

## Weil, Gotshal & Manges LLP

### MEMORANDUM

November 4, 2003

To Our Clients and Friends:

**Re: NYSE and Nasdaq Corporate Governance Listing Standards Approved**

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’s action gives effect to new requirements regarding board composition, structure and process and other corporate governance matters initially proposed by the NYSE and Nasdaq in the Fall of 2002 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 originally proposed, although numerous technical changes have been made by both the NYSE and Nasdaq from their original proposals. 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 on their websites or in their annual reports 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 be required during 2004, generally by their 2004 annual meeting of shareholders. 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.

### Highlights

The key, common requirements of the NYSE and Nasdaq corporate governance listing standards, as to which there are only quite limited exceptions, are as follows:

Board Independence:

- Independent directors must comprise a majority of the board of directors.

- A director's independence is to be determined by the board of directors, which must affirmatively find a director to be independent in order to qualify as such, in accordance with a general standard and certain specific requirements or presumptions. (In the case of the NYSE, the board must conclude that the director has no "material relationship" with the company either directly or "as a partner, shareholder or officer of an organization that has a relationship with the company." In the case of Nasdaq, the board must conclude that a director does not have any relationship that would interfere with his or her exercise of independent judgment. Specific provisions bar from treatment as independent, among other things, an employee, a director who receives any compensation from the company or its affiliates above a threshold level (except for service as a director), and a director who is materially associated with a provider of professional services or a material provider of other services or goods or a material customer (as determined under specified materiality criteria). In addition, any director who has had such a relationship within the past three years also will not be considered independent (except that, as a transitional matter, until the first anniversary of the effectiveness of the new standards, a "look-back" period of one year only will apply for a NYSE-listed company).
- Independent directors must meet regularly without any management members present and both the director who will preside at such meetings (or the manner of selecting the presiding director) and the manner shareholders may use to communicate with the independent directors must be disclosed.

#### Independent Committee Requirements:

- Both NYSE- and Nasdaq listed companies are required to have an audit committee of at least three members and composed entirely of independent directors and having specified authority and responsibility, consistent with SEC Rule 10A-3. (The requirements of this rule are discussed in our April 30 memorandum to clients, which is available at [http://www.weil.com/wgm/cwgmhomep.nsf/Files/SOXA301FinalRules/\\$file/SOXA301FinalRules.pdf](http://www.weil.com/wgm/cwgmhomep.nsf/Files/SOXA301FinalRules/$file/SOXA301FinalRules.pdf) In addition, NYSE listed companies must have an independent nominating/corporate governance committee and an independent compensation committee. Nasdaq companies, if they do not have such committees, must have a majority of their independent directors approve director nominations and executive officer compensation.
- Audit committees must have a Board-approved charter, which must be disclosed. NYSE-listed companies must adopt and disclose charters for their compensation and nominating/governance committees, providing these committees with certain minimum authority and responsibility. A Nasdaq-listed company must either likewise establish a charter for its nominating committee or otherwise formalize by board action its processes for selecting director nominees and for addressing such other related responsibilities as the board may be required to address under the federal securities laws.

Codes of Conduct:

- Listed companies are required to adopt and disclose a code of business conduct for their directors, officers and employees and to disclose promptly any waivers from the code's requirements granted to directors and executive officers. The code of conduct must address conflict of interest transactions, legal compliance, and a reporting and enforcement mechanism, among other matters. Nasdaq-listed companies must also review all related party transactions for conflicts of interest and such transactions will require audit committee or independent director approval. (NYSE- listed companies are also required to adopt and disclose corporate governance guidelines, which generally must address any qualifications established for election as a director, director compensation policies, policies respecting director access to management and independent advisors, policies respecting management succession and an annual board self-evaluation.)

Compliance Deadlines:

- 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 of shareholders 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. However, Nasdaq's related party transaction requirements will go into effect on January 15, 2004 and its code of conduct requirement in May 2004, six months after SEC approval.

For additional information, we attach a special edition of our corporate practice newsletter, *The Corporate Charter*, which includes a comparison in chart form of the NYSE and Nasdaq corporate governance listing standards pertaining to the composition and functions of the board of directors and further compares the listing standards with the corporate governance requirements of SOx A. More detailed information regarding the listing standards and other the corporate governance requirements applicable to companies whose securities trade in the U.S. is available on, and may be downloaded and printed from, our website of Sarbanes-Oxley Act resources, at

[http://www.weil.com/wgm/cwgmhomep.nsf/Files/SOXACorpGovRequirements/\\$file/SOXACorpGovRequirements.pdf](http://www.weil.com/wgm/cwgmhomep.nsf/Files/SOXACorpGovRequirements/$file/SOXACorpGovRequirements.pdf)

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Do not hesitate to get in touch with your contact at Weil, Gotshal & Manges if you have any questions regarding these proposals or if we can be of further assistance.