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[Notice to EDGAR Filers: Postponement of Release 8.5 and Live
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News Release 2003-51: SEC Votes to Mandate Electronic Filing of
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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)." The move followed the Commission's December 20, 2002 release of 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.

While the Commission initially announced that the new test system would go live on April 25 and that filers thereafter would no longer be able to make Form 3, 4 or 5 filings using the existing EDGAR template system, the Commission received comments on the test system that prompted, on April 23, to [delay the](#)

[implementation date](#) of the live system and EDGAR Release 8.5.

On April 24, the Commission adopted a final rule to require electronic filings and corporate Web site postings of Section 16 reports, effective June 30, 2003.

Under the final version of the rules which the SEC is expected to make available on its Web site shortly:

Mandatory filing of Forms 3, 4 and 5 via the Commission's new Web site will be required.

Companies will be required to make the reports available via their Web sites by the end of business on the business day following the filing date either by posting the reports or linking to the reports via EDGAR or other third-party sites if the requirements of the rule are met.

Forms must be submitted on or before 10 p.m. Eastern time and, in light of the filing extension from 5:30 p.m. to 10:00 p.m., temporary hardship exemptions will not be available for these forms.

For one year from the effective date, companies that experience technical problems in making their electronic filing deadlines for these forms (but file the forms no more than one day late) will not be required to disclose that the filing was late in their Forms 10-K or proxy statements under Regulation S-K and S-B Item 405.

On April 29, the Commission issued a [notice to EDGAR filers](#) announcing that the new date for implementation of the live system is Monday, May 5, 2003.

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>.

Practical Pointer: From May 5 until June 30, 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. Beginning June 30, however, mandatory filing of Forms 3, 4 and 5 via the new online site will be required.

and Persons Acting Under Their Direction from Improperly Influencing Auditors in a Way That Could Render Financials Materially Misleading

[News Release 2003-51: SEC Votes to . . . Prohibit Improper Influence of Auditors](#)

On April 24, the Commission adopted amendments to Regulation 13B2. That regulation implements Section 303 of the Sarbanes-Oxley Act of 2002.

According to the Commission's announcement:

The new rules prohibit officers and directors of an issuer, and persons acting under the direction of an officer or director, from coercing, manipulating, misleading or fraudulently influencing the auditor of the issuer's financial statements if that person knew or should have known that such action could render the financial statements materially misleading.

As the foregoing indicates, the standard for determining whether the amended regulation is violated is a negligence standard -- not the more subjective standard of whether the violator engaged in conduct "for the purpose of" influencing the auditor as referenced in Section 303 of Sarbanes-Oxley.

The final text of the amendments to Regulation 13B2 are expected to be available on the Commission's Web site any day and will become effective thirty days after their publication in the Federal Register.

SEC III: Commissioners Deal Blow to Shareholder Activists Seeking Right to Include Alternative Board Nominees in Registrants' Proxy Statements; Seeks Staff Report on all Rules and Regulations Regarding Election of Directors and Ideas for Improving Shareholder Participation

Commission Refuses To Review CorpFin Decision to Allow Citigroup Inc. to Exclude AFSCME Shareholder Proposal Related to Nomination of Candidates for Director; Orders Review of Proxy Rules and Regulations "To Improve Corporate Democracy" - Apr. 14, 2003

On April 14, the Commission announced that it has "directed the Division of

Corporation Finance to examine current proxy regulations and develop possible changes to those regulations to improve corporate democracy." The move followed a unanimous decision by the Commission the same day to refuse review of a decision by the Division of Corporation Finance to allow Citigroup Inc. to exclude a shareholder proposal submitted by the American Federation of State, County and Municipal Employees' Pension Plan to Citigroup Inc. to allow shareholders or groups of shareholders controlling 3% or more of the company's stock to nominate director candidates in the company's proxy materials. CorpFin concluded that existing Rule 14a-8 under the '34 Act did not require Citigroup to include AFSCME's proposal in its proxy materials.

