

codified in Rule 10A-3.³⁰² Another commenter recommended clarifying whether the Commission's Rule 10A-3 definition of impermissible compensation should be applied.³⁰³ A third commenter asked: (1) Which definition of "immediate family member" should be used; (2) whether NYSE intends to apply a five-year look-back; (3) whether NYSE intends to consider payments made in any period prior to board service; and (4) whether NYSE intends to consider whether payments are made to a family member or to a firm providing advisory or professional services to the listed company with which a director is or was associated in the capacities referred to in Rule 10A-3(e)(8).³⁰⁴

Another commenter requested that NYSE determine that banking transactions in the ordinary course of business between banks and their directors and their affiliated companies would not constitute a material relationship that would impair an audit committee member's independence.³⁰⁵

With respect to the Nasdaq proposal on audit committee independence, one commenter disapproved of the application of a three-year look back, and was concerned that this provision would deprive a company of a high-quality audit committee member who has an appreciation for the operational aspect of the business.³⁰⁶ The commenter argued that no look-back was necessary because directors have a legal duty to act independently of previous allegiances. Although the commenter opposed any look-back, it commented that shortening the look-back to one year would significantly mitigate the adverse effect.

Two commenters approved of the provisions in Nasdaq's original proposal to include a bright line test that would bar directors who own or control 20% or more of a company's stock.³⁰⁷ One commenter requested further clarification of this provision.³⁰⁸ Another commenter argued that directors who own more than 20% of a company's stock are the directors who are most independent of management because they have a stake in the firm apart from the compensation they

receive as directors, and often there is no indicia whatsoever of control.³⁰⁹ The same commenter argued that the proposed standard could be highly disruptive, expensive and counterproductive.³¹⁰

Other commenters requested clarification of who Nasdaq would consider to be an affiliate.³¹¹ For example, one of these commenters requested more guidance as to what factors ought to be considered in determining whether an individual is an affiliate.³¹² Another commenter asked whether a director could serve on both the board of a holding company and the board of a subsidiary of the holding company.³¹³ Two other commenters expressed concern about the effect of banking relationships.³¹⁴

Although one commenter supported Nasdaq's proposal to allow certain leniencies in exceptional and limited circumstances, it argued that a company should not be required to disclose its use of these exceptions in a proxy because that would discourage use of the exceptions. The commenter stated that, instead, a company should be required to disclose its use of these exceptions in a report to Nasdaq.³¹⁵ Another commenter stated that it would be helpful for Nasdaq to clarify the relationship between the Nasdaq proposal and the requirements of Rule 10A-3, such as whether the same definition of family member and application of a look-back applies to both.³¹⁶

One commenter requested clarification of the relationship between current Nasdaq rules addressing audit committees and the Nasdaq Audit Committee Provision.³¹⁷

I. Financial Background of Audit Committee Members

With respect to the NYSE and Nasdaq proposals on the requisite background of audit committee members, two commenters recommended harmonizing the two proposals.³¹⁸ One of these

commenters recommended modifying the NYSE proposal to require audit committee members to be financially literate at the time they join the audit committee.³¹⁹ The other commenter recommended modifying the Nasdaq proposal to provide that an individual who satisfies the Commission's definition of an audit committee financial expert would be qualified to be an audit committee member.³²⁰

With respect to the NYSE and Nasdaq proposals to require at least one member of the audit committee to have accounting or related financial management expertise, one commenter requested confirmation that past and current employment as a venture capitalist would allow a director to meet this requirement on a per se basis.³²¹ The commenter also recommended that the NYSE make clear that "accounting or related financial management experience" does not require any particular background, certification or education.³²²

J. NYSE Audit Committee Member Simultaneous Service Provision

With respect to the NYSE proposal limiting the permissibility of simultaneous service on more than three audit committees, one commenter recommended moving this proposal to a different section of the NYSE proposal because it does not relate to independence.³²³ Another commenter questioned whether the proposed requirement would be mandatory because it appears in the commentary, and argued that because it is difficult to generalize about which directors are likely to have adequate time to carry out the duties of the committee, it should apply only to directors who are currently functioning in active senior executive roles of listed companies.³²⁴ A third commenter strongly recommended that in application of the proposed requirement to investment companies, a "fund complex" should be treated as one company because: (1) It is common practice in the investment company industry for the same directors to serve on the audit committee of one or more funds in a complex; (2) an investment company's financial

and Committee on Securities Regulation Nasdaq Letter.

³¹⁹ See Investment Company Institute NYSE Letter.

³²⁰ See Committee on Securities Regulation Nasdaq Letter.

³²¹ See National Venture NYSE and Nasdaq Letters.

³²² See National Venture NYSE Letter.

³²³ See American Society of Corporate Secretaries NYSE Letter.

³²⁴ See GM NYSE Letter.

³⁰⁹ See Wachtel Nasdaq Letter.

³¹⁰ *Id.*

³¹¹ See Paul Weiss Nasdaq Letter, America's Community Bankers Nasdaq Letter, American Bankers Association Nasdaq Letter, and Investment Company Institute Nasdaq Letter.

³¹² See Paul Weiss Nasdaq Letter.

³¹³ See America's Community Bankers Nasdaq Letter.

³¹⁴ See American Bankers Association Nasdaq Letter and Independent Community Bankers Nasdaq Letter.

³¹⁵ See Paul Weiss Nasdaq Letter.

³¹⁶ See Committee on Securities Regulation Nasdaq Letter.

³¹⁷ See America's Community Bankers NYSE Letter.

³¹⁸ See Investment Company Institute NYSE Letter, Investment Company Institute Nasdaq Letter,

³⁰² See Cleary NYSE Letter.

³⁰³ See America's Community Bankers NYSE Letter.

³⁰⁴ See Committee on Federal Regulation of Securities Letter.

³⁰⁵ See Independent Community Bankers NYSE Letter.

³⁰⁶ See National Venture Nasdaq Letter.

³⁰⁷ See National Venture Nasdaq Letter and Paul Weiss Nasdaq Letter.

³⁰⁸ See America's Community Bankers Nasdaq Letter.