

The Corporate Charter

**SPECIAL
ALERT**

NOVEMBER 4, 2003

TO OUR CLIENTS AND FRIENDS,

Today the U.S. Securities and Exchange Commission ("SEC") announced its approval of new corporate governance listing standards of the New York Stock Exchange ("NYSE") and the Nasdaq Stock Market ("Nasdaq"). The SEC action gives effect to new requirements regarding board composition, structure and process and other corporate governance matters initially proposed by both the NYSE and Nasdaq in the Spring and subsequently revised after public and SEC comment, with the most recent revisions having been proposed in the last few weeks. The new listing standards include provisions implementing requirements respecting the composition and responsibilities of audit committees mandated by the SEC in a rule adopted in April in accordance with the Sarbanes-Oxley Act of 2002 ("SOxA"). Otherwise, the final listing standards are to substantially the same effect as proposed in the Spring, although numerous technical changes have been made by both the NYSE and Nasdaq from the provisions then proposed. While there are some material differences between the listing standards that will go into effect for NYSE-listed and Nasdaq-listed companies, in large part the requirements are similar (more so as now approved than when initially proposed by each market).

The new listing standards apply to any company organized in the U.S. and having equity securities listed on the NYSE or Nasdaq, subject to limited exceptions. The requirements relating to audit committees also apply to companies which have debt securities listed on the NYSE. Non-U.S. companies listed on the NYSE or Nasdaq are required to comply with certain of the requirements pertaining to audit committees but are not required to comply with the other corporate governance standards. However, non-U.S. companies must disclose any significant differences between their corporate governance practices and those required of U.S. companies by the standards.

For listed companies organized in the U.S., compliance with these standards will generally be required by the earlier of their first 2004 annual meeting of shareholders after January 15, 2004 or October 31, 2004. Listed companies organized outside of the U.S. must satisfy the audit committee requirements by July 31, 2005. Disclosure by a non-U.S. company of any significant differences between its governance practices and those required of U.S. companies by the standards will apparently be required by the time the company files its annual report during 2004.

**FINAL NYSE
AND NASDAQ
CORPORATE
GOVERNANCE
LISTING
STANDARDS
APPROVED**

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WEIL, GOTSHAL & MANGES LLP

BOARD OF DIRECTORS COMPOSITION AND FUNCTION REQUIREMENTS

(As of November 4, 2003)*

The following chart summarizes and compares corporate governance requirements relating to the composition and function of the board of directors under the Sarbanes-Oxley Act of 2002 (the "Act"), related rules of the Securities and Exchange Commission (the "SEC") and the New York Stock Exchange (the "NYSE") and Nasdaq Stock Market ("Nasdaq") corporate governance listing standards (as of November 4, 2003).

Certain companies are excluded from some of these requirements:

- "Controlled companies" (companies in which a majority of the voting power is held by an individual, a group or another company) will not be required to comply with the NYSE or Nasdaq requirements that a majority of directors be independent or the requirements regarding the independence and functions of nominating/corporate governance committees and compensation committees. A company that relies upon the controlled company exemption must disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its annual report) that it is a controlled company and the basis for that determination.
- Companies in bankruptcy proceedings and limited partnerships will not be required to comply with the NYSE requirements that a majority of their directors be independent or the requirements regarding the independence and functions of nominating/corporate governance committees and compensation committees.
- Listed companies organized under the laws of a foreign jurisdiction will be required to comply with most of the audit committee requirements, as discussed more fully below, but will generally not be required to do any act that conflicts with their home-country practices.

Generally, the deadline for compliance with the new corporate governance standards, for both NYSE - and Nasdaq-listed companies, will be the company's first annual meeting occurring after January 15, 2004, but not later than October 31, 2004, except that, in the case of a company with a classified board, to the extent compliance would require a change in a director whose term of office is not scheduled to end by such time, the company will have until the second annual meeting of shareholders after January 15, 2004, but not later than December 31, 2005, to comply. Non-U.S. companies have until July 31, 2005 to come into compliance with the audit committee requirements and must make the necessary disclosures regarding how their governance practices differ from those required by the listing standards starting with their annual report filed in 2004. Nasdaq listed companies will need to adopt a code of conduct by May 2004 and must have related party transactions approved by their audit committee effective January 15, 2004.

* On November 4, 2003, the SEC approved the corporate governance listing standards filed by the NYSE and Nasdaq (Release No. 34-48745). On April 10, 2003, the SEC released the text of the rules it adopted under Section 301 of the Act, requiring all U.S. stock exchanges and Nasdaq to adopt listing standards setting certain minimum standards regarding the composition and functions of audit committees (Release No. 33-8220).

ROLE AND AUTHORITY OF INDEPENDENT DIRECTORS OF LISTED COMPANIES

SARBANES-OXLEY ACT/SEC RULEMAKING

The Act does not address the role and authority of independent directors in general terms. However, the Act does define director independence for audit committee purposes. (See Definition of "Independent" Director below.)

NYSE REQUIREMENTS

Majority of Independent Directors. Independent directors must comprise a majority of the board. (See "Definition of Independent Director," below.)

NASDAQ REQUIREMENTS

Majority of Independent Directors. Independent directors must comprise a majority of the board. (See "Definition of Independent Director," below.) The company must disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its annual report) those directors that the board has determined to be independent.

