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**SEC I: SEC Releases Proposals Regarding Investment Company Governance, Investment Adviser Ethics and Point of Sale Disclosures**

U.S. Securities and Exchange Commission, [SEC Proposes New Investment Company Governance Requirements, New Investment Adviser Codes of Ethics Requirements, and New Confirmation and Point of Sale Disclosure Requirements](#), News Release 2004-5

(Jan. 14, 2004).

U.S. Securities and Exchange Commission, [Proposed Rule: Investment Company Governance](#), Release No. IC-26323 (Jan. 15, 2004) ([Federal Register PDF](#)).

U.S. Securities and Exchange Commission, [Investment Adviser Codes of Ethics](#), Release Nos. IA-2209, IC-26337 (Jan. 20, 2004) ([Federal Register PDF](#)) ([Appendix A: Key Distinctions Between Existing and Proposed Rules](#)).

U.S. Securities and Exchange Commission, [Proposed Rule: Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds](#), Release Nos. 33-8358, 34-49148, IC-26341 (Jan. 29, 2004).

U.S. Securities and Exchange Commission, [New Proposed Mutual Fund Disclosure Forms](#) (Jan. 29, 2004).

On January 14, the Securities and Exchange Commission voted unanimously to propose rules and rules amendments designed to correct abuses in the management and sale of mutual funds. In the broadest terms, the proposals would: (1) require the adoption of investment adviser codes of ethics; (2) require investment companies to strengthen the independence of their boards of directors; and (3) enhance disclosure requirements applicable to broker-dealers in their dealings with customers.

With regard to investment company governance, the proposal would require -- among other things -- that at least 75% of a funds board of directors be independent directors and that the Chairman of the Board be an independent director. Additionally, there would have to be separate quarterly meetings of the independent directors and the entire board would be required to prepare an assessment of its effectiveness each year. The proposal also would require funds to allow their independent directors to hire their own staff.

With regard to the Investment Adviser Codes of Ethics, the SEC proposed a new rule (Rule 204A-1) that would require investment advisers to adopt codes of

ethics. Among other things, the such codes would be required to specify standards of conduct, procedures for protecting private information about client transactions, and how to handle conflicts of interest arising from personal trading by employees. Such codes also would require so-called "pre-approval" of personal trading whether in private or public securities.

With regard to point of sale disclosures, the Commission proposed new rules to require broker-dealers to disclose additional information to customers regarding the costs and any potential conflicts of interest arising in connection with transfer of mutual fund shares, unit investment trust interests or education savings municipal fund securities. Such disclosures would have to be made at the point of sale and in connection with transaction confirmations.

## **SEC II: SEC Proposes New Procedures Governing the Calculation, Payment and Collection of Section 31 Fees and Assessments**

U.S. Securities and Exchange Commission, [Proposed Rule: Collection Practices Under Section 31 of the Exchange Act](#), Release No. 34-49104 (Jan. 20, 2004).

On January 20, the U.S. Securities and Exchange Commission released the text of proposals to provide new procedures that would govern the calculation, payment and collection of fees and assessments on self-regulatory organizations pursuant to Section 31 of the Exchange Act. Under the new procedures, the Commission would calculate the amount of fees and assessments due based on the volume of those transactions, and the Commission would bill the national securities exchange or national securities association that amount.

## **SRO I: NYSE Releases FAQs on Corporate Governance Listing Standards**

New York Stock Exchange, [NYSE Listed Company Manual Section](#)

[303A Corporate Governance Listing Standards Frequently Asked Questions](#) (Jan. 29, 2004).

On January 29, the New York Stock Exchange released a list of fifty "Frequently Asked Questions" (FAQs) regarding corporate governance listing standards. The FAQs were organized into eight sections as follows:

- Section A: Questions With Respect to Transition Periods
- Section B: Questions on Disclosure and Certifications
- Section C: Questions Regarding Independence Determination
- Section D: Questions on Section 303A.03 - Non-Management Director Communications Requirements
- Section E: Questions on Section 303A.05 - Compensation Committee Requirements
- Section F: Questions on Section 303A.06 - The Audit Committee Requirements
- Section G: Questions on Section 303A.10 - Code of Business Conduct and Ethics Requirements
- Section H: Questions on Section 303A.11 - Foreign Private Issuer Disclosure

