

in recruiting enough independent directors to maintain a board with a majority of independent directors, the three year "look back" periods contained in certain of the independence requirements would be applied prospectively for independent directors who are not members of the audit committee. Thus for the first three years after the requirement becomes effective, the applicable "look back" period would be to the date the requirement to have a board comprised of a majority of independent directors becomes effective.

Listed companies would also be required to hold board meetings on at least a quarterly basis, and the independent directors serving on the board would be required to meet in executive session (*i.e.*, without the presence of non-independent directors) as often as necessary but at least once a year.

Audit Committees

The Exchange is proposing to adopt the rule changes mandated by Commission Rule 10A-3 under the Act to prohibit the listing of any security of an issuer that is not in compliance with the specified minimum audit committee standards with respect to independence and responsibilities. These standards would be incorporated into Sections 121 and 803 of the *Amex Company Guide*. In accordance with SEC Rule 10A-3, a listed company would be required to notify the Exchange promptly after an executive officer of the company becomes aware of any material noncompliance by the company, and any company not in compliance with the specified requirements would be afforded an opportunity to cure any defects thereof in accordance with the procedures set forth in Section 1009 and Part 12 of the *Amex Company Guide*. In addition, if a member of a listed company's audit committee ceases to meet the heightened audit committee independence requirements for reasons outside the member's reasonable control, with notice to the Exchange, that person would be permitted to remain an audit committee member until the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the member to be no longer independent.

Listed companies (other than small business filers as discussed below) would continue to be required to maintain an audit committee of at least three independent directors. However, each director would now be required to satisfy both the general Amex independence standards as well as the

heightened standards applicable to audit committee members as mandated by SEC Rule 10A-3. In addition, the Exchange would continue to require that each member of the audit committee be financially literate and that one member be financially sophisticated. While a listed company would continue to be able to appoint one non-employee director to the audit committee who does not meet the general Amex independence definition, pursuant to the "exceptional and limited circumstances" exception,⁷ the proposed changes would permit the director in question to serve on the audit committee for only two years, and this director would not be permitted to not chair the audit committee. Anyone appointed pursuant to this exception would, of course, need to be qualified to serve on the committee under the heightened audit committee independence standards. Additionally, the audit committee responsibilities and charter requirements would be expanded to specify that the audit committees must be vested with all responsibilities and authority required by SEC Rule 10A-3.

Finally, audit committees would be required to hold meetings on at least a quarterly basis.

Compensation and Nominating Committees

The proposed rule changes would also increase the role of independent directors in the nomination and compensation decision-making process. For most listed companies, board nominations and chief executive officer compensation would have to be approved by a committee composed entirely of independent directors or by a majority of the independent directors on the company's board. One non-independent director would be permitted to be appointed to the compensation committee and/or the nominating committee pursuant to the "exceptional and limited circumstances exception" noted above. In addition, a director who is not independent as a result of being an officer of the company but who owns 20% or more of the company's stock could be appointed to the nominating committee in lieu of utilizing the "exceptional and limited circumstances" exception.

Ethics and Disclosure

The proposed changes would impose increased ethics and disclosure requirements in a number of respects. First, all Amex employees and Floor

members would be prohibited from serving on the board of directors of any listed company. The Exchange believes that this prohibition is imperative in order to avoid even the appearance of a conflict of interest that could potentially interfere with its regulatory role and responsibilities. Second, all Amex listed companies would be required to adopt a code of ethics that meets the definition of a "code of ethics" under the Sarbanes-Oxley Act of 2002.⁸ Third, listed companies would be required to issue a press release disclosing receipt of an audit opinion that contains a going concern qualification from the company's outside auditor, as well as any board changes and vacancies. And fourth, as discussed below, foreign issuers that elect to comply with certain home country corporate governance practices in lieu of Amex requirements would be required to provide disclosure thereof.

Applicability

The new corporate governance listing standards would apply to all listed companies with the exception of passive business organizations (such as royalty trusts) and derivatives and special purpose securities listed pursuant to Amex Rules 1000, 1000A and 1200 and Sections 106, 107 and 118B of the *Amex Company Guide*. Because of the nature and structure of such issuers, the Exchange does not believe that it is necessary or appropriate to apply the enhanced corporate governance requirements to them. However, issuers of some securities would be required to comply with Commission Rule 10A-3 to the extent required of them. In addition, the following types of issuers would be subject to limited exceptions as follows:

- **Controlled Companies:** A company in which over 50% of the voting power is held by an individual, a group or another company would not be required to comply with the requirement to have a board of directors comprised of a majority of independent directors, or with the compensation and nominating committee requirements. However, a controlled company that chooses to take advantage of any or all of these exceptions would be required to disclose in its annual meeting proxy that it is a controlled company and the basis for that determination. Controlled companies would, however, be subject to all other corporate governance requirements including those pertaining to audit committees.

- **Limited Partnerships and Companies in Bankruptcy:** Limited

⁷ See Section 121B(2)(b) of the *Amex Company Guide*.

⁸ See Item 406 of Regulation S-K and Item 406 of Regulation S-B.