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ROLE AND AUTHORITY OF INDEPENDENT DIRECTORS OF LISTED COMPANIES

NYSE REQUIREMENTS

Cure. The NYSE does not have a cure provision.

Executive Sessions. Non-management directors must meet in regularly scheduled executive sessions (without management). The name of the director presiding at the executive sessions or the procedure by which the presiding director is selected for each executive session must be disclosed in the proxy statement (or, if the company does not file a proxy statement, in the company's annual report), together with information about how interested parties can communicate with the presiding director or the non-management directors as a group. If the regularly scheduled executive sessions of non-management directors include non-independent directors, then an executive session with only independent directors should be scheduled at least once a year.

Committee Independence Requirements. In addition to an independent audit committee, companies must have:

- an independent nominating/corporate governance committee (see "Other Board Committee Requirements," below, for a description of the charter requirements); and
- an independent compensation committee (see "Other Board Committee Requirements," below, for a description of the charter requirements).

Companies may allocate the responsibilities of the nominating/corporate governance and compensation committees to committees of their own denomination, provided that the committees are comprised entirely of independent directors.

NASDAQ REQUIREMENTS

Cure. If a company fails to comply with the majority independent director requirement because a director is no longer independent for reasons beyond the director's reasonable control, or due to a vacancy on the board, the company shall regain compliance with the requirement by the earlier of its next annual meeting or one year from the event that caused the failure to comply with the requirement. A company relying on this provision must notify Nasdaq upon learning of the noncompliance.

Executive Sessions. Boards must convene regular meetings of independent directors in executive session.

Committee Independence Requirements. In addition to an independent audit committee, companies must have:

- director nominees selected or recommended for the board's selection by an independent nominating committee or by a majority of the independent directors. (One non-independent director may serve on a nominating committee (of at least three members) if such director is not then an officer or employee or a family member of an officer or employee in "exceptional and limited circumstances" as determined by the board of directors and disclosed in the annual proxy statement (or, if the company does not file a proxy statement, in its annual report), for a period of no longer than two years.)
- CEO and executive officer compensation determined or recommended to the board for determination by an independent compensation committee or by a majority of the independent directors. (The CEO may not be present for voting or deliberations regarding his/her compensation. One non-independent director who is not then an officer or employee or a family member of an officer or employee may serve on a compensation committee (of at least three members) in "exceptional and limited circumstances" as determined by the board of directors and disclosed in the annual proxy statement (or, if the company does not file a proxy statement, in its annual report), for a period of no longer than two years.)

DEFINITION OF "INDEPENDENT" DIRECTOR

SARBANES-OXLEY ACT/SEC RULEMAKING

An "independent director" is defined in **Section 301** of the Act (for audit committee purposes) as one who has not accepted any compensation from the company (other than as a director) and is not an "affiliated person" of the company or any subsidiary. (See "Audit Committee," below, for further elaboration.) *To be implemented through listing standard amendments. In accordance with Securities Exchange Act procedures, listing standard amendments had to be proposed by the exchanges and Nasdaq by July 15, 2003 and must be approved by the SEC by December 1, 2003. Listed issuers must be in compliance with these standards by the earlier of the listed issuer's first annual meeting after January 15, 2004 or October 31, 2004, except for foreign private issuers and small business issuers who will have until July 31, 2005 to come into compliance.*

NYSE REQUIREMENTS

Application of Definition. An "independent director" is one who has no material relationship with the listed company;² this definition applies for all purposes throughout the NYSE listing standards, except that additional restrictions, consistent with Section 301 of the Act, apply to membership on the audit committee (as discussed further below).

Independence Criteria.

For a director to be deemed "independent," the board must affirmatively determine that the director has no "material relationship"³ with the company either directly or "as a partner, shareholder or officer of an organization that has a relationship with the company." Directors having any of the following relationships are not eligible to be considered independent:

- a person who is an employee or is an immediate family member⁴ of an executive officer of the company;⁵
- a person who receives, or is an immediate family member of a person who receives, compensation directly from the listed company, other than director compensation or pension or deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), of more than \$100,000 per year;⁷
- a person who is affiliated with or employed by, or is an immediate family member of a person who is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company;
- a person or an immediate family member of a person who has been part of an interlocking compensation committee arrangement; and
- a person who is an executive officer or an employee, or is an immediate family member of a person who is an executive officer, of a company that makes payments to or receives payments from the listed company for property or services in an amount that in a single fiscal year exceeds the greater of 2% of such other company's consolidated gross revenues or \$1 million.⁸

NASDAQ REQUIREMENTS

Application of Definition. An "independent director" is one who has no relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director; this definition applies for all purposes throughout the Nasdaq listing standards, except that additional restrictions, consistent with Section 301 of the Act, apply to membership on the audit committee (as discussed further below).

Independence Criteria.

