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Changes to Independent Director Tests Will Impact D&O Questionnaires and Disclosure Obligations

With proxy season on the horizon, we wanted to alert you regarding two noteworthy developments regarding the criteria that are used to test the independence of directors of companies listed on the New York Stock Exchange ("NYSE"):

- ***Increase in Direct Compensation Threshold.*** Effective September 11, 2008, the amount of direct compensation that an independent director (or an immediate family member of an independent director) may receive during a period of 12 consecutive months within the three-year period preceding the determination of independence has been increased from $100,000 to $120,000. In calculating the amount of "direct compensation" payable to a director in order to determine if this threshold has been exceeded, the NYSE rules continue to permit the exclusion of director and committee fees, and pensions or other forms of deferred compensation for prior service, provided that such compensation is not contingent in any way on continued service. As a result of this change, the requirements of Section 303A.02(b)(ii) of the NYSE Listed Company Manual (the "NYSE Manual") are now consistent with the disclosure requirements of the U.S. Securities and Exchange Commission, whose Regulation S-K Item 404 was amended in 2006 to increase the dollar threshold applicable for the disclosure of related party transactions to $120,000.

- ***Change in External Auditor Affiliation Test.*** Effective September 11, 2008, the NYSE Manual was also updated to provide that a director may still be considered an independent director of a listed company even if he or she has an immediate family member who is a current employee of the company's external auditor, as long as that family member is not personally involved (and has not been personally involved for the last three years) in work on the listed company's audit. Prior to amendment, Section 303A.02(b)(iii) of the NYSE Manual provided that a director was not deemed to be independent if he or she had an immediate family member who was a current employee of a firm that was the listed company's external auditor and who participated in such firm's audit, assurance or tax compliance (but not tax planning) practice. In contrast, the amended, less restrictive test would permit, for example, a director to continue to be deemed an independent director of the listed company even if he or she has a child who, upon graduation from college, takes a position in the audit practice of the listed company's external auditor, as long as such director's child does not personally work on the listed company's audit (and assuming all other requirements for director independence are met). As with the rule increasing the level of direct compensation that may be payable to an independent director, the change in the external auditor affiliation rules also aligns the NYSE standards for director independence with the independent tests used by NASDAQ.

Action Steps You Should Take

While the amendments to the NYSE Manual do implement notable changes to the tests for determining director independence, the remainder of Section 303A.02 has remained the same—essentially requiring that a director will only be considered "independent" as long as he or she does not have any material relationship with the listed company. Nevertheless, in light of these amendments to the NYSE Manual, we recommend that all D&O questionnaires be updated to reflect the dollar threshold for direct compensation that may be payable to a director, and to reflect the relaxation of the external auditor affiliation rule, so that the independence of your directors can be determined appropriately. If you would like our assistance as you undertake these updates, please contact the following members of Venable's Corporate Finance & Securities practice group:

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