

“subsidiary,” which appears in the Nasdaq Employee Provision, the Nasdaq Payments Provision, and the Nasdaq Family of Executive Officer Provision.

One commenter expressed its strong support for the position taken by both the NYSE and Nasdaq not to disqualify independent directors for ownership of even a significant amount of stock.²⁴⁸

Two commenters recommended that NYSE and Nasdaq apply a more lenient independence standard to smaller companies.²⁴⁹

With respect to the NYSE proposal, one commenter recommended that NYSE adopt the provision permitted by Rule 10A-3 that would allow a listed issuer to have one audit committee member that ceases to be independent for reasons outside the member's reasonable control for a limited amount of time, and to extend such provision to all independent directors and the other non-Rule 10A-3 independence requirements.²⁵⁰ Another commenter recommended adding a provision relating to appropriate procedures for a company to cure any defects in its compliance with the proposed new independence standards.²⁵¹

B. Separate Meetings for Independent Directors

Several commenters were in favor of the NYSE proposal to require separate executive sessions for non-management directors.²⁵² One commenter stated that it regarded this requirement as among the most important in improving the independence of the board.²⁵³ Another commenter criticized the proposal because it believes that it could lead to decisions being made without critical information available to management, and could raise liability issues for the non-management directors under state law if their decisions are determined to be harmful to the company or not in its best interest.²⁵⁴ The commenter suggested that the NYSE encourage these meetings, but not make them mandatory, so that each company could determine if the sessions would be productive. A third commenter stated its belief that requiring executive

sessions would have a divisive effect within boards of listed companies and would deprive directors of guidance by management.²⁵⁵ Another commenter argued that independent directors, not non-management directors, should be required to attend executive sessions, and that an independent director should be required to preside over the executive sessions.²⁵⁶

With respect to the Nasdaq proposal to require separate sessions for independent directors, one commenter stated its view that such a requirement could be burdensome, and recommended requiring regular meetings of non-management directors.²⁵⁷ Another commenter recommended that Nasdaq clarify what would be expected to occur at these meetings.²⁵⁸

C. Communications with Independent Directors

Commenters recommended that NYSE clarify its proposal that interested parties should have the ability to freely communicate with a company's non-management directors with respect to the identity of “interested parties;”²⁵⁹ how they should communicate with independent directors;²⁶⁰ what topics would be appropriate to direct to independent directors, instead of the entire board;²⁶¹ and whether management could be involved in screening communications and in reviewing and responding to concerns.²⁶² Another commenter recommended limiting the proposal to employees.²⁶³ With respect to the Nasdaq proposal, one commenter advocated that companies ensure that employees know that they would not be retaliated against for reports made in good faith.²⁶⁴

D. Compensation of Officers

Many commenters disapproved of the NYSE Compensation Committee Provision because the compensation committee would be given the sole

authority to determine CEO compensation.²⁶⁵ Commenters argued that the full board should have a role in making CEO compensation decisions,²⁶⁶ or that all independent directors should have a role in making CEO compensation decisions, perhaps even by deciding how CEO compensation decisions would be made.²⁶⁷ One commenter stated that the board should be permitted to allocate this responsibility to other committees or other groups of directors, as long as all members are independent, and that the compensation committee should be permitted to make a recommendation to be approved by all of the independent directors.²⁶⁸ Another commenter recommended that the NYSE make clear that the compensation committee could be given the discretion to make other decisions.²⁶⁹ Other commenters supported the proposal.²⁷⁰ One commenter provided recommendations for how the compensation committee should evaluate CEO performance.²⁷¹

With respect to the Nasdaq Compensation of Executives Provision, one commenter argued that it would not be necessary or appropriate to apply this proposal to investment companies.²⁷² With respect to both the NYSE Compensation Committee Provision and the Nasdaq Compensation of Executives Provision, two commenters asked how other compensation would be determined.²⁷³

E. Nomination of Directors

Several commenters supported the NYSE Nominating/Corporate Governance Committee Provision,²⁷⁴ and one commenter supported the exception that provides that nominating committee approval is not required where the right to nominate a director

²⁶⁵ See Business Roundtable NYSE Letter, American Society of Corporate Secretaries NYSE Letter, International Paper NYSE Letter, Lorsch NYSE Letter, Computer Sciences NYSE Letter, Peoples Energy NYSE Letter, and Pfizer NYSE Letter.

²⁶⁶ See Computer Sciences NYSE Letter, Pfizer NYSE Letter, and International Paper NYSE Letter.

²⁶⁷ See Business Roundtable NYSE Letter, Lorsch NYSE Letter, and Peoples Energy NYSE Letter.

²⁶⁸ See Business Roundtable NYSE Letter.

²⁶⁹ See Wells Fargo NYSE Letter.

²⁷⁰ See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, and Ethical Funds NYSE Letter.

²⁷¹ See MVC Associates NYSE E-mail.

²⁷² See Investment Company Institute Nasdaq Letter.

²⁷³ See KPMG NYSE Letter and America's Community Bankers Nasdaq Letter.

²⁷⁴ See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, and Ursuline Sisters NYSE Letter.

²⁴⁸ See National Venture Nasdaq Letter and National Venture NYSE Letter.

²⁴⁹ See Independent Community Bankers NYSE Letter, Independent Community Bankers Nasdaq Letter, and America's Community Bankers Nasdaq Letter.

²⁵⁰ See Cleary NYSE Letter.

²⁵¹ See Financial Services Agency NYSE Letter.

²⁵² See TIAA-CREF NYSE Letter, Walden NYSE Letter, Social Investment NYSE Letter, Ethical Funds NYSE Letter, Barclays NYSE Letter, and SIO NYSE Letter.

²⁵³ See TIAA-CREF NYSE Letter.

²⁵⁴ See America's Community Bankers NYSE Letter.

²⁵⁵ See Independent Community Bankers NYSE Letter.

²⁵⁶ See Eisenberg NYSE Letter.

²⁵⁷ See People's Bank Nasdaq Letter.

²⁵⁸ See America's Community Bankers Nasdaq Letter.

²⁵⁹ See Committee on Securities Regulation NYSE Letter.

²⁶⁰ See America's Community Bankers NYSE Letter, Winston & Strawn NYSE Letter, Kerr-McGee NYSE Letter, Agilent NYSE Letter, and Committee on Securities Regulation NYSE Letter.

²⁶¹ See Winston & Strawn NYSE Letter.

²⁶² See Kerr-McGee NYSE Letter, Agilent NYSE Letter, and JP Financial NYSE Letter.

²⁶³ See Agilent NYSE Letter.

²⁶⁴ See America's Community Bankers Nasdaq Letter.