

(e.g., notification must occur no later than two business days after an executive officer of the issuer becomes aware of any material noncompliance)?

- Is the proposed triggering event for notification (i.e., that an executive officer of the issuer has become aware of any material noncompliance) appropriate? For example, should the standard also include any audit committee member becoming aware of any material noncompliance?

- In addition to, or in lieu of, notification in the event of noncompliance, should a listed issuer be required to disclose periodically to the SROs whether they have been in compliance with the standards? If so, how often?

- Should a listed issuer be required to notify the SRO if it has failed to comply with listing standards apart from our proposed requirements for audit committees? Should this requirement apply only to particular listing standards?

5. Opportunity To Cure Defects

Section 10A(m)(1)(B) of the Exchange Act specifies that our rules must provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition of the issuer's securities as a result of its failure to meet the proposed audit committee standards, before imposition of such a prohibition. To effectuate this mandate, our proposals would require the SROs to establish such procedures before they prohibit the listing of or delist any security of an issuer.⁹⁸ Preliminarily, we believe that existing continued listing or maintenance standards and delisting procedures of the SROs would suffice as procedures for an issuer to have an opportunity to cure any defects on an ongoing basis. These procedures already provide issuers with notice and opportunity for a hearing, an opportunity for an appeal and an opportunity to cure any defects before their securities are delisted.⁹⁹ However, we do expect that the rules of each SRO will provide for definite procedures and time periods for compliance with the proposed requirements to the extent they do not already do so.

We also expect that our final rule will have a delayed implementation date before companies would initially be subject to the standards to provide affected companies with time to conform to the new standards. We

recognize that companies may need to conduct shareholder elections to elect independent directors for their audit committees. We envision that the standards contemplated by our proposals would need to be operative by the SROs no later than the first anniversary of the publication of our final rule in the **Federal Register**. This should give listed issuers enough time to go through an annual meeting election cycle to elect any new directors that would be necessary to meet the new requirements.

Questions regarding the opportunity to cure defects:

- Should the SROs be required to establish specific procedures for curing defects apart from those proposed? If so, what would these procedures look like? Should there be a specific course for redress other than the delisting process?

- Should our final rule include specific provisions that set maximum time limits for an opportunity to cure defects? If so, what time limits would be appropriate?

- Beyond the limited exemption we propose for the independence requirements, should companies that have just completed their initial public offering be given additional time to comply with the requirements?

- Is the proposed date for when the SROs rules must be operative appropriate for companies that must comply with the new standards? If not, what date would be appropriate and what factors should we consider in setting any such date? Would a period beyond the proposed date be necessary or appropriate for compliance by smaller companies? Are there special considerations that we should take into account for foreign private issuers?

G. Disclosure Changes Regarding Audit Committees

1. Disclosure Regarding Exemptions

Our proposals provide for certain exemptions. Because these exemptions would distinguish certain issuers from most other listed issuers, we believe that it is important for investors to know if an issuer is availing itself of one of these exemptions. Accordingly, we propose that these issuers would need to disclose their reliance on the exemption and their assessment of whether, and if so, how, such reliance would materially adversely affect the ability of their audit committee to act independently and to satisfy the other requirements of proposed Exchange Act Rule 10A-3. Such disclosure would need to appear in, or be incorporated by reference into, annual reports filed with the

Commission.¹⁰⁰ The disclosure also would need to appear in proxy statements or information statements for shareholders' meetings at which elections for directors are held.

Because of the nature of the exemption for boards of auditors or similar structures of foreign private issuers discussed in Section II.F.3.a., we also are proposing that foreign private issuers availing themselves of that exemption be required to file an exhibit to their annual reports stating that they are doing so.¹⁰¹ Because the presence of exhibits can be easily identified in electronic filings, we believe this requirement will facilitate monitoring of the use of this exemption by investors.

As discussed in Section II.F.3.d., we are proposing a general exemption for unit investment trusts from the requirements of the proposed rule. In addition, we are proposing that UITs be excluded from the disclosure requirements relating to their use of the exemption.¹⁰² As a passive investment vehicle, a UIT has no board of directors, and there is little reason why investors would expect a UIT to have an audit committee. In addition, there is no appropriate disclosure document required by Commission rules where a UIT could include this disclosure.¹⁰³

¹⁰⁰ This disclosure is proposed to be included in Part III of annual reports on Form 10-K and 10-KSB (through an addition to Item 401 of Regulations S-K and S-B). Consequently, companies subject to the proxy rules would be able to incorporate the required disclosure from a proxy or information statement that involves the election of directors into the annual report, if the issuer filed such proxy or information statement within 120 days after the end of the fiscal year covered by the report. See General Instruction G.(3) of Form 10-K and General Instruction E.3. of Form 10-KSB.

For foreign private issuers that file their annual reports on Form 20-F, the disclosure requirement would appear in new paragraph (f) to Item 15. The additions of paragraphs (c)-(e) to Item 15 of Form 20-F were proposed in Release No. 33-8138 (Oct. 22, 2002), Release No. 33-8154 (Dec. 2, 2002), and Release No. 33-8160 (Dec. 10, 2002) [67 FR 77594] (Rule 10b-18 and purchases of certain equity securities by the issuer and others), respectively.

For foreign private issuers that file their annual reports on Form 40-F, the disclosure requirement would appear in paragraph (11) to General Instruction B. The additions of paragraphs (9) and (10) to General Instruction B. of Form 40-F were proposed in Release No. 33-8138 (Oct. 22, 2002) and Release No. 33-8154 (Dec. 2, 2002), respectively.

For registered investment companies, the disclosure would appear in Item 8 of proposed Form N-CSR and Item 22(b)(14) of Schedule 14A.

¹⁰¹ The exhibit requirement would appear in new paragraph 11 to the Instructions as to Exhibits of Form 20-F. The addition of paragraph 10 to the Instructions as to Exhibits of Form 20-F was proposed in Release No. 33-8138 (Oct. 22, 2002).

¹⁰² See proposed Exchange Act Rule 10A-3(d).

¹⁰³ UITs file annual reports with the Commission on Form N-SAR [17 CFR 249.330 and 274.101] under Investment Company Act Rule 30a-1 [17 CFR 270.30a-1]. However, these N-SAR reports are

⁹⁸ These procedures, of course, could not include an extended exemption or waiver of the requirements apart from those proposed.

⁹⁹ See, e.g., NASD Rule 4800 Series and NYSE Listed Company Manual Section 804.