The board has an affirmative responsibility to determine that a director does not have any relationship that disqualifies him or her from being independent. Directors having any of the following relationships are not eligible to be considered independent:

- a person who is employed by the company or by any parent or subsidiary of the company;⁶
- a person who is a family member⁹ of an individual who is employed by the company or any parent or subsidiary of the company as an executive officer;
- a person who is, or has a family member who is, a current partner of the company's outside auditor or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years;
- a person who accepts, or is a family member of a person (other than an employee of the company or a parent or subsidiary of the company) who accepts, payments from the company or any of its affiliates in excess of \$60,000 during the current or any of the past three fiscal years of the company;¹⁰
- a person who is, or has a family member who is, "a partner in, or a controlling shareholder or an executive officer of," any organization to which the company made, or from which the company received, payments for property or services that exceed 5% of the recipient's consolidated gross revenues or \$200,000, whichever is more, for the current or any of the past three fiscal years;¹¹ or
- a person who is, or has a family member who is, employed as an executive officer of another company where any of the company's executive officers serve on the other company's compensation committee.

DEFINITION OF “INDEPENDENT” DIRECTOR (continued)

NYSE REQUIREMENTS

Independence “Cooling Off” Period. In applying the independence criteria discussed above by which specific relationships are considered to impair independence, a three-year “cooling off” period is to be applied, and no individual who has had – even though he no longer has – such a relationship within the “cooling off” period, or who is an immediate family member of an individual who had such a relationship, can be considered independent.

Note that during the first year immediately following the effective date of the listing standard, the “look back” period referenced above will be a one-year look back period and the full three-year look back period will begin to apply after the first anniversary of the effective date of the listing standard.

Shareholdings. “[A]s the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.”

Disclosure of Immateriality Determinations; Customized Materiality Standards. The basis for a board’s determination that a relationship between a company or its management and a director is not material must be disclosed in the company’s annual proxy statement (or, if the company does not file a proxy statement, in the company’s annual report). A board may adopt categorical standards concerning material relationships for purposes of determining director independence, but must disclose such standards. In such cases, a general disclosure may be made that a director is considered independent by reason of the application of such categorical standards to relationships addressed by such standards and without further explanation. This is intended to give investors adequate means for assessing board independence while avoiding excessive disclosure about immaterial relationships.

NASDAQ REQUIREMENTS

Independence “Cooling Off” Period. In applying the independence criteria discussed above by which specific relationships are considered to impair independence, a three-year “cooling off” period is to be applied, and no individual who has had – even though he no longer has – such a relationship within the “cooling off” period, or who is a family member of an individual who had such a relationship, can be considered independent.

Note that the three-year look back period for bullets 1,2,3 and 6 above begin on the date the relationship ceases. For example, a director who is employed by the company will not be independent until three years after such employment terminates.

Shareholdings. “Because Nasdaq does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors.”

AUDIT COMMITTEE REQUIREMENTS

SARBANES-OXLEY ACT/SEC RULEMAKING

Audit Committee Independence. Every member of the audit committee of a listed company must be “independent.” Independence is defined in **Section 301** of the Act, and Rule 10A-3 of the Exchange Act, to have two principal components. First, a director must not accept any direct or indirect consulting, advisory or other compensatory fees¹² from the company other than compensation for service as a director. (Unless the rules of the national stock exchanges and national securities associations provide otherwise, compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer (provided that such compensation is not contingent in any way on continued service).) Second, a director must not be affiliated with the company or its subsidiaries. Rule 10A-3 defines “affiliate” or “affiliated person” as “a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.” “Control” is defined as “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” Under a “safe harbor,” a person who is not an executive officer or a shareholder owning 10 percent or more of any class of voting securities of the company would be deemed not to control the company.¹³ *To be implemented through listing standard amendments. In accordance with Securities Exchange Act procedures, listing standard amendments had to be proposed by the exchanges and Nasdaq by July 15, 2003 and must be approved by the SEC by December 1, 2003. Listed issuers must be in compliance with these standards by the earlier of the listed issuer’s first annual meeting after January 15, 2004 or October 31, 2004, except for foreign private issuers and small business issuers who will have until July 31, 2005 to come into compliance.*

Audit Committee Financial Expert. **Section 407** of the Act (Item 401(h) of Regulation S-K) requires all companies whose securities trade in the U.S (even if none of the securities are listed) to disclose in annual and quarterly reports whether or not the audit committee includes at least one member who is an “audit committee financial expert” and, if not, the reasons (subject to certain exceptions). An “audit committee financial expert” is a person who has an understanding of financial statements and generally accepted accounting principles (“GAAP”); experience in preparing, auditing, analyzing or evaluating financial statements of companies comparable to the company or experience in actively supervising one or more persons engaged in such activities; experience in applying GAAP to accounting for estimates, accruals and reserves; and an understanding of internal accounting controls, procedures for financial reporting and the functioning of audit committees; as a result of:

- (a) education and experience as a public accountant, auditor, principal financial officer, controller or principal accounting officer of a company, or a position involving similar functions,
- (b) experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions,
- (c) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements, or
- (d) other relevant experience.

Companies must comply with the audit committee financial expert disclosure requirements in their annual reports for fiscal years ending on or after July 15, 2003. Small business issuers must comply with the audit committee financial expert disclosure requirements in their annual reports for fiscal years ending on or after December 15, 2003.

