

Required fields are shown with yellow backgrounds and asterisks.

Proposed Rule Change by NYSE MKT LLC.
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>			
			Rule					
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	19b-4(f)(1) <input type="checkbox"/>	19b-4(f)(2) <input type="checkbox"/>	19b-4(f)(3) <input type="checkbox"/>	19b-4(f)(4) <input type="checkbox"/>	19b-4(f)(5) <input type="checkbox"/>	19b-4(f)(6) <input type="checkbox"/>

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

Proposal to amend Sections 110 and 801 and 803 and 805 of the Exchanges Company Guide to comply with the requirements of Securities and Exchange Commission Rule 10C 1

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name * John Last Name * Carey
 Title * Vice President NYSE Regulation
 E-mail * jcarey@nyx.com
 Telephone * (212) 656-5640 Fax (212) 656-2223

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 09/25/2012
 By Janet McGinness Corporate Secretary
 (Name *) (Title *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

NYX Janet McGinness,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information (required)

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change (required)

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) NYSE MKT LLC (“NYSE MKT” or the “Exchange”) proposes to amend Sections 110, 801, 803 and 805 of the Exchange’s Company Guide (the “Company Guide”) to comply with the requirements of Securities and Exchange Commission (“Commission” or “SEC”) Rule 10C-1.¹ The text of the proposed rule changes is set forth in Exhibit 5 attached hereto.
- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The board of directors of NYSE Regulation, Inc. approved the proposed rule change on July 23, 2012. In addition, senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange's governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

John Carey
Vice President -- Legal
NYSE Regulation, Inc.
(212) 656-5640

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

(a) Purpose

NYSE MKT proposes to amend Sections 110, 801, 803 and 805 of the Company Guide to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 110, 801, 803 and 805 will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the Company Guide until June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended provisions of those sections will be included in the Company Guide with introductory text indicating that the

¹ 17 CFR 240.10C-1.

revised text does not become operative until July 1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”)² added Section 10C to the Securities Exchange Act of 1934.³ Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C’s compensation committee and compensation adviser requirements. On June 20, 2012, to comply with the requirements of Section 10C, the Commission adopted new Rule 10C-1, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.

Rule 10C-1 does not by its terms require a national securities exchange to mandate that listed companies must have a compensation committee. However, in the absence of a compensation committee, most of the provisions of Rule 10C-1 applicable to compensation committees are applicable to “the members of the board of directors who oversee executive compensation matters on behalf of the board of directors.”⁴ NYSE MKT’s listing standard with respect to executive compensation, Section 805 of the Company Guide, provides that the compensation of the chief executive officer of a listed company must be determined, or recommended to the board for determination, either by a compensation committee comprised of independent directors or by a majority of the independent directors on the company’s board of directors. Consequently, if a listed company does not have a compensation committee, the Exchange’s proposed amendments to its rules pursuant to Rule 10C-1 would apply to the independent directors of the listed company individually and as a group, as applicable. The Exchange proposes to amend Section 805(a) to provide that all references to a listed company’s compensation committee in Section 805 will, in the case of a listed company that does not have a compensation committee, be applicable to the listed company’s independent directors as a group, and the same approach is utilized in this filing.

Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, 10C-1(b)(1)(ii)⁵ requires the exchanges to consider relevant factors including, but not limited to: (i) the source of the director’s compensation, including any consulting, advisory or other compensatory fees paid by the listed company; and (ii) whether the director has an affiliate relationship with the company, a

² Pub. L. No. 111-203, 124 Stat. 1900 (2010).

³ 15 U.S.C. 78j-3.

⁴ See the definition of the term “compensation committee” in Rule 10C-1(c)(2)(iii).

⁵ 17 CFR 240.10C-1(b)(1)(ii).

subsidiary of the company or an affiliate of a subsidiary of the company. Rule 10C-1(a)(4)⁶ requires that the rule filing submitted to the SEC by each exchange in connection with the adoption of the rules required by Rule 10C-1 must include a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange's consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.

The Exchange's director independence standards are set forth in Section 803(A)(2). That section provides that no director qualifies as independent unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, Section 803(A)(2) provides that a director may not be deemed to be independent if such director has a relationship with the listed company which violates any one of five "bright line" tests.⁷

⁶ 17 CFR 240.10C-1(a)(4).

⁷ The following are the "bright line" tests set forth in Section 803(A)(2):

- (a) The director is, or during the past three years was, employed by the company, other than prior employment as an interim executive officer (provided the interim employment did not last longer than one year).
- (b) The director accepted or has an immediate family member who accepted any compensation from the company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (i) compensation for board or board committee service; or, (ii) compensation paid to an immediate family member who is an employee (other than an executive officer) of the company; or, (iii) compensation received for former service as an interim executive officer (provided the interim employment did not last longer than one year); or, (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation;
- (c) The director is an immediate family member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer;
- (d) The director is, or has an immediate family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments (other than those arising solely from investments in the company's securities or payments under non-discretionary charitable contribution matching programs) that exceed 5% of the organization's consolidated

The provisions of Section 803(A)(2) will continue to be applicable to independence determinations in relation to compensation committee service, as compensation committee members will be required to be independent under the Exchange's general board independence standards set forth in Section 803(A)(2), in addition to the independence requirements proposed specifically for compensation committee service.

The Exchange proposes to amend Section 803(A)(2) of the Company Guide to require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, or, in the case of a company that does not have a compensation committee, in affirmatively determining the independence of *all* independent directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management, in connection with the duties of a compensation committee member including, but not limited to, the two factors that are explicitly enumerated in Rule 10C-1(b)(ii) that are set forth in proposed Section 805(c)(1). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, proposed new commentary .03 to Section 805 provides that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or

gross revenues for that year, or \$200,000, whichever is more, in any of the most recent three fiscal years;

- (e) The director is, or has an immediate family member who is, employed as an executive officer of another entity where at any time during the most recent three fiscal years any of the issuer's executive officers serve on the compensation committee of such other entity; or
- (f) The director is, or has an immediate family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

In lieu of Section 803A(2)(a) through (f), 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.

indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 805(c)(1) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),⁸ the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.⁹ Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing "bright line" independence standards as set forth in Section 803(A)(2) of the Company Guide are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 803(A)(2) already requires the board to consider any relationship that would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 805(c)(1), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

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

⁸ Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

⁹ See Adopting Release at 38428.

