

## **303A.00 Introduction**

### NYSE Listed Company Manual

#### **General Application**

Companies listed on the Exchange must comply with certain standards regarding corporate governance as codified in this Section 303A. Consistent with the NYSE's traditional approach, as well as the requirements of the Sarbanes-Oxley Act of 2002, certain provisions of Section 303A are applicable to some listed companies but not to others.

#### **Equity Listings**

Section 303A applies in full to all companies listing common equity securities, with the following exceptions:

##### Controlled Companies

A listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company is not required to comply with the requirements of Sections 303A.01, 303A.04 or 303A.05. Controlled companies must comply with the remaining provisions of Section 303A.

Disclosure Requirement: A controlled company that chooses to take advantage of any or all of these exemptions must comply with the disclosure requirements set forth in Instruction 1 to Item 407(a) of Regulation S-K.

##### Limited Partnerships and Companies in Bankruptcy

Due to their unique attributes, limited partnerships and companies in bankruptcy proceedings are not required to comply with the requirements of Sections 303A.01, 303A.04 or 303A.05. However, all limited partnerships (at the general partner level) and companies in bankruptcy proceedings must comply with the remaining provisions of Section 303A.

##### Closed-End and Open-End Funds

The Exchange considers the significantly expanded standards and requirements provided for in Section 303A to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940, given the pervasive federal regulation applicable to them. However, closed-end funds must comply with the requirements of Sections 303A.06, 303A.07(a), 303A.07(b), 303A.08 and 303A.12 with the following exceptions. A closed end fund is not required to comply with the director independence requirements of Section 303A.02 incorporated into Section 303A.07(a). A closed end fund is also not required to comply with the Disclosure Requirements in Section 303A.07(a), when a director serves on multiple boards in the same fund complex as such service will be counted as one board for purposes of Section 303A. In addition, a closed-end fund is not required to make the audit committee charter required by Section 303A.07(b) available on or through its website. In addition, all closed-end funds are required to comply with the requirements of Section 303A.14.

Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that act, are required to comply with all of the provisions of Section 303A applicable to domestic issuers other than Section 303A.02 and the Section 303A.02 director independence requirements incorporated into 303A.07(a). For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and 303A.09, a director of a business development company shall be 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.

As required by Rule 10A-3 under the Exchange Act, open-end funds (which can be listed as Investment Company Units, more commonly known as Exchange Traded Funds or ETFs) are required to comply with the requirements of Sections 303A.06 and 303A.12(b) and (c). In addition, all open-end funds are required to comply with the requirements of Section 303A.14.

Rule 10A-3(b)(3)(ii) under the Exchange Act requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters. In view of the external management structure often employed by closed-end and open-end funds, the Exchange also requires the audit committees of such companies to establish such procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the management company, as well as employees of the management company. This responsibility must be addressed in the audit committee charter.

#### Other Entities

Except as otherwise required by Rule 10A-3 under the Exchange Act (for example, with respect to open-end funds), Section 303A does not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities (such as those described in Sections 703.19 and 703.20). To the extent that Rule 10A-3 applies to a passive business organization, listed derivative or special purpose security, such entities are required to comply with Sections 303A.06 and 303A.12(b). In addition, all such entities are required to comply with the requirements of Section 303A.14.

#### Foreign Private Issuers

Listed companies that are foreign private issuers (as such term is defined in Rule 3b-4 under the Exchange Act) are permitted to follow home country practice in lieu of the provisions of this Section 303A, except that such companies are required to comply with the requirements of Sections 303A.06, 303A.11 and 303A.12(b) and (c). In addition, all foreign private issuers are required to comply with the requirements of Section 303A.14.

#### Smaller Reporting Companies

Listed companies that satisfy the definition of smaller reporting company in Exchange Act Rule 12b-2 are not required to comply with Section 303A.02(a)(ii) and the second paragraph of the Commentary to Section 303A.02(a). However, smaller reporting companies must comply with all applicable requirements under Section 303A.05, with the exception of Section 303A.05(c)(iv).

#### **Preferred and Debt Listings**

Section 303A does not generally apply to companies listing only preferred or debt securities on the Exchange. To the extent required by Rule 10A-3 under the Exchange Act, all companies listing only preferred or debt securities on the NYSE (including securities listed under Rule 5.2(j)) are required to comply with the requirements of Sections 303A.06 and 303A.12(b) and (c). In addition, all companies listing only preferred or debt securities on the NYSE (including securities listed under Rule 5.2(j)) are required to comply with the requirements of Section 303A.14.

