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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68639; File No. SR-NYSE-2012-49)

January 11, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval for Proposed Rule Change, as Modified by Amendment Nos. 1 and 3, to Amend the Listing Rules for Compensation Committees to Comply with Securities Exchange Act Rule 10C-1 and Make Other Related Changes

I. Introduction

On September 25, 2012, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to modify the Exchange’s rules for compensation committees of listed issuers to comply with Rule 10C-1 under the Act and make other related changes. On October 1, 2012, NYSE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the Federal Register on October 15, 2012.³ The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.⁴ The Commission received seven comment letters on the proposed rule change,⁵ as well as a response to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (“Notice”).

⁴ See Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

⁵ See Letters to Elizabeth M. Murphy, Secretary, Commission, from: Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer, Ameriprise Financial, Inc., dated October 18, 2012 (“Ameriprise Letter”); J. Robert Brown, Jr., Director,

comment letters from NYSE Euronext, Inc. regarding the NYSE proposal.⁶ On December 4, 2012, the Exchange filed Amendment No. 2 to the proposed rule change, which was later withdrawn.⁷ On January 8, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.⁸

Corporate & Commercial Law Program, University of Denver Sturm College of Law, dated October 30, 2012 (“Brown Letter”); Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, dated November 1, 2012 (“ICI Letter”); Brandon J. Rees, Acting Director, Office of Investment, AFL-CIO, dated November 5, 2012 (“AFL-CIO Letter”); Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters, dated November 5, 2012 (“Teamsters Letter”); Wilson Sonsini Goodrich & Rosati, Professional Corporation, dated November 14, 2012 (“Wilson Sonsini Letter”); and Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (“Corporate Secretaries Letter”).

In addition, the Commission received one comment on a substantially similar proposal by NYSE Arca, Inc. (“NYSE Arca”) by a party that did not specifically comment on the NYSE filing. See Securities Exchange Act Release No. 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (SR-NYSEArca-2012-105). The comment letter received on the NYSE Arca filing is a letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012 (“CII Letter”). Since the comment letter received on the NYSE Arca filing discusses issues directly related to the NYSE filing, the Commission has included it in its discussion of this filing.

⁶ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, Inc., dated January 10, 2013 (“NYSE Response Letter”). In the NYSE Response Letter, NYSE Euronext, Inc., the parent company of NYSE, states that, as the comments made by the letters submitted on the NYSE and NYSE Arca proposals are applicable in substance to NYSE, NYSE Arca and NYSE MKT LLC, its response will address the comments on behalf of all three exchanges.

⁷ Amendment No. 2, dated December 4, 2012, was withdrawn on January 7, 2013.

⁸ In Amendment No. 3 to SR-NYSE-2012-49, NYSE: (a) revised the transition period for companies that cease to be Smaller Reporting Companies to comply with the full range of new requirements, see infra notes 70-73 and accompanying text; (b) changed references in the rule text from Regulation S-K, Item 10(f)(1) to Exchange Act Rule 12b-2; (c) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the compensation adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S-K, see infra notes 45-48 and

This order approves the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C-1 under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),⁹ the Commission proposed Rule 10C-1 under the Act,¹⁰ which directs each national securities exchange (hereinafter, “exchange”) to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule’s requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C-1.¹¹

Rule 10C-1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee¹² of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.¹³ In determining the independence standards for members of compensation committees of listed issuers, Rule 10C-1 requires the

accompanying text; and (d) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not require the adviser to be independent, only that the compensation committee consider the enumerated factors before selecting or receiving advice from the adviser. See infra notes 49-51 and accompanying text.

⁹ Pub. L. 111-203, 124 Stat. 1900 (2010).

¹⁰ See Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (“Rule 10C-1 Proposing Release”).

¹¹ See Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (“Rule 10C-1 Adopting Release”).

¹² For a definition of the term “compensation committee” for purposes of Rule 10C-1, see Rule 10C-1(c)(2)(i)-(iii).

¹³ See Rule 10C-1(a) and (b)(1).

exchanges to consider relevant factors, including, but not limited to: (a) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the “Fees Factor”); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the “Affiliation Factor”).¹⁴

In addition, Rule 10C-1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.¹⁵ The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.¹⁶ Finally, among other things, Rule 10C-1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C-1,¹⁷ as well as any other factors identified by the relevant exchange in its listing standards.¹⁸

¹⁴ See id. See also Rule 10C-1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. See Rule 10C-1(b)(1)(iii)(B).

¹⁵ See Rule 10C-1(b)(2).

¹⁶ See Rule 10C-1(b)(3).

¹⁷ See Rule 10C-1(b)(4). The six factors, which NYSE proposes to set forth in its rules, are specified in the text accompanying note 43, infra.

¹⁸ Other provisions in Rule 10C-1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable

B. NYSE's Proposed Rule Change, as Amended

To comply with Rule 10C-1, NYSE proposes to amend three sections of its rules concerning corporate governance requirements for companies listed on the Exchange: NYSE Listed Company Manual ("Manual") Section 303A.00, "Corporate Governance Standards;" Section 303A.02, "Independence Tests;" and Section 303A.05, "Compensation Committee." In addition, NYSE proposes to make some other changes to its rules regarding compensation committees. To accomplish these changes, the Exchange proposes to replace current Sections 303A.00, 303A.02 and 303A.05 of the Manual with new operative text that will be effective on July 1, 2013.

Current Section 303A.05 of the Manual provides that each listed company have a compensation committee, and that such compensation committee be composed entirely of "Independent Directors"¹⁹ and have a written charter.²⁰

Under its proposal, NYSE will retain its existing requirement that each listed company be required to have a compensation committee composed entirely of Independent Directors, as defined in NYSE's rules.²¹ Under the proposed amendment, however, each compensation

opportunity to cure any defects that would be the basis for the exchange, under Rule 10C-1, to prohibit the issuer's listing.

¹⁹ "Independent Directors", as defined in Section 303A.02(a)-(b) of the Manual and used herein, includes a two-part test for independence. The rule sets forth specific categories of directors who cannot be considered independent because of certain discrete relationships ("bright-line tests"); and also provides that a listed company's board make an affirmative determination that each independent director has no material relationship that, in the opinion of the board, would raise concerns about independence from management. Id. See also the Commentary to Section 303A.02(a) of the Manual.

²⁰ See Section 303A.05(b) of the Manual.

²¹ See id.

committee member must also satisfy additional independence requirements, as described in Section II.B.1 below.²²

NYSE will also retain the existing requirement that a listed issuer adopt a formal written compensation committee charter²³ that specifies the scope of the committee’s responsibilities and how it carries out those responsibilities, including structure, operations and membership requirements.²⁴ The proposed amendment to the rule would require the charter to specify additional responsibilities and authority with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting and receiving advice from advisers; and receiving funding from the company to engage them, which are discussed in detail in Section II.B.2 below and set forth in proposed Section 303A.05(c) of the Manual.²⁵

1. Compensation Committee Composition and Independence Standards

²² See proposed Section 303A.02(a)(ii) of the Manual (concerning the consideration of director compensation and affiliation).

²³ Rule 10C-1 requires a compensation committee to have certain specified authority and responsibilities. See *supra* notes 15-17 and accompanying text. The existing NYSE rule already requires compensation committees of listed companies to have a charter setting forth specified responsibilities, and the proposed rule updates the language concerning this authority and set of responsibilities and adds the required content discussed *infra* at text accompanying notes 40-42.

²⁴ See Section 303A.05(b) of the Manual. The existing Commentary to Section 303A.05, which NYSE proposed to replace with a comparable provision, currently provides that “if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.” See discussion *infra* at text accompanying notes 39-41.

²⁵ See proposed Section 303A.05(b) of the Manual. Because smaller reporting companies are not required to comply with the new compensation adviser independence considerations in proposed Section 303A.05(c)(iv), see *infra* notes 52-56 and accompanying text, their charters are not required to reflect this requirement. See also proposed Section 303A.00 (Smaller Reporting Companies) of the Manual.