¹⁰ 17 CFR 240.10C-1(b)(2).

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

Rule 10C-1(b)(3)¹¹ requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

The Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as new subsection (c)(3) to Section 805.

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹² provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

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

¹¹ 17 CFR 240.10C-1(b)(3).

¹² 17 CFR 240.10C-1(b)(4).

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

Accordingly, the Exchange proposes to add as new subsection (c)(4) to Section 805 a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 805(c)(4) would not include any additional factors for consideration, as the Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),¹³ the Exchange proposes to include as new Commentary .04 to Rule 805 an explicit statement that nothing in Section 805(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed new Commentary .05 to Section 805 would specify that the compensation committee need not engage in an analysis of the independence factors before consulting with or obtaining advice from in-house legal counsel.

Cure Periods

Rule 10C-1(a)(3)¹⁴ requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. The Exchange proposes to adopt, as new Rule 805(c)(2), this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of

¹³ 17 CFR 240.10C-1(b)(2)(iii).

¹⁴ 17 CFR 240.10C-1(a)(3).

the director's reasonable control.¹⁵ However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).¹⁶ Consistent with the transition periods approved by the SEC for inclusion in the Exchange's current corporate governance requirements at the time of their original adoption,¹⁷ the Exchange proposes to adopt new Section 805(c)(5), under which listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new Section 805(c)(1) compensation committee independence standards. Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards. In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 809(a) of the Company Guide.¹⁸

The Exchange proposes to exempt smaller reporting companies¹⁹ from compliance with the proposed new independence requirements with respect to compensation committee service. Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the

¹⁵ See proposed Section 803(c)(3).

¹⁶ See Adopting Release at 38444.

¹⁷ See Securities Exchange Act Release No. 48863 (December 1, 2003), 68 FR 68432 (December 8, 2003)(SR-Amex-2003-65).

¹⁸ Section 809(a) affords companies that have listed in conjunction with their initial public offering exemptions from all board composition requirements consistent with the exemptions afforded in Exchange Act Rule 10A-3. That is, for each applicable committee that the company establishes (i.e., nominating and/or compensation) the company must have one independent member at the time of listing, a majority of independent members within 90 days of listing and all independent members within one year.

¹⁹ As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the Exchange proposes to include in proposed Section 805(c)(5) a transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 805(c)(1).²⁰ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, to (I) have a committee composed entirely of members that meet the independence requirements of proposed Section 805(c) within six months of the Smaller Reporting Company Determination Date and (II) have a compensation committee as of the Smaller Reporting Company Determination Date that complies with the requirements of proposed Section 805(c)(4) with respect to compensation consultant independence considerations.

General Exemptions

Rule 10C-1(b)(5)²¹ provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies,²² and Rule 10C-1(b)(1)(iii)(A)²³ provides an automatic exemption from the compensation committee independence requirements for limited partnerships, companies in bankruptcy, open-end management investment companies registered under the Investment Company Act of 1940 (“1940 Act”). Rule 10C-1(b)(1)(iii)(A) also exempts from the compensation committee independence requirements any foreign private issuer that discloses in its annual report filed with the SEC the reasons that the foreign private issuer does not have an independent compensation committee.

²⁰ A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion *infra*.

²¹ 17 CFR 240.10C-1(b)(5).

²² The Exchange proposes to amend subsection (h) of Section 801 to include a statement that smaller reporting companies are required to comply with Section 805(c), with the exception of the compensation committee independence requirements of Section 803(c)(1) and the requirements of proposed Section 805(c)(4) with respect to compensation consultant independence considerations. The same statement will be included in proposed Commentary .01 to Section 805. In addition, the Exchange proposes to amend Section 805(b) to clarify that henceforth only smaller reporting companies will be eligible to avail themselves of the ability of the board under exceptional and limited circumstances to appoint a non-independent director to the compensation committee.

²³ 17 CFR 240.10C-1(b)(1)(iii)(A).

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuers that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the Exchange's existing compensation committee requirements. Thus, as proposed, controlled companies, limited partnerships, companies in bankruptcy, and open-end and closed-end funds that are registered under the 1940 Act, asset-backed issuers and other passive business organizations (such as royalty trusts) or derivatives and special purpose securities listed pursuant to Exchange Rules 1000, and 1200 and Sections 106, 107 and 118B would be exempt from both the new compensation committee independence requirements and the new compensation adviser requirements. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees (e.g., passive business organizations (such as royalty trusts)); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

Foreign private issuers²⁴ are currently permitted by Section 110 to apply for an exemption from the Exchange's compensation committee requirements. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),²⁵ from the proposed new compensation committee requirements to foreign private issuers that seek an exemption on the basis that they follow home country practice. The Exchange notes that Section 110 provides that foreign based entities availing themselves of exemptions from compliance with Exchange rules must provide English language disclosure of any significant ways in which their corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards. Section 110 currently provides that this disclosure may be provided on the company's web site and/or in its annual report as distributed to shareholders in the U.S. As the Exchange no longer requires companies to distribute annual reports, except for its requirements in Section 610 with respect to the web site posting and distribution of annual reports filed with the SEC, the Exchange proposes to modify this provision to provide that a

²⁴ The term "foreign private issuer" used in Section 110 is defined in Exchange Act Rule 3b-4(c).

²⁵ 17 CFR 240.10C-1(b)(5)(i).

company must either include this disclosure on its web site or in the annual report it is required to file with the SEC that includes audited financial statements (including on Forms 10-K, 20-F, or 40-F) While Section 110 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 805. The Exchange proposes to grant these issuers a general exemption from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1.

(b) Statutory Basis

The Exchange believes that the proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes that the proposed rule change is consistent with Section 6(b)²⁶ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁷ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(5).

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

4. Self-Regulatory Organization’s Statement on Burden on Competition

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

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

The Exchange has not solicited written comments on the proposed rule change. The Exchange has received two comment letters on the proposed rule change.²⁸ One commenter made the following points: (i) the Exchange should specify that the relevant factors for consideration with respect to compensation committee independence should include a consideration of fees received for service on the board itself; (ii) the relevant factors should explicitly include consideration of the

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

personal and business relationships between directors and officers; (iii) the additional factors to be considered for compensation committee independence should be considered as a part of general board independence determinations; and (iv) the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of board independence.

