

December 2003

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Published by RR Donnelley

Editorial Content by Glasser LegalWorks

Blake Bell, Editor in Chief

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SEC I: SEC Adopts Final Rules Regarding Nominating Process Disclosure and Shareholder Communications

U.S. Securities and Exchange Commission, [Final Rule: Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors](#), Release Nos. 33-8340, 34-48825, IC-26262 (Nov. 24, 2003).

U.S. Securities and Exchange Commission, [Summary of Comments In Response to the Commission's Proposed Rules](#)

[Relating to Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors](#), Exchange Act Release No. 34-48301, Investment Company Act Release No. 26145, File No. S7-14-03 (Nov. 24, 2003).

U.S. Securities and Exchange Commission, [SEC Adopts Rules on Disclosure of Nominating Committee Functions and Communications Between Security Holders and Boards of Directors](#), News Release 2003-160 (Nov. 19, 2003).

U.S. Securities and Exchange Commission, [Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors](#) (Jul. 15, 2003).

On November 24, the U.S. Securities and Exchange Commission released new disclosure requirements and amendments to existing disclosure requirements "to enhance the transparency of the operations of boards of directors." The Commission adopted what it described as "enhancements" to existing disclosure requirements regarding the operations of board nominating committees and a new disclosure requirement regarding the means, if any, by which security holders may communicate with directors.

The SEC's final release states that the new rules require disclosure, but do not "mandate any particular action by a company or its board of directors". The effective date for the new rules is January 1, 2004.

Nominating Process Disclosure

The new rules require, among other things, that the company disclose the following:

Whether it has a nominating committee and, if so, whether the committee's members are independent;

If it does not have a nominating committee, then the identity/ies of the

director(s) who make nomination decisions and a statement regarding whether its lack of a nominating committee is appropriate;

Whether the committee has a charter and, if so, the procedures by which shareholders can obtain or review a copy;

The process by which the committee identifies and considers the qualifications of nominees;

The manner in which the committee evaluates shareholder nominations and a description of the difference, if any, between this process and the board's process for committee nominations;

The qualifications, including minimum qualifications, that the committee considers in deciding whether a nominee is fit for membership on the board;

The process by which shareholders may submit nominations and the committee's policies for considering and evaluating such nominees;

For each board nominee who is not an incumbent board member or an executive officer of the company, the relationship to the company of the nominator who nominated each such candidate;

In the event the nominating committee determines not to nominate a candidate recommended by a shareholder (or group of shareholders) who beneficially owns more than five percent of the company's voting stock for at least one year (so called Eligible Shareholders), the name(s) of such shareholder(s) and the name of the candidate whom the committee chose not to recommend.

The role played by any third party who assisted in identifying or evaluating nominees in exchange for a fee.

To the extent that a company changes its policies regarding its consideration of shareholder recommendations and the procedures by which shareholders may nominate prospective board members, the company must disclose those changes in its periodic reports.

Shareholder Communications Disclosure

The new rules also include a number of proxy statement disclosure requirements

concerning shareholder communications with directors, including requirements that the company disclose the following:

Whether the company has procedures by which shareholders may communicate with directors;

If it does not have such procedures, a statement of the basis for the company's view that no such process is needed;

If it does have such procedures, a description of the process for permitting communications with directors and -- if such communications are screened in any way -- a description of the screening process;

A statement of the company's policy regarding the attendance of directors at the company's annual meetings and the number of directors who attended the last annual meeting of shareholders;

RealCorporateLawyer.com is pleased to provide memoranda detailing the final rules regarding nominating process disclosure and shareholder communications in substantial detail.

See:

Dechert LLP, [Mergers & Acquisitions - The SEC Shareholder Access Proposal: What Is It and What Should You Do About It?](#)
(Nov. 13, 2003).

Morrison & Foerster LLP, [MoFo Update: SEC Proposes Increased Shareholder Access to Management's Proxy Statement for Election of Directors](#) (Nov. 2003).

Gibson, Dunn & Crutcher LLP, [SEC Adopts New Disclosure Requirements: Rules Require New Disclosures Regarding Nominating Committees and Shareholder-Director Communications](#)
(Nov. 19, 2003).

Troutman Sanders LLP, [SEC Finalizes Nominating Process Disclosure Rules](#) (Nov. 25, 2003).

Nixon Peabody LLP, [Securities Law Alert: Shareholder Participation in the Nomination of Directors - The Beginning of a New Era in Corporate Governance](#) (Oct. 23, 2003).