#### **Transition Periods for Compensation Committee Requirements**

Listed companies will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new director independence standards with respect to compensation committees contained in Section 303A.02(a)(ii) and the second paragraph of the Commentary to Section 303A.02(a).

#### **Compliance Dates**

Companies listing on the NYSE are required to comply with all applicable requirements of Section 303A as of date that the company's securities first trade on the NYSE (the "listing date") unless otherwise provided below.

#### *A Company Listing in Conjunction with an Initial Public Offering*

A company will be considered to be listing in conjunction with an initial public offering as follows:

- For purposes of Section 303A other than Sections 303A.06 (which incorporates Exchange Act Rule 10A-3 by reference) and 303A.12(b), a company will be considered to be listing in conjunction with an

initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act.

- For purposes of Sections 303A.06 and 303A.12(b), a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions of Rule 10A-3(b)(1)(iv)(A) under the Exchange Act, namely, that the company was not, immediately prior to the effective date of a registration statement, a reporting company that was required to file reports with the SEC pursuant to Sections 13(a) or 15(d) of the Exchange Act.

A company listing in conjunction with its initial public offering is required to comply as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing date.
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, by the earlier of the date the initial public offering closes or five business days from the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the earlier of the date the initial public offering closes or five business days from the listing date, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must have at least one independent member on its audit committee that satisfies the requirements of Rule 10A-3 and, if applicable, Section 303A.02, by the listing date, at least a majority of independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement.
- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.
- The company must comply with the internal audit function requirement of Section 303A.07(c) within one year of the listing date.

Note: the company may include non-independent directors on its audit committee during the phase-in period if it was not required to file periodic reports with the SEC prior to listing. If it was required to file periodic reports with the SEC prior to listing, it is precluded from including non-independent directors on its audit committee during the phase-in period.

#### *A Company Listing in Conjunction with a Carve-out or Spin-off Transaction*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing date.
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, by the date the transaction closes.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the date the transaction closes, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must have at least one independent member on its audit committee that satisfies the requirements of Rule 10A-3 and, if applicable, Section 303A.02, by the listing date, at least a majority of

independent members within 90 days of the effective date of its registration statement and a fully independent committee within one year of the effective date of its registration statement.

- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.
- The company must comply with the internal audit function requirement of Section 303A.07(c) within one year of the listing date.

Note: the company may include non-independent directors on its audit committee during the phase-in period if it was not required to file periodic reports with the SEC prior to listing. If it was required to file periodic reports with the SEC prior to listing, it is precluded from including non-independent directors on its audit committee during the phase-in period.

#### *A Company that Lists Upon Emergence from Bankruptcy*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing date.
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, by the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the listing date, at least a majority of independent members on each committee within 90 days of the listing date and fully independent committees within one year of the listing date.
- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section 303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.
- The company must comply with the three-person audit committee requirement of Section 303A.07(a) by the listing date.

#### *A Company Previously Registered Pursuant to Section 12(b) of the Exchange Act*

- The company must satisfy requirements of Section 303A within one year of the listing date to the extent the national securities exchange on which it was listed did not have the same requirement. If the other exchange had a substantially similar requirement and the company was afforded a transition period that had not expired, the company will have the same transition period as would have been available to it on the other exchange.
- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section 303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.

#### *A Company Previously Registered Pursuant to Section 12(g) of the Exchange Act*

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the listing date.
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, by the listing date.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the listing date, at least a majority of independent members on each committee within 90

days of the listing date and fully independent committees within one year of the listing date.

- The company must comply with the audit committee requirements of Section 303A.06 including, if applicable, the independence requirements of Section 303A.02, by the listing date unless an exemption is available pursuant to Rule 10A-3.
- With respect to the requirement of Section 303A.07(a) that the audit committee must have at least three members, the company must have at least one member on its audit committee by the listing date, at least two members within 90 days of the listing date and at least three members within one year of the listing date.

#### *A Company Ceases to Qualify as a Controlled Company*

To the extent a controlled company ceases to qualify as such, it is required to comply with the Section 303A domestic company requirements as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within one year of the date its status changed.
- The company must satisfy the website posting requirements of Sections 303A.04 and 303A.05, if applicable, by the date its status changed.
- The company must have at least one independent member on its nominating committee and at least one independent member on its compensation committee as required by Sections 303A.04 and 303A.05, if applicable, by the date its status changed, at least a majority of independent members on each committee within 90 days of the date its status changed and fully independent committees within one year of the date its status changed.