Auditor Oversight; Approval of Non-Audit Work. **Section 301** of the Act directs the SEC to require audit committees to be responsible for appointing, compensating and retaining the company’s independent auditor and for overseeing the work of the auditor in preparing or issuing any audit report (and any related work) including resolving any disagreements between management and the auditor regarding financial reporting. In addition, **Section 202** requires the audit committee to approve all audit services; and prohibits an independent auditor from providing any otherwise permissible non-audit services without prior approval of the audit committee (subject to certain exceptions). *To be implemented through listing standard amendments. In accordance with Securities Exchange Act procedures, listing standard amendments had to be proposed by the exchanges and Nasdaq by July 15, 2003 and must be approved by the SEC by December 1, 2003. Listed issuers must be in compliance with these standards by the earlier of the listed issuer’s first annual meeting after January 15, 2004 or October 31, 2004, except for foreign private issuers and small business issuers who will have until July 31, 2005 to come into compliance.*

Authority to Engage Professionals. **Section 301** of the Act provides that audit committees must be authorized to engage independent counsel and other advisors as the committee determines necessary to carry out its duties and must have appropriate funding to compensate the independent auditor and its advisors. *To be implemented through listing standard amendments. In accordance with Securities Exchange Act procedures, listing standard amendments had to be proposed by the exchanges and Nasdaq by July 15, 2003 and must be approved by the SEC by December 1, 2003. Listed issuers must be in compliance with these standards by*

AUDIT COMMITTEE REQUIREMENTS (continued)

the earlier of the listed issuer's first annual meeting after January 15, 2004 or October 31, 2004, except for foreign private issuers and small business issuers who will have until July 31, 2005 to come into compliance.

“Whistle Blower” Policy. Section 806 of the Act prohibits companies from discharging, demoting or otherwise discriminating against any employee who provides information regarding conduct the employee reasonably believes constitutes a violation of the securities laws or financial fraud statutes (i) to any governmental authority, (ii) by testimony or otherwise in any proceeding pending or about to be commenced concerning such a violation or (iii) to any person with supervisory authority over the employee or authorized by the company to investigate such conduct (e.g., the audit committee; auditors; counsel engaged by the audit committee). Effective now. Section 301 of the Act requires the audit committee to establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters and for the confidential, anonymous submission by employees of concerns regarding accounting or auditing matters. **To be implemented through listing standard amendments. In accordance with Securities Exchange Act procedures, listing standard amendments had to be proposed by the exchanges and Nasdaq by July 15, 2003 and must be approved by the SEC by December 1, 2003. Listed issuers must be in compliance with these standards by the earlier of the listed issuer's first annual meeting after January 15, 2004 or October 31, 2004, except for foreign private issuers and small business issuers who will have until July 31, 2005 to come into compliance.**

Required Disclosures. Any reliance on exemptions to the audit committee requirements, including the exemptions for certain foreign private issuers discussed below, must be disclosed with an assessment of any materially adverse effects on the ability of the audit committee to act independently and to satisfy its requirements. Such disclosure would be in the annual reports filed with the SEC (or incorporated by reference) and in proxy statements or information statements for shareholders' meetings at which elections for directors are held.

Audit committee membership must be disclosed (or incorporated by reference) in the company's annual report. **Compliance is required beginning with reports covering periods ending on or after (or proxy or information statements for actions occurring on or after) the compliance date for the listing standards applicable to the particular issuer.**

NYSE REQUIREMENTS

Audit Committee Size. Each company must have a minimum three person audit committee.

Additional Independence Requirements for Audit Committee Members. An audit committee member must meet the independence requirements of Section 301 of the Act and Exchange Act Rule 10A-3(b)(1) (subject to the exemptions provided for in Rule 10A-3(c)).

Authority Over Auditor Relationships. Audit committees must be directly responsible for hiring and firing the independent auditors.

Financial Literacy/Expertise. Audit committee members must be financially literate, as determined by the board, or must become financially literate within a reasonable period of time following their appointment. In addition, at least one member of the committee (who need not be the committee chair) must have “accounting or related financial management expertise” in the judgment of the board. A board may presume that a person who

NASDAQ REQUIREMENTS

Audit Committee Size. Each company must have a minimum three person audit committee.

Additional Independence Requirements for Audit Committee Members. An audit committee member must meet the independence requirements of Section 301 of the Act and Exchange Act Rule 10A-3(b)(1) (subject to the exemptions provided for in Rule 10A-3(c)) and must not have participated in the preparation of the financial statements of the company or any current subsidiary at any time during the past three years. One director who meets the criteria for independence set forth in Section 10A(m)(3) and is not a family member of an officer or employee but is otherwise not independent may serve on the committee in "exceptional and limited circumstances" as determined by the board of directors and disclosed in the annual proxy statement (or, if the company does not file a proxy statement, in its annual report), for a period of no longer than two years.¹⁴

Authority Over Auditor Relationships. Audit committees must be directly responsible for hiring and firing the independent auditors.

Financial Literacy/Expertise. Audit committee members must be able to read and understand financial statements at the time of appointment. In addition, at least one member of the committee will be required to have had past employment in finance or accounting, professional certification in accounting or other comparable experience or background such as being or having been a chief executive officer, chief financial officer or other

AUDIT COMMITTEE REQUIREMENTS (continued)

NYSE REQUIREMENTS

would be considered an audit committee financial expert under Section 407 of the Act as expressed in Item 401(h) of Regulation S-K has accounting or related financial management expertise.

