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In This Issue:

[SEC I: SEC Adopts E-Proxy Rule Amendments Based on Notice and Access Model](#)

[SEC II: SEC Will Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation](#)

[SEC III: SEC Votes To Re-Propose Rules Allowing Foreign Private Issuer Deregistration Under the Exchange Act](#)

[SEC IV: SEC Will Propose Rule to Prohibit Fraud by Investment Advisers to Certain Pooled Investment Vehicles as Well as Revisions to Criteria for Accredited Investors in Certain Private Investment Vehicles](#)

[SEC V: SEC Will Issue Rules for Comment to Supplement the Bank Broker Provisions Jointly with Fed Board of Governors and Will Issue its Own Companion Proposal](#)

[SEC VI: SEC's Handling of Investigation of Hedge Fund Is Subject of Senate Judiciary Committee Hearing](#)

[SEC VII: SEC Grants Further Postponement of Date by Which Smaller Companies and Newly Public Companies Must Comply with Section 404](#)

[DOJ I: Department of Justice Releases New Principles of Federal Prosecution of Business Organizations to Replace the 2003 Thompson Memo](#)

[PRACTICAL GUIDANCE: Courtesy of RealCorporateLawyer.com](#)

[COMINGS AND GOINGS: Who's Doing and Saying What and Where?](#)

SEC I: SEC Adopts E-Proxy Rule Amendments Based on Notice and Access Model

U. S. Securities and Exchange Commission, [SEC Votes to Adopt E-Proxy Rule Amendments and Propose Mandatory Model](#) , News Release 2006-209 (Dec. 13, 2006).

At its open meeting held on December 13, the Commission adopted amendments to the proxy rules that become effective on July 1, 2007. Under those amendments, after the effective date companies may, but are not required to, furnish proxy materials to shareholders via the Web using the so-called

"notice and access" model. As the Commission describes it:

"A company choosing to follow the model must post its proxy materials on an Internet Web site and send a Notice of Internet Availability of Proxy Materials to shareholders at least 40 days before the meeting date. A proxy card may not accompany the Notice. However, a company may send a paper proxy card accompanied by another copy of the Notice 10 days or more after it sending the initial the Notice.

The new alternative model for furnishing proxy materials seeks to substantially decrease the expense incurred by issuers to comply with the proxy rules and provide persons other than the company with a more cost-effective means to undertake their own proxy solicitations. . . .

A soliciting person other than the company may follow the notice and access model in substantially the same manner as a company. However, its Notice must be sent to shareholders by the later of 40 days before the meeting or 10 days after the company filed its proxy materials. It may limit its solicitation to shareholders who have not previously requested paper or e-mail copies. But if the soliciting person sends a Notice to a shareholder, it must send that shareholder a paper or e-mail copy upon request."

Of course, this will mean a new world for proxy solicitations that will substantially decrease the cost for dissident shareholders who wish to wage proxy battles. Companies are bracing.

SEC II: SEC Will Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation

U. S. Securities and Exchange Commission, [SEC Votes To Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation](#) , News Release 2006-206 (Dec. 13, 2006).

[Statement by SEC Commissioner Roel C. Campos: Section 404 - Proposed Management Guidance](#) (Dec. 13, 2006).

Also during its December 13 open meeting, the SEC voted to propose for public comment interpretive guidance for companies regarding their managements' evaluations of internal control over financial reporting. The Commission also proposed amendments to Rules 13a-15 and 15d-15 to clarify that a company choosing to perform an evaluation of internal control in accordance with the interpretive guidance would satisfy the annual evaluation required by those rules. Finally, the Commission proposed amendments to Regulation S-X to clarify the auditor's reporting requirement pursuant to Section 404(b) of the Sarbanes-Oxley Act.

