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## SEC I: SEC Amends Investment Company Advertising Rules

U.S. Securities and Exchange Commission, [Final Rule: Amendments to Investment Company Advertising Rules](#), Release Nos. 33-8294, 34-48558, IC-26195 (Sept. 29, 2003).

U.S. Securities and Exchange Commission, [SEC Amends Mutual Fund Advertising Rules, Proposes New Rules and Amendments for Fund of Funds Investments](#), News Release No. 2003-122 (Sept. 24, 2003).

On September 24, the SEC adopted amendments that it says are designed to encourage mutual fund advertisements "that convey more balanced information to prospective investors, particularly with respect to past performance." The amendments:

Require funds that advertise performance to make available returns that are current to the most recent month-end by a toll-free or collect telephone number or on a Web site (with fund advertisements required to identify this telephone number or Web address).

Require fund advertisements that contain performance information to include disclosure that past performance does not guarantee future results and that current performance may be lower or higher than the performance quoted;

Require fund advertisements to include disclosure that would direct investors' attention to a fund's investment objectives, risks, and charges and expenses, in order to address concerns that this important information about a fund may be overshadowed by fund advertising that is focused on past

performance;

Require more prominent disclosure in fund advertisements of important information such as the dates during which quoted performance occurred;

Reemphasize that fund advertisements are subject to the antifraud provisions of the federal securities laws;

Eliminate the requirement in Rule 482 under the Securities Act that investment company advertisements under that rule contain only information the substance of which is included in the statutory prospectus;

Rescind, as duplicative, the provisions of Rule 134 under the Securities Act that permit investment companies to include in "tombstone" advertisements a broad range of information; and

Making conforming changes to investment company registration forms, including Form N-1A for mutual funds and Forms N-3, N-4, and N-6 for variable insurance products.

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## **SEC II: SEC Releases Staff Report on "Implications of the Growth of Hedge Funds"**

U.S. Securities and Exchange Commission, [Implications of the Growth of Hedge Funds - Staff Report to the United States Securities and Exchange Commission](#) (Sept. 29, 2003).

U.S. Securities and Exchange Commission, [Staff Hedge Fund](#)

[Report Fact Sheet](#) (Sept. 29, 2003).

U.S. Securities and Exchange Commission, [SEC Chairman Donaldson Releases Staff Report on Hedge Funds, News Release 2003-125](#) (Sept. 29, 2003).

On September 29, the Commission released a lengthy report that compiles the results of an investigation by SEC Staff members of more than 65 hedge fund advisers managing more than 650 different hedge funds. The report, entitled "Implications of the Growth of Hedge Funds," identifies five principal areas of concern regarding the industry: (1) the trend toward "retailization" of hedge funds; (2) the lack of Commission information about hedge funds and their adviser's activities; (3) the lack of prescribed and uniform disclosure by hedge fund advisers; (4) valuation and other conflict of interest issues; and (5) the increased incidence of hedge fund fraud.

The principal recommendation of the report -- a recommendation that was widely anticipated -- is that the Commission should revise its rules to require that hedge fund advisers register under the Investment Advisers Act. Other recommendations, however, include the following:

The Commission and its staff should require that all registered investment companies that invest their assets in hedge funds, including registered funds of hedge funds, have policies and procedures designed to ensure that funds and their boards value their interests in hedge funds in a manner consistent with the requirements of the Investment Company Act.

The Commission and its staff should require all registered investment companies, including registered funds of hedge funds, to disclose in their prospectus fee tables the estimated expenses of the company's underlying fund interests..

The Commission should consider eliminating the prohibition on general solicitation or advertising in offerings by hedge funds that rely on the exclusion from the definition of an investment company for hedge funds that permit investments only by highly sophisticated investors.

The staffs of the Commission and the NASD should monitor closely capital introduction services provided by broker-dealers and watch closely for violations of broker-dealer suitability obligations with respect to the sale of funds of hedge funds.