Related Party/Conflict of Interest Transactions. No provision, except insofar as implicit in the other audit committee responsibilities referred to above.¹⁵

Internal Audit. Every company must have an internal audit function. As indicated above, the audit committee will have oversight responsibility over such function.

Cure. Listed companies will be provided the opportunity to cure any defects for failing to comply with any of the requirements of Section 301 and Rule 10A-3 discussed above.

Audit Committee Charter. The audit committee charter must specify the committee's purpose, which must include (i) assisting board oversight of the integrity of the company's financial statements, the company's compliance with legal and regulatory requirements, the independent auditor's qualifications and independence, and the performance of the company's internal audit function and independent auditors and (ii) preparing an audit committee report that SEC rules require be included in the company's annual proxy statement.

The charter must also detail the duties and responsibilities of the audit committee, including:

- appointing, retaining, compensating, evaluating and terminating the company's independent auditors (this includes resolving disagreements between management and the independent auditor);
- establishing procedures for the receipt, retention and treatment of complaints from company employees on accounting, internal accounting controls or auditing matters, as well as for the confidential, anonymous submissions by company employees of concerns regarding questionable accounting or auditing matters;
- having the authority to engage independent counsel and other advisors as it determines necessary to carry out its duties; and
- receiving appropriate funds, as determined by the audit committee, from the company for payment of compensation to the outside legal, accounting or other advisors employed by the audit committee.

NASDAQ REQUIREMENTS

senior official with financial oversight responsibilities, that results in the individual's financial sophistication. A director who qualifies as an audit committee financial expert under Item 401(h) of Regulation S-K is presumed to qualify as a financially sophisticated audit committee member.

Related Party/Conflict of Interest Transactions. All related-party transactions must be reviewed and approved by the audit committee or comparable independent body of the board.

Cure. If a company fails to comply with the audit committee composition requirements because a committee member is no longer independent for reasons beyond the member's reasonable control, or due to a vacancy on the committee, the company will have up to the earlier of its next annual meeting or one year from the event that caused the failure to comply with the composition requirements. A company relying on this provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the compliance failure.

Audit Committee Charter. The audit committee charter must now specify all of the duties and responsibilities of the audit committee under the Act, including:

- appointing, retaining, compensating, evaluating and terminating the company's independent auditors (this includes resolving disagreements between management and the independent auditor);
- establishing procedures for the receipt, retention and treatment of complaints from company employees on accounting, internal accounting controls or auditing matters, as well as for the confidential, anonymous submissions by company employees of concerns regarding questionable accounting or auditing matters;
- having the authority to engage independent counsel and other advisors as it determines necessary to carry out its duties; and
- receiving appropriate funds, as determined by the audit committee, from the company for payment of compensation to the outside legal, accounting or other advisors employed by the audit committee.

Note: The foregoing charter requirements correspond to the requirements of Rule 10A-3.

AUDIT COMMITTEE REQUIREMENTS (continued)

NYSE REQUIREMENTS

Note: The foregoing charter requirements correspond to the requirements of Rule 10A-3.

- at least annually: (i) obtaining and reviewing a report by the independent auditor describing the independent auditor's internal quality control procedures; (ii) reviewing any material issues raised by the auditor's most recent internal quality control review of themselves; and (iii) assessing the auditor's independence;
- discussing the annual audited financial statement and quarterly financial statements with management and the independent auditor;
- discussing earnings press releases, as well as financial information and earnings guidance that is given to analysts and rating agencies;
- discussing policies with respect to risk assessment and risk management;
- meeting separately, from time to time, with management, with the internal auditors and with the independent auditors;
- reviewing with the independent auditor any audit problems or difficulties and management's response to such issues;
- setting clear hiring policies for employees or former employees of the independent auditors;
- reporting regularly to the board of directors; and
- evaluating the audit committee on an annual basis.

The company's website must include the charter of the audit committee and its annual report must state that the charter is available on its website and is available in print to any shareholder that requests it.

NASDAQ REQUIREMENTS

OTHER BOARD COMMITTEE REQUIREMENTS

SARBANES-OXLEY ACT/SEC RULEMAKING

The Act does not address the role or composition of other board committees.

NYSE REQUIREMENTS

Other Committee Charters. Companies must adopt and disclose charters for their compensation and nominating/corporate governance committees.

The Nominating/Corporate Governance Committee: The nominating/corporate governance committee composed of independent directors must have a written charter that addresses:

- the committee's purpose and responsibilities, which must include (i) identifying individuals who are qualified to become

NASDAQ REQUIREMENTS

Other Committee Charters. Companies must adopt a charter or board resolution, as applicable, regarding the nomination process and other such related matters as may be required under the federal securities laws (such as disclosures about shareholder nominees required in a company's proxy statement). There is no charter requirement for the compensation committee.

The Nominating Committee: The rules do not provide specific requirements for the nominating committee charter. Note that all director nominees must be selected or recommended for the board's selection by a nominating committee that is composed of independent directors or, if no such committee exists, by a

OTHER BOARD COMMITTEE REQUIREMENTS (continued)

NYSE REQUIREMENTS

board members consistent with criteria that were approved by the full board, (ii) selecting, or recommending that the board select, the director nominees for the next annual meeting of shareholders, (iii) developing and recommending to the board a set of corporate governance principles for the corporation and (iv) overseeing the evaluation of the board and management; and

- an annual performance evaluation of the committee.

