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SEC I: SEC Releases Additional Form 8-K Guidance in the Form of FAQs

U.S. Securities and Exchange Commission, [Current Report on Form 8-K Frequently Asked Questions](#) (Nov. 23, 2004).

U.S. Securities and Exchange Commission, [Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date](#) (Mar. 25, 2004; effective date Aug. 23, 2004).

U.S. Securities and Exchange Commission, [Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date - Technical Correction](#) (Aug. 4, 2004; effective date Aug. 23, 2004).

U.S. Securities and Exchange Commission, [Proposed Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date](#) (June 17, 2002).

[Comments on Proposed Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, File No. S7-22-02.](#)

On November 23, 2004, the Commission posted on its Web site a long-awaited set of Frequently Asked Questions (FAQs) regarding its new Form 8-K disclosure requirements. The amendments became effective last August 23. The Commission, in its final rule, expanded the number of events that are reportable on Form 8-K, adding eight new items to the form, transferring two items from the periodic reports and expanding required disclosures under two pre-existing Form 8-K items. The Commission also reorganized the Form 8-K items into topical categories and shortened the Form 8-K filing deadline for most items to four business days after the occurrence of an event triggering the disclosure requirements of the form. Finally, in its final rule, the Commission adopted a limited safe harbor from liability for failure to file certain of the required Form 8-K reports in consideration of the "real time issuer disclosure" mandate in Section 409 of the Sarbanes-Oxley Act.

The Commission's 30 FAQs provide additional guidance on the following nine items: (1) General; (2) Item 1.01 Entry Into a Material Definitive Agreement; (3) Item 1.02 Termination of a Material Definitive Agreement; (4) Item 2.03 Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant; (5) Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement; (6) Item 2.05 Costs Associated with Exit or Disposal

Activities; (7) Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review; (8) Item 5.02 Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers; and (9) Item 5.03.

To enable you to learn more about the SEC's new Form 8-K FAQs, RealCorporateLawyer.com is pleased to make the following law firm memo available:

Nixon Peabody LLP, [SEC Posts Frequently Asked Questions Regarding Form 8-K Disclosure Requirements](#) (Dec. 1, 2004).

In addition, RealCorporateLawyer.com is pleased to make available its own new set of FAQs entitled "[The New Form 8-K Disclosure Requirements](#)" by Stanley Keller and Matthew J. Gardella of Palmer & Dodge LLP.

SEC II: SEC Issues Final Rule Release Requiring Registration for Certain Hedge Fund Investment Advisers

U.S. Securities and Exchange Commission, [Final Rule: Registration Under the Advisers Act of Certain Hedge Fund Advisers](#) (Dec. 2, 2004).

U.S. Securities and Exchange Commission, [Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Registration Under the Advisers Act of Certain Hedge Fund Advisers](#) (Dec. 2, 2004).

[Speech by Paul F. Roye, Director of the Division of Investment Management: General Session Speaker at the SIA Hedge Funds Conference - New Regulation: Weighing the Impact](#) (Nov. 30, 2004).

On October 26, the SEC voted to adopt new Rule 203(b)(3)-2. The new rule will

require hedge fund advisers to register with the Commission under the Investment Advisers Act of 1940 by February 1, 2006. Registration under the new rule is intended to permit the Commission to:

- collect important information about the operations of hedge fund advisers, which represent a significant and growing component of the U.S. financial system;
- conduct examinations of hedge fund advisers allowing the SEC to identify compliance problems at an early stage, identify practices that may be harmful to investors and provide a deterrent to unlawful conduct;
- require all hedge fund advisers to adopt basic compliance controls to prevent violation of the federal securities laws;
- improve disclosures made to prospective and current hedge fund investors; and
- prevent felons or individuals with other serious disciplinary records from managing hedge funds.

On December 2 the Commission final made the final rule release available via its Web site. It is at least possible that the delay in making the final rule release available involved the complexities arising from a rather scathing 30-page written dissent issued by Commissioners Cynthia A. Glassman and Paul S. Atkins. Noting that the majority was "unmoved by the chorus of credible concerns from diverse voices [and] determined to adopt the hedge fund registration rules largely as proposed", the dissenters voiced the following broad objections:

There are many viable alternatives to this rulemaking that should have been considered.

Given that the staff previously found that fraud was not rampant in the hedge fund industry, the pretext for the rule does not withstand scrutiny.

The Commission's limited resources will be diverted.