The Commission should encourage the hedge fund industry to embrace and further develop best practices.

The Commission should continue its efforts to improve investor education regarding hedge funds.

The Commission should consider issuing a concept release to examine the wider use of hedge fund investment strategies in registered funds.

The SEC Staff's report comes at a time of intensifying scrutiny of hedge funds. In early September, New York State Attorney General Eliot Spitzer accused hedge fund Canary Capital Partners L.L.C. of unlawful trading schemes involving mutual funds and announced that the firm "has agreed to make restitution [of] \$30 million in illegal profits generated from unlawful trading and pay a \$10 million penalty." See, Office of New York State Attorney General Eliot Spitzer, [State Investigation Reveals Mutual Fund Fraud - Secret Trading Schemes Harmed Long-Term Investors](#) (Sept. 3, 2003). On September 25, the SEC announced that a federal judge in Arizona issued a temporary order "halting an ongoing fraudulent scheme to sell unregistered interests in a hedge fund called Millennium Capital Hedge Fund, L.P. ('Millennium') of Gilbert, Arizona." See U.S. Securities and Exchange

Commission, [SEC Halts Ongoing Hedge Fund Fraud](#), Litig. Release No. 18362 (Sept. 25, 2003).

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### **SEC III: SEC Issues Policy Statement on Business Continuity Planning for Trading Markets**

(See Also [SRO II: SEC Releases NASD and NYSE Amendments to Proposed Rules on Business Continuity Plans](#))

U.S. Securities and Exchange Commission, [Policy Statement: Business Continuity Planning for Trading Markets](#), Release No. 34-48545 (Sept. 25, 2003).

U.S. Securities and Exchange Commission, [SEC Issues Policy Statement on Business Continuity Planning for Trading Markets](#), News Release No. 2003-124 (Sept. 26, 2003).

On September 25, the SEC issued a Policy Statement regarding "Business Continuity Planning for Trading Markets". The Policy Statement is effective October 1, 2003, although the Commission has requested public comments on or before October 31, 2003. Generally, the Policy Statement sets forth the Commission's view that SROs that operate trading markets (SRO Markets) and electronic communications networks (ECNs) "should apply certain basic principles in their business continuity planning within the specified implementation timeframe." Those principles, as specified in the Policy Statement, include:

Each SRO Market and ECN should have a business continuity plan that anticipates the resumption of trading, in the securities traded by that market, no later than the next business day following a wide-scale disruption.

Assuring resumption of trading activities by a market by the next business day generally requires geographic diversity between primary and backup sites. Thus, to be fully resilient, backup sites should not rely on the same infrastructure components used by the primary site and the operation of such backup sites should not be impaired by a wide-scale evacuation at or the inaccessibility of staff that service the primary site.

The SRO Markets also should assure the full resilience of important shared information systems, such as the consolidated market data stream generated for the equity and options markets.

The effectiveness of backup arrangements in recovering from a wide-scale disruption should be confirmed through testing.

Each SRO Market and ECN should implement plans reflecting these principles as soon as practicable and strive to do so no later than the end of 2004.

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## **SEC IV: SEC Issues Final Rule on Custody of Funds or Securities of Clients by Investment Advisers**

U.S. Securities and Exchange Commission, [Final Rule: Custody of Funds or Securities of Clients by Investment Advisers](#), Release No. IA-2176 (Sept. 25, 2003).

On September 25, the SEC issued its final rule regarding custody of funds or securities of clients by investment advisers. The final rule release amends the

custody rule under the Investment Advisers Act (rule 206(4)-2) "to reflect modern custodial practices and clarify circumstances under which an adviser has custody of client assets." The amended rule, with an effective date of November 5, 2003 and a compliance date of April 1, 2004, requires investment advisers to maintain client funds and securities with a broker-dealer, bank, or other "qualified custodian." If the "qualified custodian" sends account statements directly to an adviser's clients, the adviser need not send its own account statements and need not undergo an annual surprise examination. Additionally, the final rule adds a definition of "custody" and illustrates the circumstances under which an adviser has custody of client funds or securities. It defines custody as whenever an adviser holds "directly or indirectly, client funds or securities or [has] any authority to obtain possession of them." The final version of the rule also removes the Form ADV requirement that investment advisers with custody include an audited balance sheet in their disclosure brochure to clients.