In a statement released at the conclusion of the open meeting, the Commission summarized the guidance it intends to provide as follows:

The proposed guidance describes a risk-based approach and addresses many of the concerns that have been raised to the Commission including: excessive testing of controls generally; excessive documentation of processes, controls, and testing; and the ability to scale the evaluation to smaller companies. The guidance addresses four specific areas including:

1. **Identification of risks to reliable financial reporting and the related controls that management has implemented to address those risks.** The proposed guidance describes a risk-based approach that would require the use of judgment to determine those areas that are both material and which pose a risk to reliable financial reporting. Management then would identify the controls that address those risks, including the risk of material misstatement due to fraud. The guidance would not require that every control in a process be identified. Once those controls are identified that adequately address the risk of material misstatement in the financial statements, it would be unnecessary to include additional controls within management's evaluation.
2. **Evaluation of the operating effectiveness of controls.** Once management has determined the controls within the scope of its evaluation, management would then gather and analyze evidence about the operation of those controls. The proposed guidance provides for a risk-based approach that would require the use of judgment to direct management's evaluation efforts towards those areas that pose greatest risk to reliable financial reporting based on the company's unique facts and circumstances. The proposed guidance would allow management to support its evaluation in a variety of ways and illustrates how management can consider and utilize its existing daily interaction with its business, self-assessment, and other ongoing monitoring activities to support its evaluation.

3. **Reporting the overall results of management's evaluation.** Once management has completed its evaluation, management must decide if any identified control deficiencies are material weaknesses. The proposed guidance provides management with a framework, outside of the auditing literature, for making these judgments and includes situations that are considered strong indicators that a material weakness exists. The guidance describes the factors that management should consider to evaluate the severity of a deficiency. If the deficiency is a material weakness, consistent with the Commission's existing rules, management must conclude that internal control over financial reporting is not effective and management has reporting responsibilities surrounding that material weakness. In addition, the guidance addresses the disclosure requirements for internal control reports in situations such as scope limitations and restatements.
4. **Documentation.** The proposed guidance explains the nature and extent of evidential matter that management must maintain in support of its assessment including how management has flexibility in approaches to documentation. The proposed guidance indicates that such documentation can take many forms, can be presented in a number of ways, and does not need to include all controls within a process that impacts financial reporting. The proposed guidance provides that the evidential matter maintained in support of the assessment would also include the methods and procedures it utilizes to gather and evaluate evidence and the basis for its conclusions about the controls related to individual financial reporting elements. The proposed guidance indicates that in those situations in which management is able to rely on its daily interaction with its controls as a basis for its assessment, management may have limited documentation created specifically for the evaluation beyond documentation regarding how its interaction provided it with sufficient evidence.

RealCorporateLawyer.com is pleased to make additional guidance available regarding these developments. *See* :

[SEC Proposes Guidance Relating to Section 404 Evaluations, Adopts New Internet Proxy Rules, and Reproposes Foreign Private Issuer Deregistration Rules from Alston & Bird LLP. \(12/14/06\)](#)

[SEC Votes to Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation from the U.S. SEC . \(12/13/06\)](#)

SEC III: SEC Votes to Repropose Rules Allowing Foreign Private Issuer Deregistration Under the Exchange Act

U.S. Securities and Exchange Commission, [SEC Votes To Re-Propose Rules Allowing Foreign Private Issuer Deregistration Under the Exchange Act](#), News Release 2006-172 (Dec. 13, 2006).

Among the many decisions made by the Commission during its widely-anticipated December 13 open meeting was a decision to re-propose rules to allow foreign private issuer deregistration under the Exchange Act. Currently a foreign private issuer may exit the Exchange Act registration and reporting regime if the class of the issuer's securities has less than 300 record holders who are U.S. residents.

Such restrictions have increasingly come under fire with the globalization of the securities markets. Recently foreign private issuers have found it difficult to terminate their registration and reporting obligations in the U.S. even when there is little interest in their securities among U.S. investors. In re-proposing, the Commission plans the following:

"Reproposed Exchange Act Rule 12h-6 would permit the termination of Exchange Act reporting regarding a class of equity securities under either Section 12(g) or Section 15(d) of the Exchange Act by a foreign private issuer that meets a quantitative benchmark designed to measure relative U.S. market interest for that class of securities, which does not depend on a head count of the issuer's U.S. security holders. The reproposed benchmark would require the comparison of the average daily trading volume of an issuer's securities in the United States with that in its primary trading market. Because the Commission did not fully address this approach when it originally proposed Rule 12h-6 last December, and because of other proposed changes to Rule 12h-6 not fully discussed in the original rule proposal, it has reproposed Rule 12h-

6 and the accompanying rule amendments."

