

shareholder equity requirements, will limit the size of issuers that will be affected by the requirements.¹⁷² However, we are sensitive to the possible implication for smaller issuers and for SROs that would like to specialize in securities of these issuers. As discussed in section II.F.1, we are providing an extended compliance period for listed issuers that are small business issuers. In addition, the modifications to several of the other exemptions in the final rule, such as the overlapping board exemption and the new issuer exemption, should provide additional flexibility to small and new issuers in meeting the requirements of the rule. Our approach of not mandating specific procedures for the auditor responsibility requirement and the complaint procedures requirement also should provide issuers flexibility in meeting these requirements.

c. Issuers of Asset-Backed Securities and Certain Other Passive Issuers

In several of our releases implementing provisions of the Sarbanes-Oxley Act,¹⁷³ we have noted the special nature of asset-backed issuers.¹⁷⁴ Because of the nature of these entities, such issuers are subject to substantially different reporting requirements. Most significantly, asset-backed issuers are generally not required to file the types of financial statements that other companies must file. Also, such entities typically are passive pools of assets, without a board of directors or persons acting in a similar capacity. Accordingly, we are excluding asset-backed issuers from the requirements as proposed. Commenters supported this exclusion.¹⁷⁵

Several commenters advocated similar relief for additional types of securities that are issued by trusts where the trust's activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.¹⁷⁶ For example, issuers of royalty trust securities and trust issued receipts often meet such criteria. Structures such as royalty trusts act as mere conduits though which proceeds on the underlying assets are distributed

to securityholders.¹⁷⁷ For securities such as trust issued receipts, the receipts represent undivided beneficial ownership of the specified underlying securities that are held in the trust.¹⁷⁸ Because such structures are similar to asset-backed issuers in that they do not have a board of directors or comparable persons from which to form an audit committee, the same policy reasons that exempt asset-backed issuers generally apply to such structures as well.

We recognize that we cannot anticipate all of the various types of these entities that may seek a listing on a national securities exchange or national securities association. Under the final rule, SROs may exclude from Exchange Act Rule 10A-3's requirements issuers that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.

d. Investment Companies

We proposed that the rule cover closed-end investment companies and so-called "exchange-traded funds" ("ETFs") structured as open-end investment companies.¹⁷⁹ We proposed to exclude ETFs structured as unit investment trusts ("UITs"). Two commenters argued that open-end ETFs should also be excluded from the

rule.¹⁸⁰ The commenters stated that the rule would impose unjustified competitive burdens on open-end ETFs in relation to both open-end investment companies that are not exchange-traded and ETFs structured as UITs.

However, Exchange Act section 10A(m)(1) requires us to direct the SROs to prohibit the listing of any security of an issuer that is not in compliance with the enumerated audit committee standards. Thus, the statute is specifically addressed to issuers listed for trading on SROs, and, as a result, we believe that it would be inconsistent with the statute to exclude open-end ETFs from the rule. With regard to the exclusion for UIT ETFs, we note that UITs, like asset-backed issuers and unlike open-end ETFs, are not actively managed and do not have boards of directors from which audit committee members could be drawn.

4. Determining Compliance With Proposed Standards

Apart from the general requirement to prohibit the listing of a security not in compliance with the enumerated standards, section 10A(m) of the Exchange Act does not establish specific mechanisms for a national securities exchange or a national securities association to ensure that issuers comply with the standards on an ongoing basis. SROs are required to comply with statutory provisions and Commission rules pertaining to SROs and to enforce their own rules, including rules that govern listing requirements and affect their listed issuers.

To further the purposes of section 10A(m), we proposed that SROs, as part of their implementing rules, must require a listed issuer to notify the applicable SRO promptly after an executive officer of an issuer becomes aware of any material noncompliance by the listed issuer with the requirements.¹⁸¹ The overwhelming majority of commenters supported this proposal.¹⁸² Accordingly, the final rule includes this requirement as proposed.

We also requested comment on whether listed issuers should be required to disclose periodically to the

¹⁷² Examples of the types of quantitative standards necessary for initial and continued listings on the NYSE, Nasdaq and AMEX are available on their respective Web sites.

¹⁷³ See note above.

¹⁷⁴ The term "Asset-Backed Issuer" is defined in 17 CFR 240.13a-14(g) and 240.15d-14(g).

¹⁷⁵ See, e.g., the Letters of CSC; Deloitte; NYSE.

¹⁷⁶ See, e.g., the Letters of ABA; Nasdaq; NYSE.

¹⁷⁷ For a more detailed description of royalty trusts, see Staff Accounting Bulletin No. 47. Of course, the exemption we are establishing will not extend to structures that hold, in addition to the royalty interest, an interest in the operating company that actually owns the oil and gas properties, such as structures commonly known as Canadian income trusts. In these situations, the trustee often also delegates significant management decisions to an operating company, which in turn may delegate those decisions to a manager. The operating company often has a board of directors that is appointed by both the manager and the trust unit holders. We believe such structures should be treated in a manner similar to limited partnerships.

¹⁷⁸ For a further description of trust issued receipts, see, for example, rule 1200 of the AMEX's listing standards, rule 1200 of the NYSE's listing standards, and HOLDERS, SEC No-Action Letter (Sep. 3, 1999) (the staff agreed not to recommend enforcement action to the Commission if, among other things, the trust did not register as an investment company under the Investment Company Act).

¹⁷⁹ Business development companies are covered by the final rules.

Investment companies may avail themselves of the general exemptions in Exchange Act Rule 10A-3(c) [17 CFR 240.10A-3(c)], if applicable. The independence exemptions of Exchange Act rule 10A-3(b)(1)(iv)(A)-(E) [17 CFR 240.10A-3(b)(1)(iv)(A)-(E)] will not apply to investment companies.

¹⁸⁰ See the Letters of Amex; Barclays Global Investors, N.A.

¹⁸¹ We encourage the SROs to impose a similar requirement for noncompliance with other SRO listing standards that pertain to corporate governance standards apart from the audit committee requirements in Exchange Act Rule 10A-3, to the extent SROs do not already provide for such a notice requirement. Commenters also expressed strong support for such a requirement.

¹⁸² See, e.g., the Letters of Amex; CalPERS; CII; CSC; Matsushita; PwC; Transparency International-USA.