

issuers.<sup>125</sup> These issuers may need additional time to locate a sufficient number of qualified directors to meet the requirements. In addition, small business issuers that are listed on some markets, such as Nasdaq, have previously been exempt from listing requirements that require independence for the entire audit committee.<sup>126</sup> Commenters requested an additional transition period for such companies to alleviate the potential burdens they may face.

In response to these concerns, we are adopting a revised set of implementation dates, with an extended date for foreign private issuers and smaller issuers. We are distinguishing listed issuers that are not foreign private issuers by size based upon whether they are a "small business issuer," as defined in Exchange Act rule 12b-2. A small business issuer is a U.S. or Canadian issuer with less than \$25 million in revenues and public float that is not an investment company.<sup>127</sup>

Under the final rule, listed issuers, other than foreign private issuers and small business issuers, must be in compliance with the new listing rules by the earlier of (1) their first annual shareholders meeting after January 15, 2004, or (2) October 31, 2004. Foreign private issuers and small business issuers must be in compliance with the new listing rules by July 31, 2005. We believe these dates strike an appropriate balance between the need for timely implementation of the requirements and the ability of listed issuers to comply with the requirements without an unreasonable burden.

As discussed in the Proposing Release, the OTC Bulletin Board (OTCBB), the Pink Sheets and the Yellow Sheets are not affected by Exchange Act rule 10A-3, and therefore issuers whose securities are quoted on these interdealer quotation systems similarly will not be affected, unless their securities also are listed on an exchange or Nasdaq.<sup>128</sup> Each of these quotation systems does not provide issuers with the ability to list their

securities, but is a quotation medium for the over-the-counter securities market that collects and distributes market maker quotes to subscribers. These interdealer quotation systems do not maintain or impose listing standards, nor do they have a listing agreement or arrangement with the issuers whose securities are quoted through them. Although market makers may be required to review and maintain specified information about the issuer and to furnish that information to the interdealer quotation system,<sup>129</sup> the issuers whose securities are quoted on such systems do not have any filing or reporting requirements with the system.<sup>130</sup>

## 2. Securities Affected

In enacting section 10A(m) of the Exchange Act, Congress made no distinction regarding the type of securities to be covered. Section 10A(m)(1)(A) of the Exchange Act prohibits the listing of "any security" of an issuer that does not meet the new standards for audit committees. Accordingly, the final rule applies not just to voting equity securities, but to any listed security, regardless of its type, including debt securities, derivative securities and other types of listed securities. We believe investors in all securities of an issuer, whether common equity or fixed income, will benefit from the increased financial oversight of an issuer that would result from a strong and effective audit committee.

Despite the statutory language, a few commenters believed that debt securities and non-convertible preferred securities should be exempted in their entirety.<sup>131</sup> As discussed above, we do not believe such a broad-based exemption is consistent with the language and the intent of section 10A(m). Effective oversight of financial reporting improves the quality and accuracy of such reporting. Quality and accurate financial reporting facilitates the proper pricing and liquidity of all securities on listed markets, regardless of type. While the Sarbanes-Oxley Act made explicit distinctions between debt and equity securities in several different provisions,<sup>132</sup> it made no such distinction in enacting Exchange Act section 10A(m). To avoid undue burden on listed issuers, including debt issuers,

we have adopted several exemptions where consistent with the purposes and policies of section 10A(m) and the protection of investors, such as the overlapping board exemption discussed in section II.A.5 and the multiple listing exemption discussed below.

### a. Multiple Listings

Many companies today issue multiple classes of securities through various ownership structures on various markets. For example, a company may have a class of common equity securities listed on one market, several classes of debt listed on one or more other markets, and derivative securities listed on yet another market. If an issuer already was subject to the requirements in Exchange Act rule 10A-3 as a result of one listing, there would be little or no additional benefit from having the requirements imposed on the issuer due to an additional listing.

In addition, companies often issue non-equity securities through controlled subsidiaries for various reasons. Requiring these subsidiaries, which often have no purpose other than to issue or guarantee the securities, to be subject to the audit committee requirements would add little additional benefit if the subsidiary is closely controlled or consolidated by a parent issuer that is subject to the requirements. Instead, imposing the requirements on these subsidiaries could create an onerous burden on the parent to recruit and maintain an audit committee meeting the requirements for each specific subsidiary.

Accordingly, we are adopting as proposed an exemption from the requirements for listings of additional classes of securities of an issuer at any time the issuer is subject to the requirements as a result of the listing of a class of common equity or similar securities. The additional listings could be on the same market or on different markets. Some commenters questioned conditioning the exemption on the listing of a class of common equity or similar securities.<sup>133</sup> We proposed conditioning this exemption on the listing of a class of common equity or similar securities because these securities will most likely represent the primary public listing of the company and the applicable listing standards, including those required by our rules, would be likely to be the most comprehensive. We are persuaded that this approach is proper in respect of the listing of subsidiaries' securities, but it is not necessary in the case of multiple listings of the issuer itself. Therefore,

<sup>125</sup> See, e.g., the Letters of ABA; Amex; Nasdaq.

<sup>126</sup> See, e.g., rule 4350(d)(2)(C) of the NASD's listing standards.

<sup>127</sup> Public float is the aggregate market value of a company's outstanding voting and non-voting common equity (i.e., market capitalization) minus the value of common equity held by affiliates of the company.

<sup>128</sup> The OTCBB is operated by The Nasdaq Stock Market, Inc., which is owned by the NASD. Information about the OTCBB can be found at <http://www.otcbb.com>. The Pink Sheets and the Yellow Sheets (as well as the corresponding Electronic Quotation Service) are operated by Pink Sheets LLC. Information about the Pink Sheets, the Yellow Sheets and the Electronic Quotation Service can be found at <http://www.pinksheets.com>.

<sup>129</sup> See 17 CFR 240.15c2-11.

<sup>130</sup> However, under OTCBB rules, issuers of securities quoted on the OTCBB must be subject to periodic filing requirements with the Commission or other regulatory authority. See NASD rule 6530.

<sup>131</sup> See, e.g., the Letters of ABA; NYSE; S&C.

<sup>132</sup> See, e.g., section 501 of the Sarbanes-Oxley Act.

<sup>133</sup> See, e.g., the Letters of ABA; NYSBA.