

Client Alert

A report
for clients
and friends
of the firm **December 2003**

Amended New York Stock Exchange Listing Standards

Introduction

On November 4, 2003, the Securities and Exchange Commission (the "SEC") approved certain amendments to the listing standards of the New York Stock Exchange, Inc. (the "NYSE"). The amended listing standards (the "Revised Standards"), together with the recently enacted Sarbanes-Oxley Act of 2002 and the new and proposed SEC regulations, represent a comprehensive realignment of minimum corporate governance standards for NYSE-listed companies ("Companies"). This Client Alert outlines the major requirements set forth in the Revised Standards. A summary of some of the most important provisions are as follows:

- A majority of a Company's board of directors must be "independent";
- Non-management directors must meet at regularly scheduled executive sessions without management;
- Companies must establish Audit Committees composed entirely of independent directors who are financially literate (with at least one member who has accounting or related financial management expertise) and adopt written charters addressing specific purposes, duties and responsibilities and annual performance evaluations;
- Companies must establish Nominating/Corporate Governance Committees composed entirely of independent directors and adopt written charters addressing specific purposes and responsibilities and annual performance evaluations;
- Companies must establish Compensation Committees composed entirely of independent

directors and adopt written charters addressing specific purposes and direct responsibilities and annual performance evaluations;

- Companies must adopt Corporate Governance Guidelines addressing specific matters relating to directors, management succession and annual performance evaluations;
- Companies must adopt Codes of Business Conduct and Ethics addressing compliance standards and procedures for waiving violations; and
- The Chief Executive Officer of each Company must certify annually that he or she is not aware of any violations of the NYSE corporate governance listing standards.

Effective Dates

Non-Classified Board of Directors

A Company with a board of directors that is not classified will have until the earlier of (i) the first annual meeting of shareholders after January 15, 2004 or (ii) October 31, 2004 (the earlier of such dates being referred to hereinafter as the "Compliance Date") to comply with the Revised Standards.

Classified Board of Directors

A Company with a classified board of directors that would be required to change a director who would not normally stand for election in the first annual meeting of shareholders after January 15, 2004 may continue such director in office until the second annual meeting after the Compliance Date, but no later than December 31, 2005.

Majority of Independent Directors

General Rule

The Revised Standards require a Company to have a majority of independent directors on its board of directors.

Definition of Independence

A director will be considered "independent" only if the board of directors affirmatively determines 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).

Material Relationships

Boards making "independence" determinations should broadly consider all relevant facts and circumstances. When assessing the materiality of a director's relationship with the Company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, ownership of even a significant amount of stock, by itself, is not a bar to an independence finding.

Conflicted Relationships

● Irrebuttable Presumptions

The following are conclusively presumed to lack independence under the Revised Standards:

- A director who is an employee of the Company (other than as an interim Chairman or CEO) or whose immediate family member (as defined below) is an executive officer of the Company.
- A director who receives, or whose immediate family member receives, more than \$100,000 per year in direct compensation from the Company other than (i) director and committee fees; (ii) pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); (iii) compensation received by a director for former service as an interim Chairman or CEO; or (iv) compensation received by an immediate family member for service as a non-executive employee of the Company.
- A director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the Company.
- A director who is employed, or whose immediate family member is employed, as an executive officer of another Company where any of the Company's present executives serve on that Company's compensation committee.
- A director who is an executive officer or an employee, or whose immediate family member is an execu-

tive officer, of a company that makes payments to, or receives payments from, the Company for property or services in amount which, in any single fiscal year, exceeds the greater of (i) \$1 million or (ii) 2% of such other company's consolidated gross revenues.

● Certain Definitions

- *Company.* References to the "Company" include any parent or subsidiary in a consolidated group with the Company.
- *Immediate Family Member.* 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.

● Look-Back Periods

- *Prior to November 4, 2004.* A one-year look-back period applies after the termination of the offending relationship or status for the disqualifying circumstances described above.
- *After November 4, 2004.* A three-year look-back period applies after the termination of the offending relationship or status for the disqualifying circumstances described above.
- *Certain Exemptions.* With respect to the look-back periods, a Company need not consider (i) former employment of the director or immediate family member or (ii) individuals who are no longer immediate family members as a result of legal separation or divorce or those who have died or become incapacitated. In addition, charitable organizations are not considered "Companies" for these purposes. However, a Company must disclose in its public filings any charitable contributions made to any charitable organization in which a director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year exceeded the greater of (i) \$1 million or (ii) 2% of such charitable organization's consolidated gross revenues in any single fiscal year within the preceding three years.

