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Commission Says Programming to Add Items 11 and 12 of Form 8-K to EDGAR System Not Yet Complete - Mar. 27, 2003

Interim Guidance Provides Instructions for Handling Such Filings Until Further Notice

Release Nos.: 33-8216, 34-47583, IC-25983, FR-69

File Nos.: S7-43-02 and S7-44-02

Effective Date: March 28, 2003

<http://www.sec.gov/rules/final/33-8216.htm>

<http://www.sec.gov/news/press/2003-41.htm>

On March 27, the SEC issued a statement providing interim guidance regarding filings required under rules adopted by the SEC on January 22, 2003 that would require new Items 11 and 12 of Form 8-K. New Item 11 requires registrants to provide public notice of pension fund blackout periods. New Item 12 requires registrants to provide certain specified disclosures when it publicly reveals any material non-public information regarding its results of operations or financial condition for a completed quarterly or annual fiscal period (such as an earnings release).

In its announcement, the SEC revealed that it has not been able to complete computer programming to add new Items 11 and 12 of Form 8-K to the EDGAR system. Accordingly, the Commission has provided the following interim guidance to remain in effect until it announces that the EDGAR system has been enabled to allow registrants to file or furnish information using the new Items 11 and 12 designations:

[R]egistrants should continue to disclose the information required by Item 11 under Item 5 (Other Information) of Form 10-Q or 10-QSB in the first quarterly report after commencement of the blackout period.

Registrants should furnish the information required by Item 12 under Item 9 (Regulation FD Disclosure) of Form 8-K. A registrant must furnish the information within five business days after the occurrence of an event specified in Item 12. Information provided under the requirements of Regulation FD; in this case, any earlier deadline for Item 9 under Regulation FD would apply.

To Read More About the SEC's Interim Guidance See:

U.S. Securities and Exchange Commission, Final Rule: [Filing Guidance Related To: Conditions for Use of Non-GAAP Financial Measures; and Insider Trades During Pension Fund Blackout Periods](#), Release Nos. 33-8216, 34-47583, IC-25983, FR-69 (Mar. 27, 2003).

U.S. Securities and Exchange Commission, [SEC Provides Guidance for Filers Reporting](#)

[Pension Fund Blackout Periods, Non-GAAP Financial Data](#), News Release No. 2003-41 (Mar. 27, 2003).

SEC II: SEC Issues Concept Release and Seeks Comment on NYSE Request for Comment on the NYSE Petition Relating to Participant Fee Exemptions

NYSE Petition Would Require Participants in the Consolidated Tape Association and the CQ Plan to Pay for CTA and CQS Data Whether Such Data is Received or Used for Regulation or For Other Purposes - Mar. 27, 2003

Release No.: 34-47571

File No.: S7-07-03

Comments Due: 30 Days After Date of Publication in the Federal Register

On March 27, the SEC released the text of a Concept Release dated the previous day seeking comments on whether it should act on, and the effects of, a NYSE Petition that proposes the elimination of Participant Fee Exemptions so as to require participants in the Consolidated Tape Association and the CQ Plan to pay for CTA and CQS data whether such data is received or used for regulation or for other purposes. The NYSE's petition was filed with the Commission on February 16, 2001 and this is at least the fourth time the SEC has been asked to take action with regard to these issues.

To Read More About the SEC's Concept Release (Including a Summary of the NYSE's Petition) See:

U.S. Securities and Exchange Commission, [SEC Concept Release: Request for Comment on the NYSE Petition Relating to Participant Fee Exemptions](#), Release No. 34-47571 (Mar. 26, 2003).

SEC III: SEC Issues Notice to EDGAR Filers of New Web Site for Creating and Filing Ownership Reports

Commission Staff Announces New Web Site for Online Creation and Submission of Forms 3, 3/A, 4, 4/A, 5 and 5/A - Mar. 20, 2003

Web Site Open for Test Period During Which Filers with CIK and Password May Access and Test the Functionality Between 8:00 A.M. to 10:00 P.M. Eastern Time Monday through Thursday (Except for Federal Holidays)

<http://www.sec.gov/info/edgar/ednews/ownerfilesite.htm>

On December 20, 2002, the SEC released the text of [proposed rule and form amendments](#) to require electronic filing and Web site posting by issuers with corporate Web sites of

beneficial ownership reports filed by officers, directors and principal security holders under Section 16(a) of the Securities Exchange Act of 1934, generally as required by Section 403 of the Sarbanes-Oxley Act of 2002. In its proposing release, the SEC noted that "We intend to adopt the amendments to implement the statutory changes as soon as reasonably practicable before the July 30, 2003 date mandated by" Sarbanes-Oxley.