In addition, the charter should give the nominating/corporate governance committee sole authority to hire and fire any search firm to be used to identify director candidates.

The company's website must include the charters of its most important committees (this could be applicable to the nominating/corporate governance committee). If the charter is on the company's website, the company's annual report must state that and that it is available in print to any shareholder that requests it.

If the company is required by contract or otherwise to provide a party the ability to nominate one or more directors, the selection and nomination of such directors need not be subject to the nominating committee process.

Compensation Committee: The compensation committee composed of independent directors must have a written charter that addresses:

- the committee's purpose and responsibilities, which must include: (i) producing a compensation committee report on executive compensation that must be included in the company's annual proxy statement or in the company's annual report; (ii) reviewing and approving corporate goals and objectives relevant to CEO compensation, evaluating the CEO's performance in light of those goals and objectives, and either as a committee or together with the other independent directors (as directed by the board), determining and approving the CEO's compensation level based on such evaluation;¹⁷ and (iii) making recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans; and
- an annual performance evaluation of the compensation committee.

In addition, the charter should give the committee sole authority to retain and terminate any consulting firm to assist in the evaluation of director or senior executive compensation, including sole authority to approve the firm's compensation and other retention terms.

The company's website must include the charters of its most important committees (this could be applicable to the compensation committee). If the charter is on the company's website, the company's annual report must state that and that it is available in print to any shareholder that requests it.

NASDAQ REQUIREMENTS

majority of the independent directors in either case voting in executive session.¹⁶

Where the right to nominate a director does not reside with a company by reason of a lawful arrangement, the provision for nomination of directors by independent directors does not apply. However, the company is still obligated to comply with the nominating, compensation and audit committee composition requirements under the listing standards.

Compensation Committee: The rules do not require a charter for the compensation committee. Note that CEO and executive officer compensation must be determined or recommended to the board for determination by a compensation committee that is composed of independent directors or, if no such committee exists, by a majority of the independent directors in either case voting in executive session (the CEO may not be present for voting or deliberations regarding his/her compensation).

DIRECTOR AND OFFICER DISQUALIFICATION

SARBANES-OXLEY ACT/SEC RULEMAKING

Bar to Future Service. Pursuant to **Section 305** of the Act, any person found to have violated the general antifraud provision of the Securities Exchange Act can be barred by a court or the SEC, after notice and a hearing, from serving as a director or officer of a public company if his conduct demonstrates “unfitness” to serve as a director or officer of such a company. *Effective now.*

NYSE REQUIREMENTS

None.

NASDAQ REQUIREMENTS

None.

CODES OF CONDUCT AND ETHICS

SARBANES-OXLEY ACT/SEC RULEMAKING

Code of Ethics for Senior Financial Officers and Chief Executive Officers. **Section 406** of the Act, as implemented by SEC rules (Regulation S-K, Item 406; Form 8-K, Item 10), requires companies to disclose in their quarterly and annual reports whether or not they have adopted a code of ethics applicable to their principal executive officer, principal financial officer and comptroller or principal accounting officer (and, if not, why not). The code of ethics must include standards reasonably necessary to promote: honest and ethical conduct, including the handling of actual or apparent conflicts of interest between personal and company interests; full, fair, accurate, timely and understandable disclosure in SEC periodic reports; and compliance with applicable governmental rules. In addition, the company must promptly disclose any change in or waiver of the code of ethics. While the SEC’s rules do not explicitly require board oversight of the code of ethics, given the seniority of the officers involved and the subject matter, responsibility to adopt and oversee the code will usually be a board responsibility, which, given the customary audit committee charter, may fall within the audit committee’s responsibilities. *Companies must comply with the code of ethics disclosure requirements in their annual reports for fiscal years ending on or after July 15, 2003.*

Manipulation of Auditors. **Section 303** of the Act states that no action may be taken by any director or officer of the company (or other person acting under the direction thereof), in contravention of such rules as the SEC may establish, to fraudulently influence, coerce, manipulate or mislead any independent auditor of the company’s financial statements for the purpose of rendering the financial statements materially misleading. *Effective April 26, 2003.*

NYSE REQUIREMENTS

Code of Business Conduct and Ethics. Companies are required to adopt and disclose a Code of Business Conduct and Ethics (beyond the Code of Ethics mandated by Section 406 of the Act) for directors, officers and employees that addresses:

- conflicts of interest;
- corporate opportunities;
- confidentiality;
- fair dealing;
- protection and proper use of company assets;
- compliance with laws, rules and regulations (including insider trading laws); and
- encouraging the reporting of any illegal or unethical behavior.

Waivers. Companies must promptly disclose any waivers given to directors or executive officers and the waivers must be approved by the board or a board committee.

NASDAQ REQUIREMENTS

Code of Conduct. Companies must adopt a code of conduct for all directors, officers and employees that is publicly available and includes the elements necessary to meet the code of ethics requirements established by the SEC pursuant to Section 406 of the Act. In addition, the code must provide for an enforcement mechanism.

Waivers. Companies must disclose any waivers given to directors or executive officers and the waivers must be approved by the board or a board committee.