#### *A Company Ceases to Qualify as a Foreign Private Issuer*

To the extent a foreign private issuer ceases to qualify as such under SEC rules (so that it is required to file on domestic forms with the SEC), such company is required to comply with the Section 303A domestic company requirements as follows:

- The company must satisfy the majority independent board requirement of Section 303A.01, if applicable, within six months of the date as of which it fails to qualify for foreign private issuer status pursuant to SEC Rule 240.3b-4. Under SEC Rule 240.3b-4, a company tests its status as a foreign private issuer on an annual basis at the end of its most recently completed second fiscal quarter (hereinafter, for purposes of this subsection, the "Foreign Private Issuer Determination Date").
- The company must satisfy the website posting requirements of Sections 303A.04, 303A.05, 303A.07(b), 303A.09 and 303A.10, to the extent such sections are applicable, within six months of the Foreign Private Issuer Determination Date.
- The company must have fully independent nominating and compensation committees as required by Sections 303A.04 and 303A.05, if applicable, within six months of the Foreign Private Issuer Determination Date.
- The company's audit committee members must comply with the independence requirements of Section 303A.02, if applicable, within six months of the Foreign Private Issuer Determination Date.
- The company must comply with the three-person audit committee requirement of Section 303A.07(a) within six months of the Foreign Private Issuer Determination Date.
- The company must comply with the shareholder approval requirements of Section 303A.08 by the Foreign Private Issuer Determination Date, subject to the provisions in Section 303A.08 under the heading "Ongoing Transition Period for a Foreign Private Issuer Whose Status Changes."

#### *A Company Ceases to Qualify as a Smaller Reporting Company*

- Under Exchange Act 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"). A smaller reporting company which ceases to meet the requirements for smaller reporting company status as of the last business day of its second fiscal quarter will cease to be a smaller reporting company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. The compensation committee of a company that has ceased to be a smaller reporting company shall be required to comply with Section 303A.05(c)(iv) as of six months from the date it ceases to be a smaller reporting company and must have:
  - one member of its compensation committee that meets the independence standard of Section 303A.02(a)(ii) and the second paragraph of the commentary to Section 303A.02(a) within six months of that date;
  - a majority of directors on its compensation committee meeting those requirements within nine months of that date; and
  - a compensation committee comprised solely of members that meet those requirements within twelve months of that date.

#### **Cure Period for Compensation Committee Independence Non-Compliance**

If a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with prompt notice to the Exchange and only so long as a majority of the members of the compensation committee continue to be independent, may remain a member of the compensation committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.

#### **Disclosure Requirements**

If a listed company makes a required Section 303A disclosure in its annual proxy statement, or if the company does not file an annual proxy statement, in its annual report filed with the SEC, it may incorporate such disclosure by reference from another document that is filed with the SEC to the extent permitted by applicable SEC rules. If a listed company is not a company required to file a Form 10-K, then any provision in this Section 303A permitting a company to make a required disclosure in its annual report on Form 10-K filed with the SEC shall be interpreted to mean the annual periodic disclosure form that the listed company does file with the SEC. For example, for a closed-end management investment company, the appropriate form would be the annual Form N-CSR.

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49); August 22, 2013 (NYSE-2013-40); November 6, 2018 (NYSE-2018-51); June 9, 2023 (NYSE-2023-12).

## **303A.01 Independent Directors**

NYSE Listed Company Manual

Listed companies must have a majority of independent directors.

*Commentary:* Effective boards of directors exercise independent judgment in carrying out their responsibilities. Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest.

**Amended:** November 25, 2009 (NYSE-2009-89).

## **303A.02 Independence Tests**

### NYSE Listed Company Manual

In order to tighten the definition of "independent director" for purposes of these standards:

**(a)(i)** No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).

**(ii)** In addition, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:

(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.

*Commentary:* It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to "listed company" would include any parent or subsidiary in a consolidated group with the listed company). Accordingly, it is best that boards making "independence" determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, as the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

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 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.

*Disclosure Requirement:* The listed company must comply with the disclosure requirements set forth in Item 407(a) of Regulation S-K.

**(b)** In addition, a director is not independent if:

**(i)** The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, <sup>1</sup> of the listed company.

*Commentary:* Employment as an interim Chairman or CEO or other executive officer shall not disqualify a director from being considered independent following that employment.



(ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).

*Commentary:* Compensation received by a director for former service as an interim Chairman or CEO or other executive officer need not be considered in determining independence under this test.

Compensation received by an immediate family member for service as an employee of the listed company (other than an executive officer) need not be considered in determining independence under this test.

(iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.

(iv) The director or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.

(v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

*Commentary:* In applying the test in Section 303A.02(b)(v), both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year of such other company. The look-back provision for this test applies solely to the financial relationship between the listed company and the director or immediate family member's current employer; a listed company need not consider former employment of the director or immediate family member.

*Disclosure Requirement:* Contributions to tax exempt organizations shall not be considered payments for purposes of Section 303A.02(b)(v), provided however that a listed company shall disclose either on or through its website or in its annual proxy statement, or if the listed company does not file an annual proxy statement, in the listed company's annual report on Form 10-K filed with the SEC, any such contributions made by the listed company to any tax exempt organization in which any independent director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year from the listed company to the organization exceeded the greater of \$1 million, or 2% of such tax exempt organization's consolidated gross revenues. If this disclosure is made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address. Listed company boards are reminded of their obligations to consider the materiality of any such relationship in accordance with Section 303A.02(a) above.

*General Commentary to Section 303A.02(b):* An "immediate family member" includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. When applying the look-back provisions in Section 303A.02(b), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become incapacitated.

In addition, references to the "listed company" or "company" include any parent or subsidiary in a consolidated group with the listed company or such other company as is relevant to any determination under the independent standards set forth in this Section 303A.02(b).

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49).

---

## Footnotes

- 1 For purposes of Section 303A, the term "executive officer" has the same meaning specified for the term "officer" in Rule 16a-1(f) under the Securities Exchange Act of 1934.

## **303A.04 Nominating/Corporate Governance Committee**

### NYSE Listed Company Manual

- (a) Listed companies must have a nominating/corporate governance committee composed entirely of independent directors.
- (b) The nominating/corporate governance committee must have a written charter that addresses:
  - (i) the committee's purpose and responsibilities – which, at minimum, must be to: identify individuals qualified to become board members, consistent with criteria approved by the board, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; develop and recommend to the board a set of corporate governance guidelines applicable to the corporation; and oversee the evaluation of the board and management; and
  - (ii) an annual performance evaluation of the committee.

*Commentary:* A nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees. The committee is also responsible for taking a leadership role in shaping the corporate governance of a corporation.

If a listed company is legally required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors need not be subject to the nominating committee process.

The nominating/corporate governance committee charter should also address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to delegate to subcommittees); and committee reporting to the board. In addition, the charter should give the nominating/corporate governance committee sole authority to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm's fees and other retention terms.

Boards may allocate the responsibilities of the nominating/corporate governance committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a committee charter.

*Website Posting Requirement:* A listed company must make its nominating/corporate governance committee charter available on or through its website. If any function of the nominating/corporate governance committee has been delegated to another committee, the charter of that committee must also be made available on or through the listed company's website.

*Disclosure Requirements:* A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its nominating/corporate governance committee charter is available on or through its website and provide the website address.

**Amended:** November 25, 2009 (NYSE-2009-89).

## **303A.05 Compensation Committee**

### NYSE Listed Company Manual

(a) Listed companies must have a compensation committee composed entirely of independent directors. Compensation committee members must satisfy the additional independence requirements specific to compensation committee membership set forth in Section 303A.02(a)(ii).

(b) The compensation committee must have a written charter that addresses:

(i) the committee's purpose and responsibilities – which, at minimum, must be to have direct responsibility to:

(A) review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation;

(B) make recommendations to the board with respect to non-CEO executive officer compensation, and incentive-compensation and equity-based plans that are subject to board approval; and

(C) prepare the disclosure required by Item 407(e)(5) of Regulation S-K;

(ii) an annual performance evaluation of the compensation committee.

(iii) The rights and responsibilities of the compensation committee set forth in Section 303A.05(c).

*Commentary:* In determining the long-term incentive component of CEO compensation, the committee should consider the listed company's performance and relative shareholder return, the value of similar incentive awards to CEOs at comparable companies, and the awards given to the listed company's CEO in past years. To avoid confusion, note that the compensation committee is not precluded from approving awards (with or without ratification of the board) as may be required to comply with applicable tax laws (i.e., Rule 162(m)). Note also that nothing in Section 303A.05(b)(i)(B) is intended to preclude the board from delegating its authority over such matters to the compensation committee.

The compensation committee charter should also address the following items: committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to delegate to subcommittees); and committee reporting to the board.

Boards may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a committee charter.

Nothing in this provision should be construed as precluding discussion of CEO compensation with the board generally, as it is not the intent of this standard to impair communication among members of the board.