RealCorporateLawyer.com, [Proxy and Shareholder Issues](#) (Collection of Law Firm Memoranda on the Topic).

SEC II: SEC Approves NYSE and Nasdaq Corporate Governance Standards for Listed Companies

U.S. Securities and Exchange Commission, [NASD and NYSE Rulemaking: Relating to Corporate Governance](#), Release No. 34-48745 (Nov. 4, 2003).

U.S. Securities and Exchange Commission, [SEC Approves NYSE, NASDAQ Strengthening of Corporate Governance Standards for Listed Companies](#), News Release 2003-150 (Nov. 4, 2003).

On November 4, 2003, the Securities and Exchange Commission approved new rules proposed and adopted by the New York Stock Exchange and the Nasdaq Stock Market requiring "widespread strengthening of corporate governance standards for listed companies." The rules approved by the Commission establish a more stringent definition of independence for directors and require the majority of members on listed companies' boards to satisfy that standard. The

new rules also include provisions that require and facilitate independent director oversight of processes relating to corporate governance, auditing, director nominations, and compensation. Some of the more important provisions include:

A requirement that a majority of the board of directors be independent;

Defining independence to require that:

the director was not an employee of the company or its parent or subsidiary during any of the previous three years;

no immediate family member of the director has been an executive officer of the company or its parent or subsidiary during any of the previous three years;

neither the director nor any immediate family member has received more than \$100,000 (NYSE) or \$60,000 (Nasdaq) in direct annual compensation in the previous three years, except certain permitted payments;

neither the director nor any immediate family member has been an executive officer or employee (in the case of the director) of any company that provided payments or services worth more than \$1 million or two percent of the other company's consolidated gross revenues for the year (NYSE) or, in the case of Nasdaq, the greater of \$200,000 or five percent of the other company's consolidated gross revenues in any of the previous three years;

neither the director nor any immediate family member may be a partner of the company's outside auditor or have been a partner or employee of the auditor or have worked on the company's audit during any of the previous three years; and

neither the director nor any immediate family member may have been employed as an executive officer or another company during any of the previous three years if that other company's compensation committee included any of the listed company's executives as members;

A requirement that independent directors meet regularly without members of management being present;

A requirement of independent audits that includes, among other things, the following:

the creation of an audit committee composed solely of at least three independent directors who have not accepted compensatory fees (such as consulting fees) either directly or indirectly from the company or its affiliates, excluding such amounts as compensation under a retirement plan (including deferred compensation) and who are not "affiliated persons" of the company or any of its subsidiaries;

Requirements that at least one member of the audit committee has an expertise in finance and all members have adequate understandings of finance;

In the case of NYSE-listed companies, the audit committee must have a written charter detailing the companies responsibilities and purpose and which requires an annual performance evaluation of the committee;

In the case of NYSE-listed companies, the company must create an independent nominating and corporate governance committee consisting solely of independent directors (Nasdaq's new rules are slightly less restrictive in this regard);

In the case of NYSE-listed companies, there must be an independent compensation committee consisting solely of independent directors (Nasdaq allows CEO

compensation to be determined by either such a committee or by a majority of the board's independent directors).

The rules are far more extensive than such a brief summary might otherwise suggest. RealCorporateLawyer.com is pleased to provide memoranda describing the final rules and their implications in substantial detail.

See:

Kirkland & Ellis LLP, [SEC Approves New NYSE and NASDAQ Corporate Governance Rules-Focus on Director Independence](#) (Nov. 2003).

Wachtell, Lipton, Rosen & Katz, [Public Company Compensation Committees - An Update](#) (Nov. 18, 2003).

Hogan & Hartson LLP, [SEC Update: SEC Adopts Final NYSE Listing Standards on Corporate Governance](#) (Nov. 6, 2003).

Hogan & Hartson LLP, [SEC Update: SEC Adopts Final Nasdaq Listing Standards on Corporate Governance](#) (Nov. 6, 2003).

SEC III: SEC Releases Final Rules Amending the Issuer Stock Repurchase Safe Harbor Under Rule 10b-18

U.S. Securities and Exchange Commission, [Proposed Rule: Rule 10b-18 and Purchases of Certain Equity Securities by the Issuer and Others](#), Release Nos. 33-8160, 34-46980, IC-25845 (Dec. 10, 2002).

[Comments on Proposed Rule: Rule 10b-18 and Purchases of Certain Equity Securities by the Issuer and Others](#), File No. S7-50-

02.