NYSE proposes to amend Section 303A.02(a) of the Manual, which would continue to provide that no director qualifies as “independent” unless the board of directors of the listed company affirmatively determines that the director has no material relationship with the listed company. As noted above, NYSE’s rules currently require each member of a listed company’s compensation committee to be an Independent Director, as defined in Section 303A.02(a) of the Manual.²⁶ Rule 10C-1, as discussed above, provides that exchange standards must require compensation committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, NYSE discussed its consideration of these factors,²⁷ and proposed the following:²⁸

With respect to the Fees and Affiliation Factors, NYSE proposes to adopt a provision stating that the board of directors of the listed company would be required, in affirmatively determining the independence of any director who will serve on the compensation committee of the board, to 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: (A) the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and

²⁶ See supra note 19.

²⁷ See Notice, supra note 3.

²⁸ See Notice, supra note 3, for the Exchange’s explanation of its reasons for the proposed change. See infra Sections II.B.3 and II.B.4 concerning entities that would be exempt from this requirement.

(B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.²⁹

With respect to the Fees Factor, NYSE also proposes to amend the commentary to provide 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.³⁰

With respect to the Affiliation Factor, NYSE proposes, similarly, to amend the commentary to provide that the board should consider whether an 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."³¹

Although Rule 10C-1 requires that exchanges consider "relevant factors" not limited to the Fees and Affiliation Factors, NYSE states that, after reviewing its current and proposed listing rules, it concluded not to propose 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 its proposal, NYSE stated that it did 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

²⁹ See proposed Section 303A.02(a)(ii) of the Manual. See also Notice, supra note 3.

³⁰ See proposed Commentary to Section 303A.02(a)(ii) of the Manual.

³¹ See id.

specified percentage of the listed company.³² Further, as stated in its filing, NYSE 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.³³ Additionally, NYSE stated that 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 from Section 303A.02(b) of the Manual.³⁴ NYSE believes that these requirements with respect to general director independence, when combined with the

³² See Notice, supra note 3.

³³ See id. 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.

³⁴ See Notice, supra note 3.

specific considerations required by proposed Section 303A.02(a)(ii), represent an appropriate standard for compensation committee independence.³⁵

NYSE proposes a cure period for a failure of a listed company to meet its committee composition requirements for independence. Under the provision, if a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, only so long as a majority of the members of the compensation committee continue to be independent, may remain a member of the compensation committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.³⁶ The proposed rule also requires a company relying on this provision to provide notice to NYSE promptly.³⁷

NYSE modified the suggested cure period language contained in Rule 10C-1(a)(3) by limiting the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors.³⁸

2. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

³⁵ See id.

³⁶ See proposed Section 303A.00 "Cure Period for Compensation Committee Independence Non-Compliance" of the Manual.

³⁷ See id.

³⁸ See Notice, supra note 3. The Commission notes that while NYSE does not provide any new procedures for an issuer to have an opportunity to cure any other defects with respect to its proposed compensation committee requirements, current NYSE rules provide issuers with an opportunity to cure defects, and appeal, before their securities are delisted for rule violations. See NYSE Listed Company Manual, Sections 802.02 ("Continued Listing – Evaluation and Follow-up Procedures for Domestic Companies") and 804.00 ("Procedure for Delisting").

In its proposed rule change, NYSE proposes to fulfill the requirements imposed by Rule 10C-1(b)(2)-(4) under the Act concerning compensation advisers by setting forth those requirements in its own rules and requiring these new rights and responsibilities to be included in the compensation committee's charter.³⁹ Thus, proposed Section 303A.05(c)(i)-(iii) of the Manual proposes to adopt the requirements that NYSE believes are required by Rule 10C-1(b)(2)-(3) 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; (ii) the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the compensation committee;⁴⁰ and (iii) 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.⁴¹

Proposed Section 303A.05(c)(iv) of the Manual, as amended, also sets forth explicitly, in accordance with Rule 10C-1, that the compensation committee may select, or receive advice

³⁹ Rule 10C-1(b)(4), does not include the word "independent" before "legal counsel" and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In providing commentary to proposed Section 303A.05(b)(iii), as modified by Amendment No. 3, NYSE provides for two limited exceptions. See infra notes 45-48 and accompanying text.

⁴⁰ The proposal also includes a provision, derived from Rule 10C-1, stating that nothing in the rule may 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. See Commentary to Section 303A.05 to the Manual.

⁴¹ See Notice, supra note 3.

from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration all factors relevant to that person's independence from management, including the following six factors set forth in Rule 10C-1 regarding independence assessments of compensation advisers.⁴²

The six factors, which are set forth in full in the proposed rule, are: (A) the provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser; (B) 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; (C) 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; (D) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (E) any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and (F) 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.⁴³

As proposed, Section 303A.05(c)(iv) of the Manual would not include any specific additional factors for consideration, as NYSE stated that it believes the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the

⁴² See Rule 10C-1(b)(4).

⁴³ See also Rule 10C-1(b)(4)(i)-(vi).

compensation committee to consider any other factors that would be relevant to the adviser's independence from management.⁴⁴

The proposed commentary to proposed Section 303A.05 of the Manual, as modified by Amendment No. 3,⁴⁵ further states that, as provided in Rule 10C-1, a compensation committee is required to conduct the independence assessment outlined in proposed Section 303A.05(c)(iv) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than (i) in-house legal counsel⁴⁶ and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.⁴⁷ NYSE noted that this second exception is based on Item 407(e)(3)(iii) of Regulation S-K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation

⁴⁴ See Notice, supra note 3.

⁴⁵ See supra note 8. NYSE's proposal as submitted originally only contained an exception for in-house legal counsel. As described below, the Exchange amended its proposal to add an exception for advisers whose role is limited to certain broad-based plans or to providing non-customized information.

⁴⁶ See proposed Commentary to Section 303A.05 of the Manual.

⁴⁷ See Exhibit 5 to Amendment No. 3 (amending, in part, the proposed Commentary to Section 303A.05 of the Manual).

advisers in determining or recommending the amount or form of a registrant's executive and director compensation.⁴⁸

The proposed commentary to Section 303A.05 of the Manual, as modified by Amendment No. 3, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.⁴⁹ It further clarifies that compensation committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in Section 303A.05(c)(iv)(A)-(F) of the Manual.⁵⁰ The Exchange clarified that, while the compensation committee is required to consider the independence of compensation advisers, the compensation committee is not precluded from selecting or receiving advice from compensation advisers that are not independent.⁵¹

3. Application to Smaller Reporting Companies

Rule 10C-1 includes an exemption for smaller reporting companies from all the requirements included within the rule.⁵² Consistent with this Rule 10C-1 provision, NYSE, as a

⁴⁸ See Amendment No. 3; see also 17 CFR 229.407(e)(3)(iii). The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S-K.

⁴⁹ See Exhibit 5 to Amendment No. 3, supra note 8.

⁵⁰ See id.

⁵¹ See Amendment No. 3, supra note 8.

⁵² See supra Section II.A; see also Rule 10C-1(b)(5)(ii).

general matter, proposes that a smaller reporting company, as defined in Rule 12b-2⁵³ under the Act (hereinafter, a “Smaller Reporting Company”), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C-1.⁵⁴ Thus, NYSE proposes not to require Smaller Reporting Companies to comply with either the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation or the compensation adviser independence considerations.⁵⁵

NYSE proposes in Section 303A.00 of the Manual that Smaller Reporting Companies are not required to comply with Section 303A.02(a)(ii) concerning the additional independence factors for members serving on the compensation committee. A Smaller Reporting Company will be required to continue to comply with the pre-existing portions of proposed Section 303A.05 of the Manual, including the requirements of Section 303A.05(c) concerning the compensation committee’s authority, responsibility and funding of compensation advisers. However, NYSE proposes an exception from the new portion of proposed Section 303A.05(c)(iv) that would otherwise require the Smaller Reporting Company’s compensation committee to consider independence factors before selecting such advisers, which goes beyond NYSE’s existing requirements.⁵⁶ NYSE argues that, under this approach, Smaller Reporting Companies will effectively be subject to the same requirements as is currently the case under the

⁵³ 17 CFR 240.12b-2.

