

“reasonable approach,”¹⁸⁹ while another commenter thought the proposal was too rigid because it would disqualify employees who were paid more than \$100,000 and did not have significant decision-making authority.¹⁹⁰ Some commenters requested clarification of this proposal. For example, one of these commenters asked whether “compensation” had a similar meaning to that given by the Commission in Rule 10A-3,¹⁹¹ and whether any of the following could be excluded: gains from investments in securities and dividends,¹⁹² restricted stock received by directors as part of their compensation for service as directors,¹⁹³ payments from banking transactions in the ordinary course of business,¹⁹⁴ and deferred compensation.¹⁹⁵ One commenter expressed its preference for the NYSE Direct Compensation Provision over the Nasdaq Payments Provision because the Nasdaq Payments Provision excluded individuals who received “payments,” which the commenter believed was too broad.¹⁹⁶ One commenter argued that either the \$100,000 threshold of the NYSE Direct Compensation Provision should be increased for larger companies, or the board should have the discretion to establish the appropriate threshold.¹⁹⁷ With respect to the Nasdaq Payments Provision, one commenter argued that an indication of non-independence based on the threshold amounts of payments received should be a rebuttable presumption as in the NYSE Direct Compensation Provision, rather than a bright line test.¹⁹⁸ Commenters advocated that the following should be excluded from these amounts: indirect payments, such as payments to related organizations,¹⁹⁹ payments from banking or brokerage transactions in the ordinary course of business,²⁰⁰ other items excluded from disclosure per Commission rules such as Item 404 of Form S-K,²⁰¹ and compensation for

service on board committees.²⁰² In contrast, one commenter stated that director’s fees should be the only compensation an independent director could receive from the company.²⁰³ In addition, one commenter stated its belief that the three-year look back should not apply to the Nasdaq Payments Provision because the board would already be required to consider previous employment in making an affirmative determination of director independence.²⁰⁴ One commenter expressed its strong support for the exception in the NYSE Direct Compensation Provision for compensation received by a director for former service as an interim Chairman or CEO, and recommended that Nasdaq include this exception in its proposal.²⁰⁵

Business Relationship Provisions

One commenter supported the NYSE Business Relationship Provision and represented that members of its corporate governance task force (which consists of representatives from both large and small, public and non-public banking organizations) were confident that the majority of directors sitting on the boards of banking organizations impacted by these listing standards would be able to satisfy this requirement.²⁰⁶ Other commenters argued that the NYSE Business Relationship Provision would be difficult to implement and would not, in many cases, be the most accurate measure of the materiality of a business relationship.²⁰⁷ Likewise, commenters argued that NYSE’s threshold of 2% was too low,²⁰⁸ the proposal was not appropriate for smaller companies,²⁰⁹ the proposal was ambiguous,²¹⁰ and that the existence of a commercial relationship should give rise only to a rebuttable presumption of lack of independence.²¹¹ Commenters were also concerned about the application of the proposal to family members.²¹² In addition, commenters argued that the

proposal should not apply to the following: Executive officers or employees of a company making the payments who seek to be independent directors of the company that is on the receiving end of the payments,²¹³ certain loans,²¹⁴ non-executive employees,²¹⁵ disqualification due to consolidation accounting principles,²¹⁶ and gross revenues received in certain competitively bid and public utility transactions.²¹⁷

With respect to the Nasdaq Business Relationship Provision, one commenter recommended defining “controlling shareholder.”²¹⁸

Interlocking Directorate Provisions

Two commenters supported the NYSE and Nasdaq Interlocking Directorate Provisions.²¹⁹ One commenter does not believe that the look-back provisions of the NYSE and Nasdaq Interlocking Directorate Provisions should apply because independence would seem to be compromised only if the listed company’s executives had the current ability to participate in determining the director’s compensation as an executive officer of the other entity.²²⁰ The commenter suggests that if the NYSE and Nasdaq look-back provisions are applied, then the service of the listed company’s executive, and the employment of the listed company’s director, at the other company should be required to have occurred at the same time during that five-year period.²²¹

Relationships of a Director with the Company’s Auditors

With respect to the NYSE’s proposal concerning relationships with an auditor, one commenter did not believe that the NYSE had sufficiently explained why a director’s affiliation with a company’s auditor would compromise the director’s independence.²²² In addition, several commenters argued that applying the proposals to family members would be too burdensome, given the small number of accounting firms that provide audit services to large publicly traded companies, and would be difficult to monitor. These commenters suggested

¹⁸⁹ See America’s Community Bankers NYSE Letter.

¹⁹⁰ See GM NYSE Letter.

¹⁹¹ See America’s Community Bankers NYSE Letter.

¹⁹² See Aetna NYSE Letter.

¹⁹³ See Exxon NYSE Letter.

¹⁹⁴ See America’s Community Bankers NYSE Letter.

¹⁹⁵ See New York State Bar NYSE Letter.

¹⁹⁶ See American Bankers Association NYSE Letter.

¹⁹⁷ See Wells Fargo NYSE Letter.

¹⁹⁸ See Committee on Securities Regulation Nasdaq Letter.

¹⁹⁹ See ABC Nasdaq Letter.

²⁰⁰ See America’s Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, Whitney Nasdaq Letter, and People’s Bank Nasdaq Letter.

²⁰¹ See Whitney Nasdaq Letter.

²⁰² See People’s Bank Nasdaq Letter.

²⁰³ See TI-USA Nasdaq Letter.

²⁰⁴ See America’s Community Bankers Nasdaq Letter.

²⁰⁵ See Arrow Electronics Letter.

²⁰⁶ See American Bankers Association NYSE Letter.

²⁰⁷ See Mirant NYSE Letter, Winston and Strawn NYSE Letter, CNF NYSE Letter, America’s Community Bankers NYSE Letter, and New York State Bar NYSE Letter.

²⁰⁸ See Anadarko NYSE Letter.

²⁰⁹ See Agilent NYSE Letter.

²¹⁰ See Perkins Coie NYSE Letter and Winston & Strawn NYSE Letter.

²¹¹ See Anadarko NYSE Letter, Aetna NYSE Letter, and Ameren NYSE Letter.

²¹² See Aetna NYSE Letter, Visteon NYSE Letter, and Mirant NYSE Letter.

²¹³ See CNF NYSE Letter.

²¹⁴ See Aetna NYSE Letter.

²¹⁵ *Id.*

²¹⁶ See Dow, Lohnes NYSE Letter.

²¹⁷ See Ameren NYSE Letter.

²¹⁸ See America’s Community Bankers Nasdaq Letter.

²¹⁹ See Council on Foundations Nasdaq Letter and American Bankers Association NYSE Letter.

²²⁰ See America’s Community Bankers Nasdaq Letter and America’s Community Bankers NYSE Letter.

²²¹ *Id.*

²²² See Computer Sciences NYSE Letter.