December 7, 2012

Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090
Attention: Ms. Elizabeth M. Murphy

Via Email: rule-comment@sec.gov

Re: Proposed Rule Change, as Modified by Amendment No. 1, by the New York Stock Exchange Amending Sections 303A.00, 303A.02(a) and 303A.05 of the Exchange's Listed Company Manual to Comply with the Requirements of Securities and Exchange Commission Rule 10C-1 (Release No. 34-68011; File No. SR-NYSE-2012-49)

Ladies and Gentlemen:

The Society of Corporate Secretaries and Governance Professionals (the "Society") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission" or "SEC") on the above-referenced rule proposal (the "Proposal") by the New York Stock Exchange LLC ("the Exchange"). The Proposal has been proposed in order to comply with Section 10C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10C-1 thereunder, adopted to implement Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

Founded in 1946, the Society is a professional membership association of more than 3,000 corporate secretaries, in-house counsel and other governance professionals who serve approximately 2,000 companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive managements of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

The Society generally supports the Proposal and appreciates the Exchange's efforts in this regard. However, we believe that certain aspects of the Proposal are unnecessarily burdensome or are not sufficiently clear, and therefore will likely result in practical issues and/or inconsistent administration that may fail to fulfill the objectives of Section 952. Accordingly, we believe that the Proposal should be amended to address these matters before being approved by the SEC. Our detailed comments follow.

I. Compensation Committee Director Independence Requirement

The Proposed Independence Standard for Compensation Committee Members Is Vague and Unnecessary.

The Proposal provides that, in assessing the independence of a director who is to serve on a listed company's compensation committee, the company's board (i) must affirmatively determine that the director is independent under the Exchange's existing independence standards,[1] and (ii) "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 specified in Exchange Act Section 10C(a)(3). We believe that the reference to considering "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" is vague and unnecessary, and accordingly should not be included in the final listing standards.

The Exchange's discussion of factors relevant to compensation committee independence, which is required under Exchange Act Rule 10C-1(a)(4), does not provide guidance on what type of factors might be specifically relevant for assessing independence with respect to the duties of a compensation committee that are not already encompassed by the specific factors set forth in Section 10C(a)(3) and those already encompassed by the Exchange's existing independence standards. To the contrary, in the Proposal, the Exchange states:

> The Exchange believes that its existing "bright line" independence standards as set forth in Section 303A.02(b) of the Manual are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 303A.02(a) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of "bright line" tests in Section 303A.02(b).

We believe that consideration of the factors required under the Exchange's existing independence standards, combined with those set forth in Exchange Act Section 10C(a)(3), is sufficient to achieve the objectives of Section 10C(a)(3). Accordingly, the Exchange's proposed language requiring that some further, open-ended inquiry into additional factors that may be "specifically relevant … to that director's ability to be independent from management in connection with the duties of a compensation committee member" should be deleted.

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[1] That is, the board must determine "that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)." The Exchange has stated that this standard also requires independence from management of the listed company.

II. Compensation Committee Advisers

The Proposed Independence Assessment for Compensation Committee Advisers Is Vague

Exchange Act Rule 10C-1(b)(4) 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*." (Italics added.) This provision reflects the SEC's determination that information gathered from an independence assessment of these categories of advisers will be useful to the compensation committee as it considers any advice that may be provided by these advisers. While we recognize this objective, we note that the required independence assessment will be time-consuming and burdensome due to the scope of information that will need to be gathered in order to conduct it. An overly broad application of this requirement and uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee. Accordingly, we believe that the new standard should be clearer.[2]

The List of Six Factors for Compensation Committee Consideration Should be Exclusive

The Exchange's proposed Section 303A.05(c)(iv) sets forth the factors that the compensation committee must consider in assessing an adviser's independence. Although the Exchange's proposed language to a large degree tracks the language of the six independence factors set forth in Exchange Act Rule 10C-1(b)(4), the Proposal does not state that the six factors are exclusive. Instead, the Proposal suggests that an additional inquiry is necessary, by stating that compensation committees in addition must assess "all factors relevant to that person's independence from management." The Exchange does not explain what additional types of factors may be relevant and in fact states that "the Exchange believes that the list [of six factors to be considered that are] included in Rule 10C-1(b)(4) is very comprehensive." We concur that the six factors specified in Rule 10C-1(b)(4) are comprehensive, and accordingly believe that the Exchange's proposed language requiring an additional, open-ended search for any other factors that may be relevant to an adviser's independence from management is unnecessary. This open-ended language will increase the burden associated with implementation of the standard by requiring more extensive inquiry and due diligence, without providing additional benefit, since we are not aware of any additional circumstances that typically would be relevant.