⁵⁴ See proposed Section 303A.00 of the Manual.

⁵⁵ See supra text accompanying notes 29 and 43.

⁵⁶ As noted above, NYSE currently requires such authority, responsibility and funding be provided by all listed companies to compensation committees, including by Smaller Reporting Companies. See supra text accompanying note 24. As Smaller Reporting Companies will not be required to comply with the consideration of certain independence factors when selecting an adviser, their charters will not be required to reflect this provision.

existing requirements of the Manual, but they will not be subject to any of the new requirements of proposed Sections 303A.02(a)(ii) and 303A.05(c)(iv).⁵⁷

4. Exemptions

NYSE proposes that its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in Section 303A.00 of the Manual, apply also to the new requirements of the proposed rule change and thereby will continue to provide a general exemption from all of the compensation committee requirements of Section 303A.05 of the Manual.⁵⁸ These include exemptions to the following issuers: any listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company (in other words, a controlled company); limited partnerships; companies in bankruptcy; closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940; passive business organizations in the form of trusts (such as royalty trusts) or derivatives and special purpose securities; and issuers whose only listed equity stock is a preferred stock.⁵⁹ NYSE states that these categories of issuers typically: (i) are externally managed and do not directly employ executives; (ii) do not by their nature have employees; or (iii) have executive compensation policy set by a body other than the board.⁶⁰ 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

⁵⁷ See Notice, supra note 3.

⁵⁸ See id. In addition, such exempt companies would also thereby be exempt from the enhanced independence requirements for compensation committee composition described in proposed Section 303A.02 of the Manual.

⁵⁹ See Section 303A.00 of the Manual.

⁶⁰ See Notice, supra note 3.

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.⁶¹

Concerning foreign private issuers,⁶² NYSE's current rules in Section 303A.11 of the Manual permit any such issuer to follow its home country practice in lieu of many of NYSE's corporate governance listing standards, including the Exchange's compensation-related listing rules. Section 303A.00 of the Manual currently provides that listed companies that are foreign private issuers are permitted to follow home country practice in lieu of the provisions of Section 303A, but this allowance is granted on condition that the issuer discloses in its annual report filed with the Commission any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE listing standards.⁶³ NYSE proposes that this allowance continue to apply, generally, to the Exchange's compensation committee rules as revised by the instant proposal on the same condition, namely that the issuer discloses any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE listing standards in its annual report.⁶⁴ NYSE does not propose to add any additional requirements to this disclosure requirement applicable to foreign private issuers, and argues that an additional statement as to why the company does not comply

⁶¹ See id.

⁶² Under NYSE's listing rules, "foreign private issuer" has the same meaning and is defined in accordance with the SEC's definition of foreign private issuer set out in Rule 3b-4(c) (17 CFR 240.3b-4). See Section 103.00 of the Manual.

⁶³ See Section 303A.11 of the Manual. If a foreign private issuer is not required to file its annual report with the Commission on Form 20-F, it may either make this disclosure in another annual report filed with the Commission or make this disclosure available on or through its website.

⁶⁴ See Notice, supra note 3.

would likely simply be that the foreign private issuer was not required to do so by home country law.⁶⁵

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change provides that certain of the new requirements for listed companies will be effective on July 1, 2013 and others will be effective after that date.⁶⁶ Specifically, NYSE proposes to amend Section 303A.00 to provide transition periods by which listed companies would be required to comply with the new Section 303A.02(a)(ii) compensation committee director independence standards. Pursuant to the proposal, 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 standards for compensation committee director independence. Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. NYSE proposes that all other proposed sections of the proposal would become effective on July 1, 2013 for purposes of compliance by currently listed issuers that are not otherwise exempted. On July 1, 2013, such issuers will be required to comply with the provisions relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers;

⁶⁵ See id.; see also Commentary to Section 303A.11 of the Manual.

⁶⁶ During the transition periods described herein, 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.

the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting or receiving advice from such advisers.⁶⁷

6. Compliance Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

NYSE's existing rules permit certain companies listing on the Exchange to phase-in compliance with all of the Exchange's applicable independence requirements for compensation committees after the date that the company's securities first trade on NYSE.⁶⁸ NYSE proposes to preserve its current compliance periods for those categories of issuers with respect to the enhanced independence standard for directors serving on the compensation committee, which means that companies listing in conjunction with their initial public offerings,⁶⁹ companies listing in connection with a spin-off or carve-out, companies listing upon emergence from bankruptcy, and companies that cease to qualify as a controlled company would continue to be entitled to a transition period under which the company must have: at least one independent member that meets the enhanced standards (concerning fees received by members and their affiliations) on its compensation committee by the listing date; at least a majority of independent members that meet the enhanced standards on the compensation committee within 90 days of the

⁶⁷ As noted above, NYSE already requires that, if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.

⁶⁸ See Section 303A.00 of the Manual (Compliance Dates).

⁶⁹ NYSE notes that, 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 Act.

listing date; and a fully independent compensation committee where all members meet the enhanced standards within one year of the listing date.

Companies that cease to qualify as foreign private issuers would continue to have a transition period under which they must have a fully independent compensation committee where all members meet the enhanced standards within six months of that determination.

Companies listing upon transfer from another market would have one year from the listing date to satisfy all the requirements of Section 303A to the extent the national securities exchange on which they were listed did not have the same requirement.

For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 3, establishes a compliance schedule based on certain dates relating to the company's change in status.⁷⁰ Pursuant to Rule 12b-2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the "Smaller Reporting Company Determination Date"). A company with a public float of \$75 million or more as of the Smaller Reporting Company Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Smaller Reporting

⁷⁰ See proposed Section 303A.00 (Compliance Dates), as amended. In the proposal as originally submitted, the compliance schedule was to require compliance with the enhanced standards for director independence six months after the company ceases to be a Smaller Reporting Company, but immediate compliance with all other requirements. In Amendment No. 3, NYSE states that while the revised compliance schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences, as many companies will likely not become aware of their change in status until significantly after the determination date and would therefore not utilize the transition period as originally proposed to bring themselves into compliance with the enhanced requirements, and that such companies would have significant difficulty in becoming compliant within the transition period as originally proposed.

Company Determination Date. Under NYSE’s proposal, the day of this change in status is the beginning of the compliance period (“Start Date”).⁷¹

By six months from the Start Date, the company will be required to comply with Section 303A.05(c)(iv) of the Manual, which sets forth the provision described above relating to the requirement that the committee consider independence factors before selecting compensation advisers.⁷² Six months from the Start Date, the company will begin to comply with the additional requirements in Section 303A.02(ii) regarding member independence on the compensation committee. Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) one member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.⁷³

III. Comments on the Proposed Rule Change and NYSE’s Response

As stated previously, the Commission received a total of seven comment letters on the NYSE proposal,⁷⁴ and one comment letter on a related proposal by NYSE Arca.⁷⁵ The Commission is treating the comment letter submitted on the NYSE Arca filing, for which a

⁷¹ See Amendment No. 3, *supra* note 8.

⁷² In addition, this will require the company to update its charter to reflect this additional responsibility of the compensation committee. See Section 303A.05(b)(iii) of the Manual.

⁷³ During the compliance schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

⁷⁴ See *supra* note 5.

⁷⁵ See *id.*

comparable letter was not submitted on the NYSE filing, as also being applicable to the NYSE filing since the NYSE and NYSE Arca filings address the same substantive issues. NYSE Euronext, Inc., on behalf of NYSE, responds to these comment letters for the NYSE proposal.⁷⁶

Three commenters expressed general support for the proposal, although two believed that it needed to be amended before being approved.⁷⁷ Some commenters supported specific provisions of the proposal,⁷⁸ some opposed specific provisions,⁷⁹ and some sought clarification of certain aspects of the proposal.⁸⁰ Some commenters believed that the proposal fell short of meeting the requirements of Rule 10C-1 and believed that it should have been more stringent.⁸¹ These and other comments, as well as NYSE's responses to some of the comments that raised issues with the proposal, are summarized below.