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## **SEC V: SEC's Division of Corporation Finance Issues No-Action Letter on Foreign Issuer's CEO Certification Form**

[Response of the Office of International Corporate Finance Division of Corporation Finance Re: Mitsui & Co., Ltd., Incoming Letter Dated August 19, 2003](#) (Aug. 20, 2003).

The SEC's Division of Corporation Finance has released the text of a no-action letter issued on August 20, 2003. In the letter, the staff informs a foreign private issuer that its proposed form of CEO certification for periodic reports would be acceptable under the requirements of Section 302 of the Sarbanes-Oxley Act of 2002 and under Securities Exchange Act Rules 13a-14, 13a-15, 15d-14, 15d-15 and Item 15 of Form 20-F.

The form of certification contained in the incoming letter to which the Division of

Corporation Finance responded appears immediately below:

### CERTIFICATION

I, [identify the certifying individual], certify that:

1. I have reviewed this annual report on Form 20-F of [identify company];
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the company as of, and for, the periods presented in this report;
4. The company's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the company and have:
  - a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the company, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b. [omitted pursuant to the guidance of Release No. 33-8238 (June 5, 2003)]
  - c. Evaluated the effectiveness of the company's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of a date within 90 days prior to the filing date of this annual report; and
  - d. Disclosed in this report any change in the company's internal control over financial reporting that occurred subsequent to the date of our most recent evaluation that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting; and
5. The company's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the company's auditors and the audit committee of the company's board of directors (or persons performing the equivalent functions):

- a. (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the company's ability to record, process, summarize and report financial information; and
- b. (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the company's internal control over financial reporting.

Date: .....

\_\_\_\_\_  
[Signature]  
\_\_\_\_\_

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## REGULATION FD: In Settling Regulation FD Charges Against Schering-Plough, SEC Fires a Warning Shot Across Bow

U.S. Securities and Exchange Commission, [SEC Files Settled Regulation FD Charges Against Schering-Plough Corporation and its Former Chief Executive: Company Agrees to Pay \\$1 Million Penalty, Former Executive Agrees to Pay \\$50,000 Penalty, and Both Agree to Commission Cease-and-Desist Order](#), Litig. Release No. 18330 (Sept. 9, 2003).

In the Matter of Schering-Plough Corporation and Richard J. Kogan, [Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant of Section 21C of the Securities Exchange Act of 1934](#), Admin.

Proceeding File No. 3-11249 (Sept. 9, 2003) (Release No. 48461).

*Securities and Exchange Commission v. Schering-Plough Corporation*, [Complaint](#) (D.D.C., filed Sept. 9, 2003).

U.S. Securities and Exchange Commission, [SEC Files Regulation FD Charges Against Schering-Plough Corporation and its Former Chief Executive: Company Agrees to Pay \\$1 Million Penalty](#), [Former Chief Executive Agrees to Pay \\$50,000 Penalty](#), News Release 2003-109 (Sept. 9, 2003).

On September 9, the SEC filed a federal court complaint and issued a related administrative order charging Schering-Plough Corporation with violating Regulation FD and Section 13(a) of the Securities Exchange Act of 1934. In settling the charges, Schering-Plough agreed to pay a \$1 million civil penalty and to cease and desist from committing such violations in the future. In the administrative proceeding, the former Chairman and CEO of the company, Richard J. Kogan, also agreed to cease and desist from causing any violation of Regulation FD in the future and to pay a civil penalty of \$50,000. According to the SEC's announcement: "[t]he penalty against Schering, if approved by the court, will be the largest penalty the SEC has obtained for a violation of Regulation FD, and the penalty against Kogan is the first penalty the SEC has obtained from an individual in cases involving selective disclosure."