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

The Exchange interprets its existing director independence requirements as requiring the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a part of the board's general independence determinations for all independent directors. Section 803(A) provides that, in making its affirmative determination with respect to a director's independence, the board must satisfy itself that the director "does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." As such, the Exchange believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 803(A) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

The second commenter proposed that the Exchange should require companies to make a public disclosure with respect to the factors considered by the

compensation committee in reviewing the independence of compensation consultants, legal counsel and other compensation advisers. This commenter also proposed that the Exchange should require with respect to outside counsel hired by the compensation committee the same disclosure as is required by Item 407(e)(3)(iv) of Regulation S-K with respect to the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. The Exchange does not believe that it is necessary to establish additional disclosure requirements of this nature. Item 407 of Regulation S-K contains extensive disclosure requirements with respect to a listed company's corporate governance. Moreover, with respect to disclosure of any conflicts of interest that may arise with respect to outside counsel hired by the compensation committee, the Exchange believes that the rigorous conflict of interest requirements applicable to attorneys adequately address such concerns. And the Exchange is mindful that requiring additional public disclosures regarding outside counsel could require a listed company to disclose information that otherwise may be protected by attorney-client privilege.

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The Exchange is seeking to adopt the proposed amendments to its compensation committee listing standards to comply with the requirements of SEC Rule 10C-1.

9. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register

Exhibit 2 – Comment Letters

Exhibit 5 – Proposed Rule Text

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NYSEMKT-2012-48)

[Date]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Sections 110, 801, 803 and 805 of the Exchange’s Company Guide to comply with the requirements of Securities and Exchange Commission Rule 10C-1

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on September 25, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Sections 110, 801, 803 and 805 of the Exchange’s Company Guide (the “Company Guide”) to comply with the requirements of Securities and Exchange Commission (“Commission” or “SEC”) Rule 10C-1.⁴ The text of the proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 17 CFR 240.10C-1.

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

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

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

1. Purpose

NYSE MKT proposes to amend Sections 110, 801, 803 and 805 of the Company Guide to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 110, 801, 803 and 805 will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the Company Guide until June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended provisions of those sections will be included in the Company Guide with introductory text indicating that the revised text does not become operative until July 1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")⁵ added Section 10C to the Securities Exchange Act of 1934.⁶ Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities associations to prohibit the listing of any

⁵ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

⁶ 15 U.S.C. 78j-3.

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

Rule 10C-1 does not by its terms require a national securities exchange to mandate that listed companies must have a compensation committee. However, in the absence of a compensation committee, most of the provisions of Rule 10C-1 applicable to compensation committees are applicable to "the members of the board of directors who oversee executive compensation matters on behalf of the board of directors."⁷ NYSE MKT's listing standard with respect to executive compensation, Section 805 of the Company Guide, provides that the compensation of the chief executive officer of a listed company must be determined, or recommended to the board for determination, either by a compensation committee comprised of independent directors or by a majority of the independent directors on the company's board of directors. Consequently, if a listed company does not have a compensation committee, the Exchange's proposed amendments to its rules pursuant to Rule 10C-1 would apply to the independent directors of the listed company individually and as a group, as applicable. The Exchange proposes to amend Section 805(a) to provide that all references to a listed company's compensation committee in Section 805 will, in the case of a listed company that does not have a compensation committee, be applicable to the listed company's independent directors as a group, and the same approach is utilized in this filing.

⁷ See the definition of the term "compensation committee" in Rule 10C-1(c)(2)(iii).

Compensation Committee Director Independence Requirement

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

The Exchange's director independence standards are set forth in Section 803(A)(2). That section provides that no director qualifies as independent unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, Section 803(A)(2) provides that a director may not be deemed to be independent if such director has a relationship with the listed company which violates any one of five "bright line" tests.¹⁰

⁸ 17 CFR 240.10C-1(b)(1)(ii).

⁹ 17 CFR 240.10C-1(a)(4).

¹⁰ The following are the "bright line" tests set forth in Section 803(A)(2):

The provisions of Section 803(A)(2) will continue to be applicable to independence determinations in relation to compensation committee service, as

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- (a) The director is, or during the past three years was, employed by the company, other than prior employment as an interim executive officer (provided the interim employment did not last longer than one year).
 - (b) The director accepted or has an immediate family member who accepted any compensation from the company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (i) compensation for board or board committee service; or, (ii) compensation paid to an immediate family member who is an employee (other than an executive officer) of the company; or, (iii) compensation received for former service as an interim executive officer (provided the interim employment did not last longer than one year); or, (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation;
 - (c) The director is an immediate family member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer;
 - (d) The director is, or has an immediate family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments (other than those arising solely from investments in the company's securities or payments under non-discretionary charitable contribution matching programs) that exceed 5% of the organization's consolidated gross revenues for that year, or \$200,000, whichever is more, in any of the most recent three fiscal years;
 - (e) The director is, or has an immediate family member who is, employed as an executive officer of another entity where at any time during the most recent three fiscal years any of the issuer's executive officers serve on the compensation committee of such other entity; or
 - (f) The director is, or has an immediate family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

In lieu of Section 803A(2)(a) through (f), 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.

compensation committee members will be required to be independent under the Exchange's general board independence standards set forth in Section 803(A)(2), in addition to the independence requirements proposed specifically for compensation committee service.

The Exchange proposes to amend Section 803(A)(2) of the Company Guide to require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, or, in the case of a company that does not have a compensation committee, in affirmatively determining the independence of *all* independent directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management, in connection with the duties of a compensation committee member including, but not limited to, the two factors that are explicitly enumerated in Rule 10C-1(b)(ii) that are set forth in proposed Section 805(c)(1). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, proposed new commentary .03 to Section 805 provides that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed

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

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 805(c)(1) or to adopt a requirement to consider any other specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),¹¹ the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.¹² Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing "bright line" independence standards as set forth in Section 803(A)(2) of the Company Guide are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 803(A)(2) already requires the

¹¹ Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

¹² See Adopting Release at 38428.

board to consider any relationship that would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 805(c)(1), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

Rule 10C-1(b)(2)¹³ requires exchange rules to mandate that compensation committees must have broad authority to engage advisers to assist in their performance of the committee's functions. Specifically, exchange rules must mandate that:

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

Rule 10C-1(b)(3)¹⁴ requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

¹³ 17 CFR 240.10C-1(b)(2).