CODES OF CONDUCT AND ETHICS (continued)

NYSE REQUIREMENTS

Corporate Governance Guidelines. Companies are required to adopt and disclose Corporate Governance Guidelines that address:

- qualification standards for directors;
- responsibilities of directors;
- director access to management and, as necessary, independent advisors;
- compensation of directors;
- continuing education and orientation of directors;
- management succession; and
- an annual performance evaluation of the board.

The company's website must include its corporate governance guidelines and the charters of its most important committees (including at least the audit committee). The company's annual report must state that the foregoing information is available on its website and that it is available in print to any shareholder who requests it.

NASDAQ REQUIREMENTS

EDUCATION AND TRAINING OF DIRECTORS

SARBANES-OXLEY ACT/SEC RULEMAKING

The Act does not address education and training of directors.

NYSE REQUIREMENTS

Continuing Education of Directors. Listed companies will be required to address continuing education and training of directors in their corporate governance guidelines.

NASDAQ REQUIREMENTS

Continuing Education of Directors. Nasdaq has announced that it will provide directors of listed companies with relevant continuing education opportunities concerning governance responsibilities.

APPLICABILITY TO NON-U.S. COMPANIES

SARBANES-OXLEY ACT/SEC RULEMAKING

Many of the Act's provisions (including those referred to above) apply to all companies (organized within or outside the U.S.) that have registered equity or debt securities with the SEC under the Securities Exchange Act of 1934, as amended. However, some, including those regarding director independence, apply only to companies (organized within or outside the U.S.) whose equity securities are listed on an exchange or on the Nasdaq Stock Market. Subject to any exemptions the SEC might grant, most provisions of the Act (but not the provisions regarding director independence, unless the company is simultaneously listed), also apply to companies (organized within or outside the U.S.) that have registered a public offering of their securities in the U.S. (and therefore will incur a reporting obligation under Section 15(d) of the Securities Exchange Act, regardless of whether the securities thus offered were ever sold or traded in the U.S. public markets), although in such cases compliance may be required only during the period when they have such reporting obligation, which will continue, at the least, until the fiscal year of the company following the fiscal year in which it registered its offering of securities.

Exemptions Relating to Foreign-Listed Company Audit Committees. Certain limited exemptions to the independence and other audit committee requirement of Section 301 of the Act apply to listed companies not organized in the U.S.:

APPLICABILITY TO NON-U.S. COMPANIES (continued)

- Non-management employees are allowed to sit on the audit committee of the company if the employee is elected or named to the board of directors or audit committee of the company pursuant to home country legal or listing requirements.
- The supervisory or non-management board is considered the board of directors for companies that contain two-tier boards of directors. The audit committee of such a company could be formed from the supervisory or non-management board.
- One member of the audit committee could be a shareholder, or representative of a shareholder or group, owning more than 50 percent of the voting securities of the company, if (i) the “no compensation” prong of the independence requirements is satisfied; (ii) the member in question has only observer status, and is not a voting member or the chair of, the audit committee; and (iii) the member in question is not an executive officer.
- One member of the audit committee could be a representative of a foreign government or foreign governmental entity, if (i) the “no compensation” prong of the independence requirement is satisfied and (ii) the member in question is not an executive officer of the company.
- Companies that have boards of auditors or statutory auditors (as required in several jurisdictions) would not need to have a separate independent audit committee if (i) these boards operate under legal or listing provisions that are intended to provide oversight of outside auditors that is independent of management; (ii) membership on the board excludes executive officers of the company; and (iii) certain other requirements are met.

NYSE REQUIREMENTS

Exemption of Foreign Issuers; Disclosures Required. The NYSE corporate governance standards will continue to defer to home-country practices in most instances. However, foreign issuers will be required to comply with most of the audit committee requirements (including committee independence, size and certain functions) and will also be required to promptly notify the NYSE after any executive officer of the company becomes aware of any material non-compliance with any applicable provision of the listing standards. In addition, listed foreign issuers must disclose any significant ways in which their corporate governance practices differ from those required by the other NYSE listing standards. The disclosure may be made in a brief, general summary of material differences.

NASDAQ REQUIREMENTS

Exemption of Foreign Issuers; Disclosures Required. Subject to requirements applicable under Section 301 of the Act to audit committees, none of the listing standards shall apply to require a foreign private issuer to do any act that is contrary to law, rule or regulation of any public authority exercising jurisdiction over it or that is contrary to generally accepted business practices in its country of domicile. Where a requirement is applicable, a foreign private issuer may obtain exemption from compliance with Nasdaq’s corporate governance listing standards (at the time of listing and thereafter), but must disclose the alternative practices they will follow in lieu of any waived requirement(s) annually in its annual report to the SEC.

ENFORCEMENT

SARBANES-OXLEY ACT/SEC RULEMAKING

Rule 10A-3 prohibits the national securities exchanges and Nasdaq from listing or continuing the listing of securities of a company that is not in compliance with the audit committee requirements of the rule, subject to providing an opportunity for the company to cure its noncompliance. With regard to the disclosure and other requirements of the Act discussed above, the Act provides the SEC with authority to promulgate rules and regulations in furtherance of the Act (which generally should provide it with interpretive and exemptive power) and treats a violation of the Act as a violation of the Securities Exchange Act, for which a broad variety of sanctions may be imposed (and also establishes certain other sanctions for violation of certain provisions of the Act—not, however, including those provisions discussed above).