### **The Facts Alleged by the SEC**

The SEC alleged that during September 2002 private meetings with analysts and portfolio managers of institutional investors that included some of the largest Schering-Plough investors, "through a combination of spoken language, tone, emphasis, and demeanor, Kogan disclosed negative and material nonpublic information regarding Schering's earnings prospects, including that analysts' earnings estimates for Schering's 2002 third-quarter were too high, and that

Schering's earnings in 2003 would significantly decline." In settling the matter, neither the company nor Richard J. Kogan has admitted or denied the allegations.

### **Shot Across the Bow**

Setting aside the significant level of the civil penalties levied, the SEC's action in the matter is significant for another important reason. The Commission seems to signal that non-verbal communication through "tone, emphasis, and demeanor" can support a Reg FD claim -- one more point to consider when preparing for meetings or conversations with analysts, institutional investors and others.

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### **SRO I: Report Says SEC Has Accused Amex of Falsifying Documents During Investigation**

Vincent Bland & Adrian Michaels, [SEC Accuses Amex of Falsifying Paper](#), Financial Times (Sept. 29, 2003).

In a development that is sure to have a profound effect on the American Stock Exchange and its future, the U.S. Securities and Exchange Commission reportedly has accused the exchange of providing "false documents to cover up an alleged failure to implement promised enforcement reforms." On September 29, the *Financial Times* of London reported that "The Securities and Exchange Commission made the accusations in a report into a long-running probe into claims of discrimination and favouritism on the Amex trading floor, which trades mainly stock options." The report apparently was provided to senior Amex executives last June. According to the *Financial Times*, these "are among the most serious charges against a US securities exchange, and come as the Amex

is in the process of being acquired by GTCR Golder Rauner, a private equity firm that signed a letter of intent to buy the exchange two weeks before the SEC report was sent to senior Amex executives in mid-June."

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## **SRO II: SEC Releases NASD and NYSE Amendments to Proposed Rules on Business Continuity Plans**

U.S. Securities and Exchange Commission, [NASD Rulemaking Re: Business Continuity Plans and Emergency Contact Information - Self-Regulatory Organizations; Notice of Filing of Amendment Nos. 4 and 5 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Business Continuity Plans and Emergency Contact Information](#), Release No. 34-48503 (Sept. 17, 2003).

U.S. Securities and Exchange Commission, [NYSE Rulemaking Re: Business Continuity and Contingency Planning - Self-Regulatory Organizations; Notice of Filing of Amendment No. 4 to a Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Business Continuity and Contingency Planning](#), Release No. 34-48502 (Sept. 17, 2003).

On September 29, the SEC released the text of proposed amendments (dated September 17) to the NASD's and NYSE's proposed rules regarding business continuity plans. Both entities are working with the Commission to establish rules to require members to establish and maintain business continuity plans. The NASD's and NYSE's proposed amendments generally would clarify that the proposed rule changes would not mandate that those subject to the rules must stay in business in the event of a significant business disruption. Additionally, the

amendments would add a requirement that each member must disclose to customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. Finally, the proposed amendments would require each member to review and, if necessary, update its emergency contact information.

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### **SRO III: NASD Issues Notice To Members on Rule Amendments Regarding Electronic Form U4 Filings**

NASD, [Notice to Members: Forms U4 - Rule Amendments to Require Member Applicants to File Forms U4 Electronically](#), NTM 03-56 (Sept. 2003).

On September 29, NASD issued Notice to Members No. 03-56 indicating that it has amended its New Member Application and Interview Rule (Rule 1013) to eliminate the requirement that new member applicants include in their membership applications signed, paper Forms U4 for their proposed associated persons. Rule 1013, as amended, requires new member applicants to file these Forms U4 electronically. NASD also has amended Rule 1140, the Electronic Filing Rule) to require new member applicants to follow the same procedures members must follow when making electronic Form U4 filings. The NASD's approved rule changes also make certain technical changes to Rules 1013 and 1140.