According to the Commission's announcement:

The Commission has directed the Division of Corporation Finance to formulate possible changes in the proxy rules and regulations and their interpretations regarding procedures for the election of corporate directors. This review will address shareholder proposals, the nomination process, elections of directors, the solicitation of proxies for director elections, contests for corporate control, and the disclosure and other requirements imposed on large shareholders and groups of shareholders. As part of this process, the Commission has asked the Division to consult with all interested parties, including representatives of pension funds, shareholder advocacy groups, and representatives from the business and legal communities.

The Commission has directed that the results of the review be provided to it no later than July 15, 2003.

High visibility Pension Funds recently have pressed the SEC and other bodies to reform the director nomination and election process and various constituencies already have lined up to fight any effort to define such a level of share ownership for nominating directors as that contained in the AFSCME proposal that was submitted not only to Citigroup, but also to five other companies. Another

interesting issue expected to be addressed in the initiative is whether the CorpFin staff will consider loosening requirements of Sections 13(d) and 14(a) of the '34 Act to allow shareholder activists more leeway to use the Internet (including e-mail, Web-based message boards and Web sites) to organize in ways that will not run afoul of proxy solicitation requirements including filing requirements. For more about the Commission's So-Called "Corporate Democracy" Initiative, see:

[News Release 2003-46: Commission to Review Current Proxy Rules and Regulations to Improve Corporate Democracy](#) (Apr. 14, 2003).

SEC IV: SEC Adopts Final Rule Regarding Standards Related to Listed Company Audit Committees

Release Nos.: 33-8820, 34-47654, IC-26001

Effective Date: April 25, 2003

<http://www.sec.gov/rules/final/33-8220.htm>

The Commission has adopted, and on April 9, 2003, released the text of, a new rule directing national securities exchanges and national securities associations to prohibit the listing of any security of any issuer that is not in compliance with the audit committee requirements mandated by Section 301 of the Sarbanes-Oxley Act of 2002. According to the release, under new Exchange Act Rule 10A-3, SROs are prohibited from listing any security of an issuer that is not in compliance with such standards as:

Each member of the audit committee of the issuer must be independent according to specified criteria;

The audit committee of each issuer must be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the issuer, and each such registered public accounting firm must report directly to the audit committee;

Each audit committee must establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees

of the issuer of concerns regarding questionable accounting or auditing matters;

Each audit committee must have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties; and Each issuer must provide appropriate funding for the audit committee.

With certain exceptions specified in the release, listed issuers must be in compliance with the new listing rules by the earlier of: (1) their first annual shareholders meeting after January 15, 2004; or (2) October 31, 2004. Foreign private issuers and small business issuers that are listed must be in compliance with the new listing rules by July 31, 2005.

SEC V: SEC Issues Fee Rate Advisory 1 for Fiscal Year 2004

On April 30, 2003, the Commission issued [Fee Rate Advisory #1 for Fiscal Year 2004](#). According to the advisory, effective on the later of October 1, 2003 or 5 days after the date on which the Commission receives its fiscal 2004 regular appropriation, the Section 31 fee rate applicable to securities transactions on the exchanges and Nasdaq will be reduced to \$39.00 per million from the current rate of \$46.80 per million. Additional information on the transition to the new Section 31 fee rate will be available shortly on the NYSE and NASD Web sites located at <http://www.nyse.com/> and <http://www.nasd.com/>, respectively. See [News Release 2003-57: Fee Rate Advisory # 1 for Fiscal Year 2004](#) (Apr. 30, 2003).