Some of the more interesting issues clarified by the FAQs included the following. Regarding transition periods, a company's Section 303A compliance date is the earlier of the company's first annual meeting after January 15, 2004 and October 31, 2004. Until its Section 303A compliance date, a company must continue to comply with the pre-existing corporate governance requirements of Section 303. Regarding questions on disclosure and certifications, the NYSE made clear that a form of the Section 303A.12(a) CEO certification will be available shortly on the NYSE's Web site and that the certification would have to be submitted annually to the NYSE no later than 30 days after the annual shareholder meeting. Regarding director independence determinations, the FAQs make clear that the three-year look back phase-in function will work as follows: "From November 4, 2003 until November 3, 2004, the Section 303A look back period is a twelve-month period. Beginning on November 4, 2004, the look back period is a three-year period. Consequently, it is possible that an individual who is deemed independent during the first year after approval of Section 303A ceases to be independent during the second following approval due to a prior relationship to

the listed company." This becomes particularly interesting in the context of previous payments made to a director that might total more than \$100,000 in one of the years covered by the look back. Thus, one of the FAQs states as follows:

**12) What period must be used in applying Section 303A.02(b)(ii) relating to the payment of more than \$100,000 per year in direct compensation and how does that interact with the three-year look-back requirement?**

Section 303A.02(b)(ii) prohibits a director from being deemed independent if he or she has received more than \$100,000 per year in direct compensation from the listed company. This means that if \$100,000 in direct compensation from the listed company. This means that if \$100,000 per year in direct compensation is paid within **any** twelve-month period, a director may not qualify as independent during that twelve-month period and the three-year look-back period following the end of that twelve-month period. For example, if a director received \$101,000 in direct compensation in a single payment on April 10, 2001, (and no later payments) the director would be deemed to have received more than \$100,000 per year in direct compensation through April 9, 2002. Applying the three-year look-back period to this example, such director could only be deemed independent from and after April 10, 2005.

Similarly, if a director received \$30,000 in direct compensation from the listed company on April 10, 2001, and received a second payment of \$90,000 in direct compensation from the company on April 1, 2002 (and no later payments), the director would be deemed to have received more than \$100,000 per year in direct compensation from April 1, 2002 (the first date on which the \$30,000 and \$90,000 payments could be aggregated in any twelve-

month period) through April 10, 2002 (the last date on which the \$30,000 and \$90,000 payments could be aggregated in any twelve-month period). Applying the three-year look-back period to this example, such director could only be deemed independent from and after April 10, 2005.

### **EU I: The European Commission Reportedly Plans to Propose New Legislation to Require Rotation of Companies' Auditors**

On February 2, Financial Times reported that the European Commission is considering proposed new legislation to be released next month that would require listed companies in the European Union to rotate their auditors regularly. Companies are eagerly awaiting this proposal because there is one very controversial aspect that reportedly has not yet been decided: will rotation involve a change of audit firms or merely a change of audit partners within firms? If the proposal involves the former, the proposed legislation is expected to be opposed vigorously by the Big Four audit firms.

#### **Read More About This Development:**

Dombey, Daniel & Parker, Andrew, [EU May Force Audit Firm Rotation After Scandals](#), Financial Times (Feb. 2, 2004).

Jucca, Lisa, [EU Seeks To Rotate Auditors After Parmalat](#), Reuters UK (Feb. 3, 2004).

[Commission May Force Companies To Regularly Change Auditors](#), EurActiv.com (Feb. 4, 2004).

### **EU II: EU Council of Ministers Approves New Merger Regulation That Will Reform European Merger Control**

Council of the European Union, [Council Regulation \(EC\) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings \(The EC Merger Regulation\)](#) (Jan. 20, 2004).

European Union, [New Merger Regulation Frequently Asked Questions](#) (Jan. 20, 2004).

European Union, [Merger Regulation Home Page](#).

European Union, [EU Gives Itself New Merger Control Rules for 21st Century](#) (Jan. 20, 2004).

On January 20, the European Union Council of Ministers gave final approval to a new merger law that will become effective on May 1, 2004. The new regulation is intended to permit some flexibility with regard to investigation timeframes for companies that seek regulatory clearance for mergers and acquisitions. The new regulation reinforces the so-called "one-stop shopping" concept where companies apply for regulatory clearance for M&A transactions above certain worldwide and European turnover thresholds. It further "clarifies" that the Commission "has the power to investigate all types of harmful scenarios in a merger, from dominance by a single firm to the effects stemming from a situation of oligopoly that might harm the interests of European consumers."