On November 10, 2003, the Securities and Exchange Commission released final rules amending the issuer stock repurchase safe harbor under Rule 10b-18. The Commission adopted the amendments on October 22. Rule 10b-18 offers issuers a type of "safe-harbor" protection against liability for market manipulation claims under federal securities laws in connection with repurchases of their securities in certain circumstances. The Commission adopted amendments that will change the rule substantially as indicated in the proposing release dated December 10, 2002 (see above).

Generally speaking, the rule currently provides protection against liability for market manipulation claims under federal securities laws so long as:

The issuer used a single broker or dealer to bid on or to repurchase its common stock.

The time within which the issuer bids on or repurchases its common stock falls within the period permitted under the rule.

The price bid or paid by the issuer is no higher than the pricing provisions permit under the rule.

The number of securities repurchased by the issuer is no higher than the amount of securities permitted for repurchase in a single day under the rule.

The most significant amendments provide as follows: (1) block trades are no longer excluded from the volume limitations under Rule 10b-18 with certain exceptions to be provided for the benefit of small issuers; (2) a safe harbor for mergers and acquisitions is provided so long as the repurchases occur after the transaction is announced and the amount repurchased is consistent with amounts repurchased during a defined period of time prior to announcement of the transaction. The SEC also has provided, in the amendments, for less restrictive volume restrictions on repurchases in instances following a severe market decline involving the issuer's securities.

Once again, RealCorporateLawyer.com is pleased to provide memoranda describing the final rules and their implications in substantial detail.

See:

Wachtell, Lipton, Rosen & Katz, [SEC Finalizes Changes to Buyback Safe Harbor](#) (Nov. 11, 2003).

Troutman Sanders LLP, [SEC Issues Final Rules Regarding Issuer Repurchases](#) (Nov. 24, 2003).

Alston + Bird LLP, [Securities Law Advisory: SEC Adopts Issuer Stock Repurchase Amendments](#) (Nov. 17, 2003).

Schiff Hardin & Waite, [Memorandum to Clients and Friends of Schiff Hardin & Waite: Overview of Rule 10b-18 and New Amendments to the Rule](#) (Nov. 17, 2003).

SEC IV: SEC Issues Fee Rate Advisory #6 for Fiscal Year 2004

U.S. Securities and Exchange Commission, [Fee Rate Advisory #6 for Fiscal Year 2004](#), News Release 2003-163 (Nov. 24, 2003).

On November 24, 2003, the Securities and Exchange Commission announced that the continuing resolution funding the Commission for fiscal 2004 since October 1, 2003 has been extended through January 31, 2004. Accordingly, fees paid under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g) and 31 of the Securities Exchange Act of 1934 will remain at their current rates. Five days after enactment of the Commission's regular fiscal year 2004 appropriation, however, the following fee rates will be increased from the current rate of \$80.90 per million to \$126.70 per million:

the Section 6(b) fee rate applicable to the registration of securities;

the Section 13(e) fee rate applicable to the repurchase of securities; and the Section 14(g) fee rate applicable to proxy solicitations and statements in corporate control transactions.

In addition, thirty days after enactment of the Commission's regular appropriation, the Section 31 fee rate applicable to securities transactions on the exchanges and Nasdaq will be reduced from the current rate of \$46.80 per million to \$39.00 per million, as previously announced.

SRO I: NYSE Further Amends Proposed Constitution - Individual Investors To Be Represented on Board of Executives

New York Stock Exchange, [Special Membership Bulletin: Additional Amendments to the Constitution](#) (Nov. 26, 2003).

New York Stock Exchange, [Amendments to the Constitution \(Additions are Underscored, Deletions are Struck Through\)](#) (Nov. 26, 2003).

New York Stock Exchange, [NYSE Further Amends Proposed Constitution: Individual Investors to Be Represented on Board of Executives](#) (Nov. 26, 2003).

On November 24, 2003, the New York Stock Exchange's Board of Directors approved further amendments to the NYSE's proposed new constitution that is pending review by the Securities and Exchange Commission. The Commission currently is receiving comments on the NYSE's proposal and is expected to act on it in December. The Board, among other things, voted:

To add a "representative of individual investors" to the NYSE's Board of Executives;

To remove any requirement that specialist representatives on the Board of

Executives be the chief or principal officer of the specialist firm, thereby increasing the pool of potential candidates (the amendment *does* require each person in this category to be registered as a specialist and spend substantial time on the NYSE trading floor); and

To make clear that standing committees may hire legal counsel or advisors, and that if done these should be different than counsel or advisors that are hired by the NYSE.