RealCorporateLawyer.com is pleased to make additional guidance available regarding these developments. *See* :

[SEC Proposes Guidance Relating to Section 404 Evaluations, Adopts New Internet Proxy Rules, and Reproposes Foreign Private Issuer Deregistration Rules from Alston & Bird LLP.](#) (12/14/06)

[SEC Votes to Repropose Rules Allowing Foreign Private Issuer Deregistration Under the Exchange Act from the U.S. SEC.](#)
(12/13/06)

SEC IV: SEC Will Propose Rule to Prohibit Fraud by Investment Advisers to Certain Pooled Investment Vehicles as Well as Revisions to Criteria for Accredited Investors in Certain Private Investment Vehicles

U.S. Securities and Exchange Commission, [SEC Votes to Propose Rule to Prohibit Fraud by Investment Advisers to Certain Pooled Investment Vehicle; Also Votes to Propose Revisions to Criteria for Accredited Investors in Certain Private Investment Vehicles](#) , News Release 2006-208 (Dec. 13, 2006).

During the busy December 13 open meeting, the SEC also voted to propose a rule to prohibit fraud by investment advisers to certain pooled investment vehicles as well as revisions to criteria for accredited investors in certain private investment vehicles. The hedge fund industry has been abuzz for months regarding the SEC's movements in this regard. The Commission has disclosed the following regarding its plans:

- **Antifraud Provision under the Investment Advisers Act of 1940.** The proposal would make it a fraudulent, deceptive, or manipulative act, practice, or course of business for an investment adviser to a pooled investment vehicle to make false or misleading statements or to otherwise

defraud investors or prospective investors in that pool. The rule would apply to all investment advisers to pooled investment vehicles, regardless of whether the adviser is registered under the Advisers Act. Under the proposed rule, a pooled investment vehicle would include any investment company and any company that would be an investment company but for the exclusions in sections 3(c)(1) or 3(c)(7) of the Investment Company Act.

- **Amendments to Private Offering Rules under the Securities Act of 1933.** The proposals would define a new category of accredited investor that would apply to offers and sales of securities issued by hedge funds and other private investment pools to natural persons. The proposed definition would include any natural person who (a) meets either the net worth test or income test specified in rule 501(a) or rule 215, as applicable, and (b) owns at least \$2.5 million in investments, as defined in the proposed rules.

SEC V: SEC Will Issue Rules for Comment to Supplement the Bank Broker Provisions Jointly with Fed Board of Governors and Will Issue its Own Companion Proposal

U. S. Securities and Exchange Commission, [SEC Votes to Jointly Issue with the Board of Governors of the Federal Reserve System Rules for Comment to Implement Bank Broker Provisions](#) , News Release 2006-205 (Dec. 13, 2006).

On Oct. 13, 2006, President Bush signed the "Regulatory Relief Act" into law. It requires the SEC and the Board of Governors of the Federal Reserve System to issue joint proposed rules no later than 180 days after the date of enactment and to jointly adopt final rules implementing the bank broker exceptions in Exchange Act Section 3(a)(4). At its December 13 open meeting, the Commission voted to issue such rules for comment jointly with the Board.

In broad terms, the jointly proposed rules will define certain statutory terms in the areas of third-party brokerage, trust and fiduciary activities, safekeeping and custody, and sweep accounts. They also would provide banks with conditional exemptions to accommodate certain limited bank securities activities. In addition, the proposal would provide banks with an exemption from possible third-party rescission rights for acting as an unregistered broker, as well as a related

transitional exemption.

In lieu of these developments the Commission extended its previously-granted exemption for banks from the definition of "broker" until July 2, 2007.

The key provision of the companion proposal that the Commission voted to issue reportedly will re-propose an exemption from the definition of "dealer" for banks' conduit securities lending activities, a conditional exemption from the definition of "dealer" for banks' riskless principal Regulation S transactions, and a clarifying amendment to Exchange Act Rule 15a-6 to align that rule with the Exchange Act bank broker and dealer provisions and related rules.

RealCorporateLawyer.com is pleased to make additional guidance available regarding these developments. *See* :

[SEC Votes to Jointly Issue with the Board of Governors of the Federal Reserve System Rules for Comment to Implement Bank Broker Provisions from the U.S. SEC.](#) (12/13/06)

SEC VI: SEC's Handling of Investigation of Hedge Fund is Subject of Senate Judiciary Committee Hearing

United States Senate Committee on the Judiciary, [Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity](#) (Dec. 5, 2006).

