New York State Bar Association
One Elk Street
Albany, NY 12207
518-463-3200

Business Law Section
Committee on Securities Regulation

September 29, 2004

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

E-mail address: rule-comments@sec.gov

Attention: Jonathan G. Katz, Secretary

Re: File No. SR-NYSE-2004-41
NYSE Standards Relating to Corporate Governance
Release No. 34-50298

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release No. 34-50298 to comment on the proposed rule change and amendment No. 1 thereto by the New York Stock Exchange, Inc. ("NYSE") to amend Section 303A of the NYSE Listed Company Manual relating to corporate governance.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the

majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Summary

The Committee supports the NYSE's objective of improving the independence standards for outside directors in general and audit committee members in particular. However, we have some concerns, and recommend that certain changes discussed below be made in the proposed rule change and amendment.

Our comments specifically address: the period for considering compensation to directors in determining director independence; the definition of family relationships to be included in determining director independence; clarification of the format and intention of certain proposed changes; and expansion of the provision for qualification of written affirmations. We also urge the NYSE and the Commission to reconsider the provisions on exemption of foreign affiliate equity compensation plans from shareholder approval, which we believe are too complex and unclear to provide meaningful benefit to shareholders.

Discussion

The following comments are in the order in which they relate to the proposed text of the subsections of § 303A and are not necessarily in the order of importance.

2(b)(ii). The proposed amendment to subsection 2(b)(ii) is intended to clarify the parameters of the prohibition on independent directors receiving more than $100,000 in direct compensation from the listed company in a three year period. Unfortunately, the revised text describes the relevant period as "any twelve-month period within the last three years". Although this is consistent with the February 13, 2004 update to the "NYSE Listed Company Manual Section 303A Corporate Governance Listing Standards Frequently Asked Questions" (the "FAQs"), it suggests that the period is a "rolling 12-months", i.e., it starts again with each new month trailed by the eleven months preceding it. The amount of work and the burden for listed companies to research that item for each director each month is unwarranted for any incremental

benefit it may provide. We recommend that the text of 2(b)(ii) be revised to follow the format of 2(b)(v), which refers to payments in any of the last three fiscal years instead of twelve-month periods. That is a format that has long been part of the SEC's rules for similar disclosure of transactions with directors and officers.

2(b)(iii) and (v). We support the changes to the director independence provisions relating to relationships with auditors. We do not believe the greater coverage of the current standard reached any relationship that was likely to meaningfully affect independence. 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. We believe that the changes to the text of subsection 2(b)(iii) and the adoption of the more limited definition of "immediate family member" substantially correct this anomaly.

Furthermore, we believe that the definition of "immediate family member" proposed for 2(b)(iii), which is from the SEC definition in Rule 10A-3(e)(8), should be used uniformly for all purposes in subsection 2(b). Different meanings for the same words in different parts of subsection 2(b) can only lead to unnecessary confusion. Moreover, uniformly using the Rule 10A-3(e)(8) definition should be sufficient for all independence standards.

As we previously stated in our letter to the Commission of May 8, 2003 commenting on Rel. 34-47672, we believe that the most troublesome application of the current definition of "immediate family member" is for subsection 2(b)(v). Our concern is the practicability of researching business relationships for a very broad class of family members over a very wide range of business entities (and then affirming and certifying the results of that research to the NYSE). The listed company must ask its directors to gather information from their in-laws about public and private company business relationships with listed company affiliates around the world. Even if the listed company and its directors are diligent in requesting the information, there is no way of requiring and insuring cooperation by all in-laws and all of their employers. Even if all of the requested parties cooperate, they may not find the relationship. Making omissions by mistake is quite possible, particularly where private companies, not used to this

task, may be involved, and local affiliates of the listed company may bear entirely different names from their parent.

While our basic concern is the unfairness of having listed companies and their directors responsible for failures in such a research effort, we also feel the broad scope of the current definition of "immediate family member" is unnecessary to a reasonable concept of independence. We note that the Commission adopted much more circumscribed definitions of "close family member" and "immediate family member" in Rule 2-01 of Regulation S-X in connection with standards for auditor independence. It seems peculiar to consider certain familial relationships disqualifying in determining a director's independence, where the same familial relationships are not relevant for purposes of auditor independence.

In the event you do not adopt the foregoing recommendations, we still would recommend the following changes in proposed subsection 2(b)(iii).

First, we think that the very different definition of "immediate family members" in subsection 2(b)(iii) should not be in the commentary, but in subsection 2(b)(iii) itself. That should avoid mistakes by readers who look at the basic text and wrongly assume "immediate family member" has the same meaning throughout subsection 2(b).

Second, we urge the NYSE to further clarify the distinction by not using the same term with two different definitions in the same section. If the NYSE must use a broader family concept for subsections 2(b)(i), (ii), (iv) and (v) than it uses in 2(b)(iii), it should use a different phrase (for example "household") rather than two definitions of the same phrase in the same listing standard.

2(b)(v). We believe that the clarification in subsection 2(b)(v) about the treatment of payments made to and from tax exempt organizations for property or services in ordinary commercial transactions is appropriate. However, we believe it could be made clearer. "Tax exempt organizations" should be mentioned in the text of subsection 2(b)(v) itself and not just in the commentary. Readers of the subsection are not likely to think of tax exempt organizations when they read the word "company".

In addition, the first sentence of the commentary of subsection 2(b)(v) would be somewhat confusing in that it refers to the last completed fiscal year of the company (as opposed to the text of the subsection, as proposed to be changed, which refers to the last three fiscal years). We would suggest changing the phrase "the last completed fiscal year of such other company" in the first sentence of the commentary to "each of the last three fiscal years of such other company."

5(b)(i)(B). The revised text of clause 5(b)(i)(B) should be clarified. As proposed it is not clear whether the limiting phrase "that are subject to board approval" refers to "compensation" that is subject to board approval or only plans themselves that are subject to board approval.

Furthermore, it is only in the commentary that the reader learns that clause 5(b)(i)(B) does not preclude delegation by the board to the compensation committee of non-CEO compensation determinations. As recognized by the commentary, it is common practice to delegate such determinations to the committee rather than recommend them to the full board. Therefore, it would be clearer to move that concept out of the commentary and into the text of the subsection. For example, this could be accomplished by inserting after "make recommendations to the board" the phrase "or, if delegated by the board, make determinations".

12(a), (b), and (c). We appreciate the addition to subsection 12(a) of provision for explicit qualification of statements in a CEO certification. In particular, we believe CEO's of listed companies may want to make such a qualification with regard to subsection 2(b)(v) for the reasons stated above unless subsection 2(b)(v) is limited as we recommend. For the same reason, we recommend that subsections 12(b) and 12(c) provide for explicit qualification of written affirmations by the listed companies themselves.

303A.0.8. Finally, we wish to take this opportunity to urge the NYSE and the Commission to reconsider the exemption from shareholder approval of foreign affiliate equity compensation plans in § 303A.08 and related FAQ's. They are far too complex and unclear without providing any meaningful benefit to shareholders.

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We hope the Commission and the NYSE find these comments helpful. We would be happy to discuss these comments further with the Staff or the NYSE.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday
MICHAEL J. HOLLIDAY
CHAIR OF THE COMMITTEE

Drafting Committee:
Richard E. Gutman, Chair
Michael J. Holliday
Asi Kirmayer

Copy to:
The Honorable William H. Donaldson, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
Alan L. Beller, Esq., Director of Division of Corporation Finance
Corporate Secretary, New York Stock Exchange, Inc.