

exchange and national securities association to have rules that comply with its requirements approved by the Commission no later than December 1, 2003. Other proposed changes relate to board of director composition and independence standards, audit committee composition and authority, compensation and nominating committees, and ethics and disclosure obligations, as discussed in detail in the Notice. The Amex's rule amendments will allow some leeway for small business filers. Under the proposed rule change, small business filers will be subject to the new corporate governance requirements, except that they will only be required to have a board of directors comprised of at least 50% independent directors and an audit committee of at least two independent directors.⁹ Such issuers will, of course, be required to comply with Rule 10A-3.¹⁰

In Amendment No. 2, Amex revised various aspects of its proposal, in a manner that conforms many of its provisions with corporate governance rules of other self-regulatory organizations ("SROs"), which were recently approved by the Commission.¹¹ The specific proposed revisions included in Amendment No. 2 would:

- Substantially conform the compliance dates and transition periods to those mandated for audit committees by Rule 10A-3 under the Act and adopted by other marketplaces;¹²
- Provide phase-in periods with respect to certain requirements for

companies that list in conjunction with an initial public offering, are emerging from bankruptcy, cease to be controlled companies, have staggered boards, or are transferring from other markets;

- Expand certain of the relationships that would preclude a finding of independence to apply not only to directors, but also to family members of directors;
- Exclude non-discretionary charitable match programs and loans permitted under Section 13(k) of the Securities Exchange Act from the definition of payments that would preclude a finding of independence;
- Exclude prior employment as an interim Chairman or Chief Executive Officer ("CEO"), as well as compensation received for such former service, from the relationships and payments that would preclude a finding of independence;
- Specify that business payments from or to an organization that a director (or an immediate family member) is a partner in, controlling shareholder of, or executive officer of, that would preclude a finding of independence (whether to or from the listed company) are tested against the consolidated gross revenues of the director's organization;
- Expand the scope of the relationships with the company's outside auditor that preclude a finding of independence;
- Apply a three year "look-back" to all relationships that would preclude a finding of director independence, but revise such "look-back" periods so that the independence tests applicable to independent directors who are not members of the audit committee, and certain "look-back" periods for independent directors who are members of the audit committee, would be only one year for the first year following Commission approval of the enhanced corporate governance requirements;
- Clarify that a director who qualifies as an audit committee financial expert pursuant to Commission rules is presumed to qualify as a financially sophisticated audit committee member under Amex rules, and conform the Amex rules to those adopted by other markets;
- Clarify the application of the corporate governance requirements to investment companies;
- Provide a different measure of independence for investment companies that is consistent with the Investment Company Act of 1940;¹³
- Clarify that audit committees of listed companies must adopt a formal audit committee charter that addresses

the audit committee's responsibilities, including those required by Rule 10A-3;

- Require that audit committees of investment companies must establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company;
- Codify that audit committees of listed companies must meet on at least a quarterly basis;
- Clarify that independent nominating and compensation committees may either take action or recommend that the board take action;
- Clarify that the new requirements relating to nominating decisions would not apply in cases where the right to nominate a director legally belongs to a third party, or the company is already subject to a legally binding obligation that requires a director nomination structure inconsistent with the new rule;
- Require a nominating committee charter or board resolution addressing the nominations process;
- Remove a provision that would have permitted one director holding 20% or more of the company's stock who is not independent as a result of being an officer of the company to serve on the nominations committee;
- Add a requirement that listed companies must notify the Exchange of any material non-compliance with the enhanced corporate governance requirements;
- Specify that the CEO of a listed company may not be present during voting or deliberations on his or her compensation, and state that compensation for all other officers must be determined, or recommended to the Board for determination, either by the compensation committee or a majority of the independent directors on the company's board of directors;
- Specify that a listed company's required code of conduct and ethics must be publicly available, and any waivers of the code for directors and executive officers must be disclosed within five days in a Commission Form 8-K; and
- Provide that the compensation committee or a majority of independent directors is not precluded from approving awards either with or without board ratification, as may be required to comply with applicable tax and state corporate laws.

⁹ Companies that are not small business filers will be required under the proposed rule change to have a board of directors comprised of a majority of independent directors and an audit committee of at least three independent directors.

¹⁰ In addition, the Amex proposal includes provisions that would prohibit a listed company from appointing or permitting an Exchange employee or Floor Member to serve on its board of directors, place certain restrictions on the division of a listed company's board of directors into classes, and include other small variations from the corporate governance provisions of other SROs.

¹¹ See Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (approval of File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141) ("NYSE/NASD Corporate Governance Release").

¹² The deadline for compliance with the audit committee requirements of Rule 10A-3 is the earlier of January 15, 2004, or October 31, 2004, (other than for foreign private issuers and small business issuers). The revisions to Amex rules regarding changes to board and committee composition and structure will become effective by the earlier of the issuer's first annual meeting after March 15, 2004, or October 31, 2004, (other than for foreign private issuers and small business issuers). Foreign private issuers and small business issuers must be in compliance with the Rule 10A-3 audit committee requirements and the new board and committee composition and structure provisions by July 31, 2005.

¹³ 15 U.S.C. 80a-1 *et seq.*