¹⁴ 17 CFR 240.10C-1(b)(3).

The Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as new subsection (c)(3) to Section 805.

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹⁵ provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified by the relevant national securities exchange or national securities association in its listing standards:

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

¹⁵ 17 CFR 240.10C-1(b)(4).

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

Accordingly, the Exchange proposes to add as new subsection (c)(4) to Section 805 a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 805(c)(4) would not include any additional factors for consideration, as the Exchange believes that the list included in Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),¹⁶ the Exchange proposes to include as new Commentary .04 to Rule 805 an explicit statement that nothing in Section 805(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed new Commentary .05 to Section 805 would specify that the compensation committee need not engage in an analysis of the

¹⁶ 17 CFR 240.10C-1(b)(2)(iii).

independence factors before consulting with or obtaining advice from in-house legal counsel.

Cure Periods

Rule 10C-1(a)(3)¹⁷ requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. The Exchange proposes to adopt, as new Rule 805(c)(2), this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of the director's reasonable control.¹⁸ However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

¹⁷ 17 CFR 240.10C-1(a)(3).

¹⁸ See proposed Section 803(c)(3).

Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).¹⁹ Consistent with the transition periods approved by the SEC for inclusion in the Exchange's current corporate governance requirements at the time of their original adoption,²⁰ the Exchange proposes to adopt new Section 805(c)(5), under which listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new Section 805(c)(1) compensation committee independence standards. Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards. In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 809(a) of the Company Guide.²¹

¹⁹ See Adopting Release at 38444.

²⁰ See Securities Exchange Act Release No. 48863 (December 1, 2003), 68 FR 68432 (December 8, 2003)(SR-Amex-2003-65).

²¹ Section 809(a) affords companies that have listed in conjunction with their initial public offering exemptions from all board composition requirements consistent with the exemptions afforded in Exchange Act Rule 10A-3. That is, for each applicable committee that the company establishes (i.e., nominating and/or compensation) the company must have one independent member at the time of listing, a majority of independent members within 90 days of listing and all independent members within one year.

The Exchange proposes to exempt smaller reporting companies²² from compliance with the proposed new independence requirements with respect to compensation committee service. Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the Exchange proposes to include in proposed Section 805(c)(5) a transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 805(c)(1).²³ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, to (I) have a committee composed entirely of members that meet the independence requirements of proposed Section 805(c) within six months of the Smaller Reporting Company Determination Date and (II) have a compensation committee as of the Smaller Reporting Company Determination Date that complies with the requirements of proposed Section 805(c)(4) with respect to compensation consultant independence considerations.

General Exemptions

Rule 10C-1(b)(5)²⁴ provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies,²⁵ and

²² As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

²³ A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion *infra*.

²⁴ 17 CFR 240.10C-1(b)(5).

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

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuers that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the Exchange’s existing compensation committee requirements. Thus, as proposed, controlled companies, limited partnerships, companies in bankruptcy, and open-end and closed-end funds that are registered under the 1940 Act, asset-backed issuers and other passive business organizations (such as royalty trusts) or derivatives and special purpose securities listed pursuant to Exchange Rules 1000, and 1200 and Sections 106, 107 and 118B would be

²⁵ The Exchange proposes to amend subsection (h) of Section 801 to include a statement that smaller reporting companies are required to comply with Section 805(c), with the exception of the compensation committee independence requirements of Section 803(c)(1) and the requirements of proposed Section 805(c)(4) with respect to compensation consultant independence considerations. The same statement will be included in proposed Commentary .01 to Section 805. In addition, the Exchange proposes to amend Section 805(b) to clarify that henceforth only smaller reporting companies will be eligible to avail themselves of the ability of the board under exceptional and limited circumstances to appoint a non-independent director to the compensation committee.

²⁶ 17 CFR 240.10C-1(b)(1)(iii)(A).

exempt from both the new compensation committee independence requirements and the new compensation adviser requirements. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees (e.g., passive business organizations (such as royalty trusts)); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

Foreign private issuers²⁷ are currently permitted by Section 110 to apply for an exemption from the Exchange's compensation committee requirements. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),²⁸ from the proposed new compensation committee requirements to foreign private issuers that seek an exemption on the basis that they follow home country practice. The Exchange notes that Section 110 provides that foreign based entities availing themselves of exemptions from compliance with Exchange rules must provide English language disclosure of any significant ways in which their corporate governance practices differ from those followed

²⁷ The term "foreign private issuer" used in Section 110 is defined in Exchange Act Rule 3b-4(c).

²⁸ 17 CFR 240.10C-1(b)(5)(i).

by domestic companies pursuant to the Exchange's standards. Section 110 currently provides that this disclosure may be provided on the company's web site and/or in its annual report as distributed to shareholders in the U.S. As the Exchange no longer requires companies to distribute annual reports, except for its requirements in Section 610 with respect to the web site posting and distribution of annual reports filed with the SEC, the Exchange proposes to modify this provision to provide that a company must either include this disclosure on its web site or in the annual report it is required to file with the SEC that includes audited financial statements (including on Forms 10-K, 20-F, or 40-F). While Section 110 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 805. The Exchange proposes to grant these issuers a general exemption from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1.

2. Statutory Basis

The Exchange believes that the proposed rule change in relation to the

Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes that the proposed rule change is consistent with Section 6(b)²⁹ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,³⁰ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers that request an exemption based on home country practice and smaller reporting companies are consistent with Section 10C and Rule 10C-1, for the reasons stated above in the "Purpose" section, including

²⁹ 15 U.S.C. 78f(b).

³⁰ 15 U.S.C. 78f(b)(5).

because (i) Rule 10C-1(b)(5)(ii) explicitly exempts smaller reporting companies and (ii) foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing Exchange listing requirements. The Exchange believes it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Rule 10C-1. The Exchange believes that it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i) , and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange's compensation committee requirement, for the structural reasons discussed in the "Purpose" section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

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

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

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

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

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

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

whole, the Exchange does not believe that an analysis of the board compensation of individual directors is a meaningful consideration in determining their independence for purposes of compensation committee service.