On March 20, 2003, the Commission issued a notice announcing the establishment of a new Web site located at <https://www.onlineforms.edgarfiling.sec.gov> "exclusively for the on-line creation and submission of Securities Exchange Act of 1934 Section 16(a) ownership reports (Forms 3, 4, and 5)."

Since its announcement, the SEC has opened the new Web site for a test period expected to last approximately 30 days. EDGAR filers must enter their CIK and Password to use the site. The site is available during the test period only from 8:00 a.m. to 10:00 p.m. Eastern time Monday through Thursday (except for federal holidays).. The site only supports the assembly and transmission of ownership filings (specifically form types 3, 3/A, 4, 4/A, 5 and 5/A). Filers wishing to file a non-ownership submission to the SEC must continue to login to the EDGAR Filing Web site.

According to the SEC's announcement, after "April 25, 2003, the test system will go 'live' and filers will no longer be able to make Form 3, 4, or 5 filings using the existing EDGAR template system" Practical Pointer: From April 25 until that date to be set by the SEC for the mandated electronic filing rules to become effective, filers may file Forms 3, 4 and 5 electronically using either the new Web site or private company software products, or may file such forms in paper format.

Instructions for using the new Web site to submit filings are included in Volume III of the EDGAR Filer Manual, Version 8.5. A draft version of that manual is available on the SEC Web site at <http://www.sec.gov/info/edgar/filermanual85.htm>.

SEC IV: SEC Chairman Speaks on Corporate Governance and Outlines "Priority Issues" Boards of Directors Should Consider in a Review of Their Organizations

Chairman Donaldson Speaks at the 2003 Washington Economic Policy Conference Sponsored by the National Association for Business Economics - Mar. 24, 2003

Text of speech available at <http://www.sec.gov/news/speech/spch032403whd.htm>

On March 24, SEC Chairman William H. Donaldson spoke at the 2003 Washington Economic Policy Conference in Washington, D.C. sponsored by the National Association for Business Economics. The subject of his remarks, in one of his first public appearances since his swearing in, was corporate governance. Significantly, Chairman Donaldson outlined what he described as "a few priority issues that a board might consider as early steps in a review of its organization." Noting that there is no "one answer to these hotly

debated questions," he listed the following matters as among those to be considered in such a review:

- Consideration of whether the Chairman of the Board should be non-executive
- Consideration of whether the CEO should be prohibited from also serving as Chairman of the Board

- Consideration of whether there should be a lead director

- Examination of director dependence on management and compensation consultants when making decisions about compensation for senior management

- An honest assessment by each director and the Board of Directors as a whole regarding how many boards and committees each director and director candidate can serve "while maintaining the dedication and responsibility that is demanded of them these days"

- Development of director training programs

SEC V: SEC Issues Proposed Rule and Interim Guidance Proposing to Require Issuers To Provide Certifications Required by Sarbanes-Oxley Sections 302 and 906 as Exhibits to the Periodic Reports to Which They Relate

SEC Releases Text of Proposed Rule Which Includes Guidance on How Certifications May "Accompany" a Periodic Report to Which they Relate - Mar. 21, 2003

Release Nos.: 33-8212, 34-47551, IC-25967

File No.: S7-06-03

Comments Due: 45 Days After Date of Publication in the Federal Register
(Published March 25)

<http://www.sec.gov/rules/proposed/33-8212.htm>

http://www.nasdaq.com/about/SR-NASD-2002-141_Fed_Reg.pdf

On March 21, the SEC released the text of a proposed rule, and interim guidance, regarding certification of disclosure in certain Exchange Act reports. In general, the release proposed amendments to rules and forms under the Exchange Act and the '40 Act to require issuers to provide certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act of 2002 "as exhibits to the periodic certifications to which they relate." Additionally, the release provides guidance regarding how Section 906 certifications may "accompany" a periodic report to which they relate, pending the Commission's adoption of final versions of the proposed rule.