On December 5, 2006, the United States Senate Committee on the Judiciary held a hearing entitled "Examining Enforcement of Criminal Insider Trading and Hedge Fund Activity". Much of the hearing revolved around the way regulators handled an investigation of the hedge fund Pequot Capital and whether the SEC acted improperly by allowing Morgan Stanley's CEO, John Mack, to avoid questioning during the investigation. The SEC has taken strong exception to any suggestion that it acted improperly in any fashion.

Among those who provided testimony was Gary J. Aguirre, the former SEC employee who has alleged that the SEC granted favorable treatment to Mr. Mack

by not requiring him to submit to questions during the inquiry. Mr. Aguirre's prepared testimony is available via the above link on the Senate Judiciary Committee Web site.

[SEC VII: SEC Grants Further Postponement of Date by Which Smaller Companies and Newly Public Companies Must Comply with Section 404](#)

SEC VII: SEC Grants Further Postponement of Date by Which Smaller Companies and Newly Public Companies Must Comply with Section 404

U. S. Securities and Exchange Commission, [Further Relief From the Section 404 Requirements for Smaller Companies and Newly Public Companies](#), News Release 2006-210 (Dec. 15, 2006).

U.S. Securities and Exchange Commission, [Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies](#), Release Nos. 33-8760 and 34-54942 (Dec. 15, 2006).

On December 15, the SEC announced that it has adopted a further extension to the date by which smaller public companies must comply with internal control reporting requirements required under Sarbanes-Oxley Section 404. The Commission extended the date for non-accelerated filers to provide management's assessment regarding internal control over financial reporting in their annual reports for fiscal years ending on or after December 15, 2007. The previous date was for annual reports for fiscal years ending on or after July 15, 2007.

The Commission also extended the date by which non-accelerated filers must comply with the auditor attestation requirement. Due to the extension, non-accelerated filers must begin to comply in their annual reports filed for fiscal years ending on or after Dec. 15, 2008. According to the Commission: "Deferred implementation of the auditor's attestation report requirement will provide smaller public companies and their auditors with additional time to

consider the anticipated revisions to Auditing Standard No. 2, as well as any implementation guidance that the PCAOB plans to issue for auditors of smaller companies. The extension also should enable management of smaller public companies to focus on the internal assessment process during the first year of compliance with the internal control reporting provisions."

DOJ I: Department of Justice Releases Principles of Federal Prosecution of Business Organizations to Replace the 2003 Thompson Memo

U.S. Department of Justice Office of the Deputy Attorney General, [Principles of Federal Prosecution of Business Organizations](#) (December 13, 2006).

The U.S. Department of Justice has released its long-awaited "Principles of Federal Prosecution of Business Organizations" to replace the 2003 Thompson Memorandum. The new memorandum, known as the McNulty memorandum because it was released by Deputy Attorney General Paul J. McNulty, changes the Justice Department's guidelines for the prosecution of alleged instances of corporate fraud.

The memorandum, among other things, deals with the issue of advancing attorneys' fees to employees who are the subject of an investigation. Generally, the memorandum indicates that prosecutors should not consider whether a company has advanced such fees when deciding to charge the company with wrongdoing. The reasons include the fact that employment contracts and various states' laws may require such advancements. According to the memorandum, however, such a rule is not a blanket, per se rule. Rather, when the totality of the circumstances suggests that fee advancement was part of a scheme to thwart an investigation, approval may be sought from the Deputy Attorney General for considering such advancements when deciding whether to charge a company with wrongdoing. If such approval is granted, advancements of fees may be considered.

RealCorporateLawyer.com is pleased to make additional guidance available regarding these developments. *See* :

[U.S. Deputy Attorney General Paul J. McNulty Revises Thompson](#)

[Memorandum from Morrison & Foerster LLP.](#) (12/12/06)

PRACTICAL GUIDANCE: Courtesy of RealCorporateLawyer.com

RealCorporateLawyer.com provides 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 frequently-updated "Emerging Legal Issues" area of the home page for such current memoranda, as well as the [Expert Analysis: SEC Reform Portal](#) section containing hundreds of other such memoranda. Recent additions include:

