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- (iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;

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<sup>17</sup> 17 CFR 240.10C-1(b)(4).

- (iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- (v) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- (vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

Accordingly, the Exchange proposes to include in proposed Section 303A.05(c) a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 303A.05(c) would not include any specific additional factors for consideration, as the Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),<sup>18</sup> the Exchange proposes to include in Section 303A.05(c) an explicit statement that nothing in Section 303A.05(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed in [sic] Section 303A.05(c) would specify that the compensation committee

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<sup>18</sup> 17 CFR 240.10C-1(b)(2)(iii).

need not engage in an analysis of the independence factors before consulting with or obtaining advice from in-house legal counsel.

#### Cure Periods

Rule 10C-1(a)(3)<sup>19</sup> requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. The Exchange proposes to amend Section 303A.00 to adopt this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of the director's reasonable control. However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

#### Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods

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<sup>19</sup> 17 CFR 240.10C-1(a)(3).

through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).<sup>20</sup> Consistent with the transition periods approved by the SEC for inclusion in Section 303A at the time of its original adoption,<sup>21</sup> the Exchange proposes to amend Section 303A.00 to provide that listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new Section 303A.02(a)(ii) compensation committees independence standards . Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards.

In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 303A.00. Transition periods are available to: companies listing in connection with their initial public offerings (“IPOs”) or which did not have a class of common stock registered under the Exchange Act prior to the listing date;<sup>22</sup> companies listing in connection with a spin-off or carve-out; companies listing upon emergence from bankruptcy; companies previously registered under Section 12(g) of the Exchange Act; and companies previously registered under Section 12(b) of the Exchange Act to the extent the national securities exchange on which they were listed did not have the same requirement; and companies

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<sup>20</sup> See Adopting Release at 38444.

<sup>21</sup> See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR-NYSE-2002-33).

<sup>22</sup> For purposes of Section 303A other than Sections 303A.06 and 303A.12(b), a company is considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act.

that cease to qualify as a controlled company or a foreign private issuer. All of the foregoing categories of issuers (other than companies previously registered under Section 12(b) of the Exchange Act) would continue to be entitled to a transition under which the company must have: at least one independent member on its compensation committee by the listing date (or (i) in the case of an IPO, the earlier of the closing date of the IPO or five business days from the listing date, or (ii) in the case of a spin-off or carve-out, by the date the transaction closes); at least a majority of independent members on the compensation committee within 90 days of the listing date; and a fully independent compensation committee within one year of the listing date. A company that ceases to qualify as a controlled company would continue to have a transition under which it must have at least one independent member on its compensation committee by the date its status changed, at least a majority of independent members on the compensation committee within 90 days of the date its status changed and a fully independent compensation committee within one year of the date its status changed. A company that ceases to be a foreign private issuer would continue to have a transition under which it must have a fully independent compensation committee within six months of the Foreign Private Issuer Determination Date.<sup>23</sup> A company previously registered under Section 12(b) of the Exchange Act must satisfy the requirements of Section 303A within one year of the listing date to the extent the national securities exchange on which it was listed did not have the same requirements; and if the other exchange had a substantially similar requirement and the company was afforded a transition period that had not expired, the company has the same transition period as would have been

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<sup>23</sup> Section 303A.00 currently defines the “Determination Date” as the date at the end of a company’s second fiscal quarter on which it is required by SEC Rule 240.3b-4 to test its foreign private issuer status on an annual basis. The Exchange proposes to change this to the “Foreign Private Issuer Determination Date” so it is distinguished from the new “Smaller Reporting Company Determination Date”.

available to it on the other exchange.

The Exchange proposes to exempt smaller reporting companies<sup>24</sup> from compliance with the proposed new independence requirements with respect to compensation committee service. Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the Exchange proposes to adopt a new transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 303A.02(a)(ii).<sup>25</sup> As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, (I) to have a committee composed entirely of members that meet the independence requirements of proposed Section 303A.02(a)(ii) within six months of the Smaller Reporting Company Determination Date and (II) to comply with Section 303A.05(c)(iv) as of the Smaller Reporting Company Determination Date. The Exchange also proposes to include a new subsection in Section 303A.00 specifying that smaller reporting companies are subject to proposed Section 303A.05(c) with the exception of proposed Section 303A.05(c)(iv) requirements with respect to the Compensation Committee’s consideration of compensation consultant’s independence from management. Under this approach, smaller reporting companies will effectively be subject to precisely the same requirements as is currently the case.

#### General Exemptions

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<sup>24</sup> As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

<sup>25</sup> A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion *infra*.

Rule 10C-1(b)(5)<sup>26</sup> provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies, and Rule 10C-1(b)(1)(iii)(A)<sup>27</sup> provides an automatic exemption from the compensation committee independence requirements for limited partnerships, companies in bankruptcy, open-end management investment companies registered under the Investment Company Act of 1940 (“1940 Act”). Rule 10C-1(b)(1)(iii)(A) also exempts from the compensation committee independence requirements any foreign private issuer that discloses in its annual report filed with the SEC the reasons that the foreign private issuer does not have an independent compensation committee.