The background behind the proposal is interesting. To implement the Section 302 mandate that required certifications be "in" each quarterly or annual report filed or submitted under Section 13(a) or 15(d) of the Exchange Act, the Commission amended Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F and 40-F under the Exchange Act to require that the certifications would appear immediately beneath the signature block at the end of

the reports. According to the Commission, "Because the certifications are part of the text of the report to which they relate, however, investors are not able to easily access the certifications through [EDGAR]. In addition, the Commission staff must review the actual text of a quarterly or annual report to confirm that the certifications have been filed." Consequently, the proposal provides that issuers will have to file these certifications as an exhibit to the periodic reports to which they relate. Similarly, to implement the Section 906 mandate that required that filed financial statements be "accompanied by" a written statement by the CEO and CFO certifying the financials as required in that section, the proposal provides that issuers will be required to furnish such statements as an exhibit to the periodic reports to which they relate.

There is, of course, a potentially significant difference between information deemed to be "in" a Section 13(a) or Section 15(d) filing under the Exchange Act and information that "accompanies" filed financial statements. Because Section 906 merely requires that certifications must "accompany" a periodic report to which they relate, the SEC has proposed to require issuers to "furnish" rather than "file" the Section 906 certifications with the Commission. Practical Pointer: This is not a "distinction without a difference". Section 906 certifications that "accompany" a periodic report, but are not "filed" would not be subject to liability under Section 18 of the Exchange Act and would not be subject to automatic incorporation by reference into an issuer's Securities Act registration statements that otherwise are subject to liability under Section 11 of the Securities Act (unless the issuer takes steps to include the certifications in a registration statement). This would suggest that filers may wish to begin following the Section 906 guidance as soon as possible.

SROs I: NASD Rulemaking: SEC Issues Notice of Filing of Proposed Rule Change and Amendment No. 1 by NASD Relating to NASD Rules 4200 and 4350 Regarding Board Independence and Independent Committee

SEC Issues Notice of Filing of Proposed Rule Change and Solicits Public Comment Regarding Changes to its Proposed Corporate Governance Listing Standard - Mar. 17, 2003

Release No.: 34-47516

File No.: SR-NASD-2002-141

Comments Due: 21 Days from Date of Publication in the Federal Register

<http://www.sec.gov/rules/sro/34-47516.htm>

On March 11, 2003, The Nasdaq Stock Market, Inc. submitted Amendment No. 1 to its proposed rule change regarding NASD Rules 4200 and 4350 dealing with Board independence and independent committees. On March 17, the SEC issued notice of the filing. (Nasdaq filed the original proposed rule change with the Commission on October 9, 2002.)

The amendment now proposes to require that "at least one audit committee member must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities." This is a departure from the heavily criticized original proposal that would have required audit committees to have at least one "financial expert" member.

The amendment further provides that in the event a board member has a family member who receives payments in excess of \$60,000 from the company, its parent or any subsidiary, the board member will not be deemed to lack independence so long as the payments: (1) arise solely from investments in the company's securities (e.g., dividends); or (2) are compensation for employment by the company in some capacity other than as an executive officer of the company, its parent or any of its subsidiaries; or (3) are benefits under a tax-qualified retirement plan, or non-discretionary compensation.

Finally, the amendment makes clear that any required code of conduct implemented by a company must include all requirements mandated by Section 406 of the Sarbanes-Oxley Act of 2002 as well as the SEC's rule promulgated to implement that section.

SROs II: NYSE Files with the SEC Amendments to its Proposed Director Independence Listing Standards

NYSE File No.: SR-NYSE-2003-6

Under cover letter dated March 12, the New York Stock Exchange filed with the SEC amendments to its proposed director independence listing standards that were previously filed with the Commission in File No. SR-NYSE-2002-33 on August 16, 2002. The amendments do not change the substance of the NYSE's proposal to require that boards of directors of listed companies maintain a majority of independent directors on the board. But, generally speaking, the amendments include two important changes.

First, the NYSE proposal revises its earlier strict standard providing, generally, that employees / former employees of a company lack the necessary independence with a softer "rebuttable presumption" standard providing that if a director receives more than \$100,000 per year in direct compensation from the company (excluding director fees and deferred compensation for prior service to the company) he or she will be presumed to lack independence. According to the NYSE commentary on the amended proposal:

A listed company's board may negate this presumption with respect to a director if the board determines (and no independent director dissents) that, based upon the relevant facts and circumstances, such compensatory relationship is not material. Any affirmative determination of independence made by the board in these circumstances must be specifically explained in the listed company's proxy statement and cannot

be covered by a categorical standard adopted in accordance with [the NYSE's guidance]. . . .

