

legally belongs to a third party.²⁷⁵ However, one commenter argued that the NYSE should permit director nomination responsibilities to be allocated to other committees or other groups of directors so long as all members are independent.²⁷⁶

With respect to the role of board committees generally, one commenter recommended that the proposed listing standards explicitly recognize the oversight role and the responsibilities of the board of directors as a whole.²⁷⁷

While one commenter supported the Nasdaq Director Nomination Provision,²⁷⁸ another commenter believed that the full board should be involved in the director nomination process, because otherwise all the independent directors may be friends and may not be independent in thought from one another.²⁷⁹ One commenter recommended clarifying that the proposal's exception for cases where the right to nominate a director legally belongs to a third party includes arrangements other than contractual arrangements.²⁸⁰ Another commenter recommended changing the 20% shareholder exception that had been included in Nasdaq's original proposal by deleting the phrase, "and is not independent as defined in Rule 4200 because that director is also an officer."²⁸¹ In addition, another commenter argued that the proposal should not apply to investment companies whose independent directors are nominated by independent directors.²⁸²

F. Controlled Company Exemption

While one commenter supported both the NYSE and Nasdaq proposals to exempt controlled companies from some of the independent director requirements,²⁸³ two commenters did not support the NYSE proposal.²⁸⁴ One of these commenters argued that it would disenfranchise minority shareholders,²⁸⁵ and the other commenter argued that the exemption should apply only where the measure of "control" is both voting and economic

control, because corporations with two-tier classes of voting stock, where the minority economic interests exercise voting control because of supermajority voting rights, are particularly subject to the potential for abuse.²⁸⁶ With respect to the Nasdaq proposal, one commenter recommended adding language to make clear that controlled companies choosing not to rely on the exemption need not include any special disclosures about their controlled status.²⁸⁷

G. Audit Committee Charter

In general, several commenters supported increasing the authority and responsibility of the audit committee.²⁸⁸ However, one commenter argued that final authority over audit committee issues should rest with all the independent directors.²⁸⁹ With respect to the NYSE Audit Committee Charter Provision, several commenters were concerned with the extent of the audit committee's proposed new responsibilities.²⁹⁰ For example, one of these commenters argued that the audit committee should be permitted to delegate non-financial risk management activities to other committees so long as such committee reports to the audit committee.²⁹¹ Another commenter argued that the audit committee should not be responsible for legal and regulatory compliance, and that investing a single committee with an overload of functions may dilute resources of the committee that should be available to its accounting and financial oversight role.²⁹² A third commenter argued that there were too many items for the audit committee to discuss and that the audit committee needs the flexibility to set its agenda to focus on the company's most significant financial reporting and corporate governance issues.²⁹³ One of the commenters also argued that financial statements are the representations and responsibility of management, not the audit committee.²⁹⁴

Further, one commenter requested clarification of whether advance discussion of quarterly financial statements would be required and, if so,

argued that the audit committee should be permitted to decide whether this requirement should apply to the earnings release or the quarterly financial statements.²⁹⁵ Another commenter recommended excluding investment companies from the proposed requirement that audit committee members discuss earnings press releases as well as financial information and earnings guidance provided to analysts and rating agencies.²⁹⁶

With respect to the Nasdaq Audit Committee Charter Provision, the same commenter supported the proposed requirements regarding complaints, particularly their flexibility; and favored the proposal to grant the audit committee the authority to engage and fund outside advisors.²⁹⁷ However, the commenter also argued that the Nasdaq proposal should be revised to make clear that each Nasdaq-listed company would be required to provide appropriate funding to the audit committee.²⁹⁸ Another commenter argued that the Nasdaq proposal should be revised to require audit committee charters to state that one of the audit committee's purposes must be to assist the board in oversight of the company's compliance with laws and regulations, which would be consistent with the NYSE Audit Committee Charter Provision.²⁹⁹

Several commenters, writing before the NYSE and Nasdaq filed amendments to the proposals, pointed out that the NYSE and Nasdaq Audit Committee Charter Provisions should be revised so that the responsibilities required of the audit committee would comply with the requirements of Rule 10A-3.³⁰⁰

H. Audit Committee Independence

With respect to the NYSE proposal on audit committee independence, two commenters supported the proposal to require an independent audit committee.³⁰¹ However, several commenters were concerned about the interplay between the proposal and the requirements of Rule 10A-3. For example, one commenter argued that the proposal should incorporate the various exceptions and accommodations

²⁷⁵ See National Venture NYSE Letter.

²⁷⁶ See American Society of Corporate Secretaries NYSE Letter.

²⁷⁷ See Securities Committee NYSE Letter.

²⁷⁸ See National Venture Nasdaq Letter.

²⁷⁹ See Kolber Nasdaq Letter.

²⁸⁰ See Cenex Harvest Nasdaq Letter.

²⁸¹ See Kreider Nasdaq Letter.

²⁸² See Investment Company Institute Nasdaq Letter.

²⁸³ See National Venture NYSE Letter and National Venture Nasdaq Letter.

²⁸⁴ See International Corporate Governance NYSE Letter and Cascade NYSE Letter.

²⁸⁵ See International Corporate Governance NYSE Letter.

²⁸⁶ See Cascade NYSE Letter.

²⁸⁷ See People's Bank Nasdaq Letter.

²⁸⁸ See TIAA-CREF NYSE Letter, National Association of State Treasurers NYSE Letter, Railways Pension NYSE Letter, Barclays NYSE Letter, and SIO NYSE Letter.

²⁸⁹ See Computer Sciences NYSE Letter.

²⁹⁰ See American Society of Corporate Secretaries NYSE Letter, KPMG NYSE Letter, and Computer Sciences NYSE Letter.

²⁹¹ See American Society of Corporate Secretaries NYSE Letter.

²⁹² See KPMG NYSE Letter.

²⁹³ See Computer Sciences NYSE Letter.

²⁹⁴ See KPMG NYSE Letter.

²⁹⁵ See Wells Fargo NYSE Letter.

²⁹⁶ See Investment Company Institute NYSE Letter.

²⁹⁷ See Investment Company Institute Nasdaq Letter.

²⁹⁸ *Id.*

²⁹⁹ See TI-USA Nasdaq Letter.

³⁰⁰ See Committee on Securities Regulation NYSE Letter, New York State Bar NYSE Letter, Financial Services Agency NYSE Letter, and Investment Company Institute Nasdaq Letter.

³⁰¹ See Social Investment NYSE Letter and Ethical Funds NYSE Letter.