

requiring CEO certification is too high of a standard given the myriad of rules and standards facing listed companies, and recommended requiring a representation from the CEO, rather than a certification.³⁵² The other commenter argued that the NYSE proposal should be modified to require notification of material noncompliance with the new standards by the company, and not the CEO in his or her individual capacity, for the following reasons: (1) Certification could still be made if the CEO was unavailable or unwilling to make the certification; (2) the proposal adds an element of personal liability to the CEO that the commenter believes is unduly burdensome and is not contemplated by Rule 10A-3, which only applies to non-compliance with audit-related matters; and (3) the requirement is more onerous and time-consuming than the annual certification requirement.³⁵³ The commenter also recommended that the NYSE make clear that the event that triggers the reporting requirement would not create a private cause of action against the company or the CEO.

One commenter recommended that the proposal be modified to provide that the CEO certify that he or she is not aware of any "material and ongoing" violations, and that the NYSE should clarify what is not material or ongoing.³⁵⁴

Another commenter asked whether a company would be required to include a full text of these certifications, or a statement that the certifications have been made in its annual report.³⁵⁵

P. NYSE Public Reprimand Provision

Two commenters supported the NYSE proposal to permit the Exchange to issue public reprimand letters to non-compliant companies.³⁵⁶ One commenter recommended that the NYSE specify that any new NYSE corporate governance rules should not create a private right of action for non-compliance.³⁵⁷ Another commenter recommended that the NYSE research and revise this proposal separately from the remainder of the corporate governance reforms.³⁵⁸ The commenter also stated that a provision for due process prior to issuance of a reprimand letter would be necessary for fact

checking and an opportunity to remedy the company's non-compliance.³⁵⁹

Q. Other Exemptions

One commenter strongly concurred with NYSE's exemption for closed-end funds.³⁶⁰ Another commenter approved of the NYSE exemption for companies in bankruptcy and urged Nasdaq to adopt a similar exemption.³⁶¹

R. Application of Rules to Foreign Private Issuers

Several commenters supported the NYSE proposal regarding private foreign issuers.³⁶² A few commenters recommended that the NYSE modify the proposal to clarify that foreign issuers would be permitted to take advantage of the accommodations for foreign issuers set forth in Rule 10A-3.³⁶³

With respect to the Nasdaq proposal regarding foreign private issuers, one commenter argued that, consistent with the NYSE proposal, the Nasdaq proposal should be amended to: (1) Automatically exempt foreign private issuers from the proposed corporate governance requirements (except for Rule 10A-3 requirements); (2) synchronize its effective date with Rule 10A-3 requirements; and (3) require disclosure of exemptions and alternative measures in a company's first annual report covering the fiscal year ending on or after July 31, 2005.³⁶⁴

S. Implementation Schedule

With respect to the NYSE's proposed implementation schedule, one commenter criticized what it viewed as a long delay in implementation of the new requirements.³⁶⁵ Another commenter recommended coordinating the effective dates and transition periods with Rule 10A-3 requirements.³⁶⁶

With respect to Nasdaq's proposed implementation schedule for its Independent Director Proposal, one commenter recommended that Nasdaq adopt transition periods for compliance for newly-listed companies similar to the transition periods outlined in the NYSE proposal.³⁶⁷ Two commenters

recommended that Nasdaq adopt transition periods for compliance for companies with classified boards similar to the transition periods outlined in the NYSE proposal.³⁶⁸ Another commenter recommended granting small business issuers additional time to come into compliance.³⁶⁹

IV. Amendments to NYSE and Nasdaq Proposals

The discussion in Sections II.B. and C. above reflects revisions proposed in the amendments to the NYSE and Nasdaq proposals that were submitted by the NYSE and Nasdaq following publication of the NYSE Notice and the Nasdaq Notice. The discussion below summarizes those revisions.

In Amendment No. 2 to its Corporate Governance Proposal, the NYSE proposed revisions in a number of areas. The proposed revisions in Amendment No. 2 would:

- Conform the compliance dates and transition periods with those mandated for audit committees by Rule 10A-3 under the Exchange Act;
- Provide phase-in periods with respect to certain requirements for companies listing in conjunction with an initial public offering, companies emerging from bankruptcy, and companies that ceased to be Controlled Companies;
- Revise the "look-back" periods so that the independence tests would have a one year look-back during the first year after Commission approval of the new standards, with the full look-back period becoming applicable after the end of that first year, and would shorten the periods from five years to three years;
- Clarify that when applying look-back provisions to family members, listed companies need not consider individuals who are no longer family members due to separation or divorce, or individuals who have died or become incapacitated;
- Indicate that references to "company" would include any parent or subsidiary in a consolidated group with the company;
- Clarify the NYSE Employee Provision to provide that a director who is an employee, or whose immediate family member is an executive officer, of the company would not be considered independent until three years after the end of such employment relationship;
- Provide that employment as an interim Chairman or CEO would not

³⁵⁹ *Id.*

³⁶⁰ See Investment Company Institute NYSE Letter.

³⁶¹ See Committee on Federal Regulation of Securities Letter.

³⁶² See Committee on Securities Regulation NYSE Letter, TIAA-CREF NYSE Letter, and Walden NYSE Letter.

³⁶³ See Cleary NYSE Letter and Financial Services Agency NYSE Letter.

³⁶⁴ See S&C 2002-138 Letter.

³⁶⁵ See Eisenberg NYSE Letter.

³⁶⁶ See Computer Sciences NYSE Letter.

³⁶⁷ See Committee on Securities Regulation Nasdaq Letter.

³⁵² See Computer Sciences NYSE Letter.

³⁵³ See Agilent NYSE Letter.

³⁵⁴ See Committee on Securities Regulation NYSE Letter.

³⁵⁵ See Ogden Newell NYSE Letter.

³⁵⁶ See TIAA-CREF NYSE Letter and Barclays NYSE Letter.

³⁵⁷ See Committee on Securities Regulation NYSE Letter.

³⁵⁸ See Computer Sciences NYSE Letter.

³⁶⁸ See Committee on Securities Regulation Nasdaq Letter and Whitney Nasdaq Letter.

³⁶⁹ See National Venture Nasdaq Letter.