Standards Relating to Listed Company Audit Committees. Under Rule 10A-3, each exchange and Nasdaq must require a listed company to notify it of any material noncompliance with the audit committee requirements it has established under the rule promptly after an executive officer of a company becomes aware of such noncompliance. Subject to the interpretive and any exemptive power which the exchange or Nasdaq has over its listing standards and subject to the opportunity to cure any noncompliance which must be provided to the listed company, delisting is required upon noncompliance with the audit committee requirements.

ENFORCEMENT (continued)

NYSE REQUIREMENTS

Public Reprimand Letter and Delisting. Upon finding a violation of an Exchange listing standard, the NYSE may issue a public reprimand letter to any company and ultimately suspend or de-list an offending company.

NYSE Listing Certification. The CEO must certify each year that he/she is not aware of any violations of the NYSE listing standards. The SEC and NYSE certifications must be disclosed in each company's annual report to shareholders.

Notification. Each company CEO will be required to promptly notify the NYSE in writing after any executive officer of the company becomes aware of any material noncompliance with any applicable provision of the listing standards.

NASDAQ REQUIREMENTS

Delisting. A material misrepresentation or omission by a company to Nasdaq may result in the company's being de-listed. The Nasdaq Listing and Hearing Review Council may deny a re-listing based upon a corporate governance violation that occurred while the company's appeal was pending.

Notification. A listed company is required to promptly notify Nasdaq if an executive officer becomes aware of any material noncompliance with Nasdaq's corporate governance rules.

1. Nasdaq-listed limited partnerships are governed by a separate Nasdaq listing standard that references and incorporates the current Nasdaq corporate governance listing standards. Rule 4360. This separate listing standard may eventually be amended to conform with the new Nasdaq corporate governance listing standards discussed herein. Nasdaq is silent regarding any exemptions from its proposed corporate governance listing standards for companies in bankruptcy.
2. References to "company" include a parent or subsidiary that is in a consolidated group with the company.
3. A material relationship "can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others."
4. An immediate family member includes a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home.
5. Service as an interim CEO or Chairman does not automatically disqualify a person from being considered independent following such employment.
6. A "parent" or "subsidiary" includes entities that are controlled by the issuer and are consolidated with the financial statements of the issuer as filed with the SEC (but not if the issuer reflects such entity solely as an investment in its financial statement).
7. Compensation received (i) for prior service as an interim Chairman or CEO need not be considered for this independence test and (ii) by an immediate family member for service as a non-executive employee of the listed company need not be considered for this independence test.
8. The payments and consolidated gross revenue numbers to be used for this independence test must be those from the last completed fiscal year. Charitable organizations are not considered "companies" for the purposes of this independence test. However, the listed company must disclose in its annual proxy statement (or, if the company does not file a proxy statement, in the company's annual report) any charitable contributions from the company to a charitable organization that one of their directors is an executive officer of, if, within the previous three years, contributions in a single fiscal year exceeded the greater of 2% of such charity's consolidated gross revenues or \$1 million.
9. A family member includes a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, whether by blood, marriage or adoption, or someone who has the same residence as the person.
10. Payments received as compensation for board or committee service or arising solely from investments in the company's securities, compensation paid to a family member who is an employee of the company or a parent or subsidiary of the company (but not if such person is an executive officer of the company or a parent or subsidiary of the company), benefits under a tax qualified retirement plan or non-discretionary compensation and loans permitted under Section 402 of the Act are excluded from the \$60,000 limitation.
11. Payments arising solely from investments in the company's securities or under non-discretionary charitable contribution matching programs are not included in the limitation.
12. Indirect compensation includes payments to spouses, minor children or stepchildren and children or stepchildren sharing a home with the audit committee member, as well as payments accepted by an entity which provides accounting, consulting, legal, investment banking or financial advisory services to the company and in which the audit committee member is a partner, member, an officer such as a managing director or an executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions).
13. A member of the audit committee of an investment company is not subject to the affiliation prong of the independence test, but instead cannot be an "interested person" of the investment company as defined in Section 2(a)(19) of the Investment Company Act of 1940. Also exempt from the "affiliated person" requirement is an audit committee member who sits on the board of directors of both a listed issuer and an affiliate of the listed issuer, if the audit committee member otherwise meets the independence requirements for both the issuer and the affiliate. In addition, all but one member of a non-investment company's audit committee may be exempt from the independence requirements for 90 days from the effective date of a company's (i) initial registration statement under Section 12 of the Exchange Act or (ii) registration statement under the Securities Act covering an initial public offering of securities of the company and a minority of the members of the listed issuer's audit committee may be exempt from the independence requirements for one year from the date of effectiveness of such registration statement.
14. It is recommended that a company disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its annual report) if any audit committee member is deemed independent but falls outside of the safe harbor provisions of Exchange Act Rule 10A-3(e)(1)(ii).
15. See Codes of Conduct and Ethics below regarding requirements of the Act and the new NYSE standards regarding codes of conduct and ethics.
16. A company need not comply with the director nomination requirement it is subject to a binding obligation (existing prior to the approval of the new listing standards) that is inconsistent with the new listing standards.
17. Discussions regarding CEO compensation with the board generally are not precluded, as it is not the intent to impair communication among board members.