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[2] Our members have observed that the stock exchanges appear to be reluctant to issue interpretive advice regarding listing standards that are mandated by SEC rules. We believe that the stock exchanges are well positioned to interpret how these standards should be applied in the context of companies whose securities they list, particularly in the context of standards adopted under Exchange Act Section 10C, where Congress provided for flexibility in the implementation of the new listing standards, and therefore that the SEC should encourage the stock exchanges to provide interpretive guidance regarding these listing standards, both at the time of adoption and thereafter.

Alternatively, Any Additional Factors Should be Specified

Moreover, if there is any additional factor that the Exchange contemplates as being relevant to an independence assessment, the factor should be "identified by [the Exchange] in its listing standards," as required under Rule 10C-1(b)(4). This is because under Exchange Act Section 10C(b)(2), the factors specified must be "competitively neutral," a standard that we believe is not achieved by the Exchange's proposed vague and open-ended reference to considering additional factors. We note that a compensation committee, in the exercise of its state law fiduciary duties, is permitted to consider any factors it determines appropriate, whether relating to independence or not, in selecting advisers. However, for purposes of satisfying the standard mandated by the Dodd-Frank Act, the Exchange's rules should require a compensation committee to consider only the six factors specifically identified in Rule 10C-1(b)(4), or should specifically identify any additional competitively neutral factor that the Exchange believes, and the SEC concurs, should be considered.

The Definition of Adviser Should be Clarified and Include Only Those Providing Advice on Executive Compensation

The Exchange should confirm and clarify that the independence assessment is required only with respect to advisers who are providing advice on executive compensation.[3] In this respect, the linchpin of the SEC's definition of "compensation committee" is the committee whose members "oversee executive compensation matters." If a company determines to assign other responsibilities to its compensation committee, such as the determination of director compensation or oversight of broad-based retirement plans, persons who provide advice to the committee on such additional matters should not be subject to the required independence assessments. Otherwise, boards will be forced to pursue form over substance by moving those additional responsibilities to other board committees in order to avoid the burden of conducting an independence assessment as to advisers addressing matters that do not relate primarily to the compensation of the company's executives.

The Exchange also should confirm, either in the text of its rules or in commentary or interpretive guidance, that not all persons who provide services to a board compensation committee are deemed to be providing executive compensation advice. For example, we understand that a consultant whose services for a compensation committee are limited to providing information, such as surveys, that either is not customized for a particular company, or that is customized based on parameters that are not developed by the compensation consultant, should not be considered as providing advice to the compensation committee merely as a result of providing

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[3] For example, the Exchange could revise its proposed Commentary to state, "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 <u>on executive compensation</u>, other than in-house legal counsel."

such survey data.[4] Similarly, actuaries, in-house human resources staff and others who provide information or make recommendations to a compensation committee, even if relating to executive compensation, should not as a result of such actions alone be deemed persons who "provide advice" to the compensation committee.

Because Section 10C and the rules adopted pursuant to it create a distinction between the "compensation consultant, legal counsel or other adviser to the compensation committee" and the "the person that employs the compensation consultant, legal counsel or other adviser," the Exchange should clarify that references to the "compensation consultant, legal counsel or other adviser to the compensation committee" refer only to the person(s) who are responsible for providing the advice to the compensation committee (for example, an engagement partner) and not to all other persons who may work under the supervision of or provide input to that person. Typically, a consultant or other adviser will consult numerous sources and obtain the views and input of numerous other individuals in developing the advice that is provided to a compensation committee. Nevertheless, the compensation committee looks to and relies upon the judgment and experience of the person actually providing advice to it when evaluating executive compensation decisions. Accordingly, the Exchange should confirm, either in the text of its rules or in commentary or interpretive guidance, that the independence assessment need only address that individual when assessing whether the compensation adviser can provide independent advice to the compensation committee.

