

questions with respect to materiality determinations.

(a) Share Ownership

Many commentators expressed a desire for additional clarification of the interaction between share ownership and independence.

Several commentators opposed viewing any degree of share ownership as a per se bar to "independence" (absent such other factors as an employment relationship or other financial or personal tie to the company). They argued that directors who own or represent institutions that own very significant economic stakes in the listed companies are often effective guardians of shareholders' interests not only as members of the full board but also of compensation and nominating committees, while directors whose only stake in the membership on the board is the director's fee may be unduly loyal to management. Several venture capitalists raised a similar concern that they would run afoul of the new independence definition, even though venture capitalists, acting as fiduciaries to funds with significant shareholdings, typically have all the qualities that the independent director definition is intended to ensure.

The question of the impact of ownership on independence was particularly vexing to companies with listed subsidiaries. They were concerned that a director who is deemed independent with respect to a parent company may not be considered independent with respect to the parent-controlled subsidiary.

The Exchange has clarified in subsection 2 of Section 303A that, since the concern is independence from management, ownership of even a significant amount of stock, by itself, is not necessarily a bar to an independence finding.

(b) Safe Harbors for Independence Determinations

Several financial institutions specifically applauded the committee's recommendation that non-materiality determinations be made on a case-by-case basis and publicly disclosed and justified. However, a number of companies objected to the affirmative determination requirement, requesting that the NYSE specify a safe harbor for materiality. These companies cited the competing demands on the board's time and attention; the likelihood that the "no material relationship" requirement would unduly shrink the pool of qualified directorship candidates; and the possibility that the fact-specific inquiry required would expose directors

to additional scrutiny and potential liability, which they may be unwilling to assume without additional compensation and/or protection.

Many commentators would like to be able to fulfill their affirmative determination requirement through the establishment of their own safe harbors. For example, one commentator attached a detailed safe harbor proposal covering various types of credit transactions. In addition, a vast majority of commenting banks and financial institutions asked for clarification regarding the treatment of loans to directors. In light of the existing regulatory framework that controls relationships between a bank and its directors and affiliated entities, banks desired to establish categorically that arm's-length loans to directors would not negate independence.

Numerous companies and organizations argued that if there are no material relationships, the NYSE should allow the statement of reasons for the board's determination of independence to be omitted from the proxy statement, and suggested that the rules should not require details of each relationship regardless of size.

The Exchange has clarified in subsection 2 of Section 303A that categorical standards are permissible.

(c) Five-Year Cooling-Off Period

More than half of the companies commenting on this issue protested that five years is too long, advocating a two-to-three year period instead. Five companies, reflecting their individual circumstances, requested an exemption for interim CEOs who have served for less than one year. One commentator objected to subjecting all former employees to the cooling-off period, recommending that the prohibition be limited to former executive officers only.

Several commentators agreed with the five-year period for former employees, but found the period too long with respect to compensation committee interlocking directorates. Notably, one company thought that the five-year look-back on interlocking directorates would strain parent-subsidiary relations. Likewise, one parent of a controlled public subsidiary expressed its belief that its executives should be able to sit on the subsidiary's compensation committee to ensure that subsidiary's compensation policies are compatible with those of its parent. In addition, a few companies asked whether the inquiry would end by examining the present and past relationships at companies where directors are currently employed, or if one would be required to search back

for possible interlocks at companies that may have since been acquired or dissolved "pointing out that with the immediate family overlay to the rule, the latter inquiry could become extremely cumbersome."

Several financial institutions (along with several smaller companies) took issue with the blanket exclusion of family members for five years. One company argued that when a family member's relationship has terminated, there should be independence. Another commentator recommended that relatives of deceased or disabled former officers be classified as independent as long as they themselves have no financial involvement other than ownership in the company.

The Exchange has clarified several of these issues with specified provisions in subsection 2(b) of Section 303A.

Non-Management Executive Sessions

The great majority of the commentators objected to the executive session requirement, to the requirement to designate and disclose a presiding director for such sessions, or to both. They argued that the sessions (a) were unnecessary because the mandated audit, compensation and nominating committees would provide sufficient checks; (b) would bifurcate the board into two tiers, turning management directors into second-class directors; and (c) would deprive directors of guidance by management. In addition, they argued that mandating such sessions could result in mechanical, pro forma meetings.

The majority of commentators argued that the presiding director requirement would have a divisive effect. In addition, they argued that the requirement would deprive the board of needed flexibility; they would like the NYSE to allow any independent director to preside over a given executive session. Some commentators also complained that the presiding director requirement amounts to the NYSE's mandating separation of the roles of Chairman and CEO. (Conversely, one non-U.S. company urged the NYSE to require the designation of a "lead director", or to mandate separation of these roles.) One organization suggested that the NYSE should instead require that the corporate governance guidelines specify procedures for the selection of a chair for each executive session. Even commentators who did not vigorously object to the recommendation that a presiding director be designated objected to the requirement that such designation be publicly disclosed.

The Exchange has clarified in subsection 3 of Section 303A that no