

## New Securities Law Disclosures in 2004 Forms 10-K, 10-Q and 8-K and Proxy Statement

Over the past year, the Securities and Exchange Commission, in part as mandated by the Sarbanes-Oxley Act of 2002, has adopted a number of new disclosure requirements for public companies. Some of these changes already have taken effect, while others will be required for the first time in 2004. In addition, the New York Stock Exchange (the "NYSE") and the Nasdaq Stock Market ("Nasdaq") in the past year each has made significant changes to its listing standards relating to corporate governance that will require additional disclosures in a public company's SEC filings.<sup>1</sup>

Set forth below is a brief summary of new disclosures applicable to U.S. public companies in 2004 under SEC rules, as well a brief summary of new disclosure obligations resulting from changes in the NYSE and Nasdaq listing standards.<sup>2</sup>

### Securities and Exchange Commission Rules

#### SEC Rules - Form 10-K

Subject	Discussion
<i>Accelerated Reporting</i>	Although the SEC adopted final rules relating to the acceleration of periodic reporting dates in September 2002, this is the first year in which an "accelerated filer" (as defined in Rule 12b-2 under the Securities Exchange Act of 1934) is subject to an accelerated filing deadline. An accelerated filer must file its Form 10-K within 75 days after the end of its fiscal year if the fiscal year ended on or after December 15, 2003. <sup>3</sup> <i>(General Instruction A to Form 10-K)</i>

<sup>1</sup> The compliance deadline for both the NYSE and Nasdaq corporate governance changes is generally the earlier of (i) the company's first annual meeting after January 15, 2004, and (ii) October 31, 2004. This summary does not discuss the corporate governance reforms of the American Stock Exchange ("AMEX"), which were approved by the SEC on December 1, 2003. The compliance deadline for the new AMEX rules is generally the earlier of (i) the company's first annual meeting after March 15, 2004, and (ii) October 31, 2004.

<sup>2</sup> For a discussion of the substantive requirements of the NYSE's and Nasdaq's new corporate governance listing standards, see Covington & Burling's client advisory, *New NYSE and Nasdaq Corporate Governance Listing Standards* (November 5, 2003) < <http://elzar.wlwg.com/publications/download/oid61382/411.pdf> >.

<sup>3</sup> An accelerated filer also must disclose in its Form 10-K its website address and whether it makes reports on Forms 10-K, 10-Q and 8-K available on its website, free of charge, as soon as reasonably practicable after these reports are filed with the SEC. If a company does not make such reports available on its website, the company must disclose why it does not do so, and whether it will voluntarily provide electronic or paper copies of such filings free of charge upon request. *(Item 101 of Regulation S-K)*

## SEC Rules - Form 10-K

Subject	Discussion
<i>Management's Discussion and Analysis ("MD&amp;A")</i>	
Material Off-Balance Sheet Arrangements	The MD&A section of the Form 10-K (either directly or by incorporation by reference to the Annual Report to Shareholders) must include, under a separate caption, a discussion of the company's material "off-balance sheet arrangements." <sup>4</sup> The disclosure must include, to the extent necessary to the understanding of the arrangements and their impact on the company, (i) the nature and business purpose of the off-balance sheet arrangements, (ii) the importance to the company for liquidity, capital resources, market or credit risk support or other benefits, (iii) the financial impact on the company and the risks to which they expose the company, and (iv) any known event, demand, commitment, trend, or uncertainty that will result in (or is reasonably likely to result in) the termination or material reduction in the availability or benefit to the company of its off-balance sheet arrangements and the course of action the company has taken or proposes to take in response to such circumstances. <i>(Item 303(a)(4) of Regulation S-K)</i>
Tabular Disclosure of Contractual Obligations	The MD&A section of the Form 10-K (either directly or by incorporation by reference to the Annual Report to Shareholders) must include a table showing the aggregate amount of contractual obligations and the period within which the obligations are due, broken out according to the following categories: (i) long-term debt obligations, (ii) capital (finance) lease obligations, (iii) operating lease obligations, (iv) purchase obligations, and (v) other long-term liabilities reflected on the company's balance sheet under GAAP. The table can include explanatory footnotes describing provisions that create, increase or accelerate obligations disclosed in the table. <i>(Item 303(a)(5) of Regulation S-K)</i>
New MD&A Guidance	On December 19, 2003, the SEC issued new interpretative guidance concerning the disclosures in the MD&A. The guidance reiterates that the MD&A should not be merely a recitation of the financial statements in narrative form or an otherwise uninformative series of technical responses to the MD&A requirements. The release encourages top-level management to participate in the drafting of the MD&A and provides guidance regarding (i) the overall presentation and focus of the MD&A (including through executive-level overviews, emphasis on the most important information and a reduction of duplicative information), (ii) the importance of analyzing financial information, (iii) known material trends and