Second, the NYSE now has proposed a clearer standard for determining whether a director affiliated with (or who has a family member affiliated with) another company that has a business relationship with the NYSE-listed company lacks independence. The amended proposal says:

A director who is an executive officer or an employee, or whose immediate family member is an executive officer, of another company (A) that accounts for at least 2% or \$1 million, whichever is greater, of the listed company's consolidated gross revenues, or (B) for which the listed company accounts for at least 2% or \$1 million, whichever is greater, of such other company's consolidated gross revenues, in each case is not "independent" until five years after falling below such threshold.

PCAOB I: Public Company Accounting Oversight Board Proposes Rules To Establish Accounting Support Fee Required Under Section 109 of Sarbanes Oxley to Fund Its Activities

PCAOB Solicits Public Comments, But No Later than April 4 - Mar. 17, 2003

PCAOB Release No.: 2003-002

Docket No.: 002

Comments Due: April 4, 2003

On March 14, the Public Company Accounting Oversight Board issued PCAOB Release No. 2003-002 proposing rules to establish the accounting support fee that issuers will be required to pay as mandated by Section 109 of the Sarbanes-Oxley Act of 2002. Here's the bottom line:

Who will pay? Two classes of issuers: (1) publicly-traded companies with average, monthly U.S. equity market capitalizations during the previous year, based on all classes of common stock, of greater than \$25 million; and (2) investment companies with average, monthly U.S. equity market capitalizations (or net asset values) of greater than \$250 million. All other issuers including those not required to file audited financials with the SEC, employee stock purchase, savings and similar plans and bankrupt issuers that file modified reports, would be allocated shares of zero.

How much will an issuer have to pay? In its release, the Board states that if it assumes the market capitalizations of U.S. issuers listed in the Wilshire 5000 Index as of December 31, 2002, assumes a total of 7,000 Equity Issuers and Investment Company Issuers, then Equity Issuers would cover approximately 95% of the accounting support fee and Investment Company Issuers would cover approximately 5% of the accounting support fee. Using these assumptions, the Board's "preliminary modeling" indicates that for every \$10 million of accounting support fee, the largest issuer would be allocated

\$260,000, the 1,500th largest issuer would be allocated \$500, and the 3,000th largest issuer would be allocated \$100.

What happens if an issuer doesn't pay? Failure to pay after two notices issued by the PCAOB and the passage of 90 days from the issuance of the first of the notices will result in the PCAOB reporting the non-payment to the Commission. An issuer's failure to pay is a violation of Section 13(b)(2) of the Exchange Act and could, like any Exchange Act violation, result in administrative, civil or criminal sanctions.

Comments on the proposal are due April 4 and may be submitted electronically by e-mail to: comments@pcaobus.org with the subject line "Docket No. 002".

Read More About the PCAOB Release No. 2003-002:

Board Funding: Proposal for Establishment of Accounting Support Fee, PCAOB Release No. 2003-002 (Mar. 14, 2003).

PCAOB, Briefing Paper - Board Funding: Proposed Accounting Support Fee (March 13, 2003 Public Meeting of the Board).

PCAOB II: Public Company Accounting Oversight Board Proposes Registration Rules and Proposed Form for Public Accounting Firms to Register with the Board

PCAOB Holds Roundtable on March 31 - Mar. 7, 2003

PCAOB Release No.: 2003-001

Docket No.: 001

Comments Due: March 31, 2003

On March 7, the Public Company Accounting Oversight Board issued PCAOB Release No. 2003-001 proposing a registration system for public accounting firms. Section 102 of Sarbanes-Oxley prohibits "persons" that are not registered with the Board from preparing or issuing audit reports on "issuers" (as defined in the Act) and from participating in such audits. Firms must register with the PCAOB if they intend to engage in these activities after the 180-day period following the SEC's determination that the Board has the capacity to carry out the requirements of Sarbanes-Oxley. That determination must be made no later than April 26, 2003.

The PCAOB release includes nine proposed rules and a proposed form. Below is a broad overview of the principal provisions of the PCAOB proposal:

Firms that prepare or issue audit reports on U.S. public companies must register with the Board. Additionally, public accounting firms that play "a substantial role in the preparation and furnishing of an audit report" (as defined in the rules) must register.

Applicants will be required to pay a fee to cover costs of processing and reviewing applications, although the Board has not yet set the fees.

Individual accountants, in contrast to "sole proprietorships" are not required to

register, but each firm must disclose the names of all individual accountants associated with the firm in its registration application.

The registration form will be Web-enabled and will only be available electronically for submission via the Internet.