Lawsuits/Enforcement I: 10 Wall Street Firms Enter \$1.4 Billion Settlement of Research Analyst Conflicts of Interest Allegations

**Attorney General of State of New York, SEC, NASD, NYSE and NASAA
Announce Settlement of Enforcement Actions - Apr. 28, 2003**

Settlement Requires Reforms That Will Affect Every Firm on the Street

On April 28, the Attorney General of the State of New York, the SEC, the NASD, the NYSE and NASAA announced a \$1.4 billion settlement of enforcement actions against ten Wall Street firms involving allegations of conflicts of interest between research and investment banking. The ten firms against which

enforcement actions were commenced and settled are: Bear Stearns, Credit Suisse First Boston LLC, Goldman Sachs & Co., Lehman Brothers Inc., J.P. Morgan Securities Inc., Merrill Lynch, Morgan Stanley, Citigroup Global Markets Inc., UBS Warburg LLC and U.S. Bancorp Piper Jaffray Inc. In addition, as part of the settlement Jack Grubman of Salomon Smith Barney and Henry Blodget of Merrill Lynch agreed to lifetime bans from the securities industry as well as the payment of significant fines.

The so-called "global resolution" of the research analyst investigations will result in far-reaching reforms expected to have a significant impact on the practices involving analyst research. As described by the Attorney General of the State of New York, Eliot Spitzer, the reforms includes:

A clear separation of the research and investment banking divisions at firms -- analysts will be insulated, and they will no longer be allowed to solicit business or accompany investment bankers on pitches and roadshows, or identify investment banking prospects. Investment banking will not be allowed input into analyst evaluation and compensation;

A new mechanism for providing independent research to investors at no cost to help them make more informed decisions -- independent research will guarantee that the retail customer has alternative views, and as important, let the analyst know that he or she is being judged by comparative independent analysis;

Transparency of rating information -- certain analyses generated by an investment house will be made public within 90 days after the conclusion of each quarter. Each firm will publish the information on its website in a downloadable format. This will enable investors to compare and evaluate the performance of analysts from different firms and permit the market to generate objective rankings;

A ban on IPO spinning -- investment firms will no longer be allowed to allocate to officers or directors of public companies preferential access to valuable IPO shares of corporations from which they have sought or obtained investment banking business;

Independent monitors for each firm -- a monitor will report to regulators on the firm's compliance with the terms of the agreement;

Investor education -- programs will be established to help investors protect themselves against securities fraud; and

The largest overall monetary payments in Wall Street history -- \$1.4 billion.

See [Statement by Attorney General Eliot Spitzer Regarding the "Global Resolution" of Wall Street Investigations](#) (Apr. 28, 2003).

Much has been written of the global resolution. However, readers of this publication may be particularly interested in reviewing some of the more important material regarding the events:

- [Joint Press Release of Attorney General of the State of New York, SEC, NASD, NYSE and NASAA](#) (Apr. 28, 2003).
- [Commission "Statement Regarding Global Settlement Related to Analyst Conflicts of Interest](#) (Apr. 28, 2003).
- [SEC Fact Sheet on Global Research Analyst Settlements](#) (Apr. 28, 2003).
- [Voluntary Initiative Regarding Allocations of Securities in "Hot" Initial Public Offerings to Corporate Executives and Directors](#) (Apr. 28, 2003).
- [SEC Chairman William H. Donaldson's Statement](#) (Apr. 28, 2003).
- [Joint Statement on Permanent Bar of Jack Grubman](#) (Apr. 28, 2003).
- [Joint Statement on Permanent Bar of Henry Blodget](#) (Apr. 28, 2003).
- [SEC Litigation Release LR-18118 \(U.S. Bancorp Piper Jaffray Inc.\)](#)
- [SEC Litigation Release LR-18117 \(Morgan Stanley & Co. Incorporate\)](#)
- [SEC Litigation Release LR-18116 \(Lehman Brothers Inc.\)](#)
- [SEC Litigation Release LR-18115 \(Merrill Lynch, Pierce, Fenner & Smith Incorporated; Henry M. Blodget\)](#)
- [SEC Litigation Release LR-18114 \(J.P. Morgan Securities Inc.\)](#)
- [SEC Litigation Release LR-18113 \(Goldman, Sachs & Co.\)](#)
- [SEC Litigation Release LR-18112 \(UBS Warburg LLC\)](#)
- [SEC Litigation Release LR-18111 \(Citigroup Global Markets Inc., f/k/a Smith Barney Inc.; Jack Benjamin Grubman\)](#)