The Exchange interprets its existing director independence requirements as requiring the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a part of the board's general independence determinations for all independent directors. Section 803(A) provides that, in making its affirmative determination with respect to a director's independence, the board must satisfy itself that the director "does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." As such, the Exchange believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 803(A) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

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

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

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

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2012-48 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-NYSEMKT-2012-48. 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 inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection

and copying at the NYSE's principal office and on its Internet website at www.nyse.com. 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-NYSEMKT-2012-48 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Kevin M. O'Neill
Deputy Secretary

³² 17 CFR 200.30-3(a)(12).



August 2, 2012

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Re: Rule 10C-1

Ladies & Gentlemen:

As you know, the Securities and Exchange Commission ("SEC") recently promulgated Rule 10C-1. 17 CFR 240.10C-1.¹ Mandated by Section 952 of Dodd-Frank,² the Rule requires national securities exchanges to adopt listing standards that govern compensation committees. Among other things, the exchanges are obligated to propose standards that discuss the "factors relevant to compensation committee independence" and that include "the definition of independence applicable to compensation committee members". Rule 10C-1(a)(4), 17 CFR 240.10C-1(a)(4). The proposal must be promulgated within 90 days.

In defining relevant factors, the exchanges will need to take into account a number of matters. First, as Dodd-Frank requires, the exchanges should specify that the relevant factors include the fees paid by directors in return for service on the board. Second, the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers. Third, the exchanges should clarify that the relevant factors apply to the consideration of independence for all directors, not just those serving on the compensation

¹ I was recently appointed to, and elected Secretary of, the Investor Advisory Committee created by the Securities and Exchange Commission. See <http://www.sec.gov/news/press/2012/2012-58.htm>. Please note that the opinions expressed in this letter are my own and do not reflect the views of the Commission or the Investor Advisory Committee.

² See Section 952, Pub. L. No. 111-203, 124 Stat. 1900 (2010). A copy of the final legislation is here: <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

committee. Finally, the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of director independence.

I. Existing Factors

In mandating the development of “relevant factors,” Congress in Section 10C specified two of them. These included: (A) The source of compensation of a member of the board of directors of an issuer, including any consulting, advisory or other compensatory fee paid by the issuer to such member of the board of directors; and (B) Whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.³

This is not the first time that Congress has expressed concern over the compensation received by directors or their affiliations. Section 10A of the Exchange Act, a provision adopted in Sarbanes Oxley, prohibited directors who had certain affiliations or who received certain types of compensation from serving on the audit committee.⁴ These mandates were implemented in Rule 10A-3. 17 CFR § 240.10A-3.

Dodd-Frank, however, took a different approach. Congress did not impose substantive standards for membership on the compensation committee. Instead, Congress merely required consideration of “relevant factors.” The approach allowed Congress to take a broader view toward the matters that must be considered in determining director independence.

This shift in approach can be seen by comparing the language in Section 10A and Section 10C. Section 10A prohibits a director from serving on the audit committee if he or she accepts “any consulting, advisory, or other compensatory fee from the issuer . . .”⁵ Under the express language, the disqualifying payment must come from the issuer and must resemble consulting or advisory fees. It does not include fees paid to directors for their service on the board.

Section 10C, in contrast, contains much broader language. The provision requires consideration of the “source of compensation of a member of the board of directors of an issuer . . .”⁶ The provision is not limited to compensation paid by the issuer. Nor is it restricted to payments that resemble consulting or advisory fees.⁷ Instead it applies to *all* compensation paid to a director.

Fees paid for service on the board are a form of compensation. *See* Item 402 of Regulation S-K, 17 CFR § 229.402 (providing for disclosure of fees in a table labeled “director compensation”). As a result, the broad language of Section 10C requires that these fees be included within the list of relevant factors. Even without the language in Section 10C, directors’

³ 15 U.S.C. § 78j-3.

⁴ 15 U.S.C. § 78j-1.

⁵ 15 U.S.C. § 78j-1.

⁶ 15 U.S.C. § 78j-3(a)(3)(A)

⁷ While the language of Section 10C does refer to any “consulting, advisory, or other compensatory fee paid by the issuer,” they do not purport to be a definitive list of applicable payments.

fees would need to be included. Fees can amount to a material payment from the issuer,⁸ something the exchanges have recognized.⁹

The exchanges should, therefore, explicitly acknowledge that director compensation under Section 10C includes fees for service on the board and must be considered as a relevant factor. In addition, the listing standard should make clear that director fees must not be considered in isolation but in conjunction with other compensation paid by the issuer.¹⁰

II. Additional Factors

The factors listed in Section 10C are not exclusive. The exchanges may identify other “relevant factors” that must be considered in determining director independence.¹¹ In promulgating Rule 10C-1, the Commission set out a number of other factors that the exchanges should include in the relevant listing standard.

The Commission emphasized “that it is important for exchanges to consider other ties between a listed issuer and a director, in addition to share ownership, that might impair the director’s judgment as a member of the compensation committee.” Specifically, the Commission noted that the exchanges “might conclude that personal or business relationships between members of the compensation committee and the listed issuer’s executive officers should be addressed in the definition of independence.”¹²

It is particularly important that, in identifying the “relevant factors,” the exchanges make clear that they include any personal or business relationships between directors and executive officers. These types of relationships can impair independence,¹³ something at least one exchange has noted.¹⁴

⁸ Total compensation for directors can exceed \$1 million for service on the board. See Apple Proxy Statement (filed in 2011) (total compensation of two directors exceeded \$1 million), available at <http://sec.gov/Archives/edgar/data/320193/000119312511003231/ddef14a.htm>

⁹ See 303A.09 Corporate Governance Guidelines (“The board should be aware that questions as to directors’ independence may be raised when directors’ fees and emoluments exceed what is customary.”).

¹⁰ The rules of the exchanges permit the payment to independent directors of some non-fee compensation. See 303A.02 Independence Tests (“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).”); see also Nasdaq Rule 5605(a)(2)(B).