RealCorporateLawyer.com is pleased to make available a law firm memo addressing the SEC's new hedge fund adviser registration requirements:

[SEC Votes To Require Hedge Fund Managers to Register as Investment Advisers from Fried, Frank, Harris, Shriver & Jacobson LLP \(11/01/2004\).](#)

SEC III: SEC Grants Smaller Accelerated Filers a 45-Day Delay in Filing Date for Internal Control Report

U.S. Securities and Exchange Commission, [Order Under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption From Specified Provisions of Exchange Act Rules 13a-1 and 15d-1](#), Release No. 50754 (Nov. 30, 2004).

U.S. Securities and Exchange Commission, [SEC Postpones Filing Date for Internal Control Reports for Some Accelerated Filers](#), News Release 2004-162 (Nov. 30, 2004).

On November 30, the U.S. Securities and Exchange Commission issued an exemptive order granting certain accelerated filers up to an additional 45 days to include in their annual reports management's report on internal control over financial reporting and the related auditor's report on management's assessment of internal control over financial reporting. Both internal control reports are required under Commission rules implementing Section 404 of the Sarbanes-Oxley Act of 2002. According to the Commission's announcement, "all other information required in annual reports, including audited financial statements, would have to be filed on the original due date for the annual reports."

By its terms, the exemptive order applies to accelerated filers that have a fiscal year ending between and including November 15, 2004 and February 28, 2005, and that had a public equity float of less than \$700 million at the end of its second fiscal quarter in 2004."

In granting the delay, the Commission noted "resource constraints at accounting firms and at smaller public companies".

SEC IV: SEC Announces That It Will Consider Publication of Revisions to Proposed Regulation NMS

U.S. Securities and Exchange Commission, [SEC To Consider Publication Of Revisions To Proposed Regulation NMS](#), News Release 2004-145 (Oct. 13, 2004).

On November 30, the SEC issued a statement through a spokesperson announcing the following:

"The Commission intends to consider a recommendation from the Staff regarding proposed Regulation NMS on December 15, 2004. Regulation NMS is the product of years of consideration by the Commission of equity market structure issues, as well as an extensive public dialogue over the course of the past year. After reviewing more than 700 comment letters on the Regulation NMS proposal and the supplementary request for comment, and considering the views of commenters expressed at the April public hearing, the Staff's recommendations differ in some respects from the rule text originally proposed. The recommendations address four major issues, are complex in their detail, and to some extent are inter-dependent. The Staff intends to recommend that the Commission publish Regulation NMS in its revised form before the Commission takes final action. The comment period would be followed by Commission action early next year."

The announcement provides little information on the rumored turmoil that prompted its issuance. A story published in The Wall Street Journal leaked details of some of the behind the scenes revisions to the previously published proposed Regulation NMS. Thereafter market participants reportedly voiced a firestorm of "concerns and outrage" over what some believed was a new market structure revamp based on the report in The Wall Street Journal.

The revised version of the proposal reportedly includes a best-price rule that would require expansion of the trade-through rule to apply across New York Stock Exchange - listed stocks and Nasdaq - listed stocks. According to one report, "the trade-through rule has been a controversial aspect of Reg NMS because critics like Fidelity Investments, Nasdaq and Instinet contend that the Nasdaq market works fine without the rule." One of the issues that has caused

the greatest consternation involves an inter-market depth-of-book sweeping function that reportedly would require market centers "to hit bids and offers displayed on other stock exchanges and ECNs, away from the best price." With criticisms growing, the Commission reportedly relented and issued its statement quoted above on November 30.

SEC V: SEC Said To Be Threatening First Lawsuit Against Lawyer Adviser Hired to Help with Internal Accounting Probe

News Report: [SEC Threatens Ex-Brobeck Lawyer Over Client's Probe, People Say](#), Bloomberg (Dec. 6, 2004).

The SEC reportedly may be poised to broaden its pressure on professional advisers who perform professional services for companies that are subsequently accused of fraud. According to Bloomberg news, the SEC "is threatening a first-ever lawsuit against a lawyer hired to help with a company's internal accounting probe, people familiar with the matter said."

According to the same report, the SEC's staff has notified a lawyer who played a role in an investigation at Endocare, Inc., a medical device maker in Irvine, California, that "he may face civil sanctions for his role" in the investigation. According to William McLucas, former head of the SEC's Enforcement Division who is not involved in the case, "This looks like an expansion of the government's crackdown on gatekeepers, particularly accountants or lawyers who bless a company's prior conduct."