[SEC Litigation Release LR-18110 \(Credit Suisse First Boston LLC, f/k/a Credit Suisse First Boston Corporation\)](#)

[SEC Litigation Release LR-18109 \(Bear, Stearns & Co. Inc.\)](#)

[NY Attorney General: Citigroup, Morgan Stanley Findings \(Apr. 28, 2003\)](#)

Lawsuits / Enforcement II: Study Says Average Cost to a Company To Settle a Securities Class Action Rose 68% in 2002 to \$24.3 Million

It is getting more expensive to run afoul of disclosure obligations under federal securities laws According to a report issued by Cornerstone Research in partnership with the Stanford Law School Securities Class Action Clearinghouse issued on April 10, the average cost of settling a securities class action has increased substantially, rising 68% in 2002 to \$24.3 million. The report notes that the number is affected by the increase in the number of so-called "mega-settlements," but that overall the cost of most settlements is rising.

The study analyzed settlements of cases filed and settled since passage of the Private Securities Litigation Reform Act of 1995. According to the report, the "98 securities class action cases resolved in 2002 settled for a median of \$6.8 million and an average of \$24.3 million; this compares to a median of \$5.5 million and an average of \$14.7 million for the cases that settled in prior years." For more, see the report and press release referenced below.

[Post-Reform Act Securities Case Settlements: Cases Reported Through December 2002](#) (Apr. 10, 2003).

[Press Release: Settling Securities Class Action Lawsuits Getting More Expensive](#) (Apr. 10, 2003).

PCAOB I: SEC and PCAOB Announce that PCAOB Has Been Determined to Be Appropriately Organized and Has Capacity to Carry Out Sarbanes-Oxley

SEC Cites "Outstanding Job" Done by Founding Members of PCAOB, Charles Niemeier, Dan Goelzer, Kayla Gillan and Bill Gradison - Apr. 25, 2003

Release Nos.: Securities Act Release No. 8223,
Exchange Act Release No. 47746

<http://www.sec.gov/rules/other/33-8223.htm>

On April 25, 2003, the SEC and the Public Company Accounting Oversight Board announced that the PCAOB has been determined to be appropriately organized and has the capacity to carry out the requirements of the Sarbanes-Oxley Act of 2002. The SEC's action was taken pursuant to Section 101(d) of the Sarbanes-Oxley Act which provides that, no later than 270 days after the establishment of the PCAOB, the members of the PCAOB:

shall take such action (including the hiring of staff, proposal of rules, and adoption of initial and transitional auditing and other professional standards) as may be necessary or appropriate to enable the Commission to determine . . . that the Board is so organized and has the capacity to carry out the requirements of [the Act], and to enforce compliance with [the Act] by registered public accounting firms and associated persons thereof.

In its announcement of the Order, the SEC cited the founding members of the PCAOB, Charles Nimeier, Dan Goelzer, Kayla Gillan and Bill Gradison for their "outstanding job over the past four months to lay a strong foundation for the important work that is before them."

Read More About the SEC Order Determining the PCAOB to Be Appropriately Organized With Appropriate Capacity:

[Order Regarding Section 101\(d\) of the Sarbanes-Oxley Act of 2002](#)

(Apr. 25, 2003).

[SEC News Release No. 2003-51: SEC Determines PCAOB](#)

[Appropriately Organized](#) (Apr. 25, 2003).

PCAOB II: SEC Approves PCAOB Rules 3200T Through 3600T Setting Forth Interim Professional Standards for Use in Connection with the Audits of Public Companies

Rule 3200T Deals with Interim Auditing Standards; Rule 3300T Deals with Interim Attestation Standards; Rule 3400T Deals with Interim Quality Control

Standards; Rule 3500T Deals With Interim Ethics Standards; Rule 3600T Deals with Interim Independence Standards.

On April 25, 2003, the SEC issued an order approving Public Company Accounting Oversight Board Rules 3200T through 3600t setting forth interim professional standards for use in connection with the audits of public companies. The SEC order summarizes the various rules:

Interim Professional Auditing Standards - PCAOB Rule 3200T provides, essentially, that auditors must comply with GAAS as required in SAS 95 when preparing and issuing an audit report.