¹¹ See Exchange Act Release No. 67220 (June 20, 2012) (“Section 10C gives the exchanges the flexibility to establish their own minimum independence criteria for compensation committee members after considering relevant factors, including the two enumerated in Section 10C(a)(3).”).

¹² Exchange Act Release No. 67220 (June 20, 2012).

¹³ See generally J. Robert Brown, Jr., *Disloyalty Without Limits: ‘Independent’ Directors and the Elimination of the Duty of Loyalty*, 95 KY L. Rev. 53 (2006-2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959434

¹⁴ See <http://www.theracetothetbottom.org/independent-directors/the-nyse-and-the-problems-of-director-independence-the-non-t.html> (NYSE official said to have advised “that, in interpreting its rules, the NYSE believes relationships between a director and a member of senior management that are material to either party should be

At the same time, making the factor explicit will clarify an ambiguity in the rules of the exchanges. The NYSE only requires that boards, in determining director independence, consider whether the director has a material relationship “with the listed company . . .”¹⁵ The Nasdaq uses similar language.¹⁶

Some companies have apparently interpreted the language to suggest that independence does not require consideration of the business and personal relationships between directors and officers.¹⁷ Representatives of the NYSE have disagreed with this interpretation.¹⁸ Nonetheless, by making these factors explicit, the exchanges will avoid any erroneous interpretations of their existing listing standards.

III. Simplification

Currently the exchanges provide two different standards for director independence. Each of the exchanges has a definition applicable to all directors. With respect to directors who serve on the audit committee, however, there is a separate definition. *See* Rule 10A-3, 17 CFR 240.10A-3. To the extent that the exchanges limit the factors required by Section 10C to compensation committees, it will effectively be putting in place a third set of criteria for director independence.

The presence of three standards adds to the complexity of board membership. Moreover, it limits the ability of independent directors to sit on the various committees. Particularly when vacancies occur, boards may find themselves with an inadequate supply of directors who meet the standards for each respective committee.

The exchanges should, therefore, specify that the “relevant factors” must be considered when determining the independence of all directors on the board, not just those assigned to the compensation committee. Doing so will simplify the board structure and allow all independent directors to be eligible to sit on the compensation committee.

considered by a board of directors in its evaluation of a director’s independence.”). *See also* Commentary to NYSE Rule 303A.02(a) (with respect to director independence, “the concern is independence from management”).

¹⁵ *See* NYSE Manual 303A.02(a).

¹⁶ Nasdaq provides that independence can be lost by “having a relationship, which, in the opinion of the Company’s board of directors, would interfere with the exercise of independent judgment”. Nasdaq Rule 5605(a)(2), available at

http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_4_2&manual=%2Fnasdaq%2Fmain%2Fnasdaq-equityrules%2F. Although not limited to relationships with the issuer, the accompanying interpretation of the standard provides that investors must have confidence that “individuals serving as Independent Directors do not have a relationship with the listed Company that would impair their independence.” IM-5605. Definition of Independence — Rule 5605(a)(2).

¹⁷ At least one NYSE traded company interpreted this language to mean that personal business relationships between directors and officers “generally are not relevant to the independence tests under the New York Stock Exchange rules because they do not create a material relationship between a director and the company.” *See* <http://www.theracetothetbottom.org/independent-directors/2010/6/1/the-nyse-and-the-problems-of-director-independence-the-plain.html>

¹⁸ *See supra* note 14.

The approach will also avoid an unnecessary negative implication. By limiting the relevant factors to directors serving on the compensation committee, the exchanges arguably create an implication that these factors need not be considered when determining director independence in other circumstances. This is inconsistent with existing interpretation and, as a result, may lead to boards mistakenly characterizing directors as independent.¹⁹

IV. Clarifications

In adopting Rule 10C-1, the SEC suggested in the adopting release that no single factor would determine director independence. See Exchange Act Release No. 67220 (June 20, 2012) (noting that the factors contained in Rule 10C-1 "should be considered in their totality and that no one factor should be viewed as a determinative factor of independence.").

The statement correctly notes that the factors should be examined in their totality. The exchanges should, however, clarify that a single factor can still result in the loss of independence. Thus, for example, a director might lose his or her independence based upon a material personal or business relationship with other directors or executive officers, irrespective of the application of the other factors. This clarifying interpretation will help boards avoid making erroneous determinations with respect to director independence.

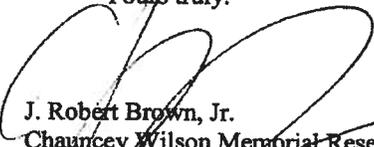
V. Conclusion

Director independence is a critical component of the existing system of corporate governance. By defining a rigorous and comprehensive set of "relevant factors" that must be considered by the board in determining director independence, the exchanges will fulfill the mandates of Dodd-Frank and better ensure investor confidence in the securities markets.

If you would like to discuss this matter further, please do not hesitate to contact me.

With best regards,

Yours truly,



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303-871-6254

¹⁹ See *supra* notes 9 & 14.

From: Robert M. Fields [<mailto:rmfields@rmfieldslaw.com>]
Sent: Monday, June 25, 2012 08:07 PM
To: Janice O'Neill
Subject: Listing Standards Mandated Under Section 952 of Dodd-Frank

Ms. O'Neill: As we briefly discussed last week, on June 20th of this year, the United States Securities and Exchange Commission (the "SEC") published Final Rules under Section 952 of Dodd-Frank dealing with the independence of members of compensation committees of listed issuers and with the independence of compensation consultants and legal counsel providing services to such compensation committees. Contained in the Final Rules is a requirement that the national securities exchanges promulgate listing standards enforcing certain provisions of Section 952.

Section 10C(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), enacted into law under Section 952 of Dodd-Frank, provides that compensation committees of listed issuers may select compensation consultants, legal counsel and other compensation advisors only after taking into account certain independence factors identified by the SEC. New SEC Regulation Section 240.10C-1 provides that the national securities exchanges must adopt listing standards requiring the listed issuers to consider such independence factors. I believe that the listing standards to be issued by the New York Stock Exchange, as well as by the other stock exchanges, should require the listed issuers to publicly disclose in their annual certification, a press release or other public statements how they are complying with the requirement to consider these independence factors.