One particularly helpful element of the Notice to Members is Attachment A which contains FAQs that explain how members should comply with the new amendments. These FAQs deal with such issues as: (1) Are the paper forms U4 filed by applicants being replaced entirely by electronic Form U4 filings?; (2) Is the electronic Form U4 based on a signed, paper Form U4?; (3) Who will retain the signed Form U4 and how will NASD obtain a copy if it needs it?; and

(5) How does an applicant comply with amended Rule 1013(a)(3).

The amendments to Rules 1013 and 1140 were filed with the SEC for immediate effectiveness on August 28, 2003. They do not, however, become operative until October 27, 2003.

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## **SRO IV: NYSE Issues Guidance and FAQs Regarding Customer Complaints and NYSE Rule 351(D) Filings**

New York Stock Exchange, Inc., [Rule 351\(D\) - Reports of Customer Complaint Statistics](#), Information Memo No. 03-39 (Sept. 19, 2003).

New York Stock Exchange, Inc., [Frequently Asked Questions Regarding Customer Complaints and NYSE Rule 351\(D\) Filings](#), Information Memo No. 03-38 (Sept. 19, 2003).

On September 29, the New York Stock Exchange issued an information memo providing guidance regarding several significant changes that are being made to the customer complaint reporting procedures under Rule 351(d) that must be reflected on the filing of the first quarter 2004 customer complaint statistics (due April 15, 2004). The memo provides guidelines regarding changes including:

Expanded product codes to include exchange traded funds, single stock futures, 529 plans, hedge funds and private placements.

Changes to a variety of sales practice problem codes.

Addition of a new non sales practice category for "poor service".

Addition of a new firm related problem category entitled "Third Party /

Anonymous" and addition of a "Complaints Referred to Previous Employer" category.

Addition of firm related problem categories entitled "Other Theft / Forgery" and "Identity Theft".

Addition of a "Miscellaneous" firm related problem category.

The same day, September 29, the NYSE issued a related information memo entitled "Frequently Asked Questions Regarding Customer Complaints and NYSE Rule 351(d) Filings." The FAQs are organized into four categories: (1) general complaint questions; (2) complaint coding issues; (3) general questions; and (4) Rule 351(d) amendments process.

The FAQs are intended to serve as a guide to members and member organizations for the situations addressed in the FAQs -- not as an all-inclusive listing of all possible complaint-related questions, issues and situations. Still, the FAQs are important reading for CEOs, COOs and for legal and compliance personnel.

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## **IOSCO I: IOSCO Technical Committee Issues Statement of Principles on Credit Rating Agency Activities**

International Organization of Securities Commissions, [IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies - A Statement of the Technical Committee of the International Organization of Securities Commissions](#) (Sept. 25, 2003).

International Organization of Securities Commissions, [Press](#)

[Release: The Technical Committee of the International Organization of Securities Commissions Today Issued a Statement of Principles Regarding the Manner in Which CRA Activities Are Conducted](#) (Sept. 25, 2003).

On September 25, the Technical Committee of the International Organization of Securities Commissions issued a Statement of Principles regarding the activities of Credit Rating Agencies. The Statement sets forth four "overarching principles" that securities commissions are encouraged to pursue in developing their regulatory schemes for dealing with such issues. They include:

Ensuring that Credit Rating Agencies issue opinions that help reduce the asymmetry of information among borrowers, lenders and other market participants.

Ensuring that Credit Rating Agency decisions are independent and free from any political or economic pressures and from any conflicts of interest arising due to the Credit Rating Agency's ownership structure, business or financial activities, or the financial interests of the Agency's employees. Credit Rating Agencies should, as far as possible, be required to avoid activities, procedures or relationships that may compromise or appear to compromise the independence and objectivity of the credit rating operations.