See [Establishment of Interim Professional Auditing Standards](#), PCAOB Release No. 2003-006 (Apr. 18, 2003).

See also PCAOB, [Briefing Paper: Statement Regarding Standards-Setting Process and Establishment of Interim Standards, April 16, 2003 Public Meeting of the Board](#) (Apr. 18, 2003).

Interim Attestation Standards - PCAOB Rule 3300T provides, in essence, that in both attestation and audit report engagements, there must be compliance with SSAE 10.

Interim Quality Control Standards - PCAOB Rule 3400T provides, in essence, that the AICPA's quality control standards as set forth in AICPA Professional Standards QC Sections 20 through 40 and the SEC's quality control standards set forth in SEC Practice Section Manual Sections 1000.08(d), (f), (m), (n)(1) and (o) shall apply.

Interim Ethics Standards - PCAOB Rule 3500T provides, in essence, that auditors who prepare or issue an audit report must abide by Rule 102 of the AICPA Code of Professional Conduct.

Interim Independence Standards - PCAOB Rule 3600T provides, in essence, that auditors who prepare or issue an audit report must abide by Rule 101 of the AICPA Code of Professional Conduct (and

Interpretations promulgated under that rule) as well as Standards 1, 2 and 3 and Interpretations 99-1, 00-1 and 00-2 of the Independence Standards Board.

These interim standards are effective as of the date the SEC approved them, on April 25, 2003.

Read the SEC Order Approving the PCAOB's Interim Professional Standards: [Order Regarding Section 103\(a\)\(3\)\(B\) of the Sarbanes-Oxley Act of 2002](#), Securities Act Release No. 8222, Exchange Act Release No. 47745 (Apr. 25, 2003).

PCAOB III: PCAOB Proposes Process It Will Use To Establish Auditing and Other Professional Standards for Registered Public Accounting Firms

On April 18, 2003, the Public Company Accounting Oversight Board announced the proposed process it plans to use to establish auditing and other professional standards for registered public accounting firms. The PCAOB will formulate new standards, but announced that it plans to appoint an advisory group "to assist it in formulating new standards and in reviewing existing standards." According to the proposal, the board has determined *not* to exercise the authority granted to it under Section 103 of Sarbanes-Oxley and, thus, will not designate or recognize any professional group of accountants to propose standards.

Rather, the PCAOB will formulate new standards itself, although it will consider proposals from the advisory board and from those who petition it for new standards. Once proposed, there will be a comment period of at least 21 calendar days before the final standard is released. Final standards will not become effective until approved by the SEC.

In its proposal, the PCAOB proposed new PCAOB Rule 3100 and a related definition that would appear in Rule 1001. According to its Release, the PCAOB says "Rule 3100 would require all registered public accounting firms to adhere to the Board's auditing (and related attestation), quality control, and ethics standards, and its independence rules, in connection with the preparation or issuance of any audit report for an issuer".

Read More About the PCAOB Proposed Process for Establishing Auditing and Other Professional Standards:

[Statement Regarding the Establishment of Auditing and Other Professional Standards](#), PCAOB Release No. 2003-005 (Apr. 18, 2003).

[Briefing Paper: Statement Regarding Standards-Setting Process and Establishment of Interim Standards - April 16, 2003 Public Meeting of the Board](#) (Apr. 18, 2003).

PCAOB IV: PCAOB Issues its Final Rules on Establishment of Accounting Support Fee to Support the Board

On April 18, 2003, the Public Company Accounting Oversight Board issued a Release announcing it had adopted final rules to establish the accounting support fee required under the Sarbanes-Oxley Act of 2002 to fund the Board's activities. The proposed funding system, as the Release states, consists of five rules (PCAOB Rules 7100 through 7104) plus certain definitions that would appear in Rule 1001. The rules, of course, will not take effect unless and until approved by the Commission.