Public Disclosure of Independence Determinations

The basis for a board determination that a relationship is not material must be disclosed in the Company's public filings. A board may adopt and disclose categorical standards to assist it in making determinations of independence and may make a general disclosure if a director meets these standards. Any determination of independence for a director who does not meet these standards must be specifically explained. A

Company must disclose any standard it adopts; it may then make the general statement that the independent directors meet the standards set by the board without detailing aspects of the immaterial relationships between individual directors and the Company. In the event that a director with a business or other relationship that does not fit within the disclosed standards is determined to be independent, a board must disclose the basis for its determination.

Meetings Of Non-Management Directors

Regularly Scheduled Meetings

The non-management directors of each Company must meet at regularly scheduled executive sessions without management.

Definition of "Non-Management" Director

"Non-management" directors are all those who are not Company officers and includes such directors who are not independent by virtue of a material relationship, former status, family membership or any other reason.

Presiding Director/Public Disclosure

There need not be a single presiding director at all executive sessions of the non-management directors. However, if one director is chosen to preside at these meetings, his or her name must be disclosed in the Company's public filings. Alternatively, a Company may disclose the procedure by which a presiding director is selected for each executive session. A Company must disclose a method for interested parties to communicate directly with the presiding director or with the non-management directors as a group.

Audit Committee

The following requirements are in addition to any other requirements of audit committees under the Securities Exchange Act of 1934 (the "Exchange Act").¹ Unlike other committees, the audit committee functions are the sole responsibility of the audit committee and may not be allocated to a different committee.

Composition

- The audit committee must have a minimum of three members.
- Each member of the audit committee must be financially literate or must become financially literate within a reasonable time after appointment.

- At least one member of the audit committee must have accounting or related financial management expertise.

Written Charter

The audit committee must have a written charter.

- Required Matters to be Addressed in Charter

The following matters must be addressed in the audit committee charter:

- The committee's purpose, which must include, at a minimum, to:
 - assist board oversight of (i) the integrity of the Company's financial statements; (ii) the Company's compliance with legal and regulatory requirements; (iii) the independent auditor's qualifications and independence; and (iv) the performance of the Company's internal audit function and independent auditors; and
 - prepare an audit committee report as required by the SEC to be included in the Company's annual proxy statement.
- An annual performance evaluation of the audit committee.
- The duties and responsibilities of the audit committee, which must include, at minimum, to:
 - At least annually, obtain and review a report by the independent auditor describing (i) the Company's internal quality-control procedures; (ii) any material issues raised by the most recent internal quality-control review, or peer review, of the Company, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the Company, and any steps taken to deal with any such issues; and (iii) all relationships between the independent auditor and the Company.²
 - Discuss the Company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including the Company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations,"
 - Discuss the Company's earnings press releases, as well as financial information and earnings

¹ Under the Exchange Act, members of a reporting company's audit committee may not (i) accept, directly or indirectly, any consulting, advisor or other compensatory fee from the company (other than fixed amounts of compensation under a retirement plan for prior service) or (ii) be an affiliated person (as defined in the Exchange Act) of the company.

² The evaluation should include the review and evaluation of the lead partner of the independent auditor, taking into account the opinions of management and the Company's internal auditors (or other personnel responsible for the internal audit function). The audit committee should consider whether there should be regular rotation, not only of the lead audit partner as required by law, but of the audit firm itself.

guidance provided to analysts and rating agencies.³

- Discuss policies with respect to risk assessment and risk management.⁴
- Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors.
- Review with the independent auditor any audit problems or difficulties and management's response. The audit committee must regularly review with the independent auditor any difficulties the auditor encountered in the course of the audit work, including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management.⁵
- Set clear hiring policies for employees or former employees of the independent auditors; and
- report regularly to the board of directors.
- ◆ Required Matters to be Reviewed with the Full Board:

- major issues regarding accounting principles and financial statement presentations, including any significant changes in the Company's selection or application of accounting principles, and major issues as to the adequacy of the Company's internal controls and any special audit steps adopted in light of material control deficiencies;

- analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects

of alternative GAAP methods on the financial statements;

- the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the Company; and

- the type and presentation of information to be included in earnings press releases (paying particular attention to any use of "pro forma," or "adjusted" non-GAAP, information), as well as review any financial information and earnings guidance provided to analysts and rating agencies.