SEC VI: SEC Approves One Year Delay In Acceleration of Form 10-K and Form 10-Q Filing Deadlines

U.S. Securities and Exchange Commission, [SEC Postpones Final Phase-In Period for Acceleration of Periodic Report Filing Dates](#), News Release 2004-158 (Nov. 17, 2004).

U.S. Securities and Exchange Commission, [Temporary Postponement of the Final Phase-In Period for Acceleration of](#)

[Periodic Report Filing Dates](#), Release Nos. 33-8507 and 34-50684
(Nov. 17, 2004).

On November 17, 2004, the SEC adopted amendments to postpone for one year the final period for acceleration of the due dates of quarterly and annual reports required to be filed under the Exchange Act by certain reporting companies known as "accelerated filers," which are issuers that have a public float of at least \$75 million, that have been subject to the Exchange Act's reporting requirements for at least 12 calendar months, that previously have filed at least one annual report, and that are not eligible to file their quarterly and annual reports on Forms 10-QSB and 10-KSB.

According to the Commission's announcement:

"Under the amended rules, for an additional year the deadline for accelerated filers will remain at 75 days after year end for annual reports and at 40 days after quarter end for quarterly reports. The accelerated filing phase-in will resume for reports filed for fiscal years ending on or after Dec. 15, 2005, when an accelerated filer will have to file its annual report within 60 days after year end and file its quarterly reports within 35 days after quarter end. This will complete the phase-in and these deadlines will then remain in place for all subsequent periods."

RealCorporateLawyer.com is pleased to make available law firm memos addressing the SEC's decision to approve a one-year delay in acceleration of Form 10-K and Form 10-Q filing deadlines:

[SEC Adopts Temporary Postponement of Phase-In Period for Acceleration of Periodic Report Due Dates from Nixon Peabody LLP](#) (11/19/2004).

[SEC Approves One Year Delay In Acceleration of Form 10-K and](#)

[Form 10-Q Filing Deadlines from Bryan & Cave LLP \(11/19/2004\)](#).

SRO I: SEC Approves NYSE's Amended Governance Standards

U.S. Securities and Exchange Commission, [Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the New York Stock Exchange, Inc. and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 2 and e Thereto to Amend Section 303A of the NYSE Listed Company Manual Relating to Corporate Governance](#), Release No. 34-50625 (Nov. 4, 2004).

Effective November 3, 2004, the U.S. Securities and Exchange Commission approved Section 303A of the New York Stock Exchange's Listed Company Manual that sets out the Exchange's corporate governance requirements applicable to listed companies. The SEC approved the NYSE's proposals to make certain clarifying and substantive changes addressing the following topics: (1) definition of "Independent Director"; (2) requirements for non-management directors; (3) disclosures of guidelines and codes and methods of communication; (4) foreign private issuer disclosures; and (5) certifications and affirmations. According to one analysis of the developments (see link below):

"One of the key changes to the NYSE corporate governance listing standards is the modification to the bright line tests used for director independence set forth in Section 303A.02(b) of the NYSE Listed Company Manual. The amended rules modify the bright line independence tests that address relationships between the company's internal and external auditors and its directors and their immediate family members. The prior standards had very far reaching limitations, including a look-back period that would have transitioned to become a three-year look back on November 4, 2004 had the SEC not approved the amended standards prior to

that date. The amended provisions revised this independence test so that the individuals who are now barred from being deemed independent as a result of auditor relationships are:

- directors who are, or whose immediate family members are, current partners of the listed company's internal or external auditors;
- directors who are current employees of the audit firm;
- directors whose immediate family members are current employees of the audit firm participating in the firm's audit, assurance or tax compliance (but not tax planning) practice; and
- directors who are, or whose immediate family members are, former partners or employees of the audit firm who personally worked on the listed company's audit during the past three years."

RealCorporateLawyer.com is pleased to make available law firm memos providing a substantive analysis of the NYSE's revised governance standards approved by the SEC:

[Securities Update: Amendment of NYSE Corporate Governance Listing Standards from Mayer, Brown, Rowe & Maw](#) (11/15/2004).

[NYSE Amends Corporate Governance Rules from Fried, Frank, Harris, Shriver & Jacobson LLP](#) (11/05/2004)

SRO II: PCAOB Releases Third Set of FAQs as Additional Guidance for Audits of Internal Control

Public Company Accounting Oversight Board, [Staff Questions and Answers: Auditing Internal Control Over Financial Reporting](#) (Nov. 22, 2004).

Public Company Accounting Oversight Board, [Board Releases Additional Guidance for Audits of Internal Control](#) (Nov. 22, 2004).