The principal change from the proposed rule on the accounting support fee seems to be that an independent auditor need only to obtain a representation from the company that the company has paid the support fee to the PCAOB to meet its obligation to confirm the payment in connection before issuing an unqualified opinion. Thus, under the rule there will be 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. As to how much would be paid, in its proposing release (see below), the Board stated 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. 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. In addition, the PCAOB has indicated it will maintain a publicly-available list of companies that have failed to pay their support fees on its Web site.

Read More About the PCAOB Final Rules on Accounting Support Fee:

[Board Funding: Establishment of Accounting Support Fee, PCAOB Release No. 2003-003](#) (Apr. 18, 2003).

[Briefing Paper: Board Funding - Accounting Support Fee, April 16, 2003 Public Meeting of the Board](#) (Apr. 18, 2003).

See also the PCAOB Accounting Support Fee Proposing Release:

PCAOB Release No.: 2003-002

Docket No.: 002

Comments Due: April 4, 2003

<http://www.pcaobus.org/pcaob1/Rules/Release2003-002.pdf>

ABA Task Force on Corporate Responsibility Releases Its Final Report

Report, Dated March 31, Made Publicly Available Via ABANet.org on April 29, 2003

On April 29, the ABA Task Force on Corporate Responsibility made its long-awaited final report publicly-available via ABANet.org. The report, dated March 31, 2003, is 89 pages long and provides background on the Task Force, a brief overview of the report, a summary of the framework of public corporation governance in the U.S., recommended policies of corporation governance, recommendations concerning the role of lawyers, recommended corporate governance practices and appendices dealing with recommended revisions to the Model Rules of Professional Responsibility.

The report is recommended reading for those dealing with corporate governance issues. The views expressed in the report have not been approved yet by the ABA House of Delegates or the Board of Governors and, thus, do not represent ABA policy at this time.

See [Final "Report of The American Bar Association Task Force on Corporate Responsibility"](#) (Mar. 31, 2003).

Delaware Supreme Court Renders Decision Essentially Confirming that Delaware is an "Option" State -- Board Cannot Agree to Enter Into Merger Agreement Without a "Fiduciary Out"

Opinion Explaining Court's Earlier Summary Ruling in NCS/Genesis/Omnicare Case Released Apr. 4, 2003

On April 4, 2003, the Delaware Supreme issued a 3-2 majority opinion, authored by Justice Holland, in *Omnicare, Inc. v. NCS Healthcare, Inc.*, No. 605,2002 (Del., Apr. 4, 2003). The opinion explained a summary ruling entered in the NCS / Genesis / Omnicare case late last year and makes clear that Delaware is a so-called "option" state. An "option" state is one providing that a board of directors cannot agree to have the company enter into a merger agreement without a so-called "fiduciary out" that allows the company to terminate the agreement if a better proposal arises or to make certain that shareholders remain free to reject the original merger in the event a better proposal arises.

In a strongly-worded joint dissent authored by Chief Justice Veasey on behalf of the Chief Justice and Justice Steele, the dissenters criticize what they describe

as the "new rule" and urge against any such bright-line test against so-called "lock-up provisions" saying that situations "will arise where business realities demand a lock-up so that wealth-enhancing transactions may go forward". The scope of the holding, some argue, is breathtaking. Those critical of the decision contend, like the dissenters, that the decision departs from the well-established doctrinal pillar that the informed, good faith business judgment of disinterested directors is to be respected and, thus, will diminish shareholder value. The practical impact of the decision seems to be that no merger agreement can be locked-up whether at the mandate of a controlling stockholder even at the end of a diligent shopping or auctioning process. As counsel who represented Genesis in the matter says: "[b]eyond that, the majority's application of 'reasonableness' review to merger-protective provisions and its insistence on directors' post-signing fiduciary duties may herald significant uncertainty about what level of deal protection will be accepted -- or whether a later higher bid will just always win."

Read a Memorandum Prepared by Wachtell, Lipton, Rosen & Katz and Available Via RealCorporateLawyer.com Regarding the Development:

[Delaware Supreme Court on "Fiduciary Outs" in Merger Agreements](#) (Apr. 10, 2003).