The information required for submission via the registration form, generally, will be the data required by Section 102(b) of Sarbanes-Oxley.

Applications filed with the Board will be available for public review with the exception of social security numbers and other similar identifying numbers.

Applicants may request confidential treatment of any other portion of an application that contains "non-public personal or proprietary information" with such requests to be decided by the Board on a case-by-case basis.

The Board will have 45 days from receipt of a completed application to approve, disapprove or request more information regarding each application it receives.

The registration system is expected to be ready to receive applications beginning in late June or early July 2003.

The proposal does not exempt non-U.S. public accounting firms from registration. Indeed, it applies to non-U.S. firms that play a "substantial role in the preparation or furnishing of audit reports" (as defined in the rules) even if they do not actually "issue" the report.

Read More About the PCAOB Release No. 2003-001:

[Proposal of Registration System for Public Accounting Firms: Announcement on the Regulation of Registered Foreign Public Accounting Firms](#), PCAOB Release No. 2003-1 (Mar. 7, 2003).

[PCAOB, Briefing Paper - Proposed Auditor Registration System](#) (March 4, 2003 Public Meeting of the Board).

PCAOB III: SEC Releases Public Company Accounting Oversight Board Proposed Bylaws

PCAOB Filing of Form 19b-4 Proposed Rules Sets Forth Proposed Bylaws - Mar. 4, 2003

On March 4, the SEC made available the text of the Public Company Accounting Oversight Board's proposed bylaws. The bylaws address issues including the PCAOB's Governing Board, board meetings, officers, liability and indemnification of board employees, amendments to the bylaws and rules of the PCAOB and other topics.

See U.S. Securities and Exchange Commission, [Public Company Accounting Oversight Board Proposed Bylaws: Form 19b-4 Proposed Rules By Public Company Accounting Oversight Board File No. PCAOB-2003-01](#) (Mar. 4, 2003).

'40 Act Reports by Richard D. Marshall of Kirkpatrick & Lockhart LLP

SEC Adopts New Rule on Proxy Voting by Investment Advisers and Investment Companies by Richard D. Marshall and Lori L. Schneider, Kirkpatrick & Lockhart LLP

The Securities and Exchange Commission ("SEC") recently adopted rules requiring investment advisers and investment companies to adopt and disclose proxy voting policies and procedures, including procedures to address material conflicts of interest, and to disclose their actual votes.

I. Action Items - Investment Advisers

The rules require an investment adviser registered with the SEC who exercises voting authority for client securities to take the following actions:

- Adopt and implement written policies and procedures to ensure proxy votes are cast in the best interests of clients, including how the adviser addresses material conflicts between its interests and those of its clients.

- Give clients a summary of the adviser's proxy voting policies and procedures.

- Make available to clients a full copy of the proxy voting policies and procedures upon request.

- Disclose to clients how they can obtain information about how the adviser has voted their proxies.

- Maintain certain written materials relating to their proxy voting.

Investment advisers must have their proxy voting policies and procedures in place, and must have provided clients with a description of their policies and procedures and how clients can obtain information from the adviser on how it voted their securities, by August 6, 2003. The rules do not apply to investment advisers that are registered with the states. They should look to state law to determine if any similar provisions exist.

II. Action Items - Investment Companies

The rules require a registered investment company that invests in voting securities to take the following actions:

- Disclose in its statement of additional information ("SAI"), and in the case of a closed-end fund, in its annual and semi-annual reports on Form N-CSR, the policies and procedures used to determine how to vote proxies relating to portfolio securities, including procedures used to address conflicts of interest. This disclosure must include any policies and procedures of the investment adviser or any other third party that are used on the fund's behalf to vote its proxies. All funds must include disclosure of their proxy voting policies and procedures in filings made on or after July 1, 2003.

- Alternatively, funds may include a copy of the policies and procedures themselves.

- State in shareholder reports and in SAIs filed on or after July 1, 2003 that a

description of its proxy voting policies and procedures is available without charge by calling a toll-free number, on the fund's website (if applicable) and on the SEC's website, and send the description within three business days of receipt of a request.

By August 31 of each year, file its complete proxy voting record for the twelve-month period ended June 30 on new Form N-PX. The disclosure would include, among other things, the name of the portfolio security, the matter voted on, how the fund cast its vote, and whether the fund voted with or against management. Funds will be required to make their first proxy voting disclosures not later than August 31, 2004, for the 12 months ending June 30, 2004.