SRO II: NASD Proposes Rules to Reform IPO Process

NASD, [Notice to Members: Request for Comment - Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings \(IPOs\)](#) (Nov. 24, 2003).

NASD, [News Release: NASD Approves Rules to Reform IPO Process](#) (Nov. 24, 2003).

On November 24, 2003, NASD proposed new rules to regulate Initial Public Offerings intended, among other things, to implement many of the recommendations made by the NYSE/NASD IPO Advisory Committee. The new rules would:

Require the lead underwriter to disclose indications of interest and final allocations to the issuer;

Prohibit brokers from accepting a market order to purchase IPO shares for one trading day after an IPO;

Impose procedures to ensure that reneged trades are not used to benefit favored clients of the underwriter;

Require that any lock-up that applies to shares owned by the issuer's officers and directors also applies to shares they receive in "friends and family" programs.

Impose new notification requirements when underwriters waive lock-ups.

Comments on the proposal must be submitted to the NASD on or before January 9, 2004.

SRO III: NASD Proposes Rule Regarding Disclosure of Mutual Fund Expenses in Performance Advertising

NASD, [News Release: NASD Proposes Disclosure Rule for Mutual Fund Expenses in Performance Advertising](#) (Nov. 21, 2003).

On November 21, 2003, NASD proposed to require disclosure of mutual fund expenses in advertisements and other sales material that promotes the fund's performance. The proposal would require that all fund advertisements, sales material and correspondence that includes performance information include "a prominent text box that sets forth" the fund's: (1) standardized performance information (i.e., 1, 5 and 10-year returns); (2) maximum sales charge; and (3) annual expense ratio..

NASD intends to seek public comment on the proposal and states in its release announcing the development that details of the proposal will be the subject of a Notice to Members.

Practical Guidance on the New Audit Committee Charter Requirements

The Sarbanes-Oxley Act of 2002 requires the Securities and Exchange Commission to direct the national securities exchanges and associations to prohibit the listing of any security of any issuer not in compliance with the statute's audit committee requirements. To comply with this directive, the New York Stock Exchange and the Nasdaq Stock Market proposed new listing rules to the SEC that impose new requirements on the audit committees of their listed companies. As noted above, on November 4, 2003, the new listing rules were

approved by the SEC. These NYSE and Nasdaq requirements must conform to SEC Rule 10A-3, which implements certain audit committee requirements mandated by Sarbanes-Oxley.

Listed issuers, other than foreign private issuers and small business issuers, must comply with the new listing rules by the earlier of their first annual shareholders meeting after January 15, 2004, and October 31, 2004. Foreign private issuers and small business issuers that are listed must comply with the new listing rules no later than July 31, 2005. Boards of directors and audit committees should update audit committee charters to embody the new requirements.

RealCorporateLawyer.com is pleased to provide an extensive article prepared by James H. Ball, Jr. and Alexander F. Kennedy of Milbank, Tweed, Hadley & McCloy LLP setting forth recommendations that each issuer should reflect in its audit committee charter. A model charter also accompanies the article, which was published in the November 2003 (Vol. 7, No. 6) of Wall Street Lawyer.

Ball, Jr., James H. & Kennedy, Alexander F., [New Audit Committee Charter Requirements](#), 7(6) Wall Street Lawyer (Nov. 2003).

For those who would like to delve even more deeply into the SRO governance and listing standards, there is an extensive collection of law firm memoranda on the topic in the RealCorporateLawyer.com Reform Portal. [Click here to access those memos.](#)

PCAOB I: PCAOB Proposes Auditing Standard on Audit Documentation

Public Company Accounting Oversight Board, [Proposed Auditing Standard on Audit Documentation and Proposed Amendment to Interim Auditing Standards](#) (Nov. 21, 2003).

Public Company Accounting Oversight Board, [Briefing Paper: Proposed Auditing Standard on Audit Documentation and Proposed Amendment to Interim Auditing Standards](#) (Nov. 21, 2003).

Public Company Accounting Oversight Board, [Board Proposes Two Auditing Standards, Amendment to Interim Auditing Standards](#) (Nov. 12, 2003).

On November 12, the Public Company Accounting Oversight Board voted unanimously to propose for public comment two auditing standards and an amendment to an interim auditing standard.

First, the Board voted to propose for comment an auditing standard on audit documentation that would establish general requirements for documentation auditors must prepare and retain in connection with any public company audit. The Board also voted to propose related amendments to the interim auditing standards. The proposed standard and amendments would apply to engagements completed on or after June 15, 2004 and the Board announced a sixty-day comment period.