Independence Assessments Should Be Conducted Annually Unless There is a Change in Circumstances

Finally, the Exchange should address and provide guidance on how often the required independence assessment must occur. Many compensation committee consultants and other advisers attend and provide advice at each meeting of the compensation committee, including the many telephonic committee meetings that in our experience typically occur during the year. It will be extremely burdensome and disruptive if prior to each such meeting, the committee had to conduct a new assessment. The Exchange, either in the text of its rules or in commentary or interpretive guidance, should confirm that an annual assessment of independence is sufficient, and that thereafter during the following year a new assessment is necessary only if the adviser or the company learns of a material change in circumstances that is reasonably likely to affect the adviser's independence.

We expect that additional interpretive questions will arise under the listing standard requiring the compensation committee to assess the independence of each compensation consultant and other adviser that provides advice to the committee. Because Section 10C and Rule 10C-1 recognize that the exchanges are in the best position to assess how the statutory mandates should apply to

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[4] See, for example, the SEC's statement in Exchange Act Rel. No. 61175 (Dec. 16, 2009), noting the distinction between providing services and providing advice when the SEC stated that the compensation committee fee disclosure rule for consultants who supply survey data "would not be available if the compensation consultant provides advice or recommendations in connection with the information provided in the survey."

their listed companies and provide the exchanges discretion in how the statutory mandates are implemented, we request that the SEC encourage the exchanges to provide appropriate on-going interpretive advice on the application of the adviser independence assessment rules.

III. Cure Periods

The Cure Provision Should Address Compliance with Each Requirement under the Listing Standard as Required under Section 952 of the Dodd-Frank Act.

As required by Exchange Act Section 10C(f)(2), Rule 10C-1(a)(3) provides that the listing rules adopted by the exchanges "must provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects" in compliance with the rules (emphasis added). We support the rule proposed by the Exchange to permit issuers a period of time to cure failures to comply with the requirements as a result of a member of the compensation committee ceasing to be independent for reasons outside the member's reasonable control. However, to fulfill the statute, the Exchange also should provide an opportunity to cure any other form of non-compliance with these new rules. This is particularly true in the context of the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. Inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the company would be in violation of the Exchange's listing standard and have no recourse.

Accordingly, in addition to addressing situations where a compensation committee member fails to comply with the independence requirements, we believe the Exchange should permit any other form of non-compliance with the listing standards mandated by Rule 10C-1(a)(3) to be cured by taking corrective action within a reasonable time after the company's senior executives learn of the non-compliance. In the case of the requirement to conduct independence assessments of compensation committee advisers, a reasonable time for curing a violation should be review of the adviser's independence no later than three months after the company learns of the non-compliance. This cure period will allow sufficient time to conduct an appropriate inquiry and due diligence into the required independence factors, and for the committee to review and consider the information identified as a result of that inquiry.

IV. Date of Effectiveness

More Time Should Be Provided to Comply with the New Listing Standard

The Exchange proposes that the revisions to its rules become operative on July 1, 2013, except that 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 compensation committee independence standards.

We support the transition period for compliance with the new compensation committee independence standards but believe that the Exchange should provide a longer period for

companies to implement the other listing standards. We note that the SEC's rules require stock exchanges to have final rules or rule amendments that comply with Rule 10C-1 approved by the SEC no later than June 27, 2013, but do not specify when the new or amended listing standards must be in effect. Companies will not be able to determine with certainty what revisions to their compensation committee charters and procedures will be necessary to satisfy the new rules until after they have been approved by the SEC, the timing of which is uncertain. Boards and their advisers should be allowed adequate time to assess how best to implement the new rules, and it will then be necessary to plan for and calendar approval of any required changes.

Finally, we expect that companies will seek, when possible, to satisfy the due diligence inquiries that will be necessary to support the independence assessments of compensation advisers as part of their annual directors' and officers' questionnaire process. In order to accommodate all of these considerations, companies should be provided a transition period for compliance with all aspects of the new listing rules. Specifically, we believe that companies should have until the first fiscal year beginning on or after December 27, 2013 in order to comply with the new listing rules. We expect that during this transition period most companies will hold at least two board meetings, which would provide an adequate opportunity for companies' boards to consider and approve any changes necessary to satisfy the new standards. We believe that such time would tend to encourage best practices to develop for individual companies.

Summary

Again, we appreciate the time and effort put into the proposed rules by the Staff of the Division of Corporation Finance of the Securities and Exchange Commission and the rulemaking staff the Office of the General Counsel of the NYSE. We support the rules as proposed, subject to the suggestions made in this letter.

Respectfully submitted,

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