A. Definition of Independence

1. Consideration of Director Compensation

Three commenters believed that the proposal falls short of the requirements of Rule 10C-1, which, in their view, requires that fees paid to a director for service on the company's board

⁷⁶ See supra note 6.

⁷⁷ See Ameriprise Letter, which supported the proposal but believed that certain aspects were not sufficiently clear such that the proposal needed to be amended to provide additional clarity; ICI Letter, which urged approval of the proposal; and Corporate Secretaries Letter, which generally supported the proposal, but believed that certain of its aspects were unnecessarily burdensome or not sufficiently clear such that the proposal needed to be amended before being approved by the Commission.

⁷⁸ See Brown Letter, CII Letter, and ICI Letter.

⁷⁹ See AFL-CIO Letter, Brown Letter, and Wilson Sonsini Letter. See also CII Letter, which stated that it believed that specific aspects of the NYSE Arca proposal were lacking.

⁸⁰ See Ameriprise Letter and Corporate Secretaries Letter.

⁸¹ See AFL-CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

also be considered.⁸² Two of these commenters, after noting that the proposal did not require boards of directors to also consider the compensation paid to the directors for their service on the board in determining the independence of directors serving on the compensation committee, argued that the proposal falls short of the requirements of Rule 10C-1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.⁸³ The other commenter argued that the language of Section 10C of the Act itself, as well as its legislative history, indicates Congress's intent that such fees be considered.⁸⁴ These commenters believed that compensation for board service can result in "the impairment of independence as a result of excessive fees,"⁸⁵ because "[h]igh director fees relative to other sources of income can compromise director objectivity,"⁸⁶ and "[h]ighly paid directors also may be more inclined to approve large executive pay packages."⁸⁷ One of these commenters believed that the requirement of Section 10C of the Act and Rule 10C-1 to consider the source of compensation of a director goes further, and applies to all types of compensation that a director may receive, including compensation paid by any person, including non-issuers.⁸⁸

In its response to comments, NYSE stated that, as all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, NYSE does not believe that it is likely that director compensation would be a relevant

⁸² See Brown Letter, AFL-CIO Letter, and Teamsters Letter.

⁸³ See AFL-CIO Letter and Teamsters Letter, noting that Rule 10C-1 requires the exchanges to consider a director's "source of compensation," and arguing that this phrase includes director fees.

⁸⁴ See Brown Letter.

⁸⁵ Id.

⁸⁶ See AFL-CIO Letter and Teamsters Letter.

⁸⁷ Id.

⁸⁸ See Brown Letter.

consideration for compensation committee independence.⁸⁹ NYSE noted that, however, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations.⁹⁰ Therefore, NYSE believes that, to the extent that excessive board compensation might affect a director's independence, the proposed rules would require the board to consider that factor in its determination.⁹¹

2. Personal or Business Relationships Between Directors and Officers

Some commenters believed that the proposed rules should explicitly require the board of a listed company, when considering affiliations of a director in determining eligibility for compensation committee membership, to consider personal or business relationships between the director and the company's executive officers.⁹² As expressed by two of these commenters, "too many corporate directors have significant personal, financial or business ties to the senior executives that they are responsible for compensating."⁹³

Some commenters believed that related party transactions should explicitly be included as a relevant factor in determining independence for members of compensation committees.⁹⁴ The additional requirements suggested by commenters also included, for example, disqualification of a director from membership on the compensation committee if an immediate family member of the director received compensation in excess of \$120,000 a year from the

⁸⁹ See NYSE Response Letter.

⁹⁰ See id.

⁹¹ See id.

⁹² See AFL-CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

⁹³ AFL-CIO Letter and Teamsters Letter.

⁹⁴ See AFL-CIO Letter and Teamsters Letter.

company even if that family member was not an executive officer of the company;⁹⁵ or if the director has, or in the past five years has had, a personal contract with the company, with an executive officer of the company, or with any affiliate of the company.⁹⁶

One commenter acknowledged that the proposal would require consideration of all factors specifically relevant to determining whether a director has a relationship which is material to that director's ability to be independent from management, but argued that such requirement is not sufficient to ensure that boards weigh personal or business relationships between directors and executive officers.⁹⁷ In support, the commenter argued that: (1) such relationships were not technically with the "listed company" and therefore would at least create confusion as to whether it should be considered; (2) the omission of an explicit reference to this relationship was inconsistent with other approaches taken in the proposal that made reference to certain other relationships; and (3) legislative history makes it clear that Congress expected these relationships to be explicitly considered in determining director independence.⁹⁸

In response, NYSE noted that the existing independence standards of NYSE require the board to make an affirmative determination that there is no material relationship between the

⁹⁵ See AFL-CIO Letter and Teamsters Letter. NYSE's definition of Independent Director already disqualifies a director from membership on the compensation committee if an immediate family member of the director receives in excess of \$120,000 from the company or was an executive officer of the company.

⁹⁶ See CII Letter. The commenter acknowledged, however, that existing director requirements implicitly require this consideration, but similarly recommended that the importance of the factor requires it be explicit in the NYSE Arca's proposal. Outside the scope of this proposal, the commenter also suggested NYSE Arca consider, at some future date, developing a more comprehensive and robust definition of independent directors that could be applicable to all board committees and provided a proposed definition for NYSE Arca's consideration. As noted above, the comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

⁹⁷ See Brown Letter.

⁹⁸ See id.

director and the company which would affect the director's independence.⁹⁹ NYSE further stated that commentary to Section 303A.02(a) explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT LLC and NYSE Arca have always interpreted their respective director independence requirements in the same way.¹⁰⁰ Consequently, NYSE stated that it did not believe that any further clarification of this requirement is necessary.¹⁰¹

As to a requirement to consider related party transactions, NYSE responded that it believes that this is unnecessary as the existing director independence standards require boards to consider all material factors relevant to an independence determination, as do the specific compensation committee independence requirements of the proposed rules.¹⁰²

3. Sufficiency of Single Factor and Additional Comments on Independence

Two commenters explicitly sought clarification that a single factor can result in the loss of independence.¹⁰³ In its response letter, NYSE confirmed that it has interpreted the existing general board independence standards as providing that a single relationship could be sufficiently material that it would render a director non-independent. NYSE stated it was not aware that there has been any confusion with respect to this interpretation.¹⁰⁴ Consequently, NYSE did not believe it is necessary to include in the proposed rules a statement that a single factor may be

⁹⁹ See NYSE Response Letter.

¹⁰⁰ See id.

¹⁰¹ See id.

¹⁰² See id.

¹⁰³ See AFL-CIO Letter and Teamsters Letter.

¹⁰⁴ See NYSE Response Letter.

sufficiently material to render a director non-independent, as this is clearly the intention of the rules as drafted.¹⁰⁵

Some of the above commenters expressed the belief, in general, that the definition of an independent director should be more narrowly drawn, that the bright-line tests of independence should be strengthened, and that the standards of independence should be uniform for all committees requiring independent directors.¹⁰⁶

One commenter believed that the requirement that the board “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” was vague and unnecessary in light of the comprehensive factors already required.¹⁰⁷ In responding to this commenter, NYSE disagreed, noting that the requirement to consider all material relationships, not just those enumerated, was essential, as it is impossible to foresee all relationships that may be material.¹⁰⁸

B. Compensation Adviser Independence Factors

The Commission received letters from four commenters relating to the provision of the proposed rule change that requires a compensation committee to take into consideration the factors set forth in the proposal in the selection of a compensation consultant, legal counsel, or other adviser to the committee.¹⁰⁹

¹⁰⁵ See id.