- ◆ Recommended Matters to be Reviewed with the Full Board:

- any issues that arise with respect to (i) the quality or integrity of the Company's financial statements, (ii) the Company's compliance with legal or regulatory requirements, (iii) the performance and independence of the Company's independent auditors and/or (iv) the performance of the internal audit function.

Internal Audit Function

Each Company must have an internal audit function. A Company may outsource this function to a third-party service provider other than its independent auditor.

Public Disclosure Concerning Membership on Multiple Audit Committees

If an audit committee member also serves on the audit committees of more than three public companies, and the Company does not limit the number of audit committees on which its audit committee members serve, then the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the Company's audit committee and disclose such determination in the Company's public filings.

3 The audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be done generally. The audit committee need not discuss in advance each earnings release or each instance in which a Company may provide earnings guidance.

4 The audit committee should discuss the Company's major financial risk exposures and the steps management has taken to monitor and control such exposures. The audit committee is not required to be the sole body responsible for risk assessment and management. If a Company manages and assesses its risk through mechanisms other than the audit committee, the processes in place should be reviewed in a general manner by the audit committee.

5 Among the items the audit committee may want to review with the auditor are (i) any accounting adjustments that were noted or proposed by the auditor but were "passed" (as immaterial or otherwise), (ii) any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement and (iii) any "management" or "internal control" letter issued, or proposed to be issued, by the audit firm to the Company. The review should also include discussion of the responsibilities, budget and staffing of the Company's internal audit function.

Nominating/Corporate Governance Committee

Composition

Companies must have a nominating/corporate governance committee composed entirely of independent directors.

Written Charter

The nominating/corporate governance committee must have a written charter.

- Required Matters to be Addressed in Charter
The following matters must be addressed in the Company's nominating/corporate governance committee charter:
 - The committee's purpose and responsibilities, which must include, at a minimum, to:
 - identify individuals qualified to become board members, consistent with criteria approved by the board;
 - select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders;
 - develop and recommend to the board a set of corporate governance principles applicable to the corporation; and
 - oversee the evaluation of the board and management.
 - An annual performance evaluation of the committee.
- Recommended Matters to be Addressed in Charter
 - committee member qualifications;
 - committee member appointment and removal;
 - committee structure and operations (including authority to delegate to subcommittees);
 - committee reporting to the board; and
 - granting sole authority to the nominating/corporate governance committee to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm's fees and other retention terms.

Contract Rights of Third Parties

If a Company is legally required by contract or otherwise to provide third parties with the ability to nominate directors, the selection and nomination of such directors need not be subject to the nominating committee process.

Compensation Committee

Composition

A Company must have a compensation committee composed entirely of independent directors.

Written Charter

The compensation committee must have a written charter.

- Required Matters to be Addressed in Charter
The following matters must be addressed in the Company's compensation committee charter:
 - the committee's purpose and direct responsibilities, which must include, at a minimum, to:
 - review and approve corporate goals and objectives relevant to CEO compensation, evaluate 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), determine and approve the CEO's compensation level based on this evaluation.⁶
 - make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans; and
 - produce a compensation committee report on executive compensation as required by the SEC to be included in the Company's public filings.
 - an annual performance evaluation of the compensation committee.
- Recommended Matters to be Addressed in Charter
 - committee member qualifications;
 - committee member appointment and removal;
 - committee structure and operations (including authority to delegate to subcommittees);
 - committee reporting to the board; and

⁶ In determining the long-term incentive component of CEO compensation, the committee should consider (i) the Company's performance and relative shareholder return, (ii) the value of similar incentive awards to CEOs at comparable Companies and (iii) the awards given to the listed Company's CEO in past years.

- if a compensation consultant is to assist in the evaluation of director or senior executive compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.

Corporate Governance Guidelines

A Company must adopt and disclose corporate governance guidelines.

Required Matters to be Addressed in Guidelines

The following matters must be addressed in the Company's corporate governance guidelines:

- Director qualification standards
These standards should, at a minimum, reflect the independence requirements set forth above.⁷
- Director responsibilities
These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.
- Director access to management and, as necessary and appropriate, independent advisors.
- Director compensation
Director compensation guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate). The board should be aware that questions as to directors' independence may be raised when directors' fees and emoluments exceed what is customary.
- Director orientation and continuing education.
- Management succession
Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.
- Annual performance evaluation of the board
The board should conduct a self evaluation at least annually to determine whether it and its committees are functioning effectively.