Credit Rating Agencies should be required to maintain in confidence all non-public information communicated to them by any issuer, or its agents, under the terms of a confidentiality agreement or otherwise under a mutual understanding that the information is shared confidentially.

## on Research Analyst Conflicts

International Organization of Securities Commissions, [IOSCO Statement of Principles for Addressing Sell-Side Securities Analyst Conflicts of Interest - A](#) (Sept. 25, 2003).

International Organization of Securities Commissions, Press Release: [The Technical Committee of the International Organization of Securities Commissions \(IOSCO\) Today Issued a Statement of Principles to Guide Securities Regulators and Others in Addressing the Conflicts of Interest Securities Analysts May Face](#) (Sept. 25, 2003).

On the same day it released its guidance regarding Credit Rating Agencies -- September 25 -- IOSCO also issued a Statement of Principles regarding the conflicts of interest securities analysts may face. According to IOSCO, there are certain "core measures" that should be implemented by securities regulators "to properly address" the conflicts of interest that securities analysts may face. According to the statement, these include:

Prohibiting analysts from trading securities or related derivatives ahead of publishing research on the issuer of those securities.

Prohibiting firms that employ analysts from improperly trading securities or related derivatives ahead of the analyst publishing research on the issuer of those securities.

Prohibiting firms that employ analysts from promising issuers favorable research coverage, specific ratings, or specific target prices in return for a future or continued business relationship, service or investment.

Prohibiting analysts from participating in investment banking sales pitches and road shows.

Prohibiting analysts from reporting to the investment banking function.

Prohibiting analyst compensation from being directly linked to specific investment banking transactions.

Prohibiting the investment banking function from pre-approving analyst reports or recommendations (except in circumstances subject to oversight by compliance or legal personnel where investment banking personnel review a research report for factual accuracy prior to publication).

Requiring that analysts, or the firms that employ analysts, publicly disclose whether the issuer or other third party provided any compensation or other benefit in connection with a research report.

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## **PCAOB I: PCAOB Adopts Final Rules on Investigations and Registration Withdrawal**

Public Company Accounting Oversight Board, [Rules on Investigation and Adjudications](#), PCAOB Release No. 2003-015 (Sept. 29, 2003) (PCAOB Rulemaking Docket Matter No. 005).

Public Company Accounting Oversight Board, [Final Rule on Withdrawal from Registration](#), PCAOB Release No. 2003-016

(Sept. 29, 2003) (PCAOB Rulemaking Docket Matter No. 007).

Public Company Accounting Oversight Board, [Board Adopts Rules on Investigations, Registration Withdrawal](#) (Sept. 29, 2003).

On September 29, the Public Company Accounting Oversight Board adopted final rules regarding: (1) investigations and procedures; and (2) the process by which a registered public accounting firm may seek to withdraw from registration. The rules must still be submitted to the SEC for approval and will not take effect, of course, unless approved by the SEC.

### **Investigations and Adjudications**

On July 28, 2003, the PCAOB published for comment a proposed set of rules to govern the conduct of investigations, the conduct of hearings and the imposition and termination of sanctions. See Public Company Accounting Oversight Board, [Proposed Rules on Investigations and Adjudications](#), PCAOB Release No. 2003-012 (Jul. 28, 2003). The Board received 17 comment letters on the proposal. See Public Company Accounting Oversight Board, [Rulemaking Docket Matter 006 - Release No. 2003-013 - Proposed Rules on Inspections of Registered Public Accounting Firms](#) (Aug. 27, 2003).