Read the Delaware Supreme Court Opinion:

[Omnicare, Inc. v. NCS Healthcare, Inc.](#), No. 605,2002 (Del., Apr. 4, 2003).

Comings and Goings: Who's Doing What and Where

SEC Chairman **William Donaldson** announced on April 15 that **William McDonough**, currently President of the Federal Reserve Bank of New York, will not be entering a life of retirement anytime soon but, instead, is the SEC's choice to serve as Chairman of the Public Company Accounting Oversight Board. See [Speech by SEC Chairman: Statement at Press Briefing to Announce Selection of the Chairman of the Public Company Accounting Oversight Board](#) (Apr. 15,

2003).

SEC Chairman **William Donaldson** also announced on April 23 that he has appointed a new leadership team consisting of **Laura Cox**, **Peter Derby** and **Patrick Von Barga**n. **Laura Cox** will serve as Managing Executive for External Affairs. **Peter Derby** will serve as Managing Executive for Operations. **Patrick Von Barga**n will serve as Managing Executive for Policy and Staff. See [News Release No. 2003-50: Chairman William H. Donaldson Announces Selection of Leadership Team](#) (Apr. 23, 2003).

On April 17, the PCAOB named accounting industry critic Douglas R. Carmichael, a Professor and Director of the Center for Financial Integrity at the City University of New York's Baruch College, as its Chief Auditor. Doug Carmichael formerly served as a Vice President with the AICPA and is a frequent expert witness on behalf of plaintiffs suing accounting firms. See [New Accounting Board Picks Chief Auditor](#), Wash. Post (Apr. 18, 2003).

Commissioner **Cynthia A. Glassman** spoke on April 10, 2003 at the 23rd Annual Ray Garrett Jr. Corporate and Securities Law Institute at Northwestern University School of Law in Chicago. The subject of her remarks was improving corporate disclosure. See [Speech by SEC Commissioner: Improving Corporate Disclosure - Improving Shareholder Value](#) (Apr. 10, 2003). Commissioner Glassman also spoke at the National Economists Club on April 7, 2003 on corporate governance. See [Speech by SEC Commissioner: SEC Implementation of Sarbanes-Oxley - The New Corporate Governance](#) (Apr. 7, 2003).

The Commission has announced that **Jackson Day**, the Acting Chief Accountant at the SEC, is leaving to return to the private sector. See News Release No. 2003-42: Jackson M. Day, Acting Chief Accountant, to Leave SEC (Mar. 27, 2003).

Upcoming Events

IA Seminars: US Financial Reporting Issues

June 9th - June 13th London

In Association with RR Donnelley Financial

Two-Day Seminar on US GAAP & SEC Reporting Current Requirements (Monday 9 - Tuesday 10 June 2003) Workshop on Reporting and Valuation of Mergers and Acquisitions (Wednesday 11 June 2003) Workshop on Asset Valuation and Impairment (Thursday 12 June 2003) Workshop on Revenue Recognition and Liabilities (Friday 13 June 2003)

IA Seminars: International Accounting Standards Events

June 2nd - June 6th London

In Association with RR Donnelley Financial

Two-Day Conference on International Accounting Standards (Monday 2 - Tuesday 3 June 2003) Critical IAS Transition Issues: Revenue, Financial Instruments, Provisions, Segment Reporting and Taxes (Wednesday 4 June 2003) Critical IAS Transition Issues: Business Combinations and Consolidated Financial Statements (Thursday 5 June 2003) Critical IAS Transition Issues: Meeting the Specific Requirements for First Time Application of IAS (Friday, 6 June 2003)

For more information and a full programme please call or email Martin Simmons, RR Donnelley Financial +33 1 53 45 19 00

- martin.simmons@rrd.com or visit <http://www.iaseminars.com/june03.htm>

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Hear from SEC Officials, Corporate Counsel, Law Firm Partners

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- I. SEC Corporation Finance Disclosure Developments
- II. SRO Listing Standards; NYSE and NASD requirements
- III. Securities Enforcement and Litigation
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