

majority-owned subsidiary, if the committee member otherwise meets the independence requirements for both the parent and the subsidiary, including the receipt of only ordinary-course compensation for serving as a member of the board of directors, audit committee or any other board committee of the parent or subsidiary.

Commenters were nearly unanimous in their support for such an exemption.⁸⁰ However, many commenters believed the exemption, particularly the requirement that the subsidiary must be both consolidated and majority-owned, was overly restrictive.⁸¹ Some companies may possess the requisite ownership to establish control, but may not consolidate the subsidiary due to particular accounting situations.⁸² Others may have the requisite control to consolidate by means other than ownership and therefore may not meet the ownership test. Several commenters were particularly concerned regarding unconsolidated 50% owned joint ventures, arguing that many of the reasons provided by the Commission for the exemption apply as well to such joint ventures where two parents exercise joint control.⁸³ Other commenters noted that while the Commission's proposal addresses parents and subsidiaries, it did not provide similar accommodations for independent directors that serve on boards of sibling subsidiaries under common control of a parent, if such directors would be independent other than for the fact that the two sibling subsidiaries are affiliated through the parent.

To address these concerns, we are expanding the exemption. Under the final rule, an audit committee member may sit on the board of directors of a listed issuer and any affiliate so long as, except for being a director on each such board of directors, the member otherwise meets the independence requirements for each such entity, including the receipt of only ordinary-course compensation for serving as a member of the board of directors, audit committee or any other board committee of each such entity. Under the revised exemption, audit committee members will still be required to be independent

of the issuer and its affiliate, but the exemption will now apply regardless of the source of control.

There are some foreign private issuers that operate under a dual holding company structure.⁸⁴ Each holding company is a foreign private issuer organized in a different national jurisdiction. The holding companies together collectively own and supervise the management of one or more businesses conducted as a single economic enterprise. The holding companies do not conduct any business other than collectively owning and supervising such businesses. The boards of directors of these dual holding companies may have all, some or no members in common. The dual holding companies may have established a joint audit committee for the group consisting of directors from each dual holding company. The audit committee members of such entities would otherwise meet the independence requirements for the overall group, but could technically be considered affiliates, or as persons who are not directors, because of the particular structural form of the dual holding companies. We are providing an accommodation for such dual holding companies. First, where a listed issuer is one of two dual holding companies, those companies may designate one audit committee for both companies so long as each member of the audit committee is a member of the board of directors of at least one of such dual holding companies. Second, dual holding companies will not be deemed to be affiliates of each other by virtue of their dual holding company arrangements with each other, including where directors of one dual holding company are also directors of the other dual holding company, or where directors of one or both dual holding companies are also directors of the businesses jointly controlled, directly or indirectly, by the dual holding companies (and in each case receive only ordinary-course compensation for serving as a member of the board of directors, audit committee or any other board committee of the dual holding companies or any entity that is jointly controlled, directly or indirectly, by the dual holding companies).

6. Other Requests for Independence Exemptions

As discussed in section II.G.1 below, issuers availing themselves of exemptions from Exchange Act rule 10A-3 will generally have to disclose

that fact. Apart from the two limited exemptions discussed in sections II.B.4 and 5 above and the exemptions for controlling persons, foreign governmental board representatives and non-management employee members of foreign private issuers discussed in section II.F.3.a below, we are not exempting other particular relationships from the independence requirements at this time.

We noted in the Proposing Release that despite the existence of exemptions based on exceptional and limited circumstances in several existing SRO rules,⁸⁵ section 10A(m) of the Exchange Act, as enacted by Congress, does not contain any such exemption. Nevertheless, we requested comment as to whether such an exemption would be appropriate. Commenters were split on this point, with the commenters representing investors and investor groups not supporting such an exemption, and the commenters predominantly representing SROs supporting the freedom to provide such exemptions.⁸⁶ Some of the commenters that advocated against the exemption were concerned that the existing SRO exceptions have been or could be applied in practice more broadly than intended, though some commenters supporting such an exemption disputed this point. Consistent with our proposal, our final rules do not contain any exemptions based on exceptional and limited circumstances.

We also announced in the Proposing Release that, given the policy and purposes behind the Sarbanes-Oxley Act, as well as to maintain consistency and to ease administration of the requirements by the SROs, we do not intend to entertain exemptions or waivers for particular relationships on a case-by-case basis.⁸⁷ We requested comment on whether we should permit companies to request exemptive relief from the Commission or SROs on a case-by-case basis. Commenters also were split on this point, again with the commenters representing predominantly investors and investor groups not supporting case-by-case

⁸⁰ See, e.g., America's Community Bankers; American Bankers Association; CalPERS; CSC; Deloitte; NYSE; PwC; Southern Company; Greg Swallow. But see the Letter of SWIB.

⁸¹ See, e.g., the Letters of Dow Corning Corporation; Michael Groll; Kinder Morgan Energy Partners, L.P.; S&C.

⁸² See, e.g., the Letter of Michael Groll.

⁸³ See, e.g., the Letter of Dow Corning Corporation.

⁸⁴ See, e.g., the Letters of Reed Elsevier PLC; Royal Dutch Petroleum Company; Unilever PLC.

⁸⁵ See, for example, section 303.01 of the NYSE's listing standards; Rule 4350(d) of the NASD's listing standards and section 121B of the AMEX's listing standards. The rules of the NYSE, NASD and AMEX are available on their Web sites at <http://www.nyse.com>, <http://www.nasdaq.com> and <http://www.amex.com>, respectively.

⁸⁶ Compare, e.g., the Letters of CalPERS; CII; CSC; Deloitte; PwC; SWIB, with the Letters of AICPA; Amex; The Nasdaq Stock Market, Inc. ("Nasdaq"); NVCA.

⁸⁷ Similarly, Commission staff will not entertain no-action letter or exemption requests in this area.