The comments prompted the Board to make several important changes to the final version of the rules, including:

Clarifying the Board's views of what privileges may be invoked in Board proceedings, including that the Board will not treat proper invocations of the Fifth Amendment privilege against self-incrimination as noncooperation;

Reducing the reach of noncooperation sanctions in the context of testimony, by eliminating the possibility that omitting material information can, by itself, be grounds for a noncooperation proceeding;

Clarifying that the Board will not withhold material exculpatory evidence from a respondent;

Requiring that any exercise of the Board's authority to conduct an examination to verify information supplied in an investigation must be approved by the Director of the Board's Division of Enforcement and Investigations;

Clarifying how a bar or suspension of an associated person affects the ways in which a firm may compensate that person;

Clarifying in the rules that all staff in the Board's Division of Enforcement and Investigations will be excluded from participating in the adjudication of any disciplinary proceeding;

Revising the definition of "hearing officer" to provide that neither a Board member nor interested staff may serve as a hearing officer;

Expanding the scope of the Board's staff that is covered by restrictions on ex parte communications with the Board after a disciplinary proceeding is authorized;

Providing that firms can produce copies of documents in response to a demand for the production of documents, unless the accounting board demand expressly requires originals to be produced;

Providing that permission for an attorney to withdraw as counsel in a proceeding before the Board or a hearing officer will not be unreasonably withheld;

Extending the time for witnesses to request changes to the transcript of

their testimony;

Requiring the Board staff to provide a "privilege log" for certain documents that the staff withholds from respondents based on a claim of privilege;

Revising the procedures for appeals to the Board of actions taken by Board staff under delegated authority;

Allowing state regulatory authorities to participate in a proceeding for purposes of requesting a stay of the proceeding; and

Clarifying when a firm's registration may be suspended for failing to pay a money penalty.

### **Withdrawals from Registration**

Also on July 28, the PCAOB published for comment a proposed set of rules to govern the process by which a registered public accounting firm may seek to withdraw from registration. See Public Company Accounting Oversight Board, [Proposed Rule on Withdrawal from Registration](#), PCAOB Release No. 2003-014 (Jul. 28, 2003). The Board received 3 comment letters on the proposal. See Public Company Accounting Oversight Board, [Rulemaking Docket Matter 007 - Release No. 2003-014 - Proposed Rule on Withdrawal from Registration](#) (Aug. 18, 2003).

As noted in its announcement of the final rule, under the final rule a registered firm wishing to withdraw from registration may file a request on Form 1-WD. Any firm that files such a form "may not engage in the preparation or issuance of, or play a substantial role in the preparation or furnishing of, an audit report unless it first withdraws its Form 1-WD filing." Withdrawal is not automatic upon request. Rather, withdrawal is delayed if either disciplinary proceedings are pending against the firm or if the Board decides to delay withdrawal (which it may do for a

period of up to 18 months). If withdrawal is delayed, the rule nevertheless eases the firm's reporting and annual fee obligations during the delay. The rule gives the Board discretion to waive any regular inspection of the firm that would otherwise commence, in the regular inspection cycle, during the delay.

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## PCAOB II: PCAOB Conducts Roundtable on Audit Documentation

[Archived Webcast of PCAOB Roundtable on Audit Documentation](#)

(Sept. 29, 2003).

Public Company Accounting Oversight Board, [Briefing Paper For the Roundtable on Audit Documentation](#) (Sept. 10, 2003).

On September 29, the Public Company Accounting Oversight Board conducted a roundtable on audit documentation. Accounting industry participants, as expected, urged the PCAOB to consider audit documentation rules carefully and to avoid "overly burdensome" new rules. Industry participants expressed fears that the Board could go to extremes and basically require them to document every single thing done and every single person to whom they speak over the course of each lengthy audit.

One seemingly odd portion of the debate revolved around whether the PCAOB will require that audit documentation must reflect who performed what work and the date such work was completed. It turns out that, in practice, it can be difficult to assign such a "completion date" to workpapers since audits typically are an "ongoing process". The SEC's Chief Accountant did not seem to agree, saying simply that all workpapers should be signed and dated by the person who performed the work and his or her supervisor.

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## MERGERS: NY Appellate Court Reverses Injunction Blocking Merger Saying Court Below Intruded on Management Matters

*George Kimeldorf v. First Union Real Estate Equity and Mortgage Investments, et al.*, [Slip Op.](#) (N.Y. App. Div., 1st Dep't, Sept. 4, 2003).

