

Investment Company Act⁹⁰ that are not registered under the Investment Company Act, to comply with all of the provisions of NYSE section 303A applicable to domestic issuers, except that the directors of such companies, including audit committee members, would not be required to satisfy the independence requirements set forth in NYSE section 303A(2) and 303A(7)(b).⁹¹ For purposes of NYSE sections 303A(1), (3), (4), (5), and (9), a director of a business development company would be considered to be independent if he or she is not an "interested person" of the company, as defined in section 2(a)(19) of the Investment Company Act.⁹²

Open-end management investment companies ("open-end funds"), which can be listed as Investment Company Units, and are more commonly known as Exchange Traded Funds or ETFs, would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3, and (2) notify the Exchange in writing of any material non-compliance.⁹³

In addition, the NYSE proposes also to require the audit committees of closed-end and open-end funds to establish procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company, of concerns regarding questionable accounting or auditing matters.⁹⁴ This responsibility would be required to be addressed in the audit committee charter.⁹⁵

NYSE proposes that except as otherwise required by Rule 10A-3, the new requirements also would not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities (such as those described in NYSE sections 703.16, 703.19, 703.20, and 703.21). To the extent that Rule 10A-3 applies to a passive business organization, listed derivative, or special purpose security, the requirement to have an audit committee that satisfies the requirements of Rule 10A-3, and the requirement to notify

the NYSE in writing of any material non-compliance, also would apply.⁹⁶

The new requirements generally would not apply to companies listing only preferred or debt securities on the NYSE. To the extent required by Rule 10A-3, however, all companies listing only preferred or debt securities on the NYSE would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3, and (2) notify the Exchange in writing of any material non-compliance.⁹⁷

13. Application to Foreign Private Issuers

NYSE section 303A would permit NYSE-listed companies that are foreign private issuers, as such term is defined in Rule 3b-4 under the Exchange Act,⁹⁸ to follow home country practice in lieu of the new requirements, except that such companies would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A-3; (2) notify the NYSE in writing after any executive officer becomes aware of any non-compliance with any applicable provision; and (3) provide a brief, general summary of the significant ways in which its governance differs from those followed by domestic companies under NYSE listing standards.⁹⁹ Listed foreign private issuers would be permitted to provide this disclosure either on their website (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States in accordance with Sections 103.00 and 203.01 of the NYSE Manual.¹⁰⁰ If the disclosure is made available only on the website, the annual report would be required to state this and provide the web address at which the information may be obtained.¹⁰¹

⁹⁰ See NYSE section 303A—General Application—Other Entities. In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add language to clarify the application of Rule 10A-3 to passive business organizations.

⁹¹ See NYSE section 303A—General Application—Preferred and Debt Listings. In NYSE Amendment No. 2, *supra* note, the NYSE proposes to add language to clarify the application of Rule 10A-3 to companies listing only preferred or debt securities.

⁹² 17 CFR 240.3b-4.

⁹³ See NYSE section 303A—General Application—Equity Listings—Foreign Private Issuers, and NYSE section 303A(11). In NYSE Amendment No. 2, *supra* note, the NYSE proposes to clarify the application of Rule 10A-3 to foreign private issuers.

¹⁰⁰ See Commentary to NYSE section 303A(11).

¹⁰¹ *Id.*

14. Proposed Implementation of New Requirements

In NYSE Amendment No. 2, the NYSE proposes a revised implementation schedule for the new requirements. Pursuant to the new schedule, listed companies would have until the earlier of their first annual meeting after January 15, 2004, or October 31, 2004, to comply with the new standards. However, if a company with a classified board is required to change a director who would not normally stand for election in such annual meeting, the company would be permitted to continue such director in office until the second annual meeting after such date, but no later than December 31, 2005. Notwithstanding the foregoing, foreign private issuers would have until July 31, 2005, to comply with any Rule 10A-3 audit committee requirements.¹⁰²

Companies listing in conjunction with their initial public offering¹⁰³ would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and fully independent committees within one year. They would be required to meet the majority of independent board requirement within 12 months of listing.¹⁰⁴

Companies listing upon transfer from another market would have 12 months from the date of transfer in which to comply with any requirement to the extent the market on which they were listed did not have the same requirement. To the extent the other market has a substantially similar requirement but also had a transition period from the effective date of that

¹⁰² See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Effective Dates/Transition Period.

¹⁰³ In NYSE Amendment No. 2, *supra* note, NYSE proposes that for purposes of section 303A, a company would be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act. The NYSE also proposes to permit companies that are emerging from bankruptcy or have ceased to be Controlled Companies within the meaning of section 303A to phase in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with an initial public offering. However, for purposes of the requirement that a company have an audit committee that complies with the requirements of Rule 10A-3, and the requirement that a company notify the Exchange in writing of any material non-compliance, a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions of Rule 10A-3(b)(1)(iv)(A). Investment companies are not subject to this exemption under Rule 10A-3(b)(1)(iv)(A), however. See NYSE section 303A—General Application—Effective Dates/Transition Period.

¹⁰⁴ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Effective Dates/Transition Period.

⁹⁰ 15 U.S.C. 80a-2(a)(48).

⁹¹ See NYSE Amendment No. 2, *supra* note and NYSE section 303A—General Application—Equity Listings—Closed-End and Open-End Funds.

⁹² 15 U.S.C. 80a-2(a)(19).

⁹³ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Closed-End and Open-End Funds.

⁹⁴ See NYSE Amendment No. 2, *supra* note, and NYSE section 303A—General Application—Equity Listings—Closed-End and Open-End Funds.

⁹⁵ See NYSE Amendment No. 3.