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuer that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the NYSE’s existing compensation committee requirements. Thus, as proposed, controlled companies, limited partnerships and companies in bankruptcy, closed-end and open-end funds registered under the 1940 Act, passive business organizations in the form of trusts (such as royalty trusts), derivatives and special purpose securities (such as those described in Sections 703.19 and 703.20 of the Manual), and issuers whose only listed equity security is a preferred stock, would be exempt. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees

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<sup>26</sup> 17 CFR 240.10C-1(b)(5).

<sup>27</sup> 17 CFR 240.10C-1(b)(1)(iii)(A).

(e.g., passive business organizations in the form of trusts or issuers of derivative or special purpose securities); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

Section 303A.00 currently provides that foreign private issuers are permitted to follow home country practice in lieu of compliance with the Exchange's compensation committee listing standard. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),<sup>28</sup> from the proposed new compensation committee requirements to foreign private issuers that follow home country practice. The Exchange notes that Section 303A.11 requires foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE listing standards. Foreign private issuers that are required to file an annual report on Form 20-F with the SEC must include their statement of significant differences in that annual report. All other foreign private issuers may either (i) include the statement of significant differences in an annual report filed with the SEC or (ii) make the statement of significant differences available on or through the listed company's website. As any foreign private issuer availing itself of the proposed exemption would have to disclose that fact in its statement of significant differences, the Exchange does not propose to require those companies to comply with the disclosure requirement of Rule 10C-1(b)(1)(iii)(A).

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<sup>28</sup> 17 CFR 240.10C-1(b)(5)(i).

While Section 303A.11 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 303A.05(c). The Exchange proposes to grant these issuers a general exemption from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1.

## 2. Statutory Basis

The Exchange believes that the proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>29</sup> of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,<sup>30</sup> in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination

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<sup>29</sup> 15 U.S.C. 78f(b).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendments to its compensation committee listing standards are consistent with the protection of investors and the public interest in that they strengthen the independence requirements for compensation committee membership, provide additional authority to compensation committees and require compensation committees to consider the independence of compensation consultants.

The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers and smaller reporting companies are consistent with Section 10C and Rule 10C-1, for the reasons stated above in the “Purpose” section, including because (i) Rule 10C-1(b)(5)(ii) explicitly exempts smaller reporting companies and (ii) foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing NYSE listing requirements. The Exchange believes it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1. The Exchange believes that it is an appropriate use of its

exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange's compensation committee requirement, for the structural reasons discussed in the "Purpose" section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has not solicited written comments on the proposed rule change. The Exchange has received two comment letters on the proposed rule change.<sup>31</sup> One commenter made the following points: (i) the Exchange should specify that the relevant factors for consideration with respect to compensation committee independence should include a consideration of fees received for service on the board itself; (ii) the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers; (iii) the additional factors to be considered for compensation committee independence should be considered as a part of general board independence determinations; and (iv) the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of board independence.

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<sup>31</sup> Both of these letters were addressed to NYSE Regulation, Inc. Neither author indicated that the comments related to just one of the three national securities exchanges owned by NYSE Euronext. Therefore, the Exchange is addressing those comments to the extent they are applicable to its existing rules and the proposed amendments.

The Exchange does not believe that it is appropriate to consider board compensation as part of the compensation committee independence determination with respect to individual directors. Non-executive directors devote considerable time to the affairs of the companies on whose boards they sit and eligible candidates would be difficult to find if board and committee service were unpaid in nature. Consequently, independent directors of listed companies are almost invariably paid for their board and committee service. As all independent directors are almost certainly going to receive board compensation from the company and do so on terms determined by the board as a whole, the Exchange does not believe that an analysis of the board compensation of individual directors is a meaningful consideration in determining their independence for purposes of compensation committee service.

The Exchange's existing director independence requirements require the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Commentary included in Section 303A.02(a) makes this explicit by stating that when the board is making an affirmative independence determination "the concern is independence from management." Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a part of the board's general independence determinations for all independent directors. Section 303A.02(a) notes that "[I]t is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company" and that the board should therefore "broadly consider all relevant facts and circumstances" when making affirmative independence determinations. As such, the Exchange

believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 303A.02(a) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

The second commenter proposed that the Exchange should require companies to make a public disclosure with respect to the factors considered by the compensation committee in reviewing the independence of compensation consultants, legal counsel and other compensation advisers. This commenter also proposed that the Exchange should require with respect to outside counsel hired by the compensation committee the same disclosure as is required by Item 407(e)(3)(iv) of Regulation S-K with respect to the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. The Exchange does not believe that it is necessary to establish additional disclosure requirements of this nature. Item 407 of Regulation S-K contains extensive disclosure requirements with respect to a listed company's corporate governance and the Exchange's own rules generally incorporate those requirements by reference where applicable. Moreover, with respect to disclosure of any conflicts of interest that may arise with respect to outside counsel hired by the compensation committee, the Exchange believes that the rigorous conflict of interest requirements applicable to attorneys adequately address such concerns. And the Exchange is mindful that requiring

additional public disclosures regarding outside counsel could require a listed company to disclose information that otherwise may be protected by attorney-client privilege.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2012-49 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2012-49. 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 website (<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 website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office and the Internet website of the Exchange. 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-2012-49, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>32</sup> 17 CFR 200.30-3(a)(12).