*George Kimeldorf v. First Union Real Estate Equity and Mortgage Investments, et al.*, [Order](#) (N.Y. App. Div., 1st Dep't, Sept. 4, 2003).

On September 4, a panel of New York's Appellate Division, First Department, issued its decision in *Kimeldorf v. First Union Real Estate Equity and Mortgage Investments*. There the court below had enjoined a merger between Gotham Golf Partners, a company that operates golf courses, and First Union Real Estate Equity and Mortgage Investments, a real estate investment trust after certain of First Union's preferred shareholders asserted breach of fiduciary duty and breach of contract claims based on an argument that management had previously disposed of the investment trust's assets and agreed to merge with an otherwise "insolvent" Gotham Golf Partners.

The five judge panel unanimously reversed the lower court's decision, stating that "[p]laintiff states no reason to justify the substantial intrusion by the courts into a matter of corporate governance. . . . The question of how an entity should recast its line of business or restructure its operations is one for which there is 'no available objective standard' for application by a court . . . whereas the managers' 'individual capabilities and experience peculiarly qualify them for the discharge of that responsibility'".

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## COMINGS AND GOINGS: Who's Doing and Saying What and Where?

On September 10, the American Stock Exchange announced that **David Harris** has been appointed Senior Vice President of Strategic Planning and **Anthony Opiatowski** has been appointed Vice President of Project Advisory Services. Before joining Amex, Mr. Harris served as E.V.P. and General Counsel of Nasdaq Liffe Markets LLC. Mr. Opiatowski, before joining Amex, was V.P. of Instinet Corporation. See American Stock Exchange, [American Stock Exchange Announces Two Additions to the Senior Management Team](#) (Sept. 10, 2003).

On September 15, the SEC's Office of the Chief Accountant announced the selection of **Kimberly Smith** as Academic Accounting Fellow for a one-year term that began August 2003. Dr. Smith is an Associate Professor at the School of Business Administration at The College of William and Mary. See U.S. Securities and Exchange Commission, [Kimberly Smith Named Academic Accounting Fellow in the Office of the Chief Accountant](#), News Release 2003-115 (Sept. 15, 2003).

**What Are the Commissioners Saying?** SEC Chairman **William H. Donaldson** delivered his "[Remarks Before the Foreign Policy Association](#)" regarding links between U.S. securities markets and other securities markets throughout the world on September 25. Chairman Donaldson also delivered a "[Speech to NASAA Annual Conference](#)" regarding the need for cooperation between the activities of state and federal securities regulators on September 14, 2003. Commissioner **Cynthia A. Glassman** delivered "[Remarks Before Government-Business Forum on Small Business Capital Formation](#)" regarding small business capital formation on September 22, 2003. Commissioner Glassman also spoke on "[Financial Reform: Relevance and Reality in Financial Reporting](#)" before the National Association for Business Economics on September 16, 2003 and on "[Obstacles to Good Financial Reporting](#)" before the American Enterprise Institute on September 3, 2003.

**What Are the Commission Staffers Saying?** Mary Ann Gadziala, Associate Director of the SEC's Office of Compliance Inspections and Examinations spoke on "[Strengthening Investor Confidence Through Compliance and Risk Controls](#)" before the 5th Annual Regulatory Compliance Conference for Financial Institutions on September 24, 2003. Stephen M. Cutler, Director of the SEC's Division of Enforcement, delivered "[Remarks Before the National Regulatory Services Investment Adviser and Broker-Dealer Compliance / Risk Management Conference](#)" regarding the "conflicts crisis on Wall Street" on September 9, 2003. Mr. Cutler also delivered "[Remarks to Announce the Filing of Actions Related to Trading Based on Non-Public Information About the Treasury's Decision To Cease Issuance of the 30-Year Bond](#)" on September 4, 2003.

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