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November 30, 2004

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

Re: Amendments to Section 303A of the NYSE Listed Company Manual Relating to Corporate Governance, File Number SR-NYSE-2004-41, 69 Federal Register 65006 (November 9, 2004).

Dear Mr. Katz:

The American Bankers Association ("ABA")[1] would like to take this opportunity to request that the New York Stock Exchange ("NYSE") consider further amendments to Section 303A of its Listed Company Manual. Specifically, we would suggest that Section 303A.02 of the NYSE Listed Company Manual be amended to provide that loans to directors' companies that are permissible under Federal Reserve Board Regulation O do not impair a director's independence. Many of our larger members are listed on the NYSE and have raised concerns regarding Section 303A.02. We have discussed this issue extensively with ABA's General Counsels group. That group believes that the solution discussed below will properly leave the regulation of bank lending activities to the Federal Reserve Board; comport with federal securities laws' treatment of Regulation O loans, and lower banking organizations' regulatory burdens while, at the same time, provide the NYSE with the assurance that director independence is not impaired in any manner.

As you are aware, the ABA is on record in strong support of the NYSE's requirement that the board of directors of each listed company must consist of a majority of independent directors. In addition, we have been actively engaged in the discussions on how "independence" is defined when those definitions disproportionately impact the banking industry. As we have stated before, unlike other corporations that manufacture specific products, banks are in the business of

[1] The American Bankers Association ("ABA") brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership—which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies, and savings banks—makes ABA the largest banking trade association in the country.

providing credit and other services to customers that include board members and their companies. Suggesting that these services when offered on an arm's length basis to a director's company renders that director "not independent" will force our members either to lose valuable and legitimate business by driving directors and their companies to seek to have their financial services needs met by competing organizations or, alternative, having the pool of qualified business leaders available to sit on banking organizations boards significantly reduced.

We are specifically concerned that Section 303A.02(b)(v) defines "independence" to exclude "a director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of $1 million, or 2% of such company's consolidated gross revenues." (hereinafter referred to as "the 2%/$1 million requirement" or the "2%/$1 million limitation") Earlier this year, the NYSE clarified that loans from financial institutions to listed companies would not be considered "payments" for purposes of Section 303A.02 but that the interest payments or other fees paid in association with such loans would be.

While the ABA very much appreciates the efforts the NYSE has taken to date to provide clarity to the term "payment," we believe that Section 303A.02 should be amended to make clear that "payments" do not include interest payments or other fees paid on extensions of credit to director-affiliated companies that are in accordance with the non-preferential lending requirements set out in the Federal Reserve Board's Regulation O.

We note, at the outset, that our support for a Regulation O safe harbor is not new. We have on at least two prior occasions advocated that the NYSE grant such a safe harbor.[2] We also continue to believe that the majority of directors sitting on the boards of banking organizations should, in the end, be able to satisfy the 2%/$1 million dollar requirement.[3] What is new, however, is the fact that it has now become quite apparent that the burdens associated with reaching that conclusion are particularly heavy when one considers the numbers of loans made each year by NYSE-listed companies and their subsidiaries.

Currently, our NYSE-listed members must now periodically review all loans made by any affiliate to a director's company and any company where a director's family member is an executive officer. We note that definition of "family member" is quite broad and includes all "in-law" relationships. Once those loans are identified and catalogued, each member must then separate principal and

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[2] See Letter of July 12, 2002, from Sarah A. Miller, ABA, to Darla C. Stuckey, NYSE; Letter of April 16, 2003, from Sarah A. Miller, ABA, to Jonathan G. Katz, Securities and Exchange Commission.

[3] See Letter of April 16, 2003, from Sarah A. Miller, ABA, to Jonathan G. Katz, Securities and Exchange Commission.

interest payments for that year and add any associated fees to the interest payment received in order to calculate whether monies received from a director's company or family member's company comes within the 2%/$1 million limitation. It would be much simpler if our members did not have to perform this analysis with respect to any loans that they knew were permissible under Regulation O.

As you are aware, Regulation O requires that extensions of credit made to companies that are related interests of a director must be made on substantially the same terms and conditions as comparable extensions of credit to comparable borrowers. A "related interest" of a director is "a company that is controlled by" the director[4] and "control" is defined to include "owning, controlling, or having the power to vote 25% percent or more of …voting securities of the company, controlling in any manner the election of a majority of the directors of the company … or having the power to exercise a controlling influence over the management or policies of the company."[5]

Interest rates, collateral requirements, credit underwriting standards and repayment terms cannot be more favorable for insider borrowers. The non-preferential lending requirements set out in Regulation O ensure that a lending relationship between a director's company and the listed issuer will not impair a director's independent judgment. Thus, Regulation O compliant loans have minimal impact on director independence (since Regulation O spells out exactly how these loans need to be made). Moreover, loans made in compliance with Regulation O are subject to extensive regulation and supervision by the Federal Reserve Board. Violations of Regulation O can result in severe sanctions, including civil penalties of more than $1 million per day per violation, being assessed against the offending banking organization.

Much like the purposes behind Regulation O, the purpose of the NYSE's director independence standards is to ensure that directors exercise judgment independent of management in carrying out their responsibilities. We would submit that because Regulation O achieves the same purpose as Section 303A.02, namely ensuring that director independence is not impaired, no need exists to enforce Section 303A.02 against loans that are in compliance with Regulation O.

Moreover, a Regulation O safe harbor would be consistent with the manner in which the federal securities laws treat Regulation O compliant loans. For example, Section 402 of the Sarbanes-Oxley Act generally prohibits publicly held companies from making personal loans to any director or executive officer of the company. This prohibition does not apply, however, to loans made by an insured depository institution, if the loan is subject to the insider lending restrictions of Regulation O.

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[4] See Section 215.2(m)(1) of Regulation O.

[5] For a complete definition of control, see Section 215.2(c )(1) of Regulation O.

Item 404(c ) of Regulation S-K generally requires publicly held companies to disclose in their proxy statements and annual reports on Form 10-K loans to directors, executive officers and certain related parties. However, loans made to these same parties need not be disclosed on an individual basis if "…the loans were (a) made in the ordinary course of business, (b) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (c) did not involve more than the normal risk of collectibility or present other unfavorable features." These standards for non-disclosure are substantially similar to the insider lending restrictions of Regulation O.

Finally, we note that if a loan is not subject to Regulation O, for example, where a director does not control the family member's company, then the 2%/$1 million requirement would still apply.

In conclusion, the ABA strongly urges the NYSE to adopt a Regulation O safe harbor to Section 303A.02 and would welcome the SEC's support in this matter. Should the Commission's staff wish to discuss this matter further, please do not hesitate to contact the undersigned.

Sincerely yours,

Sarah A. Miller