*Website Posting Requirement:* A listed company must make its compensation committee charter available on or through its website. If any function of the compensation committee has been delegated to another committee, the charter of that committee must also be made available on or through the listed company's website.

*Disclosure Requirements:* A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its compensation committee charter is available on or through its website and provide the website address.

(c)(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.

(iv) The compensation committee may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration, all factors relevant to that person's independence from management, including the following:

- The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- 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;
- 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;
- Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- 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.

*Commentary:* Nothing in this Section 303A.05(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.

The compensation committee is required to conduct the independence assessment outlined in Section 303A.05(c)(iv) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than (i) in-house legal counsel; and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.

Nothing in this Section 303A.05(c) requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser. The compensation committee may select or receive advice from any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in Section

303A.05(c)(iv)(A)—(F).

**Amended:** November 25, 2009 (NYSE-2009-89); January 11, 2013 (NYSE-2012-49)

## **303A.06 Audit Committee**

### NYSE Listed Company Manual

Listed companies must have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act.

*Commentary:* The Exchange will apply the requirements of Rule 10A-3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34-47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies the opportunity to cure defects provided in Rule 10A-3(a)(3) under the Exchange Act.

Disclosure Requirement: Please note that Rule 10A-3(d)(1) and (2) require listed companies to disclose reliance on certain exceptions from Rule 10A-3 and to disclose an assessment of whether, and if so, how, such reliance would materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of Rule 10A-3.

**Amended:** November 25, 2009 (NYSE-2009-89).

## **303A.07 Audit Committee Additional Requirements**

### NYSE Listed Company Manual

**(a)** The audit committee must have a minimum of three members. All audit committee members must satisfy the requirements for independence set out in Section 303A.02 and, in the absence of an applicable exemption, Rule 10A-3(b)(1).

*Commentary:* Each member of the audit committee must be financially literate, as such qualification is interpreted by the listed company's board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise, as the listed company's board interprets such qualification in its business judgment. While the Exchange does not require that a listed company's audit committee include a person who satisfies the definition of audit committee financial expert set out in Item 407(d)(5)(ii) of Regulation S-K, a board may presume that such a person has accounting or related financial management expertise.

Because of the audit committee's demanding role and responsibilities, and the time commitment attendant to committee membership, each prospective audit committee member should evaluate carefully the existing demands on his or her time before accepting this important assignment.

*Disclosure Requirement:* If an audit committee member simultaneously serves on the audit committees of more than three public companies, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and must disclose such determination either on or through the listed company's website or in its annual proxy statement or, if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC. If this disclosure is made on or through the listed company's website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address.

**(b)** The audit committee must have a written charter that addresses:

**(i)** the committee's purpose – which, at minimum, must be to:

**(A)** assist board oversight of (1) the integrity of the listed company's financial statements, (2) the listed company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the listed company's internal audit function and independent auditors (if the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the charter must provide that the committee will assist board oversight of the design and implementation of the internal audit function); and

**(B)** prepare the disclosure required by Item 407(d)(3)(i) of Regulation S-K;

**(ii)** an annual performance evaluation of the audit committee; and

**(iii)** the duties and responsibilities of the audit committee – which, at a minimum, must include those set out in Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act, as well as to:

**(A)** at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits



carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the listed company;

*Commentary:* After reviewing the foregoing report and the independent auditor's work throughout the year, the audit committee will be in a position to evaluate the auditor's qualifications, performance and independence. This evaluation should include the review and evaluation of the lead partner of the independent auditor. In making its evaluation, the audit committee should take into account the opinions of management and the listed company's internal auditors (or other personnel responsible for the internal audit function). In addition to assuring the regular rotation of the lead audit partner as required by law, the audit committee should further consider whether, in order to assure continuing auditor independence, there should be regular rotation of the audit firm itself. The audit committee should present its conclusions with respect to the independent auditor to the full board.

**(B)** meet to review and discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including reviewing the listed company's specific disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations";

*Commentary:* Meetings may be telephonic if permitted under applicable corporate law; polling of audit committee members, however, is not permitted in lieu of meetings.

With respect to closed-end funds, Section 303A.07(b)(iii)(B) requires that the audit committee meet to review and discuss the fund's annual audited financial statements and semi-annual financial statements. In addition, if a closed-end fund chooses to voluntarily include the section "Management's Discussion of Fund Performance" in its Form N-CSR, then the audit committee is required to meet to review and discuss it.