<sup>4</sup> "Off-balance sheet arrangements" are defined to mean any transaction, agreement or other contractual arrangement of the company with an unconsolidated entity under which the company has an obligation of various specified types, including a guarantee within the meaning of Financial Accounting Standards Board Interpretation No. 45, *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* (November 2002) and an obligation arising out of a variable interest (within the meaning of Financial Accounting Standards Board Interpretation No. 46, *Consolidation of Variable Interest Entities* (January 2003)) in an unconsolidated entity held by the company.

## SEC Rules - Form 10-K

Subject	Discussion
<i>Code of Ethics</i>	uncertainties, (iv) key performance indicators, including non-financial indicators, (v) liquidity and capital resources, and (vi) critical accounting policies. ( <i>Release No. 33-8350 (December 29, 2003)</i> < <a href="http://www.sec.gov/rules/interp/33-8350.htm">http://www.sec.gov/rules/interp/33-8350.htm</a> >)
Disclosure of Code of Ethics	The Form 10-K must disclose whether or not the company has adopted a “code of ethics” meeting specified standards applicable to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions (the “Senior Officer Code of Ethics”) and, if not, an explanation of why it has not done so. A company that has adopted a Senior Officer Code of Ethics must make it available to the public by (i) filing a copy as an exhibit to the Form 10-K, (ii) posting the text on the company’s Internet website (with disclosure in the Form 10-K and providing the website address), or (iii) including in the Form 10-K an undertaking to provide a copy to any person upon request and without charge, along with instructions on how the request can be made. If a company’s Senior Officer Code of Ethics constitutes a portion of a broader document that addresses other topics or is applicable to a larger group of individuals, the company only needs to make the portions of the document that satisfy the requirements of Item 406(c) publicly available. ( <i>Item 406(a)-(c) of Regulation S-K</i> ) <sup>5</sup>
Amendments and Waivers of Senior Officer Code of Ethics	A company also must disclose within five business days any amendment to, or waiver of, any provision of the Senior Officer Code of Ethics, either under Item 10 of Form 8-K or on its Internet website. If the company intends to make such disclosures on its website, the intention to do so and the company’s website address must be disclosed beforehand in its Form 10-K. <sup>6</sup> ( <i>Item 406(d) of Regulation S-K</i> )
<i>Non-GAAP Financial Measures</i>	<ul style="list-style-type: none"> <li>When a company includes a permitted “non-GAAP financial measure” in its Form 10-K (or any other SEC filing), it must include in the filing (i) the “most directly comparable” GAAP financial measure, (ii) a reconciliation of the non-GAAP measure to the GAAP measure, (iii) a statement disclosing why management believes presentation of the non-GAAP financial measure provides useful information to investors, and (iv) if material, a statement of the additional purposes, if any, for which management uses the non-GAAP financial measure. If a company includes in its Form 10-K the two explanatory statements required by clauses (iii) and (iv) above and then uses the non-GAAP financial measure relating to such statements in a SEC filing prior to the filing of its next</li> </ul>

<sup>5</sup> The disclosure concerning the Senior Officer Code of Ethics may be included in a company’s proxy statement and incorporated by reference under Item 10 in its Form 10-K.

<sup>6</sup> This disclosure obligation became effective in March 2003 for any company that has had a Senior Officer Code of Ethics in effect at or after the effective date.