¹⁰⁶ See CII Letter, AFL-CIO Letter, and Teamsters Letter.

¹⁰⁷ See Corporate Secretaries Letter.

¹⁰⁸ See NYSE Response Letter.

¹⁰⁹ See Ameriprise Letter, Wilson Sonsini Letter, CII Letter, and Corporate Secretaries Letter.

1. Additional Factors for Consideration

One commenter generally supported the proposal's requirement that a board consider six independence factors before engaging an adviser, but believed that at least one additional factor should be considered: "whether the compensation committee consultants, legal counsel or other advisers require that their clients contractually agree to indemnify or limit their liability."¹¹⁰ The commenter believed that such contractual provisions, which the commenter indicated have become standard practice for many consultants, "raise conflict of interest red flags" that every compensation committee should consider in determining the independence of the consultant.¹¹¹

In response, NYSE stated that it did not believe that this is an appropriate addition because a relationship would affect an adviser's independence from management only if it gave rise to a concern that it would subject the adviser to influence by management.¹¹² It was not apparent to NYSE why the existence of contractual indemnification and limitation of liability provisions would subject an adviser to any influence by management and, therefore, it is not clear how they are relevant to an independence determination.¹¹³ NYSE expressed no view on the desirability of such agreements.¹¹⁴

2. Non-Independent Consultants

One commenter suggested that, although the portion of the proposal which relates to the compensation committee's use of a compensation consultant was thoughtfully drafted and

¹¹⁰ See CII Letter. As noted above, the comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

¹¹¹ See CII Letter.

¹¹² See NYSE Response Letter.

¹¹³ See id.

¹¹⁴ See id.

accurately reflects the substance of Rule 10C-1, there was a possibility that a reader may not properly interpret the intended meaning of proposed Section 303A.05(c) of the Manual concerning the use of compensation consultants, legal counsel and advisers that are not independent.¹¹⁵ First, the commenter suggested the use of the example “independent legal counsel” might be read to require the compensation committee to only use independent legal counsel, when Rule 10C-1 would otherwise permit a compensation committee to receive advice from non-independent counsel, such as in-house counsel or outside counsel retained by management.¹¹⁶ Second, the commenter suggested that the proposal could be revised to emphasize that a compensation committee is not responsible for advisers retained by management or other parties.¹¹⁷ Third, the commenter suggested that the section addressing the funding of consultants should be revised to make clear that: (a) retained legal counsel need not be independent; and (b) expenses of an adviser, in addition to its compensation, would also be provided for by the issuer.¹¹⁸ Fourth, the commenter suggested that the proposal be clarified to require a compensation committee to take into account the independence requirements only when selecting a consultant for matters related to executive compensation, rather than for consultants selected to assist with any other responsibilities the committee may have in addition to executive compensation.¹¹⁹ In response, NYSE noted that Amendment No. 3 amended the proposed rule text to provide that: (i) nothing in the proposed rules requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the

¹¹⁵ See Ameriprise Letter.

¹¹⁶ See id.

¹¹⁷ See id.

¹¹⁸ See id.

¹¹⁹ See id. See also Corporate Secretaries Letter.

compensation committee consider the enumerated independence factors before selecting a compensation adviser; and (ii) the compensation committee may select any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in the proposed rules.¹²⁰ In addition, NYSE noted that Rule 10C-1 and the SEC's adopting release refer only to compensation advisers generally without carving out compensation advisers retained by the compensation committee with respect to matters other than executive compensation.¹²¹

One commenter believed that the proposed rule could be read as requiring a compensation committee to consider the independence factors set forth in Rule 10C-1 when selecting any consultant providing advice to the compensation committee, including any outside legal counsel that might provide legal advice to a compensation committee.¹²² The commenter argued that outside legal counsel often provides advice to compensation committees on matters other than how much a company should pay an executive.¹²³ The commenter suggested it would not be "necessary or a good use of resources for compensation committees to review independence factors for such attorneys providing advice to the compensation committee."¹²⁴ The commenter stated that no other rule requires a board committee to consider the independence of its regular legal counsel,¹²⁵ and noted that, while it may, at times, be appropriate for a board or a committee to consider independence factors, such a consideration should not be

¹²⁰ See NYSE Response Letter.

¹²¹ See id.

¹²² See Wilson Sonsini Letter.

¹²³ See id.

¹²⁴ See id.

¹²⁵ See id.

made part of a listing standard that singles out the compensation committee.¹²⁶ The commenter suggested that different language originally proposed by The NASDAQ Stock Market LLC reflected a more balanced rule that only required the compensation committee to consider the independence when selecting independent legal counsel, not every outside attorney that provides advice to the compensation committee.¹²⁷

In response, NYSE stated that it believes that its proposal is dictated by Rule 10C-1, which excludes only in-house legal counsel from the requirement to conduct an independence analysis with respect to any legal counsel consulted by the compensation committee, including the company's regular securities or tax counsel.¹²⁸ NYSE noted that the Rule 10C-1 Adopting Release provides that “[t]he exemption of in-house counsel from the independence analysis will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer.”¹²⁹

Another commenter, while generally supporting the proposal, maintained that the required independence assessment will be “time-consuming and burdensome” due to the scope of information that will need to be gathered in order to conduct the required independence

¹²⁶ See id.

¹²⁷ See id. The Commission notes that The NASDAQ Stock Market LLC has since revised its proposed rule language and added commentary that makes clear its original intent that the compensation committee of an issuer listed on The NASDAQ Stock Market LLC, absent an exemption, must consider the independence of every adviser, other than in-house legal counsel, that provides advice to the compensation committee, including non-independent legal counsel. See SR-NASDAQ-2012-109, Amendment No. 1.

¹²⁸ See NYSE Response Letter.

¹²⁹ See id.

assessment.¹³⁰ This commenter believed that uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee, and further identified a number of specific issues that it believed the Exchange should address to provide greater clarity regarding the standard.¹³¹

In response, NYSE disagreed with the commenter, arguing that it was impossible to specifically enumerate every category of relationship which might be material to a compensation committee adviser's independence.¹³² NYSE believes that it is therefore necessary for a compensation committee to conduct a more flexible analysis.¹³³ NYSE believes that it would not be appropriate for it to identify additional relevant factors in the rule, as it would be impossible to predict every category of relationship that might be material.¹³⁴

C. Opportunity to Cure Defects

One commenter supported the rule proposed by the Exchange to permit issuers a period of time, under specified conditions, to cure failures to comply with the independence requirements for compensation committee members.¹³⁵ The commenter was concerned, however, that the proposed rules did not specify a cure period for any other form of non-

¹³⁰ See Corporate Secretaries Letter.

¹³¹ The Commission notes that NYSE addressed some of the commenter's concerns in Amendment No. 3.

¹³² See NYSE Response Letter.

¹³³ See id.

¹³⁴ See id.

¹³⁵ See Corporate Secretaries Letter.

compliance with the new rules.¹³⁶ The commenter believed that a company should be allowed to take corrective action within a reasonable time after the company's senior executives learn of the non-compliance.

In response, NYSE noted that it had existing policies and procedures that govern non-compliance with rules generally and that these provisions would apply to any events of non-compliance under the proposed rules.¹³⁷ NYSE believes these provisions provide it with the ability to grant a discretionary period for an issuer to return to compliance, and noted that the determination of a reasonable cure period can only be made in light of specific facts and circumstances.¹³⁸

D. Exemptions

The Commission received one comment letter supporting the Exchange's proposal to exempt investment companies from the Rule 10C-1 requirements.¹³⁹ As the commenter noted, although Rule 10C-1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of investment companies registered under the Investment Company Act of 1940 ("Investment Company Act"), including

¹³⁶ See id. The commenter mentioned, in particular, the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. The commenter believed that inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the commenter believed, the company would be in violation of the listing standard and have no recourse.

¹³⁷ See NYSE Response Letter.

¹³⁸ See id.