On November 22, the Public Company Accounting Oversight Board released the third in a series of FAQs to provide guidance for those who must implement

PCAOB Auditing Standard No. 2 regarding audits of public companies' internal control over financial reporting.

Among the topics addressed in the FAQs are audits of multi-national companies that involve the work of more than one auditor, audits of federally insured financial institutions, the timing of auditors' communications to management and audit committees regarding material weaknesses or significant deficiencies in internal control, evaluations of deficiencies in information technology general controls, and the ability of outside auditors to use internal auditors to provide direct assistance in the audit of internal control over financial reporting.

SRO III: PCAOB Adopts Temporary Transitional Rule Relating to PCAOB Auditing Standard No. 2

Public Company Accounting Oversight Board, [Temporary Transitional Rule: Proposed Rule on Form 19B-4](#) (Nov. 30, 2004).

Public Company Accounting Oversight Board, [Temporary Transitional Rule Relating to PCAOB Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements](#), PCAOB Release No. 2004-014 (Nov. 30, 2004).

Public Company Accounting Oversight Board, [Briefing Paper: Board Considers Temporary Transitional Rule Relating To PCAOB Auditing Standard No. 2, An Audit of Internal Control Over Financial Reporting Performed In Conjunction with an Audit of Financial Statements](#) (Nov. 30, 2004).

Public Company Accounting Oversight Board, [Board Adopts Temporary Transitional Rule Relating to PCAOB Auditing Standard No. 2](#) (Nov. 30, 2004).

On November 30, the Public Company Accounting Oversight Board adopted a

"temporary transitional rule" concerning PCAOB Auditing Standard No. 2, "An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements." This standard, of course, is the standard auditors must satisfy to discharge their obligations under Section 404 of the Sarbanes-Oxley Act of 2002.

Because the SEC delayed the filing deadline for the first of the internal control reports for certain companies (see above), the PCAOB adopted its temporary transitional rule to relieve auditors from two provisions of Auditing Standard No. 2 in connection with audits of smaller companies able to rely on the Commission's order delaying the filing deadline for their first internal control reports. According to the PCAOB's announcement:

"First, PCAOB Auditing Standard No. 2 provides that the auditor's report on the financial statements and his or her report on internal control over financial reporting should be dated the same. The temporary rule would permit auditors to date their reports on management's assessment of the effectiveness of internal control over financial reporting later than the date of their reports on the financial statements of companies relying on the Commission's order.

Second, Auditing Standard No. 2 also provides that the auditor's separate report on the financial statements should include a paragraph that refers to a separate report on internal control over financial reporting. The temporary rule waives this provision for auditors in connection with their audits of companies relying on the Commission's order."

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SEC Proposes Securities Act Reform from Nixon Peabody LLP (11/24/2004)	When an "Immaterial" Mistake Costs \$10 Million: The SEC Censures KPMG for, Among Other Things, Failing to Report Irregularities in "Immaterial Transactions" from Nixon Peabody LLP (11/11/2004)
SEC Proposes Securities Offering Reform from Bryan & Cave LLP (11/23/2004)	DOJ Issues Antitrust Merger Remedies Guide from Morrison and Foerster LLP (11/08/2004)
SEC Adopts Temporary Postponement of Phase-In Period for Acceleration of Periodic Report Due Dates from Nixon Peabody LLP (11/19/2004)	California Legislative Update: California Amends Corporate Disclosure Act from Mayer, Brown, Rowe & Maw (11/08/2004)
SEC Approves One Year Delay In Acceleration of Form 10-K and Form 10-Q Filing Deadlines from Bryan & Cave LLP (11/19/2004)	NYSE Amends Corporate Governance Rules from Fried, Frank, Harris, Shriver & Jacobson LLP (11/05/2004)
SEC Update: Satisfying the SEC from Paul, Weiss, Rifkind, Wharton & Garrison LLP (11/16/2004)	SEC Votes To Require Hedge Fund Managers to Register as Investment Advisers from Fried, Frank, Harris, Shriver & Jacobson LLP (11/01/2004)
Securities Update: Amendment of NYSE Corporate Governance Listing Standards from Mayer, Brown, Rowe & Maw (11/15/2004)	Corporate Governance Alert on Up-the-Ladder Reporting from Kirkland & Ellis LLP (11/01/2004)
Are Audit Committee Self-Assessments Required? From Troutman Sanders LLP (11/15/2004)	ABS East 2004: Panel on New SEC Rules for ABS, with Jeffrey Minton, Special Counsel, SEC from Thacher, Proffitt & Wood LLP (11/01/2004)
SEC Proposes To Overhaul Various Aspects of the Securities Offering Process in the United States from Paul, Weiss, Rifkind, Wharton & Garrison LLP (11/11/2004)	Securities Act Reform from Fried, Frank, Harris, Shriver & Jacobson LLP (11/01/2004)
SEC-FDA Collaborate on New Road Rules from Nixon Peabody LLP (11/11/2004)	Banking Regulators Begin to Apply the Sarbanes-Oxley Act from Thacher Proffitt & Wood LLP (11/01/2004)