## SEC Rules - Form 10-K

Subject	Discussion
	<p>Form 10-K, it need not repeat, but only must update, the explanatory statements in the subsequent filing. <i>(Item 10(e) of Regulation S-K)</i><sup>7</sup></p> <ul style="list-style-type: none"> <li>In communications involving operating results subsequent to the Form 10-K during the same year, a company need not repeat the two explanatory statements referred to in clauses (iii) and (iv) above with respect to non-GAAP financial measures used in such communication if those statements were included in the Form 10-K (unless an update of the information previously provided is required). Therefore, a company anticipating the use later in the year of a non-GAAP financial measure not used in the Form 10-K may wish to include in the Form 10-K the information referred to in clauses (iii) and (iv), thereby avoiding the need to make such disclosures in the context of subsequent release announcements. <i>(Item 10(e)(iii) of Regulation S-K and Instruction 1 to Item 12 of Form 8-K)</i></li> </ul>
<p>CEO/CFO Certifications</p> <p>Section 302 Certifications</p> <p>Section 906 Certifications</p>	<p>Amended SEC rules have resulted in the following changes as compared to the certification included in last year's Form 10-K:</p> <p>The principal executive officer and principal financial officer certifications contemplated by Section 302 of the Sarbanes-Oxley Act (i) are now filed as Exhibits 31 to the Form 10-K, rather than as part of the text of the Form 10-K following the signature page, and (ii) include modified language relating to "internal control over financial reporting." <i>(Rule 13a-14(a), Rule 15d-14(a) and Item 601(b)(31) of Regulation S-K)</i></p> <p>The principal executive officer and principal financial officer certifications required by Section 906 of the Sarbanes-Oxley Act are now furnished (not filed) as Exhibits 32 to the Form 10-K, rather than Exhibits 99. <i>(Rule 13a-14(b), Rule 15d-14(a) and Item 601(b)(32) of Regulation S-K)</i></p>
<p>Disclosure Controls and Procedures</p>	<p>The disclosure of the conclusions of the company's principal executive officer and principal financial officer regarding the effectiveness of the company's disclosure controls and procedures required to be set forth in the company's Form 10-K (and Form 10-Q) has been changed to require that the conclusion be based on an evaluation as of the end of the period covered by the report, instead of as of a date within 90 days before the filing date. <i>(Item 307 of Regulation S-K)</i></p>
<p>Internal Control Over Financial Reporting</p>	<p>Amended SEC rules now require a company to disclose, quarterly, any change in internal control over financial reporting that has materially affected, or is reasonably likely to materially affect, such control. In addition, if a company is an accelerated filer, beginning with Form 10-Ks for the first fiscal year ending on or after June 15, 2004, the Form 10-K must include a management report regarding the company's internal control over financial reporting. This report must contain (i) a statement of management's responsibility for establishing and</p>

**Please note that in February 2004, the SEC extended the compliance date for these new rules. Under the new compliance schedule, an "accelerated filer" must begin to comply with the new rules for its first fiscal year ending after November 15, 2004, and any other filer must begin to comply for its first fiscal year ending after July 15, 2005. In addition, on March 9, 2004, the Public Company Accounting Oversight Board adopted a final standard on audit of internal control over financial reporting.**

<sup>7</sup> For additional guidance concerning the use of non-GAAP financial measures in SEC filings, see Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures (June 13, 2003) <<http://www.sec.gov/divisions/corpfin/faqs/nongapfaq.htm>>.

**SEC Rules - Form 10-K**

<b>Subject</b>	<b>Discussion</b>
<i>Changes to Nominating Committee Procedures</i>	<p>maintaining adequate internal control over financial reporting for the company, (ii) a statement identifying the framework used by management to evaluate the effectiveness of internal control, (iii) management's assessment of the effectiveness of this internal control as of the end of the company's most recent fiscal year and disclosure regarding any "material weaknesses" in such control, and (iv) a statement that the company's auditor has issued an attestation report on management's assessment. The auditor's attestation report must be included in the Form 10-K containing management's report on internal control. Companies that are not accelerated filers will not need to comply with this new disclosure requirement until their first fiscal year ending after April 15, 2005. <i>(Item 308 of Regulation S-K)</i></p> <p>A company must describe in its Form 10-K (or Form 10-Q) any material changes to the procedures by which security holders may recommend nominees to the board, where those changes are implemented after the most recent nominating committee disclosures contained in the proxy statement (described below). The adoption of such procedures, where there previously were no such procedures, constitutes a material change. <i>(Item 401(j) of Regulation S-K)</i></p>