Public Disclosure

Each Company's website must include its corporate governance guidelines and the charters of its most important committees (including at least the audit, compensation and

nominating/corporate governance committees). Each Company's annual report filed with the SEC must state that the foregoing information is available on its website and that the information is available in print to any shareholder who requests it.

Code Of Business Conduct And Ethics

Written Code of Business Conduct and Ethics

Companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.

● Required Matters to be Addressed in Code

The following matters must be addressed in the Company's code of business conduct and ethics:

- That any waiver of the code for executive officers or directors may be made only by the board or a board committee and must be promptly disclosed to shareholders; and
- Compliance standards and procedures that will facilitate the effective operation of the code.

● Recommended Matters to be Addressed in Code

- Conflicts of interest
Loans to, or guarantees of obligations of, persons with conflicts of interest are of special concern. The Company should have a policy prohibiting conflicts of interest, and providing a means for employees, officers and directors to communicate potential conflicts to the Company.
- Corporate opportunities
Employees, officers and directors should be prohibited from (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information or position; (b) using corporate property, information, or position for personal gain; and (c) competing with the Company.
- Confidentiality
Employees, officers and directors should maintain the confidentiality of information entrusted to them by the Company or its customers, except when disclosure is authorized or legally mandated.
- Fair dealing
Each employee, officer and director should endeavor to deal fairly with the Company's customers, suppliers, competitors and employees. Companies may

⁷ Companies may also address other substantive qualification requirements, including policies limiting the number of boards on which a director may sit, and director tenure, retirement and succession.

write their codes in a manner that does not alter existing legal rights and obligations of Companies and their employees, such as "at will" employment arrangements.

- Protection and proper use of Company assets
All employees, officers and directors should protect the Company's assets and ensure their efficient use. All Company assets should be used for legitimate business purposes.
- Compliance with laws, rules and regulations (including insider trading laws)
The Company should proactively promote compliance with laws, rules and regulations, including insider trading laws.
- Encouraging the reporting of any illegal or unethical behavior
The Company should encourage employees to talk to supervisors, managers or other appropriate personnel when in doubt about the best course of action in a particular situation. The Company must ensure that employees know that the Company will not allow retaliation for reports made in good faith.

Public Disclosure

Each Company's website must include its code of business conduct and ethics. Each Company's annual report filed with the SEC must state that the foregoing information is available on its website and that the information is available in print to any shareholder who requests it.

Foreign Private Issuers

General Rule

Except for the requirements relating to audit committees and notification of non-compliance, a Company that is a foreign private issuer may follow home country practice in lieu of the Revised Standards where such foreign private issuer's home-country practices differ from those followed by domestic companies under NYSE listing Standards.

Disclosure of Significant Differences

Listed foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic Companies under NYSE listing standards. A brief, general summary of the significant differences is sufficient; foreign private issuers are not required to present a detailed, item-by-item analysis of the differences.

Means of Disclosure

Listed foreign private issuers may provide this disclosure either on their web site (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States. If the disclosure is only made available on the web site, the annual report shall so state and provide the web address at which the information may be obtained.

Effective Date for Audit Committee Compliance

Foreign private issuers will have until July 31, 2005 to comply with the new audit committee standards.

Additional CEO Certification

Certification and Public Disclosure

In addition to any certifications required to be filed with the SEC, each Company's CEO must certify to the NYSE each year that he or she is not aware of any violation by the Company of NYSE corporate governance listing standards. This certification to the NYSE must be disclosed in the Company's public filings.

Obligation to Whistleblow

Each Company's CEO must promptly notify the NYSE in writing after any executive officer of the listed Company becomes aware of any material noncompliance with the above.

Controlled Companies

Exceptions from Listing Requirements

A "Controlled Company" (i.e., a Company of which more than 50% of the voting power is held by an individual, a group or another Company) need not (i) have a majority of independent directors, (ii) have a nominating/corporate governance committee composed entirely of independent directors or (iii) have a compensation committee composed entirely of independent directors.

Public Disclosure

A Controlled Company that chooses to take advantage of any or all of the exemptions referred to above must disclose the exception, the fact that it is a Controlled Company and the basis for its determination in its public filings.

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Client Alert

Proskauer's Corporate Law Department includes over 140 attorneys with significant and diverse corporate law experience. The following individuals serve as senior members of Proskauer's Corporate Governance Group and would welcome any questions you may have regarding this Client Alert.

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