Second, the Board voted to propose a requirement that registered public accounting firms expressly state in each public company audit report that the audit was conducted in accordance with PCAOB standards. This proposed requirement would apply to auditors' reports dated on or after the later of January 1, 2004 or the 10th day after final approval of the proposal. The Board provided for a 21-day comment period regarding this standard.

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

On November 26, the SEC announced the appointment of **Elizabeth Jacobs** as Deputy Director of the Commission's Office of International Affairs. Ms. Jacobs joined the SEC in 1984 as an attorney in the Division of Market Regulation's Office of Trading Practices. She became senior counsel to the Office of

International Affairs in 1989 and was promoted to Assistant Director in 1994. See U.S. Securities and Exchange Commission, [Elizabeth Jacobs Named Deputy Director of SEC's Office of International Affairs](#), News Release 2003-166 (Nov. 26, 2003).

Mary E. Keefe, Regional Director of the SEC's Midwest Regional Office, announced on November 20 that she will leave the Commission in December to become Associate General Counsel and Head of Global Compliance of Citadel Investment Group, L.L.C. Ms. Keefe has served as Regional Director of the Midwest Regional Office since July, 1994. See U.S. Securities and Exchange Commission, [Midwest Regional Director Mary Keefe To Leave SEC](#), News Release 2003-162 (Nov. 20, 2003).

On November 12, the Public Company Accounting Oversight Board announced that **Lewis H. Ferguson III** will join the Board's staff in January as General Counsel. Mr. Ferguson previously was a partner with Williams & Connolly LLP. See Public Company Accounting Oversight Board, [Lewis Ferguson To Join PCAOB as General Counsel](#) (Nov. 12, 2003).

Former SEC Chairman **Richard Breeden** and Former SEC Commissioner **J. Carter Beese, Jr.** have received some plum assignments in connection with WorldCom, Inc. matters. On November 10, the SEC announced that former SEC Chairman Breeden has been selected to supervise distribution of the SEC's civil penalty imposed against WorldCom and that former SEC Commissioner Beese will oversee the stock portion of the distribution fund. U.S. Securities and Exchange Commission, [Former SEC Chairman Richard Breeden to Supervise Distribution of SEC's Civil Penalty Against WorldCom; Former SEC Commissioner J. Carter Beese, Jr. to Oversee Stock Portion of the Distribution Fund](#), Litig. Release No. 18451 (Nov. 10, 2003).

On November 5, the SEC named **Peter H. Bresnan** as the Acting District Administrator of its Boston Office. Mr. Bresnan currently serves as the Deputy Chief Litigation Counsel in the Division of Enforcement at SEC Headquarters and will continue in that position. He will split his time between Washington, D.C. and

Boston until a permanent District Administrator is appointed. U.S. Securities and Exchange Commission, [Peter H. Bresnan Named Acting District Administrator of SEC's Boston District Office](#), News Release 2003-152 (Nov. 5, 2003).

November was a sad month in that two former SEC Commissioners and a former Director of the SEC's Division of Corporation Finance passed away. **John R. Evans**, a Commissioner from 1973 to 1983, died November 18 at the age of 71. **Linda C. Quinn**, Director of the Division of Corporation Finance from 1986 to 1996 died November 11 at the age of 55. Richard B. Smith, a Commissioner from 1967 to 1971 died November 2 at the age of 75. See Securities and Exchange Commission Historical Society, [Current News: In Memoriam](#) (November 18, 2003).

What Are the Commissioners Saying? SEC Chairman **William H. Donaldson** delivered "[Remarks to the Securities Industry Association](#)" on November 7 regarding the need for the industry to deal with the "disease that has afflicted far too many in the industry" as demonstrated by recent corporate scandals. Chairman Donaldson also delivered "Remarks to the Practising Law Institute" on November 6 regarding "up-the-ladder" reporting and the need for dealing firmly with recent corporate scandals. SEC Commissioner **Cynthia A. Glassman** delivered "[Remarks Before the Aspen Institute Italia Seminars for Leaders](#)" on November 7 regarding the need for dealing with corporate scandals transparently.

What Are the Commission Staffers Saying? Paul F. Roye delivered the "[Keynote Address before the 21st Annual Advanced ALI-ABA Conference on Life Insurance Company Products](#)" on November 20 regarding -- among other things -- the Commission's investigation of late trading and market timing abuses in the variable products area.

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