¹³⁹ See ICI Letter.

closed-end funds, from any of the requirements of Rule 10C-1. Under the proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule. The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or, by their nature, have employees. The commenter agreed with the proposal that it would be significantly and unnecessarily burdensome to require such entities to comply with the proposed requirements, and further noted that any conflicts with respect to compensation of investment advisers are governed by the Investment Company Act.¹⁴⁰

E. Transition Period

One commenter voiced support for the transition period proposed for compliance with the new compensation committee independence standard, but believed that the Exchange should provide a longer period for companies to satisfy proposed Section 303A.05 of the Manual, relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting such advisers.¹⁴¹

In response, the Exchange stated that it believes that the transition periods are sufficient to enable companies to become compliant on a timely basis in a manner that is not unduly burdensome.¹⁴² The Exchange also noted that the proposed transition period was identical to that used at the time of the initial implementation of NYSE's current board and committee

¹⁴⁰ See ICI Letter.

¹⁴¹ See Corporate Secretaries Letter.

¹⁴² See NYSE Response Letter.

independence requirements and that NYSE believes that the transition period was not unduly burdensome for companies at that time.¹⁴³

IV. Discussion

After careful review, the Commission finds that the NYSE proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴⁴ In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,¹⁴⁵ as well as with Section 10C of the Act¹⁴⁶ and Rule 10C-1 thereunder.¹⁴⁷ Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,¹⁴⁸ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate

¹⁴³ See NYSE Response Letter.

¹⁴⁴ In approving the NYSE proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁴⁵ 15 U.S.C. 78f(b).

¹⁴⁶ 15 U.S.C. 78j-3.

¹⁴⁷ 17 CFR 240.10C-1.

¹⁴⁸ 15 U.S.C. 78f(b)(5).

governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the NYSE proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,¹⁴⁹ Congress resolved to require that “board committees that set compensation policy will consist only of directors who are independent.”¹⁵⁰ In June 2012, as required by this legislation, the Commission adopted Rule 10C-1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, NYSE submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C-1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C-1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

¹⁴⁹ See supra note 9.

¹⁵⁰ See H.R. Rep. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E “Accountability and Executive Compensation,” at 872-873 (Conf. Rep.) (June 29, 2010).

The Commission notes that a number of the commenters generally supported the proposed rule change, although some commenters offered suggestions to clarify or improve various provisions of NYSE's proposal or NYSE Arca's substantially similar proposal. The Commission believes that the proposed rule change, as modified by Amendment Nos. 1 and 3, appropriately revises NYSE's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C-1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director, as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C-1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C-1 Adopting Release, "given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C-1(b)(1)."¹⁵¹ This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish

¹⁵¹ As explained further in the Rule 10C-1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Act.

to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, NYSE has enhanced its listing requirements regarding compensation committees by adopting additional standards for independence to comply with the Fees Factor and Affiliation Factor, as well as the other standards set forth in Rule 10C-1. The NYSE's proposal also adopts the cure procedures required in Rule 10C-1(a)(3) for compensation committee members who cease to be independent for reasons outside their reasonable control, so long as the majority of the members of the compensation committee continue to be independent, and retains the requirement that listed issuers have a compensation committee composed entirely of independent directors as required by Rule 10C-1.

Further, as discussed in more detail below, the NYSE proposal retains the requirement that the compensation committee have a written charter that addresses the committee's purpose and responsibilities, and adds requirements to specify the compensation committee's authority and responsibilities as to compensation advisers as set forth under Rule 10C-1. Finally, to help in assuring that companies comply with these provisions, Exchange rules will continue to require that the compensation committee charter address an annual performance evaluation of the compensation committee. Taken as a whole, the Commission believes that these changes will strengthen the oversight of executive compensation in NYSE-listed companies and further greater accountability, and will therefore further the protection of investors consistent with Section 6(b)(5) of the Act.

The Commission believes that the Exchange's proposal, which requires the consideration of the additional independence factors for compensation committee members, is designed to protect investors and the public interest and is consistent with the requirements of Sections 6(b)(5) and 10C of the Act and Rule 10C-1 thereunder.

With respect to the Fees Factor of Rule 10C-1, the Exchange commentary states when considering the source of a director's compensation in determining independence for compensation committee service, 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. In addition to the continued application of the NYSE's current bright-line tests, NYSE's new rules also require the board to consider all relevant factors in making independence determinations for compensation committee membership. The Exchange believes that these requirements of proposed Section 303A.02(a)(ii) of the Manual, in addition to the general director independence requirements, represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1 and the Fees Factor.

The Commission believes that the provisions noted above to address the Fees Factor give a board broad flexibility to consider a wide variety of fees, including any consulting, advisory or other compensatory fee paid by the issuer or entity, when considering a director's independence for compensation committee service. While the Exchange does not bar all compensatory fees, the approach is consistent with Rule 10C-1 and provides a basis for a board to prohibit a director from being a member of the compensation committee, should the director receive compensation that impairs the ability to make independent decisions on executive compensation matters, even

if that compensation does not exceed the threshold in the bright-line test.¹⁵² The Commission, therefore, believes that the proposed compensatory fee requirements comply with Rule 10C-1 and are designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act. The Commission notes that the compensatory fee consideration may help ensure that compensation committee members are less likely to have received fees, from either the issuer or another entity, that could potentially influence their decisions on compensation matters.

The Commission recognizes that some commenters did not believe that the proposal went far enough because the Exchange did not adequately consider the compensation that directors receive for board or committee service in formulating its standards of independence for service on the compensation committee, and, in particular, the levels to which such compensation may rise,¹⁵³ or otherwise favored additional requirements.¹⁵⁴ The Commission notes, however, that to the extent a conflict of interest exists because directors set their own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director compensation through this means. In addition, as NYSE states, a company's board of directors must consider all relevant factors in making compensation committee independence determinations, and if director fees could, in the opinion of the board, impair the director's independent judgment with respect to compensation-related matters, the board could

¹⁵² See supra note 33, setting forth the existing bright-line tests.

¹⁵³ See AFL-CIO Letter, Brown Letter, and Teamsters Letter, maintaining that NYSE's proposal "falls short" of the Rule 10C-1 provision requiring exchanges to consider a director's source of compensation. See also supra notes 92-96 and accompanying text. As stated by commenters, "[h]igh director fees relative to other sources of income can compromise director objectivity" and "[h]ighly paid directors also may be more inclined to approve large executive pay packages." AFL-CIO Letter. See also Teamsters Letter.

¹⁵⁴ See, e.g., CII Letter.

therefore consider director compensation in that context.¹⁵⁵ The Commission believes that, based on the NYSE's argument and the disclosure requirements noted above, these arguments are sufficient to find that NYSE has complied with the requirements of Rule 10C-1 in this regard.

With respect to the Affiliation Factor of Rule 10C-1, NYSE has concluded that an outright bar from service on a company's compensation committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for compensation committees. NYSE's existing independence standards will also continue to apply to those directors serving on the compensation committee. NYSE maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees as "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." In spite of the argument of two commenters in favor of an outright ban on affiliations with the company,¹⁵⁶ the Commission believes that NYSE's approach of requiring boards only to consider such affiliations is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C-1 Adopting Release, "In establishing their

¹⁵⁵ See NYSE Response letter, *supra* note 6. The Commission also notes that in the NYSE Response Letter, the Exchange states that to the extent that excessive board compensation might affect a director's independence, the new rules would require the board to consider that factor in its independence determination.

¹⁵⁶ See Teamsters Letter and AFL-CIO Letter.

independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.”¹⁵⁷ In determining that NYSE’s affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that NYSE’s proposal requires a company’s board, in selecting compensation committee members, to consider whether any such affiliation would impair a director’s judgment as a member of the compensation committee. The NYSE rule further states that, in considering affiliate relationships, a board should consider whether such affiliate relationship places the director under the direct or indirect control of the listed company or its senior management such that it would impair the ability of the director to make independent judgments on executive compensation. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company’s compensation committee, depending on the director’s particular affiliations with the company or its senior management.¹⁵⁸

¹⁵⁷ Rule 10C-1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders’ interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations “impair his ability to make independent judgment” as a member of the committee. See also supra notes 31-35 and accompanying text.

