

not actively managed and do not have boards of directors from which audit committee members could be drawn. Accordingly, our proposed rules would cover closed-end investment companies and exchange-traded open-end investment companies, but we are proposing to exclude exchange-traded UITs from the proposed requirements.⁹⁵

Questions regarding the proposed application to issuers:

- Although we do not propose a complete exemption for foreign issuers from coverage of the proposed rule, and question whether such an exemption would be consistent with the policies underlying the Sarbanes-Oxley Act, we solicit comment on the propriety of either a complete or broader exemption from the requirements for foreign issuers. Given the exemptions that are proposed, would the proposals conflict with local law or local stock exchange requirements? If so, how? Are the problems that the proposals are intended to address dealt with in alternative ways in other jurisdictions? Would any foreign issuers not consider a listing solely because of these requirements? Would any foreign issuers that currently maintain a U.S. listing seek to delist their securities because of these requirements?

- Is the proposed special accommodation to the independence requirements adequate for issuers in countries with a dual board structure where employee representatives sit on the supervisory board or are required to be on the audit committee? If not, how should we accommodate these issuers, if at all?

- Are the proposed special accommodations for foreign issuers with controlling shareholder or shareholder groups or foreign government representation appropriate? Do the proposed exemptions provide appropriate accommodations for foreign private issuer practices, consistent with the purposes of Section 10A(m) of the Exchange Act and the protection of investors? Are there alternative approaches that would be preferable to address the issue? Should any of the conditions of the proposed exemption

be changed? For example, for controlling shareholders, should the level of shareholder ownership proposed be higher (e.g., 80%) or lower (e.g., 10%)? Is the limitation for controlling shareholders to observer status and not being a voting member or chair of the audit committee appropriate?

- Is the proposed special accommodation for issuers from jurisdictions that operate with boards of auditors or similar bodies appropriate? Does the proposed exemption provide appropriate accommodation for these issuers, consistent with the purposes of Section 10A(m) of the Exchange Act and the protection of investors? Are there alternative approaches that would be preferable to address the issue? Should we provide a "sunset" date for this provision to allow the Commission to reconsider its effectiveness and to reexamine the trend towards audit committees in other jurisdictions? If so, what date should we use (e.g., December 31, 2005)?

- Is the compliance burden for companies under a certain size disproportionate to the benefits to be obtained from the proposed requirements? Would any smaller issuers not consider a listing solely because of these requirements? Would any smaller issuers that currently maintain a listing seek to delist their securities because of these requirements? How can we minimize the burden consistent with the purposes of the Sarbanes-Oxley Act?

- Should the scope of one or more of the proposed requirements be narrowed to exclude or apply differently to companies under a certain size? If so, which requirements should be changed? How would such accommodations be consistent with the purposes of Section 10A(m) and the protection of investors? Should there be special accommodations for companies considered under our rules to be "small business issuers" (companies that have revenues and public float of less than \$25 million)?⁹⁶ Should there be a higher cutoff, such as \$100 million or \$200 million public float and/or revenues? If there should be a different standard for determining the level of issuer affected, should it be based on additional or alternative criteria, such as total assets, shareholder equity or reporting history? What alternate means exist that would provide the same protections to shareholders?

- Is the exclusion of asset-backed issuers appropriate? If not, how should

these issuers be handled? Are there other types of issuers that should be handled differently?

- Is the exclusion for ETFs that are structured as unit investment trusts appropriate? If not, how should these ETF UITs be handled? Exchange-traded UITs typically provide audited financial information in shareholder reports although these reports are not required by Commission rules. How should this affect whether exchange-traded UITs are covered by the proposed requirements? Should the sponsor, depositor, or trustee of the UIT be required to comply with the proposed rule? Are there other types of investment companies that should be excluded from the proposed rule? If so, why?

- We propose to make the general exemptions of Exchange Act Rule 10A-3(c) available for use by investment companies. Would investment companies ever fall within any of these exemptions? Should some exemptions be available to investment companies and others unavailable? If so, which ones should be available and why?

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 proposed standards on an ongoing basis. SROs are required to comply with 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 propose to direct the SROs to 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 proposed requirements.⁹⁷

Questions regarding determining compliance with the proposed standards:

- Should a listed issuer be required to notify the SRO if it has failed to comply with our proposed requirements? Is it sufficient for the notification to be made "promptly?" Should the direction to the SROs on this point be more specific

⁹⁵ Business development companies would be covered by the proposed rules.

Investment companies may avail themselves of the general exemptions in proposed Exchange Act Rule 10A-3(c) [17 CFR 240.10A-3(c)], if applicable, and, except in the case of reliance on the exemption for UITs contained in paragraph (c)(5)(ii) or the exemption contained in paragraph (c)(1), would have to disclose such use of a general exemption on proposed Form N-CSR and in proxy statements. The independence exemptions of proposed Exchange Act Rule 10A-3(b)(1)(iv)(A)-(E) [17 CFR 240.10A-3(b)(1)(iv)(A)-(E)] would not apply to investment companies.

⁹⁶ The term "small business issuer" is defined in Exchange Act Rule 12b-2.

⁹⁷ 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 proposed Exchange Act Rule 10A-3, to the extent SROs do not already provide for such a notice requirement.