[RealCorporateLawyer.com](#) is pleased to make available on the [home page](#) of its Web site an excellent memorandum prepared by Gibson, Dunn & Crutcher LLP detailing the new EU Merger Regulation. Among many other things, that memorandum notes:

Substantively, the new Merger Regulation introduces a new test against which notified mergers will be appraised. The creation or

strengthening of a dominant position is no longer the sole criterion against which compatibility is assessed. The new Merger Regulation concentrates on the effects of a merger (i.e., whether it significantly impedes effective competition, in the common market or a substantial part thereof). This formula falls between the "dominance" test and the Substantial Lessening of Competition test that has been adopted elsewhere (*e.g.*, in the US and the UK). It is intended to enhance the Commission's flexibility and its ability to deal with situations of non-collusive oligopoly. In practice, it is expected to be used by the Commission in cases of "unilateral effects," where a merger may reduce competition (despite not necessarily leading to joint or single dominance).

### **Corporate Governance I: House Financial Services Committee Chairman Oxley Says Initial SEC Noisy Withdrawal Never Intended**

On February 4, the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the House Committee on Financial Enterprises conducted a hearing on "The Role of Attorneys in Corporate Governance". In connection with that hearing, Chairman Michael G. Oxley issued prepared remarks that stated, among other things, as follows:

The active participation of attorneys in perpetuating corporate fraud has been well documented, and indeed, is quite troubling. Attorneys were violating not only the profession's code of ethics, but they were also breaking the law. This attorney misconduct led to a legislative remedy in the Sarbanes-Oxley Act requiring attorneys to report securities law violations "up the ladder" to the general counsel and the chief executive officer and, if necessary, the board of directors. While the SEC has implemented this sensible requirement as set forth in the Act, the Commission clearly

went beyond congressional intent in proposing the noisy withdrawal mandate, but has since scaled back the provision.

**To Read Chairman Oxley's Prepared Remarks as Well as the Testimony, See:**

House Committee on Financial Services, [Subcommittee Hearing on "The Role of Attorneys in Corporate Governance"](#) (Feb. 4, 2004).

### **Corporate Governance II: What Are The Big Players Doing on Their Public Web Sites?**

The vast majority of the nation's largest corporations have launched Corporate Governance areas on their public Web sites. What follows is a large list of links to examples of such areas.

[Abbott Laboratories](#)

[Dell](#)

[Pfizer](#)

[Aetna](#)

[Duke Energy](#)

[Procter & Gamble](#)

[Alcoa](#)

[ExxonMobil](#)

[St. Paul Companies](#)

[Allstate](#)

[General Electric](#)

[TRW](#)

[American Express](#)

[General Motors](#)

[Union Pacific](#)

[AT&T](#)

[Georgia-Pacific](#)

[UPS](#)

[Bristol-Myers Squibb](#)

[Honeywell](#)

[United Technologies](#)

[Coca-Cola](#)

[Lilly](#)

[Verizon](#)

[Colgate-Palmolive](#)

[Lucent Technologies](#)

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[Merrill Lynch](#)

[Wyeth](#)

### **Practical Guidance Courtesy of RealCorporateLawyer.com**

RealCorporateLawyer.com works hard to provide its readers with free access to a very large collection of law firm memoranda providing practical guidance on current hot topics. Readers are encouraged to visit the "Special Features" area of the home page for such current memoranda, as well as the [SEC Reform Portal](#) containing hundreds of other such memoranda. In the last 30 days, RealCorporateLawyer -- a free service -- has provided its readers with easy access to the following memoranda:

[SEC Issues Further Guidance on MD&A from Paul, Weiss \(02/02/04\)](#)

[The SEC's Interpretive Release on MD&A from Mayer Brown Rowe & Maw \(01/15/04\)](#)