From the prosaic requirement that automobile owners must show proof that they have obtained liability insurance before they can register their cars, to the more germane rule providing that that listed issuers must disclose the opinions of their independent auditors (in order to publicly establish that such audits actually took place), a common theme has evolved: In virtually all situations where a statute, regulation or other rule requires a person to engage in an action or activity, establishment of proof of the accomplishment of such action or activity is required. Accordingly, some mechanism should be established by the national securities exchanges to assure the SEC and investors that the requirements of Section 10C(b) of the Exchange Act have been carried out.

New SEC Regulation Section 229.407(e)(3)(iv) provides that certain publicly traded corporations must disclose in their annual proxy statements the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. I believe that there is no rational reason why the same standard should not apply to legal counsel engaged by compensation committees. Thus, I encourage the New York Stock Exchange to require, in its listing standards, that such additional disclosure must be made, either in a publicly-disclosed annual certification, press release or another publicly-issued statement.

Adequate disclosure would provide transparency to the compensation consultant and legal counsel selection process and would also provide useful information to investors (which, in the grand scheme of things, is what Congress is encouraging under Dodd-Frank). Nevertheless, the required disclosure need not be extensive or overly burdensome on the listed issuers. A paragraph generally describing how the listed issuers' compensation committees addressed the

requirements of Section 10C(b) of the Exchange Act, and whether or not they elected to utilize the services of independent consultants, legal counsel or other compensation advisors (and why they did or did not make such an election), should be sufficient. Furthermore, this disclosure need not be made on an annual basis. Once every five years (or more frequently in the event (i) the listed issuers engage one or more new consultants, legal counsel or other compensation advisors or (ii) relevant facts change) should suffice.

Thank you for your time and consideration of this matter. Please do not hesitate to contact me at your convenience if you have any questions or comments. If you would, kindly confirm your receipt of this message.

Robert M. Fields
Attorney at Law
(212) 905-2315

Text of the Proposed Rule Changes

The proposed changes to Sections 110, 801, 803, and 805 will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the Company Guide through June 30, 2013 and will be removed immediately thereafter. Upon approval of this filing, the amended versions of those sections will also be included in the Company Guide, with introductory text indicating that the revised text does not become operative until July 1, 2013. The rule text in this Exhibit 5 is marked to show how the rule text that will become operative on July 1, 2013, differs from the current rule text.

The following will be the operative text of Sections 110, 801, 803, and 805 operative until June 30, 2013:

Sec. 110. SECURITIES OF FOREIGN COMPANIES

The Exchange recognizes that every corporate entity must operate in accordance with the laws and customary practices of its country of origin or incorporation. Therefore, in evaluating the eligibility for listing of a foreign based entity, the Exchange will consider the laws, customs and practices of the applicant's country of domicile, to the extent not contrary to the federal securities laws (including but not limited to Rule 10A-3 under the Securities Exchange Act of 1934), regarding such matters as: (i) the election and composition of the Board of Directors; (ii) the issuance of quarterly earnings statements; (iii) shareholder approval requirements; and (iv) quorum requirements for shareholder meetings. A company seeking relief under these provisions should provide written certification from independent local counsel that the non-complying practice is not prohibited by home country law. In addition, the company must provide English language disclosure of any significant ways in which its corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards. This disclosure may be provided either on the company's web site and/or in its annual report as distributed to shareholders in the U.S. If the disclosure is only available on the web site, the annual report must so state and provide the web address at which the information may be obtained.

* * * * *

Sec. 801. GENERAL

* * * * *

(h) Smaller Reporting Companies - Issuers that satisfy the definition of Smaller Reporting Company in Regulation S-K, Item 10(f)(1) are subject to all requirements specified in Sections 802 and 803 below, except that such issuers are only required to maintain a board of directors comprised of at least 50% independent directors, and an audit committee of at least two members, comprised solely of independent directors who also meet the requirements of Rule 10A-3 under the Securities Exchange Act of 1934.

* * * * *

Sec. 803. INDEPENDENT DIRECTORS AND AUDIT COMMITTEE

A. Independent Directors:

(1) Each issuer must have a sufficient number of independent directors on its board of directors (a) such that at least a majority of such directors are independent directors (subject to the exceptions set forth in Section 801) and (b) to satisfy the audit committee requirements set forth below.

(2) "Independent director" means a person other than an executive officer or employee of the company. No director qualifies as independent unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition to the requirements contained in this Section 803A, directors serving on audit committees must also comply with the additional, more stringent requirements set forth in Section 803B(2) below. The following is a non-exclusive list of persons who shall not be considered independent:

* * * * *

(3) In the case of an investment company, in lieu of Sections 803A(2) (a) through (f), a director who is an "interested person" of the investment company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

* * * * *

Sec. 805. EXECUTIVE COMPENSATION

(a) Compensation of the chief executive officer of a listed company must be determined, or recommended to the Board for determination, either by a Compensation Committee comprised of independent directors or by a majority of the independent directors on its Board of Directors. The chief executive officer may not be present during voting or deliberations. Compensation for all other officers must be determined, or recommended

to the Board for determination, either by such Compensation Committee or a majority of the independent directors on the company's Board of Directors.

(b) Notwithstanding paragraph (a) above, if the Compensation Committee is comprised of at least three members, one director who is not independent as defined in Section 803A, and is not a current officer or employee or an immediate family member of such person, may be appointed to the Compensation Committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement (or in its next annual report on SEC Form 10-K or equivalent if the issuer does not file an annual proxy statement) subsequent to such determination, the nature of the relationship and the reasons for that determination. A director appointed to the Compensation Committee pursuant to this exception may not serve for in excess of two years.

• • • *Commentary* -----

.01 Section 805 is not applicable to a controlled company (See Section 801(a)).

.02 The Compensation Committee or a majority of the independent directors is not precluded from approving awards (either with or without board ratification) or from seeking board ratification or approval as may be required to comply with applicable tax or state corporate laws.

* * * * *

The following will be the operative text of Sections 110, 801, 803 and 805 commencing July 1, 2013:

Additions are underscored. Deletions are [bracketed].

