

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68006; File No. SR-NYSEArca-2012-105)

October 9, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Equities Rule 5.3(k)(4) to Comply with the Requirements of Securities and Exchange Commission Rule 10C-1

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on September 25, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II and III below, 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 NYSE Arca Equities Rule 5.3(k)(4) to comply with the requirements of Securities and Exchange Commission (“Commission” or “SEC”) Rule 10C-1.⁴ The text of the proposed rule change is available on the Exchange’s website at 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

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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 17 CFR 240.10C-1.

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

NYSE Arca, through its wholly-owned corporation, NYSE Arca Equities, proposes to amend NYSE Arca Equities Rule 5.3(k)(4) to comply with the requirements of SEC Rule 10C-1.

The proposed changes to NYSE Arca Equities Rule 5.3(k)(4) will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the NYSE Arca Equities Rulebook until June 30, 2013 and will be removed immediately thereafter.⁵ Upon approval of this filing, the amended provisions of those sections will be included in the Rulebook 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")⁶ added Section 10C to the Securities Exchange Act of 1934.⁷ Section 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

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

⁶ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

⁷ 15 U.S.C. 78j-3.

listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.⁸

Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, 10C-1(b)(1)(ii)⁹ 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)¹⁰ 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 NYSE Arca Equities Rule 5.3(k)(1). That section provides that no director qualifies as independent unless the board of directors affirmatively determines that the director has no material relationship with the listed company, either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. In addition, NYSE Arca Equities Rule 5.3(k)(1) provides that a

⁸ There are currently no issuers listed on the Exchange that would be subject to the proposed rules.

⁹ 17 CFR 240.10C-1(b)(1)(ii).

¹⁰ 17 CFR 240.10C-1(a)(4).

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.¹¹

The provisions of NYSE Arca Equities Rule 5.3(k)(1) as currently in effect will continue to be applicable 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 NYSE Arca Equities Rule 5.3(k)(1), in addition to the independence requirements proposed specifically for compensation committee service.

¹¹ NYSE Arca Equities Rule 5.3(k)(1) provides that the following categories of directors may not be deemed independent: (A) A director who is or has been within the last three years, an employee of the listed company, or whose immediate family member is or has been within the last three years an executive officer of the listed company; (B) (i) A director or a director who has an immediate family member who is a current partner of a firm that is the company's internal or external auditor; (ii) A director who is a current employee of such a firm; (iii) A director who 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 (iv) A director or a director who has an immediate family member who 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; (C) A director or a director who has an immediate family member who is, or in the past three years has been, part of an interlocking directorate in which an executive officer of the listed company serves or served on the compensation committee of another company that concurrently employs or employed the director; (D) 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 \$200,000 or 5% of such other company's consolidated gross revenues, is not "independent" until three years after falling below such threshold; (E) A director who received, or whose immediate family member is an executive officer who 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); (F) In the case of an investment company, in lieu of paragraphs (A)-(E) above, a director who is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

The Exchange proposes to amend NYSE Arca Equities Rule 5.3(k)(4) to 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 that are set forth in proposed NYSE Arca Equities Rule 5.3(k)(4) and are 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, NYSE Arca Equities Rule 5.3(k)(4) as amended 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 amended rule text 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 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 NYSE Arca Equities Rule 5.3(k)(4)(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"),¹² 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.¹³ 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 NYSE Arca Equities Rule 5.3(k)(1) 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 to these "bright line" tests, NYSE Arca Equities Rule 5.3(k)(1) also already requires the board to consider any relationship that would be material to the independence of a director. The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed NYSE Arca Equities Rule 5.3(k)(4)(ii), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

¹² Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

¹³ See Adopting Release at 38428.

Rule 10C-1(b)(2)¹⁴ 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:

- (a) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; and
- (b) 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)¹⁵ 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 Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as new subsection (iv) to NYSE Arca Equities Rule 5.3(k)(4).

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹⁶ 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:

¹⁴ 17 CFR 240.10C-1(b)(2).

¹⁵ 17 CFR 240.10C-1(b)(3).

¹⁶ 17 CFR 240.10C-1(b)(4).