SEC Proposes Guidance Relating to Section 404 Evaluations, Adopts New Internet Proxy Rules, and Reproposes Foreign Private Issuer Deregistration Rules from Alston & Bird LLP. (12/14/06)	The Amended Federal Rules of Civil Procedure: Four Essentials You Should Know. (12/05/06)
SEC Votes to Repropose Rules Allowing Foreign Private Issuer Deregistration Under the Exchange Act from the U.S. SEC. (12/13/06)	Funds Update from Stikeman Elliott LLP. (12/2006)
SEC Votes to Propose Interpretive Guidance for Management to Improve Sarbanes-Oxley 404 Implementation from the U.S. SEC . (12/13/06)	Some Thoughts for Boards of Directors in 2007 from Wachtell, Lipton, Rosen & Katz. (12/01/06)
SEC Votes to Jointly Issue with the Board of Governors of the Federal Reserve System Rules for Comment to Implement Bank Broker Provisions from the U.S. SEC. (12/13/06)	Corporate Governance Update: Institutional Investors Ready Proxy Season 'Wish Lists' from Wachtell, Lipton, Rosen & Katz . (11/30/06)
SEC Votes to Propose Rule to Prohibit Fraud by Investment Advisers to Certain Pooled Investment Vehicles; Also Votes to Propose Revisions to Criteria for Accredited Investors in Certain Private Investment Vehicles from the U.S. SEC. (12/13/06)	The Corporate Communicator from Snell & Wilmer L.L.P. (11/2006)
Executive Compensation and Benefits Memo IRS Notice 2006-100 from Mayer, Brown, Rowe & Maw LLP.	Top Ten Practical Tips for Preparing the Compensation Discussion & Analysis from Wachtell, Lipton, Rosen & Katz.

(12/12/06)	(11/27/06)
U.S. Deputy Attorney General Paul J. McNulty Revises Thompson Memorandum from Morrison & Foerster LLP. (12/12/06)	CSA Finalize Amendments to Continuous Disclosure System from Stikeman Elliot LLP. (11/2006)
The Second Circuit Embraces the Trend Towards Requiring More Rigorous Analysis of Class Certification Requirements from Alston & Bird LLP. (12/12/06)	New ERISA Notice Requirement May Require Action by December 2, 2006, from Morrison & Foerster . (11/2006)
Second Circuit Raises the Bar for Securities Class Actions from Wachtell, Lipton, Rosen & Katz. (12/06/06)	Sample Compensation Discussion & Analysis from Troutman Sanders LLP. (11/10/06)
Key Issues for Directors from Wachtell, Lipton, Rosen & Katz. (12/06/06)	

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

On December 12, the Commission announced that **Charles A. Fishkin** , Director of the SEC Office of Risk Assessment, will leave the Commission early next year to take a risk management position in the private sector. *See* U.S. Securities and Exchange Commission, [SEC Risk Director Charles Fishkin to Leave Commission](#) , News Release 2006-204 (Dec. 12, 2006).

The Commission announced on November 29 that **Scott A. Taub** , Deputy Chief Accountant, will leave the SEC late this year. In its statement the Commission said "Mr. Taub has not yet determined where he will continue his career, but he intends to continue working to improve financial reporting." *See* U.S. Securities and Exchange Commission, [Scott Taub, Deputy Chief Accountant, to Leave SEC](#) , News Release 2006-196 (Nov. 29, 2006).

On November 17, the SEC released a statement saying that **John McCarthy** , Associate Director of the Office of Compliance Inspections and Examinations, will be leaving the Commission. He is joining a privately-held proprietary trading firm with offices in New York, London and Chicago. *See* U.S. Securities and Exchange Commission, [John McCarthy, Associate Director of OCIE to Leave Commission](#) , News Release 2006-193 (Nov. 17, 2006).

JPMorgan Chase announced on December 12 that it has hired the former chief of its Enforcement Division, **Stephen Cutler**, as the bank's top legal officer. See [JPMorgan Hires Ex-SEC Top Cop Cutler as Legal Chief](#), Bloomberg.com (Dec. 12, 2006).

What Are the Commissioners Saying?