Make the proxy voting record available to shareholders, and state in its SAI and shareholder reports filed on or after August 31, 2004 that its proxy voting record is available without charge by calling a toll-free number or on the fund's website (or both), and on the SEC's website.

While investment advisers are required to adopt proxy voting policies and procedures that ensure that client securities are voted in the clients' best interests, the investment company disclosure requirements effectively require fund policies and procedures to address "how" the fund determines to vote its proxies. Thus, the disclosure relating to an investment company's policies and procedures should include its general policies and procedures, as well as policies on voting on specific types of issues. The SEC's adopting release includes the following examples of general policies and procedures:

- The extent to which the fund delegates its proxy voting decisions or relies on recommendations from third parties;

- Policies and procedures relating to matters that may affect substantially the rights or privileges of the holders of securities to be voted; and

- Policies regarding the extent to which the fund will support management's views.

Examples of specific types of issues include corporate governance matters, changes to capital structure, stock option plans and other management compensation issues, and social and corporate responsibility matters.

III. Conflicts Considerations

One of the more difficult requirements of the new proxy voting rules is the requirement that policies and procedures contain provisions regarding the resolution of conflicts of interest. Investment company proxy voting procedures are required to contain provisions on how conflicts of interest will be resolved between fund shareholders, on the one hand, and those of the fund's adviser, principal underwriter, or an affiliated person of the fund, its adviser or principal underwriter, on the other. Similarly, investment adviser proxy voting procedures must address how the adviser resolves conflicts of interests with its clients. In order to comply with this requirement, investment companies and investment advisers must determine what constitutes a conflict of interest, establish internal mechanisms to identify a conflict and, once a conflict is identified, determine how it will be resolved in the investors' interest.

A. Investment Advisers

The SEC adopting release listed the following examples of conflicts of interest that may affect how an adviser votes its proxies: (1) the adviser (or its affiliate) manages a pension plan, administers employee benefit plans, or provides brokerage, underwriting, insurance, or banking services to a company whose management is soliciting proxies; (2) the adviser has a business or personal relationship with participants in proxy contests, corporate directors or candidates for directorships; or (3) an executive of the adviser has a spouse or other close relative who serves as a director or executive of a company. Operational procedures will need to be in place to identify such conflicts. For advisers with few affiliates, it may be possible to survey the affiliates prior to voting a proxy to ascertain any conflicts. For advisers that are part of large financial services holding companies, alternatives may include hiring an independent proxy voting service, or creating a "chinese wall" for certain personnel at the adviser that would prevent them from becoming aware of any conflicts with issuers whose securities are held by the adviser's clients.

Advisers may choose to resolve conflicts of interest in a number of ways. They may disclose the conflict to clients and obtain their consents before voting -although fully informed consent might require greater disclosure of the adviser's business plans than the adviser thinks desirable. They may also implement a pre-determined voting policy which allows for little discretion on the part of the adviser. Another alternative is for the adviser to vote client securities in accordance with a pre-determined policy based upon the recommendations of an independent third party, or to suggest that the client engage another party to determine how the proxies should be voted.

The proxy voting rule for investment advisers is part of the Investment Advisers Act of 1940 anti-fraud rules, which implies the SEC could charge an adviser with fraud if it voted proxies without adopting the required policies, or failed to fully implement the policies it had adopted.

B. Investment Company Conflicts

Like investment advisers, how an investment company determines what constitutes a conflict situation will depend largely upon the nature and extent of the business of the fund's adviser and its affiliates. In addition, investment companies must identify conflicts with the fund's principal underwriter and its affiliates and any other affiliated persons of the fund. The conflicts of interest identified in the SEC's adopting release for investment advisers, listed above, are also instructive for investment companies.

It also may be possible for investment companies to limit the scope of possible conflicts by including a materiality standard in the proxy voting procedures. This could be accomplished, for example, by establishing in the procedures that no conflict exists when the fund's holdings are below a specified percentage of the issuer's outstanding shares, or when the value of the current or potential business interest between the issuer and a fund

affiliate is less than a certain dollar amount.

If and when a conflict is identified, there are a few possible ways to resolve the conflict. One way may be to hire an independent voting service that would vote the proxy in accordance with specified guidelines. Another alternative is to have the board or a committee of the board review the conflict and give its consent to the manner of voting under the procedures. This approach may not be workable if it means that the board or board committee is asked to review conflicts on a very frequent basis. Yet another approach may be for the fund to develop its own elaborate decision tree of voting outcomes as part of its procedures and follow the tree's pre-determined outcome; however, this approach may not give a fund enough flexibility to review and decide each matter individually.

