

category.⁵¹ In particular, commenters were most concerned with the application of the prohibition to issuers or associated entities that provide financial services. To clarify application of the prohibition, the final rule specifies that the prohibition covers accounting, consulting, legal, investment banking or financial advisory services. Other commercial relationships are not covered by the final rule, although, as previously discussed, we expect that SROs will contain restrictions on additional services and activities in their own listing standards.⁵² For example, the prohibitions in Exchange Act Rule 10A-3 do not include non-advisory financial services such as lending, check clearing, maintaining customer accounts, stock brokerage services or custodial and cash management services. Further, the final rule relates only to requirements for audit committee membership. They do not affect the ability of a director associated with an entity that provides such services to a listed issuer from otherwise serving on that issuer's board of directors, again to the extent other SRO rules permit such relationships.

Several commenters requested clarification regarding the types of positions that are covered at associated entities.⁵³ The Proposing Release would have applied the prohibition where the audit committee member was a partner, member or principal or occupied a similar position with the associated entity. Some commenters questioned whether the prohibition extended to solely passive ownership positions, such as limited partners in a limited partnership and non-managing members of a manager-managed limited liability company that have no active role in providing services to the entity. Some thought the term "principal" was vague outside of organizations that specifically use that term. Others noted that while the formulation correctly indicated the Commission's intention to capture all partners or limited liability company members of a law firm, accounting firm, consulting firm or other professional organization, it was not clear how the formulation was to be applied to entities that do not have or use the term partners

or members, such as certain investment banking firms organized as corporations.

In response to these concerns, we have clarified that the list of covered positions includes partners and members (except for limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity), officers such as managing directors occupying a comparable position and executive officers (to address organizations that do not have partners and members) and others occupying a similar position. We believe extending the prohibition to any employee of an associated entity, as requested by some commenters, would be overly broad for purposes of Exchange Act Rule 10A-3, although SROs may require such an extension in their implementing rules.⁵⁴ However, we do believe the formulation should include those persons, such as partners or members in professional organizations, regardless of control, whose compensation could be directly affected by the prohibited fees, even if they are not the primary service provider. Finally, we have deleted the term "principal" because we believe the reference to "those occupying similar positions" covers entities such as professional corporations that use the "principal" designation for positions similar to a partner in a partnership.

The final rule, like our proposal, applies the prohibitions only to current relationships with the audit committee member and related persons. They do not extend to a "look back" period before appointment to the audit committee, although we expect the SROs to require such periods in their own listing standards. Similar to the comments regarding including additional independence standards in the final rule, the majority of commenters supported our proposal, arguing it is consistent with the language in Exchange Act section 10A(m) and the Commission's approach of building and relying on the SRO's independence standards that already include look back periods for a broad variety of relationships.⁵⁵

In the Proposing Release, we requested comment on whether we should explicitly clarify whether the prohibition on "compensatory fees"

excludes compensation under a retirement or similar plan in which a former officer or employee of the issuer participates. Many commenters supported such a clarification.⁵⁶ We believe such a clarification is appropriate particularly given that the rules apply only to current relationships, especially where the retirement compensation received is for prior service and is not contingent in any way on continued service. Accordingly, the final rule specifies that, unless an SRO's listing rules provide otherwise, compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer (provided that such compensation is not contingent in any way on continued service).⁵⁷

Exchange Act section 10A(m) prohibits the receipt of "any" consulting, advisory or compensatory fees. While the Sarbanes-Oxley Act specifically included a *de minimis* exception with respect to other requirements, such as the audit committee pre-approval requirements in Exchange Act section 10A(i)(1)(B),⁵⁸ it provided no similar *de minimis* exception in Exchange Act section 10A(m), even though several SROs currently have such exceptions in their listing standards. Consistent with the express language in Exchange Act section 10A(m), our proposed rule did not contain a *de minimis* exception. Nevertheless, we requested comment on whether there should be such an exception. Several commenters, including those that represent investor groups, argued forcefully that no additional relationships should be exempted, including *de minimis* payments. They argued that the statutory mandate is clear, audit committee members should be truly independent, and even a *de minimis* level of payments would create the appearance of conflict.⁵⁹ Several other commenters, primarily representing issuers and their advisors, supported some form of *de minimis* or immaterial exception, believing that issuers should have flexibility to pay some level of *de*

⁵¹ See, e.g., the Letters of American Bankers Association; AXA SA; Cleary, Gottlieb, Steen & Hamilton ("Cleary"); F.N.B. Corporation; Linklaters; National Association of Real Estate Investment Trusts; PwC; Greg Swallowell.

⁵² As a result, we have declined the suggestion by some commenters to codify in the final rule that additional services are expressly permitted. See, e.g., the Letters of Curtis Thaxter Stevens Border & Micoleau LLC and Linklaters.

⁵³ See, e.g., the Letters of Cleary; Cravath, Swaine & Moore ("Cravath"); Ford Motor Company; Linklaters; Sullivan & Cromwell ("S&C").

⁵⁴ See, e.g., the Letter of CII.

⁵⁵ Compare, e.g., the Letters of ABA; AICPA; American Bankers Association; the Association of the Bar of the City of New York ("NYCBA"); CenturyTel, Inc.; CSC; Deloitte; New York State Bar Association ("NYSBA"); NYSE; PwC; Siemens AG with the Letters of AFL-CIO; CalPERS; CalSTRS; CII; James Fanto; Teamsters; Transparency International—USA.

⁵⁶ See, e.g., the Letters of ABA; AICPA; CenturyTel, Inc.; Deloitte; NYSE; Siemens AG; S&C.

⁵⁷ The requirement that the compensation be fixed precludes retirement payments that are tied to the continued performance of the relevant entity. The requirement that the compensation be fixed does not preclude customary objectively determined adjustment provisions such as cost of living adjustments.

⁵⁸ 15 U.S.C. 78j-1(i)(1)(B).

⁵⁹ See, e.g., the Letters of CalPERS; CII; SWIB.