¹⁵⁸ The Commission notes that one commenter suggested there was ambiguity as to whether boards must consider business or personal relationships between directors and senior management. See Brown Letter. In response, NYSE noted that its existing independence standards require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director’s independence. NYSE noted that Commentary to Section 303A.02(a) of the Manual

As to whether NYSE should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in light of Rule 10C-1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for compensation committee members. The Commission does not agree with the commenters who argued that the Exchange's proposal falls short of "the requirements and/or intent" of Section 10C of the Act and Rule 10C-1. The Commission notes that Rule 10C-1 requires each exchange to consider relevant factors in determining independence requirements for members of a compensation committee, but does not require the exchange's proposal to reflect any such additional factors.

As noted above, several commenters argued that the proposal should require that other ties between directors and the company, including business and personal relationships with executives of the company, be considered by boards in making independence determinations.¹⁵⁹ The Commission did emphasize in the Rule 10C-1 Adopting Release that "it is important for exchanges to consider other ties between a listed issuer and a director ... that might impair the director's judgment as a member of the compensation committee,"¹⁶⁰ and noted that "the exchanges might conclude that personal or business relationships between members of the

explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management. Consequently, NYSE does not believe that any further clarification of this requirement is necessary. See NYSE Response Letter.

¹⁵⁹ See supra notes 92-102 and accompanying text. As noted above, one comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

¹⁶⁰ See supra note 11.

compensation committee and the listed issuer's executive officers should be addressed in the definition of independence." However, the Commission did not require exchanges to reach this conclusion and thus NYSE's decision that such ties need not be included explicitly in its definition of independence does not render its proposal insufficient.

In explaining why it did not include, specifically, personal and business relationships as a factor, NYSE cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no material relationship with the listed company with respect to their independence from management.¹⁶¹ All compensation committee members must meet the general independence standards under NYSE's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the compensation committee. Although personal and business relationships, related party transactions, and other matters suggested by commenters are not specified either as bright-line disqualifications or explicit factors that must be considered in evaluating a director's independence, the Commission believes that compliance with NYSE's rules and the provision noted above would demand consideration of such factors with respect to compensation committee members, as well as to all Independent Directors on the board.

Notwithstanding the concern of some commenters, the Commission confirms that Rule 10C-1 does not mean that a director cannot be disqualified on the basis of one factor alone. Although NYSE does not state this explicitly in its rules, in response to comments, the Exchange confirmed that they have interpreted their current rules as providing that a single relationship

¹⁶¹ See Section 303A.02(a) of the Manual. See also NYSE Response Letter.

could be sufficiently material that it would render a director non-independent. The Commission believes that nothing in Rule 10C-1 or in NYSE's current or proposed rules implies otherwise.

Finally, the Commission does not believe that NYSE is required in the current proposed rule change to consider further revisions of its independence rules as suggested by some commenters, although it may wish to do so in the future after it has experience with its rules. The Commission notes that the NYSE provision requires a board to further exercise appropriate discretion to consider all factors specifically relevant in 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. The Commission notes that one commenter argues this provision is vague and unnecessary and should be deleted from the proposal.¹⁶² The Commission does not agree with the commenter, however, that the consideration of the explicitly enumerated factors will be sufficient in all cases to achieve the objectives of Section 10C(a)(3), because it is not possible to foresee all possible kinds of relationships that might be material to a compensation committee member's independence. We therefore believe the flexibility provided in NYSE's new compensation committee independence standards provides companies with guidance, while allowing them to identify those relationships that might raise questions of independence for service on the compensation committee. For these reasons, we believe the director independence standards are consistent with the investor protection provision of Section 6(b)(5) of the Act.

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

¹⁶² See Corporate Secretaries Letter.

As discussed above, NYSE proposes to set forth explicitly in its rules the requirements of Rule 10C-1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C-1¹⁶³ and are consistent with the Act.¹⁶⁴

In addition, the Commission believes that requiring companies to specify the enhanced compensation committee responsibilities through the compensation committee's written charter will help to assure that there is adequate transparency as to the rights and responsibilities of compensation committee members. As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C-1 and Section 6(b)(5) of the Act.

As noted above, one commenter believed that Rule 10C-1 could be read as not requiring a compensation committee to consider the enumerated independence factors with respect to regular outside legal counsel and sought to have NYSE revise its proposal.¹⁶⁵ This reading is incorrect, and NYSE's rule language reflects the appropriate reading. The Commission notes that Rule 10C-1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to "any compensation consultant, legal

¹⁶³ 17 CFR. 240.10C-1.

¹⁶⁴ 15 U.S.C. 78j-3.

¹⁶⁵ See Wilson Sonsini Letter and supra notes 122-127 and accompanying text.

counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.”¹⁶⁶ To avoid any confusion, NYSE added rule text that reflects this instruction in its own rules.¹⁶⁷

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, NYSE has proposed, in Amendment No. 3, to add language to the provision regarding the independence assessment of compensation advisers¹⁶⁸ to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S-K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. NYSE states that this exception is based on Item 407(e)(3)(iii) of Regulation S-K, which provides a limited exception to the Commission’s requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant’s executive and director compensation.¹⁶⁹

¹⁶⁶ See Instruction to paragraph (b)(4) of Rule 10C-1.

¹⁶⁷ See supra note 46 and accompanying text.

¹⁶⁸ See proposed Commentary to Section 303A.05(c), as amended by Amendment No. 3.

¹⁶⁹ See 17 CFR 229.407(e)(3)(iii).

The Commission views NYSE's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.¹⁷⁰ The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C-1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters regarding the scope of the independence assessment requirement. Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

Regarding the belief of another commenter that the independence assessment requirement could discourage compensation committees from obtaining the advice of advisers,¹⁷¹ the Commission notes that, as already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, in Amendment No. 3, NYSE added specific rule language stating, among other things, that nothing in its rule requires a compensation adviser to be independent, only that the compensation committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.¹⁷²

¹⁷⁰ See Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (“We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.”).

¹⁷¹ See Corporate Secretaries Letter and supra note 130 and accompanying text.

¹⁷² See supra notes 49-50 and accompanying text.

Regarding the commenter's concern over the burdens that the Exchange proposal imposes, the Commission notes that Rule 10C-1 explicitly requires exchanges to require consideration of these six factors.¹⁷³ Moreover, five of the six factors were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C-1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.¹⁷⁴

Finally, one commenter requested guidance "on how often the required independence assessment should occur."¹⁷⁵ This commenter observed that it "will be extremely burdensome and disruptive if prior to each such [compensation committee] meeting, the committee had to conduct a new assessment." The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.

The changes to NYSE's rules on compensation advisers should therefore benefit investors in NYSE-listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

C. Application to Smaller Reporting Companies

¹⁷³ The Commission also does not agree with the argument of one commenter that NYSE Arca's substantially similar proposal must require compensation committees to specifically consider, among the independence factors relating to compensation advisers, whether such an adviser requires that clients contractually agree to indemnify or limit their liability. See CII Letter. The Commission views as reasonable the Exchange's belief that the six factors set forth in Rule 10C-1 are sufficient for the required independence assessment.

¹⁷⁴ See Rule 10C-1 Adopting Release, supra note 11.

¹⁷⁵ See Corporate Secretaries Letter.