**(C)** discuss the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies;

*Commentary:* The audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be done generally (i.e., discussion of the types of information to be disclosed and the type of presentation to be made). The audit committee need not discuss in advance each earnings release or each instance in which a listed company may provide earnings guidance.

**(D)** discuss policies with respect to risk assessment and risk management;

*Commentary:* While it is the job of the CEO and senior management to assess and manage the listed company's exposure to risk, the audit committee must discuss guidelines and policies to govern the process by which this is handled. The audit committee should discuss the listed company's major financial risk exposures and the steps management has taken to monitor and control such exposures. The audit committee is not required to be the sole body responsible for risk assessment and management, but, as stated above, the committee must discuss guidelines and policies to govern the process by which risk assessment and management is undertaken. Many companies, particularly financial companies, manage and assess their risk through mechanisms other than the audit committee. The processes these companies have in place should be reviewed in a general manner by the audit committee, but they need not be replaced by the audit committee.

**(E)** meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;

*Commentary:* To perform its oversight functions most effectively, the audit committee must have the benefit of separate sessions with management, the independent auditors and those responsible for the internal audit function. As noted herein, all listed companies must have an internal audit function.

These separate sessions may be more productive than joint sessions in surfacing issues warranting committee attention. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the committee must meet periodically with the company personnel primarily responsible for the design and implementation of the internal audit function.

**(F)** review with the independent auditor any audit problems or difficulties and management's response;

*Commentary:* The audit committee must regularly review with the independent auditor any difficulties the auditor encountered in the course of the audit work, including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management. Among the items the audit committee may want to review with the auditor are: any accounting adjustments that were noted or proposed by the auditor but were "passed" (as immaterial or otherwise); any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement; and any "management" or "internal control" letter issued, or proposed to be issued, by the audit firm to the listed company. The review should also include discussion of the responsibilities, budget and staffing of the listed company's internal audit function. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the review should include discussion of management's plans with respect to the responsibilities, budget and staffing of the internal audit function and its plans for the implementation of the internal audit function.

**(G)** set clear hiring policies for employees or former employees of the independent auditors; and

*Commentary:* Employees or former employees of the independent auditor are often valuable additions to corporate management. Such individuals' familiarity with the business, and personal rapport with the employees, may be attractive qualities when filling a key opening. However, the audit committee should set hiring policies taking into account the pressures that may exist for auditors consciously or subconsciously seeking a job with the listed company they audit.

**(H)** report regularly to the board of directors.

*Commentary:* The audit committee should review with the full board any issues that arise with respect to the quality or integrity of the listed company's financial statements, the listed company's compliance with legal or regulatory requirements, the performance and independence of the listed company's independent auditors, or the performance of the internal audit function. If the listed company does not yet have an internal audit function because it is availing itself of a transition period pursuant to Section 303A.00, the committee should review with the board management's activities with respect to the design and implementation of the internal audit function.

*General Commentary to Section 303A.07(b):* While the fundamental responsibility for the listed company's financial statements and disclosures rests with management and the independent auditor, the audit committee must review: (A) major issues regarding accounting principles and financial statement presentations, including any significant changes in the listed company's selection or application of accounting principles, and major issues as to the adequacy of the listed company's internal controls and any special audit steps adopted in light of material control deficiencies; (B) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects of alternative GAAP methods on the financial statements; (C) the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the listed company; and (D) the type and presentation of information to be included in earnings press releases (paying particular attention to any use of "pro forma," or "adjusted" non-GAAP,

information), as well as review any financial information and earnings guidance provided to analysts and rating agencies.

*Website Posting Requirement:* A listed company must make its audit committee charter available on or through its website. A closed-end fund is not required to comply with this website posting requirement.

*Disclosure Requirements:* A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its audit committee charter is available on or through its website and provide the website address.

**(c)** Each listed company must have an internal audit function.

*Commentary:* Listed companies must maintain an internal audit function to provide management and the audit committee with ongoing assessments of the listed company's risk management processes and system of internal control. A listed company may choose to outsource this function to a third party service provider other than its independent auditor. While Section 303A.00 permits certain categories of newly-listed companies to avail themselves of a transition period to comply with the internal audit function requirement, all listed companies must have an internal audit function in place no later than the first anniversary of the company's listing date.

*General Commentary to Section 303A.07:* To avoid any confusion, note that the audit committee functions specified in Section 303A.07 are the sole responsibility of the audit committee and may not be allocated to a different committee.

**Amended:** November 25, 2009 (NYSE-2009-89); August 22, 2013 (NYSE-2013-40).