Be sure to visit the [RealFundCompliance.com](#) Web site. The free site includes not only the [monthly E-Zine](#) on fund compliance but also [breaking news](#) on fund compliance issues. There are [daily regulatory developments listings](#) on the home

page as well as hot topic sections on such topics as [compliance](#), [disclosure](#), [fund governance](#), [soft dollars](#), [revenue sharing](#), [frequent trading](#) and [legislative initiatives](#). The site includes a new [FAQ section](#) as well as special features on topics including the following: [anti-money laundering](#), [bank/trust companies](#), [broker-dealers](#), [CFTC](#), [ERISA / fiduciary](#), [inspection / enforcement](#), [insurance products](#), [investment advisers](#), [litigation](#), [private funds / hedge funds](#), [registered funds](#), [retirement / 529 plans](#), and [Sarbanes-Oxley](#).

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

On November 30, the Commission announced that **Laura L. Cox**, Managing Executive for External and Governmental Affairs and a member of Chairman Donaldson's three-person senior management team will leave the SEC to join PricewaterhouseCoopers LLP, as Partner-In-Charge of Professional and Governmental Activities. Prior to joining the Commission in May 2003, Ms. Cox served as Deputy Assistant Secretary for Banking and Finance in the Office of Legislative Affairs at the U.S. Department of the Treasury. *See* U.S. Securities and Exchange Commission, [Laura L. Cox, Managing Executive for External and Governmental Affairs, to Leave Commission](#), News Release 2004-161 (Nov. 30, 2004).

The Commission also announced on November 16 the appointments of **Helene Glotzer**, **David Rosenfeld** and **Andrew M. Calamari** as Associate Regional Directors in New York with responsibility to oversee and manage the Commission's enforcement program in the Northeast Regional Office. These appointments fill vacancies created in June 2004 by the departure of **Barry W. Rashkover** for private practice and the promotion of **Mark K. Schonfeld** to the

position of Director of the Northeast Regional Office. See U.S. Securities and Exchange Commission, [Associate Directors Named for Northeast Regional Office](#), News Release 2004-156 (Nov. 16, 2004).

Former SEC Chairman **Harvey L. Pitt**'s consulting firm reportedly has grown to seven professionals including **D. Jeffrey Hirschberg** (an attorney and former Vice Chairman at Ernst & Young) as well as **Robert K. Herdman** (former SEC Chief Accountant). The expanding firm has had to vacate small temporary office space for more spacious accommodations on Connecticut Avenue near Farragut Square. See [Former SEC Chief's Consulting Firm Grows](#), WashingtonPost.com.

What Are the Commissioners Saying? On November 30, SEC Chairman **William H. Donaldson** delivered "[Remarks Before the Caux Round Table](#)" regarding the Commission's work over the past two years. Chairman Donaldson also spoke at the Commission's "[Open Meeting Regarding the SRO Governance Rule Proposal](#)" on November 9. Chairman Donaldson also delivered "[Remarks before the Annual Conference of Independent Sector](#)" regarding heightened scrutiny of the non-profit sector. Chairman Donaldson also delivered "[Remarks Before the Securities Industry Association Annual Meeting](#)" on November 5 regarding recent SEC initiatives. Finally, Commissioners **Donaldson**, **Glassman**, **Goldschmid**, **Atkins** and **Campos** released a "[Statement Regarding Milton Cohen](#)" on November 2 following Mr. Cohen's death on October 30.

What Are the Commission Staffers Saying? On November 30, the SEC's Director of the Division of Investment Management, **Paul F. Roye**, gave a "[Speech at General Session of the SIA Hedge Funds Conference](#)" regarding "New Regulation: Weighing the Impact". Mr. Roye also gave the "[Keynote Address at the 22nd Annual Advanced ALI-ABA Conference on Life Insurance Company Products](#)" on November 4 regarding issues of concern in the variable insurance products industry including concerns about sales practices, late trading and market timing.

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