NYSE MKT Company Guide

Sec. 110. SECURITIES OF FOREIGN COMPANIES

The Exchange recognizes that every corporate entity must operate in accordance with the laws and customary practices of its country of origin or incorporation. Therefore, in evaluating the eligibility for listing of a foreign based entity, the Exchange will consider the laws, customs and practices of the applicant's country of domicile, to the extent not contrary to the federal securities laws (including but not limited to Rule 10A-3 under the Securities Exchange Act of 1934), regarding such matters as: (i) the election and composition of the Board of Directors; (ii) the issuance of quarterly earnings statements; (iii) shareholder approval requirements; and (iv) quorum requirements for shareholder meetings. A company seeking relief under these provisions should provide written

certification from independent local counsel that the non-complying practice is not prohibited by home country law. Any foreign based entity that is a foreign private issuer (as defined in Exchange Act Rule 3b-4(c)) can avail itself of an exemption from the requirements of Section 805(c) hereof, but exemptive relief under Section 805(c) is not available to a foreign based issuer that is not a foreign private issuer. In addition, the company must provide English language disclosure of any significant ways in which its corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards. This disclosure may be provided either on the company's web site and/or in its annual report [as distributed to shareholders in the U.S.] it is required to file with the SEC that includes audited financial statements (including on Forms 10-K, 20-F, or 40-F) If the disclosure is only available on the web site, the annual report must so state and provide the web address at which the information may be obtained.

* * * * *

Sec. 801. GENERAL

* * * * *

(h) Smaller Reporting Companies - Issuers that satisfy the definition of Smaller Reporting Company in Regulation S-K, Item 10(f)(1) are subject to all requirements specified in Sections 802 and 803 below, except that such issuers are only required to maintain a board of directors comprised of at least 50% independent directors, and an audit committee of at least two members, comprised solely of independent directors who also meet the requirements of Rule 10A-3 under the Securities Exchange Act of 1934. Smaller Reporting Companies are subject to Section 805, except that they are not subject to Sections 805(c)(1) and (c)(4).

* * * * *

Sec. 803. INDEPENDENT DIRECTORS AND AUDIT COMMITTEE

A. Independent Directors:

* * * * *

(2) "Independent director" means a person other than an executive officer or employee of the company. No director qualifies as independent unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.

In addition to the requirements contained in this Section 803A[,]; (i) directors serving on audit committees must also comply with the additional, more stringent requirements set forth in Section 803B(2) below; and (ii) directors serving on compensation committees and, in the case of a company that does not have a compensation committee, all independent directors, must also comply with the additional, more stringent requirements set forth in Section 805(c) below. The following is a non-exclusive list of persons who shall not be considered independent:

* * * * *

- 3) In the case of an investment company, in lieu of Sections 803A(2) (a) through (f), a director who is an "interested person" of the investment company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

* * * * *

Sec. 805. EXECUTIVE COMPENSATION

(a) Compensation of the chief executive officer of a listed company must be determined, or recommended to the Board for determination, either by a Compensation Committee comprised of independent directors or by a majority of the independent directors on its Board of Directors (as used in this Section 805, the term "Compensation Committee" shall, in relation to any listed company that does not have a Compensation Committee, refer to the listed company's independent directors as a group). The chief executive officer may not be present during voting or deliberations. Compensation for all other officers must be determined, or recommended to the Board for determination, either by such Compensation Committee or a majority of the independent directors on the company's Board of Directors.

(b) Notwithstanding paragraph (a) above, if the Compensation Committee of a Smaller Reporting Company is comprised of at least three members, one director who is not independent as defined in Section 803A, and is not a current officer or employee or an immediate family member of such person, may be appointed to the Compensation Committee, if the board, under exceptional and limited circumstances, determines that membership on the committee by the individual is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement (or in its next annual report on SEC Form 10-K or equivalent if the issuer does not file an annual proxy statement) subsequent to such determination, the nature of the relationship and the reasons for that determination. A director appointed to the Compensation Committee pursuant to this exception may not serve for in excess of two years.

(c) (1) Independence Requirements

In addition to the director independence requirements of Section 803(a), the board must affirmatively determine that all of the members of the Compensation Committee or, in the case of a company that does not have a Compensation Committee, all of the independent directors, are independent under this Section 805(c)(1). In affirmatively determining the independence of any director who will serve on the Compensation Committee, 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, 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 (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.

(2) Cure Period

If a listed company fails to comply with the Compensation Committee composition requirements of either paragraph (a) above or (if applicable) this Section 805(c) because a member of the Compensation Committee ceases to be independent in accordance with Section 803(a) or (if applicable) this Section 805(c) for reasons outside the member's reasonable control, that person, with prompt notice to the Exchange and only so long as a majority of the members of the Compensation Committee continue to be independent in accordance with the applicable Exchange independence standards, 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.

(3) Compensation Consultants

(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..

(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.

(4) Compensation Consultant Independence

The Compensation Committee may select a compensation consultant, legal counsel or other adviser to the Compensation Committee only after taking into consideration all relevant factors, including the following:

- (i) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- (ii) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- (iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- (iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- (v) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- (vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

(5) Transition Period

Listed companies will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with this Section 805(c).

Under SEC Rule 12b-2, a company tests its status as a smaller reporting company on an annual basis at the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Smaller Reporting Company Determination Date"). To the extent a smaller reporting company ceases to qualify as such under SEC rules, it is required, if applicable, to: (I) have a compensation committee of which all of the members meet the independence standard of Section 805 (c)(1) within six months of the Smaller Reporting Company Determination Date; and (II) comply with Section 805(c)(4) as of the Smaller Reporting Company Determination Date.

••• Commentary -----

.01 Section 805 is not applicable to a controlled company (See Section 801(a)). Sections 805(c)(1) and (c)(4) are not applicable to a smaller reporting company.

.02 The Compensation Committee [or a majority of the independent directors] is not precluded from approving awards (either with or without board ratification) or from seeking board ratification or approval as may be required to comply with applicable tax or state corporate laws.

.03 When considering the sources of a director's compensation in determining his independence for purposes of 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. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between 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.

.04 Nothing in Section 803(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the Compensation Committee (or, if applicable, the independent directors); 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.

.05 The Compensation Committee is required to conduct the independence assessment outlined in Section 803(c)(4) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the Compensation Committee, other than in-house legal counsel.

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