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors is reasonable and consistent with the protection of investors. The Commission notes that NYSE's rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C-1, the NYSE proposal would: (i) exempt Smaller Reporting Companies from having to consider the additional independence requirements as to compensatory fees and affiliation; and (ii) exempt their compensation committees from having to consider the additional independence factors for compensation advisers. Under this approach, Smaller Reporting Companies will effectively be subject to the same requirements as is currently the case under the existing requirements of the Manual for all companies with respect to having a written charter that provides the compensation committee with the sole authority and funding for the retention of compensation consultants.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C-1 requirements, it makes sense for NYSE to provide some flexibility to Smaller Reporting Companies. Further, because a Smaller Reporting Company does not need to include in its charter the additional provision regarding the independence of compensation advisers that NYSE is requiring all other listed companies to include to comply with Rule 10C-1,¹⁷⁶ and in view of the potential additional

¹⁷⁶ As discussed supra notes 56-57 and accompanying text, the charter of a Smaller Reporting Company will not be required to include, like the charters of other listed companies, a requirement that the committee consider independence factors before selecting such advisers, because Smaller Reporting Companies are not subject to that requirement.

costs of such review, it is reasonable not to require a Smaller Reporting Company to conduct such analysis of compensation advisers.

D. Opportunity to Cure Defects

Rule 10C-1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C-1, to prohibit the issuer's listing. Rule 10C-1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that NYSE proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C-1 is the same as the cure period suggested under Rule 10C-1, but NYSE limits the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors. The Commission believes that the accommodation, including the proposed period and limitation, although it gives a company less leeway in certain circumstances than the cure period provided as an option by Rule 10C-1, is fair and reasonable and consistent with investor protection under Rule 6(b)(5) by ensuring that a compensation committee cannot take action without a majority of independent directors even when a member ceases to be independent and the committee is entitled to a period to cure that situation.

The Commission agrees with the understanding of the commenter who believed that Rule 10C-1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements. The Commission believes that NYSE's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement. For example, NYSE's rules provide that, unless continued listing of the company raises a public interest concern, when a company is deficient in compliance with listing standards, the Exchange will provide the company with an opportunity to provide NYSE with a plan of definitive action the company has taken, or is taking, that would bring it into conformity with continued listing standards within 18 months of receipt of a notice of a deficiency.¹⁷⁷

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C-1 and also are consistent with investor protection and the public interest, since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.¹⁷⁸

E. Exemptions

The Commission believes that it is appropriate for NYSE to exempt from the new requirements established by the proposed rule change the same categories of issuers that are exempt from its existing standards for oversight of executive compensation for listed companies. Although Rule 10C-1 does not explicitly exempt some of these categories of issuers from its

¹⁷⁷ See supra text accompanying notes 137-138. See also NYSE Response Letter, supra note 6.

¹⁷⁸ The Commission notes that the general procedures to cure non-compliance adequately address the comments made in the Corporate Secretaries Letter.

requirements, it does grant discretion to exchanges to provide additional exemptions. NYSE states that the reasons it adopted the existing exemptions apply equally to the new requirements, and the Commission believes that this assertion is reasonable.

NYSE proposed to exempt limited partnerships, companies in bankruptcy proceedings and open-end management investment companies that are registered under the Investment Company Act from all of the requirements of Rule 10C-1. The Commission believes such exemptions are reasonable, and notes that such entities, which were already generally exempt from NYSE's existing compensation committee requirements, also are exempt from the compensation committee independence requirements specifically under Rule 10C-1. NYSE also proposes to exempt closed-end management investment companies registered under the Investment Company Act from the requirements of Rule 10C-1. The Commission believes that this exemption is reasonable because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from NYSE's existing compensation committee requirements. The Commission notes that, as one commenter stated, typically registered investment companies do not employ executives or employees or have compensation committees. The Commission notes that the existing language of these exemptive provisions is not changed, but that the provisions, which go beyond Rule 10C-1's exemptions, are consistent with Rule 10C-1.

The Commission further believes that other proposed exemption provisions relating to controlled companies,¹⁷⁹ asset-backed issuers and other passive issuers, and issuers whose only

¹⁷⁹ The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C-1 by Rule 10C-1(b)(5).

listed equity stock is a preferred stock are reasonable, given the specific characteristics of these entities. As noted by the Exchange, many of these issuers are externally managed and do not directly employ executives; do not, by their nature, have employees, or have executive compensation policy set by a body other than their board.

The NYSE proposal would continue to permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, without requiring any further disclosure from such entities. The Commission believes that granting exemptions to foreign private issuers in deference to their home country practices with respect to compensation committee practices is appropriate, and believes that the existing disclosure requirements will help investors determine whether they are satisfied with the alternative standard. The Commission notes that such entities are exempt from the compensation committee independence requirements of Rule 10C-1 to the extent such entities disclose in their annual reports the reasons they do not have independent compensation committees.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut and matches the revised deadline set forth by The NASDAQ Stock

Market.¹⁸⁰ Accordingly, the deadline gives companies until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the remaining provisions.¹⁸¹

G. Compliance Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

The Commission believes that it is reasonable for NYSE to allow, with respect to IPOs, companies listing in conjunction with a carve-out or spin-off transaction, companies emerging from bankruptcy, companies ceasing to be controlled companies, companies ceasing to qualify as a foreign private issuer, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules.

The Commission also believes that the compliance schedule for companies that cease to be Smaller Reporting Companies, as revised in Amendment No. 3, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining when they will be subject to the heightened requirements.

V. Accelerated Approval of Amendment No. 3 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁸² for approving the proposed rule change, as modified by Amendment Nos. 1 and 3, prior to the 30th day after the date of publication of notice in the Federal Register.

¹⁸⁰ See Amendment No. 1 to File No. SR-NASDAQ-2012-109; see also Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of File No. SR-NASDAQ-2012-109).

¹⁸¹ The proposal is, however, otherwise effective on July 1, 2013, and issuers will be required to comply with the new compensation committee charter and adviser requirements as of that date. As noted above, certain existing issuers, such as smaller reporting companies, are exempt from compliance with the new independence requirement with respect to compensation committee service.

The change made to the proposal by Amendment No. 3 to change a reference from Item 10(f)(1) of Regulation S-K to a reference to Exchange Act Rule 12b-2 is not a substantive one and merely references an otherwise identical definition.

The revision made by Amendment No. 3 to the compliance rules for companies that cease to be Smaller Reporting Companies¹⁸³ establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance with the applicable requirements. The Commission notes that the Start Date of the compliance period for such a company is six months after the Smaller Reporting Company Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. As originally proposed a Smaller Reporting Company had to comply within six months of the Smaller Reporting Company Determination Date, and for the adviser assessment at the Smaller Reporting Company Determination Date. The Commission believes the amendments to the transitions for issuers that lose their status as a Smaller Reporting Company will afford such companies additional time to comply and avoid issues involving inadvertent non-compliance because of the provision that originally applied immediately on the Smaller Reporting Company Determination Date. The amendments also provide additional clarity on when the time frames commence, and as such the Commission believes good cause exists to accelerate approval.

The change to commentary made by Amendment No. 3 to exclude advisers that provide only certain types of services from the independence assessment is also appropriate. As discussed above, the Commission has already determined to exclude such advisers from the

¹⁸² 15 U.S.C. 78s(b)(2).

¹⁸³ See supra notes 70-73 and accompanying text.

disclosure requirement regarding compensation advisers in Regulation S-K because these types of services do not raise conflict of interest concerns. Finally, the addition of further guidance by Amendment No. 3 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser, and is not a substantive change, as it was the intent of the rule as originally proposed.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment No. 3.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment No. 3 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-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 of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2012-49, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by NYSE, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. NYSE's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

NYSE's rules also, consistent with Rule 10C-1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of NYSE-listed companies are better informed about potential conflicts when selecting and receiving advice

from advisers. Similarly, the provisions of NYSE's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR-NYSE-2012-49, as modified by Amendment Nos. 1 and 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.¹⁸⁴

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸⁵ that the

¹⁸⁴ 15 U.S.C. 78f(b)(5).

¹⁸⁵ 15 U.S.C. 78s(b)(2).

proposed rule change, SR-NYSE-2012-49, as modified by Amendment Nos. 1 and 3, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸⁶

Kevin M. O'Neill
Deputy Secretary

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¹⁸⁶ 17 CFR 200.30-3(a)(12).