

this problem and to align corporate interests with those of shareholders.

Our final rules enhance audit committee independence by implementing the two basic criteria for determining independence enumerated in section 10A(m) of the Exchange Act, which are discussed in more detail below. Commenters expressed general overall support for the Commission's approach to implementing section 10A(m) of the Exchange Act. Advocates of investors in particular endorsed the Commission's proposals, though not all believed that section 10A(m) and the Commission's proposals went far enough.⁴¹ Several supported having the Commission mandate all independence requirements for listed issuers, not just those specified in Exchange Act section 10A(m), as compared to the proposed approach of building on additional SRO standards for independence. However, a substantial number of commenters did not support having the Commission replace the SROs' role in setting additional criteria, preferring to leave additional requirements to the SRO rulemaking process with appropriate Commission oversight.⁴²

As noted in the Proposing Release, in seeking to ensure appropriate levels of independence, we recognize that SROs currently restrict additional business or personal relationships.⁴³ Further, several SROs are seeking significant improvements to tighten these requirements, in particular in the additional listing standards that are currently under consideration.⁴⁴ We fully support the goals the SROs are trying to achieve through these ongoing efforts, and we are firmly committed to working with the SROs to ensure the success of these proposals. Many of the additional relationships that commenters requested the Commission include in the final rule are already restricted by existing SRO rules, or

would be restricted under the new SRO proposals.

We continue to believe that our specific mandate under section 10A(m) of the Exchange Act, where independence is evaluated by reference to payments of advisory and compensatory fees and affiliate status, is best fulfilled by the final rule. These requirements standing alone do not, for example, preclude independence on the basis of other commercial relationships not specified in the final rule, and they do not extend to the broad categories of family members that may be reached by SRO listing standards. Instead, as proposed, our requirements build and rely on SRO standards of independence that cover additional relationships not specified in Exchange Act section 10A(m). Our final rule allows SROs flexibility to adopt and administer additional requirements of these sorts through SRO rulemaking conducted under Commission oversight and approval. As mentioned in the Proposing Release, we encourage SROs to review and adopt rigorous independence requirements in connection with their implementation of the standards in Exchange Act rule 10A-3. We will review the rules submitted by the SROs to implement Exchange Act rule 10A-3 so that they contain appropriate overall standards for audit committee independence.

2. Advising, Consulting or Compensatory Fees

As for the two criteria for independence in Exchange Act rule 10A-3, the first is that audit committee members are barred from accepting any consulting, advisory or other compensatory fee from the issuer or any subsidiary thereof, other than in the member's capacity as a member of the board of directors and any board committee.⁴⁵ This prohibition will preclude payments to a member as an officer or employee, as well as other compensatory payments.⁴⁶

To prevent evasion of the requirement, disallowed payments to an audit committee member includes payments made either directly or indirectly. The overwhelming majority of commenters supported our determination that barring indirect as

well as direct compensatory payments is necessary to implement the intended purposes of Exchange Act section 10A(m).⁴⁷ For example, payments to spouses of members raise questions regarding independence comparable to those raised by payments to members themselves. In addition, we believe that payments for services to law firms, accounting firms, consulting firms, investment banks or financial advisory firms in which audit committee members are partners, members, executive officers or hold similar positions, as discussed in more detail below, are the kinds of compensatory payments that were intended to be precluded by Exchange Act section 10A(m). The final rules, therefore, mandate that indirect acceptance of compensatory payments includes payments to spouses, minor children or stepchildren or children or stepchildren sharing a home with the member. In addition, indirect acceptance includes payments accepted by an entity in which such member is a partner, member, officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity) and which provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary.

Commenters generally supported the extent to which family members are included, although a few recommended an extension to additional members,⁴⁸ and a few others recommended narrowing the family members covered.⁴⁹ We continue to believe that an extension to all relatives is beyond the scope necessary to address the prohibitions in section 10A(m), and we are adopting the family member formulation as proposed. Also, we agree with the commenters who argued that given the limited number of immediate family members affected, an exception for family members that are non-executive employees is not necessary.⁵⁰

Several commenters requested additional guidance regarding the types of prohibited services in the "indirect"

⁴¹ See, e.g., the Letters of American Federation of Labor and Congress of Industrial Organizations *et al.* ("AFL-CIO"); California Public Employees' Retirement System ("CalPERS"); Council of Institutional Investors ("CII"); International Brotherhood of Teamsters ("Teamsters"); State of Wisconsin Investment Board ("SWIB"); Transparency International—USA.

⁴² See, e.g., the Letters of American Bar Association ("ABA"); America's Community Bankers; American Bankers Association; American Institute of Certified Public Accountants ("AICPA"); Computer Sciences Corporation ("CSC"); Deloitte & Touche LLP ("Deloitte"); Letter on behalf of German Chief Financial Officers ("German CFOs"); New York Stock Exchange, Inc. ("NYSE"); PricewaterhouseCoopers LLC ("PwC"); Public Service Enterprise Group Incorporated ("PSEG"); Ralph S. Saul; Southern Company.

⁴³ See note 24 above.

⁴⁴ See note 27 above.

⁴⁵ If the committee member is also a shareholder of the issuer, payments made to all shareholders of that class generally, such as dividends, will not be prohibited by this provision. Also, to conform the application of the compensatory fee prohibition with the affiliate prohibition, the final rule clarifies that the compensatory fee prohibition applies to fees from the issuer or any subsidiary thereof.

⁴⁶ The final rule does not specify any limits or restrictions on fees paid for capacity as a member of the board of directors or any board committee.

⁴⁷ Compare, for example, the Letters of CalPERS; California State Teachers' Retirement System ("CalSTRS"); CSC; NYSE with the Letter of America's Community Bankers.

⁴⁸ See, e.g., the Letters of CalPERS and Marcus B. Elliott.

⁴⁹ See, e.g., the Letter of State Street Corporation ("State Street").

⁵⁰ See, e.g., the Letter of NYSE.