<a href="#"><u>Sarbanes-Oxley Act Compliance Summary Matrix from Rutan and Tucker (01/26/04)</u></a>	<a href="#"><u>SEC Requires Investment Advisers to Adopt Written Supervisory Procedures and to Appoint a Chief Compliance Officer from Fried Frank (01/14/04)</u></a>
<a href="#"><u>A Guide to the Sarbanes-Oxley Act of 2002, and SEC, NYSE and Nasdaq Rulemaking and Proposals from Snell &amp; Wilmer LLP (01/23/04)</u></a>	<a href="#"><u>New Securities Law Disclosures in 2004 Forms 10-K, 10-Q and 8-K and Proxy Statement from Covington &amp; Burling (01/13/04)</u></a>
<a href="#"><u>Stock Plan Design for the Upcoming Proxy Season from Wachtell (01/22/04)</u></a>	<a href="#"><u>SEC Issues MD&amp;A Guidance for 2004 from Morrison &amp; Foerster (01/12/04)</u></a>
<a href="#"><u>U.S. Supreme Court Declines Review of Ruling Which Refused to Enforce Disclaimer of Reliance in M&amp;A Offering Documents from Nixon Peabody (01/22/04)</u></a>	<a href="#"><u>Planning for the Unexpected: Ten Commandments for Crisis Management from Wachtell (01/07/03)</u></a>
<a href="#"><u>Some Thoughts for Boards of Directors from Wachtell (01/21/04)</u></a>	<a href="#"><u>NASD Adopts New IPO Rule Replacing Hot Issue Rule from Morgan Lewis (01/05/04)</u></a>

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

On January 16, the SEC announced the selection of **Andrew D. Bailey, Jr.** to serve as Deputy Chief Accountant for the Commission. In this capacity, Bailey will share with **Scott A. Taub**, current Deputy Chief Accountant, responsibilities for the day-to-day operations of the Office of the Chief Accountant. See U.S. Securities and Exchange Commission, [SEC Announces Selection of Andrew D. Bailey, Jr. as Deputy Chief Accountant](#), News Release 2004-7 (Jan. 16, 2004).

On January 14, the SEC announced that R. Corey Booth joined the agency as Chief Information Officer and Director of the Office of Information Technology. Booth most recently was the Associate Principal of McKinsey and Company's Business Technology Office in Chicago, Illinois. See U.S. Securities and Exchange Commission, [R. Corey Booth Selected as Director of Office of Information Technology](#), News Release 2004-4 (Jan. 14, 2004).

On January 8, the Board of Directors of the New York Stock Exchange appointed **Richard G. Ketchum** to the newly-created role of Chief Regulatory Officer, effective June 2, reporting to the Board Regulatory Oversight & Regulatory Budget Committee. Ketchum previously spent 12 years at the NASD and Nasdaq including three years as President of Nasdaq and President of NASD for

seven years. In addition, he was with the SEC for fourteen years, eight as Director of the Division of Market Regulation. See New York Stock Exchange, [NYSE Board Names Richard G. Ketchum as Chief Regulatory Officer and Takes Other Regulatory Actions](#), NYSE Press Release (Jan. 8, 2004).

**What Are the Commissioners Saying?** SEC Commissioner **Roel C. Campos** delivered an [Opening Statement at SEC Open Meeting](#) on January 14 regarding investment adviser ethics rules, fund governance issues and fund confirmations. On January 7, SEC Chairman **William H. Donaldson** spoke regarding "[America's Need for Vigilant Mutual Fund Directors](#)" before the Mutual Fund Directors' Forum.

**What Are the Commission Staffers Saying?** On January 27, **Paul F. Roye** (Director of the Division of Investment Management) delivered "[Remarks Before the Understanding Securities Products of Insurance Companies - 2004 Conference](#)" before a Practising Law Institute audience in New York City. On January 14, **Linda C. Thomsen** (Deputy Director of the Division of Enforcement) delivered a "[Press Statement Regarding Settlement in SEC v. Andrew S. Fastow](#)". On January 14, **Paul F. Roye** also delivered a "[Statement at the SEC Open Meeting](#)" regarding proposed rules regarding governance of mutual funds. At the same meeting, **Annette Nazareth** (Director of the Division of Market Regulation) delivered a "[Statement at the SEC Open Meeting](#)" regarding proposed rules concerning mutual funds. On January 8, **Paul F. Roye** spoke before the Mutual Fund Directors Forum in Washington, D.C. regarding "[Enhancing the Fund Director's Tool Box](#)".

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