For investment companies, the new requirements are an example of "regulation by disclosure." Since funds have to disclose their policies in their SAIs, it opens the prospect that a failure to fully implement the policies might result in an allegation that the registration statement is materially false and misleading.

This summary is for informational purposes only. Nothing herein is intended to or should be construed as legal advice or a legal opinion applicable to any particular set of facts or to any individual's or entity's general or special circumstances.

Regulators Focus on Mutual Funds, Hedge Funds

Recent Congressional hearings and an upcoming SEC roundtable reflect heightened attention to both mutual funds and hedge funds.

Several Congressional committees have recently conducted hearings on mutual funds. These hearings have focused on numerous issues and have been critical of the mutual fund industry. A letter to the SEC from Congressman Baker, the chairman of a subcommittee that is conducting one of these hearings, reflects Congressional concern. Congressman Baker has asked the SEC to report to his subcommittee on several topics, including:

- Transparency of fees and costs;
- Portfolio manager information;
- Mutual fund governance;
- Fund distribution issues;
- Performance information;
- Proxy voting; and
- Valuation.

The letter, and the subcommittee's hearings, particularly reflect a concern that certain mutual fund fees and methods of rewarding persons who sell mutual fund shares may be concealed or inadequately disclosed to mutual fund investors. The latest inquiry to the SEC is likely to prompt that agency to gather additional information from the mutual fund industry. It also could lead to new rule-making, enforcement actions, or even legislation addressing Congressional concerns.

The SEC has also announced that it will conduct a roundtable in mid-May to review regulation of hedge funds. This roundtable will conclude a year of fact-finding by the SEC staff on the hedge fund industry. SEC Chairman Donaldson has commented that he is concerned about four issues regarding hedge funds:

- Fraud;
- Conflicts of interest;
- Sales of hedge funds to retail investors; and
- Possible market manipulations by hedge funds.

It is expected that any regulatory changes affecting the hedge fund industry will be proposed by the SEC after the roundtable.

The recent climate in Washington is unusually critical of mutual funds and hedge funds. All of this attention in Washington will undoubtedly result in new hearings and reports, and could result in legislation that radically alters the current regulatory landscape. Stay tuned for further developments.

Number of Securities Class Actions Filed Against Companies in 2002 Soar

Stanford Law School Securities Class Action Clearinghouse Releases Results of Studied Prepared in Cooperation with Cornerstone Research - Mar. 13, 2003

31% More Securities Class Actions Filed in 2002 than in 2001; Study Concludes Companies Named as Defendants in Such Suits Lost More than \$1.9 Trillion in Aggregate Market Capitalization

On March 13, The Stanford Law School Securities Class Action Clearinghouse, in cooperation with Cornerstone Research, announced the results of an annual study on the filing of securities class actions. According to the report: "Federal securities class action[s] . . . increased by 31 percent between 2001 and 2002, rising from 171 to 224 filings. The companies sued in 2002 also lost more than \$1.9 trillion in market capitalization during the class periods, a 24 percent increase over the comparable figure for companies sued in 2001. . . "

Significantly, however, the study includes neither the 312 "IPO Allocation" securities class actions filed in 2001 nor the more recent -- and numerous -- research analyst class actions. Those classes of actions are categorized separately by the Clearinghouse.

Read More About the Study of Securities Class Actions Filed in 2002:

Cornerstone Research, [Securities Class Action Case Filings - 2002: A Year in Review](#) (March 13, 2003).

Stanford Law School in Cooperation with Cornerstone Research, [Press Release: Thirty-One Percent More Securities Class Action Suits Filed in 2002 than in 2001](#) (March 13, 2003).

Regulation FD: SEC Staff Is Said To Be "Actively Probing" a Number of Regulation FD Matters

Commission Has Commenced and Settled Only Four Reg FD Matters So Far - Mar. 13, 2003

On March 13, Dow Jones Newswires reported that Stephen Cutler, head of the SEC's Division of Enforcement, told attendees at a Georgetown University Legal Center conference that "we've got a number of active investigations in the pipeline" involving Regulation FD. He reportedly would not say how many Reg FD cases are being investigated and would not comment on reports that Schering-Plough has received a Wells Notice informing it that the SEC Staff believes it has enough evidence of an alleged violation of Reg FD to recommend civil action against the company.