SEC Commissioner **Roel C. Campos** delivered an opening statement at the December 13 SEC open meeting regarding "[Foreign Private Issuer Deregistration](#)". Commissioner Campos spoke at the same meeting regarding "[Internet Availability of Proxy Materials](#)" and "[Section 404: Proposed Management Guidance](#)". SEC Chairman **Christopher Cox** spoke on December 5 in Philadelphia regarding "[The Promise of Interactive Data](#)". Commissioner Campos delivered remarks during the SEC's December 4 open meeting regarding "[The 2007 PCAOB Budget](#)". During the same open meeting, Chairman Cox delivered an "[Opening Statement on Eliminating the Short Sale 'Tick Test'](#)" as well as an "[Opening Statement on Proposed Amendments to Rule 105 of Regulation M under the Exchange Act](#)" and an "[Opening Statement on the PCAOB Budget](#)". Additionally, on November 28 Chairman Cox delivered a "[Statement at News Conference Announcing NYSE-NASD Regulatory Merger](#)". Chairman Cox delivered an address on November 16 to International Organization of Securities Commissioners entitled "[The Hunters and the Stag: Why National Securities Regulators Must Collaborate In the Era of Global Investing](#)". On November 13, Commissioner **Annette L. Nazareth** delivered "[Remarks Before the SIA Compliance and Legal Division Fall Compliance Seminar](#)". Commissioner Nazareth also delivered on November 10 "[Remarks Before the Brooklyn Law School Symposium on the Structure of Securities Markets](#)". Chairman Cox delivered a speech on November 10 regarding "[More Efficient and Effective Regulation in the Era of Global Consolidation of Markets](#)". Commissioner Nazareth also delivered "[Remarks Before PLI's 38th Annual Institute on Securities Regulation](#)" on November 9, 2006.

What Are the Commission Staffers Saying?

Commission staffers were also busy on the speaking circuit during the last few weeks. On December 13, the SEC's Special Counsel in the Division of Corporation Finance, **Elliot Staffin** , delivered " [Opening Remarks at the SEC Open Meeting](#) ". The SEC's Senior Associate Chief Accountant, **Jenifer Minke-Girard** , delivered " [Remarks Before the 2006 AICPA National on Current SEC and PCAOB Developments](#) ". **John W. Albert** , another of the SEC's Senior Associate Chief Accountant, delivered " [Remarks Before the 2006 AICPA Conference on Current SEC & PCAOB Developments](#) " on December 11. **Cathy J. Cole** , one of the SEC's Associate Chief Accountants, delivered " [Remarks Before the 2006 AICPA National Conference on Current SEC and PCAOB Developments](#) ". **Michael Gaynor** , one of the SEC's Professional Accounting Fellows, spoke on December 11 regarding " [Risk Based Evaluations of ICFR](#) ". Another of the SEC's Associate Chief Accountants, **Michael W. Husich** , delivered " [Remarks Before the 2006 AICPA National Conference on Current SEC and PCAOB Developments](#) " on December 11. Others who spoke at the same conference included [Timothy S. Kviz](#) (Professional Accounting Fellow), [Mark Mahar](#) (Associate Chief Accountant), [Joseph D. McGrath](#) (Professional Accounting Fellow), [Zoe-Vonna Palmrose](#) (Deputy Chief Accountant), [Sott A Taub](#) (Deputy Chief Accountant), [Joseph B. Ucuzoglu](#) (Professional Accounting Fellow) and [Lori J. Schock](#) (Acting Director of the Office of Investor Education and Assistance). On December 5, **Lori A. Richards** , the SEC's Director of OCIE, delivered " [Remarks at the 2006 Securities Law Developments Conference](#) ". The day before, the SEC's Director of the Division of Investment Management, **Andrew J. Donohue** , spoke regarding " [Mutual Funds in 2006 - Getting Back to Basics and Embracing Core Values](#) ". The SEC's General Counsel, **Brian G. Cartwright** , delivered " [Remarks Before the 2006 Securities Law Developments Conference](#) " on December 4. Andrew J. Donohue also delivered " [Remarks Before the ALI-ABA Conference on Life Insurance Company Products](#) " on November 17. The same day, **Scott A. Taub** delivered " [Remarks Regarding Restatements](#) " before the Financial Executives International meeting. On

November 15, Brian G. Cartwright delivered " [Remarks Before the 2006 Investment Company Directors' Conference](#) ". On November 14, Andrew J. Donohue delivered " [Remarks Before the CCO Outreach National Seminar](#) " while Lori A. Richards delivered " [Welcome and Closing Remarks](#) " at the same conference. Finally, on November 10 the SEC's Chief Economist and Director of the Office of Economic Analysis, Chester S. Spatt, spoke regarding " [Volatility, Price Discovery and Markets](#) ".

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