- (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;
- (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 add as new subsection (v) to NYSE Arca Equities Rule 5.3(k)(4) a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, NYSE Arca Equities Rule 5.3(k)(4)(v) would not include any 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),¹⁷ the Exchange proposes to include as new Commentary .04 to NYSE Arca Equities Rule 5.3(k)(4) an explicit statement that nothing in NYSE Arca Equities Rule 5.3(k)(4)(ii) 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 new Commentary .05 to NYSE Arca Equities Rule 5.3(k)(4) would specify that the compensation committee 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)¹⁸ 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 adopt, as a third paragraph in new subsection (ii) to NYSE Arca Equities Rule 5.3(k)(4), this cure provision period for events of non-compliance with the proposed

¹⁷ 17 CFR 240.10C-1(b)(2)(iii).

¹⁸ 17 CFR 240.10C-1(a)(3).

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 compensation committee continues to have a majority of independent directors, as this would ensure that the compensation 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.

General Exemptions

Rule 10C-1(b)(5)¹⁹ provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies,²⁰ and Rule 10C-1(b)(1)(iii)(A)²¹ 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

¹⁹ 17 CFR 240.10C-1(b)(5).

²⁰ A "smaller reporting company" is defined in SEC Rule 12b-2 and in Regulation S-K, Item 10(f)(1). Proposed Commentary .02 to NYSE Equities Rule 5.3(k)(4) will state that smaller reporting companies must comply with NYSE Equities Rule 5.3(k)(4), except that they need not comply with NYSE Equities Rule 5.3(k)(4)(ii) and (v). Proposed Commentary .02 will also include a transition period applicable to a company that ceases to be a smaller reporting company. Under SEC Rule 12b-2, a company tests its status as a smaller reporting company on an annual basis at the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Smaller Reporting Company Determination Date"). To the extent a smaller reporting company ceases to qualify as such under SEC rules, Commentary .02 will provide that such company is required, if applicable, to: (I) have a compensation committee of which all of the members meet the independence standard of Rule 5.3(k)(4)(ii) within six months of the Smaller Reporting Company Determination Date; and (II) comply with Rule 5.3(k)(4)(v) as of the Smaller Reporting Company Determination Date.

²¹ 17 CFR 240.10C-1(b)(1)(iii)(A).

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 Exchange'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, asset backed issuers and other passive business organizations (such as royalty trusts), derivatives and special purpose securities, 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 (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.

The Exchange proposes to adopt as new Commentary .03 to NYSE Arca Equities 5.3(k)(4) a general exemption from the application of the rule for foreign private issuers. Foreign private issuers are currently exempt from the existing compensation committee requirement pursuant to NYSE Arca Equities Rule 5.3(n). 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),²² from the proposed new compensation committee requirements to foreign private issuers that follow home country practice. The Exchange notes that NYSE Arca Equities Rule 5.3(n) requires foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under Exchange listing standards. Listed foreign private issuers may provide this disclosure either on their web site (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States (again, in the English language). If the disclosure is only made available on the web site, the annual report must so state and provide the web address at which the information may be obtained. 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). While Section 110 [sic] 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.

²² 17 CFR 240.10C-1(b)(5)(i).

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with NYSE Arca Equities Rule 5.3(k)(4). 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)²³ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁴ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination 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.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed amendments to its compensation committee listing standard 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 Exchange 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.²⁵ 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.

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

²⁵ 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.

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 interprets its existing director independence requirements as requiring the board to consider relationships between the director and any member of management in making its affirmative independence determinations. 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. NYSE Arca Equities Rule 5.3(k)(1) provides that the board must affirmatively determine that the director has no material relationship with the listed company, either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. 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 rule a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the rule as drafted. NYSE Arca Equities Rule 5.3(k)(1) in its current form and

proposed NYSE Arca Equities Rule 5.3(k)(4) require 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. 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. Please include File Number SR-NYSEArca-2012-105 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-NYSEArca-2012-105. 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-NYSEArca-2012-105, 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.²⁶

Kevin M. O'Neill
Deputy Secretary

²⁶ 17 CFR 200.30-3(a)(12).