To date, the Commission has commenced and settled Reg FD charges involving only four companies: Raytheon Co., Motorola, Inc., Secure Computing Corp. and Siebel Systems, Inc.

Read More About the SEC Probe of Reg FD Matters:

[SEC Actively Probing Regulation Fair Disclosure Cases](#), Dow Jones Newswires special to Quicken (Mar. 13, 2003).

Comings and Goings: Who's Doing What and Where

SEC Chairman **William Donaldson** spoke to the National Association for Business Economics on March 24, and to reporters afterward, saying that the SEC is taking "a good, hard look" at hedge funds and that the matter is still in "the fact-gathering stage". [Read a report about Chairman Donaldson's remarks](#). His remarks seem all the more interesting now, given that on March 27 the Commission announced that it will host roundtable discussions on a wide range of issues relating to hedge funds. The roundtable will be held at the Commission headquarters on May 14 and 15 with further information to be provided at <http://www.sec.gov/spotlight/hedgefunds.htm>.

Former SEC Chairman **Arthur Leavitt** is still on the lecture circuit. Earlier this month

Leavitt, the author of the New York Times bestseller "Take on the Street - What Wall Street and Corporate America Don't Want You To Know", spoke before an Indiana University business conference regarding trust in corporate America and predicted that more cases of business scandal have yet to emerge. [Read about Leavitt's appearance.](#)

The SEC is said to be "paring down" its list of those whom it is considering to serve as Chairman of the Public Company Accounting Oversight Board. Contenders reportedly include former U.S. Senator **John Danforth**, CFTC Chairperson **Susan Phillips**, former Honeywell International Chairman **Lawrence Bossidy**, Market Regulator **Mary Schapiro**, the Board's current interim Chairman, **Charles Niemeier**, and two former SEC Chairmen: **David Ruder** and **Richard Breeden**.

Dennis O. Garris, the former head of the Office of Mergers & Acquisitions in the SEC's Division of Corporation Finance, has joined the Washington, D.C. office of Alston & Bird as a partner. [Read about the move.](#)

The Commission has announced that **William L. Tolbert, Jr.**, the Associate Director of the Division of Corporation Finance will leave the SEC to join the private sector. **Bill Tolbert** joined the Division in 1988 and was named associate director of Disclosure Operations in 2000. His replacement has not yet been announced. [Read the SEC's announcement of the planned departure.](#)

Lawrence A. West has been appointed as associate director of the SEC's Division of Enforcement. West succeeds **William R. Baker III**, who left the Commission staff for private practice last November. West joined the Commission's staff in 1994 as a staff attorney in the Division of Enforcement. He became a branch chief in 1997 and an assistant director in 1999. [Read the SEC's announcement of West's appointment.](#)

On March 17, the **Hon. Gladys Kessler** appointed **Gregory S. Bruch**, formerly of the SEC's Division of Enforcement before he left in 2001 to join Foley & Lardner, to monitor and approve business decisions by U.S. Technologies, Inc. while its founder, C. Gregory Earls, faces fraud charges and an SEC investigation. [Read more about the appointment.](#)

The **Commissioners of the U.S. Securities and Exchange Commission** attended the Public Company Accounting Oversight Board roundtable conducted on March 31 at the SEC's headquarters to examine issues relating to registration and oversight of foreign public accounting firms. [Read the SEC's announcement regarding the Commissioners' participation in the event.](#)

What Are They Saying at the SEC? In March the Commission released the prepared remarks for speeches given by two Commissioners and two Staff Members:

Commissioner Paul S. Atkins (Mar. 25, 2003 - Speaking Before the International Financial Law Review): [The Sarbanes-Oxley Act of 2002: Goals, Content and Status of Implementation.](#)

Chairman William H. Donaldson (Mar. 24, 2003 - Speaking Before the

National Association for Business Economics): [Remarks at the 2003 Washington Economic Policy Conference](#).

Lori A. Richards, Director of the Office of Compliance Inspections and Examinations (Mar. 27, 2003 - Speaking Before the Securities Industry Association Conference on Anti-Money Laundering Compliance for Broker-Dealers): [The Next Phase: Implementing the Patriot Act](#).

Stephen M. Cutler, Director of the Division of Enforcement (Mar. 17, 2003): [Remarks to Announce the Filing of SEC v. Merrill Lynch, et al.](#)

In the U.K., **Callum McCarthy** has been named the new head of the United Kingdom's Financial Services Authority. He is currently the chief executive of Ofgem, the energy regulator.

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