**SEC Rules - Proxy Statement**

<b>Subject</b>	<b>Discussion</b>
<i>Identification of Audit Committee Financial Expert</i>	<p>A company must disclose in its proxy statement that its board of directors has determined that the company's audit committee either has or does not have at least one member who is an "audit committee financial expert" (and, if not, explain why).<sup>8</sup> If the audit committee has an audit committee financial expert, the company must disclose the expert's name and whether the expert is "independent" (as defined in the listing standards of the NYSE, Nasdaq or the AMEX, as applicable). A company with more than one audit committee financial expert may, but is not required to, identify more than one person as an expert. <i>(Item 7(b) of Schedule 14A and Item 401(h) of Regulation S-K)</i></p>
<i>Audit Fee Table</i>	<p>The Audit Fee Table has been expanded to cover fees billed to the company by its independent auditors in the preceding <u>two</u> fiscal years divided among the following categories: (i) professional fees for the audit of the annual financial statements and the review of the quarterly financial statements, (ii) fees for assurance and related services reasonably related to audits and reviews (along with a description of the services), (iii) professional fees for tax compliance, tax advice, and tax planning (along with a description of the services), and (iv) fees for all other products</p>

<sup>8</sup> This information also must be included directly or by incorporation by reference under Item 10 in the company's Form 10-K.

## SEC Rules - Proxy Statement

Subject	Discussion
<i>Pre-Approval Policies for Auditor Services</i>	<p>and services (along with a description of the services).<sup>9</sup> (<i>Item 9(e)(1)-(4) of Schedule 14A</i>)<sup>10</sup></p> <p>A company must disclose in its proxy statement (i) the audit committee's pre-approval policies and procedures for audit and non-audit services (either by means of a "clear, concise and understandable" description of its policies and procedures in the proxy statement or the inclusion of a copy of the policies and procedures with the proxy statement) and (ii) the percentage of services, if any, under each category of services in the Audit Fee Table (other than audit fees) that were rendered pursuant to the de minimis safe harbor exception from the pre-approval requirements.<sup>11</sup> (<i>Item 9(e)(5) of Schedule 14A</i>)<sup>12</sup></p>
<i>Nominating Committee Composition and Procedures</i>	<p>A company must address the following information pertaining to the nominating committee and its responsibilities:</p> <ul style="list-style-type: none"> <li>• The company must disclose whether it has a nominating committee (and if not, why not and who makes nominating decisions in the absence of such a committee).</li> <li>• The company must make the nominating committee charter, if any, available to security holders, either by placing the charter on its website or by including a current copy of the charter as an appendix to its proxy statement at least once every three years.</li> <li>• The company must disclose whether members of the nominating committee satisfy the "independence" requirements of the NYSE, the Nasdaq or the AMEX (as applicable).</li> <li>• With respect to the nominating committee's procedures, the company must disclose, among other things, <ul style="list-style-type: none"> <li>➤ whether the nominating committee considers candidates for director nominees put forth by security holders, and if so, the procedures to be followed by security holders in submitting recommendations,</li> </ul> </li> </ul>

<sup>9</sup> This information also must be included directly or by incorporation by reference under Item 14 in the company's Form 10-K.

<sup>10</sup> For additional guidance concerning this disclosure, see Frequently Asked Questions: Application of the January 2003 Rules on Auditor Independence (August 13, 2003), [click here](#).

<sup>11</sup> Rule 2-01(c)(7)(ii)(C) of Regulation S-X provides that the independence of the company's auditor will not be impaired if the pre-approval requirements are not satisfied with respect to services (other than audit, review or attest services) provided by the auditor if (i) the amount of such services constitutes no more than five percent of the total revenues paid by the audit client to the auditor during the year in which the services are provided, (ii) the services were not recognized at the time of the engagement as being non-audit services, and (iii) the services are promptly brought to the attention of the audit committee.

<sup>12</sup> This information also must be included directly or by incorporation by reference under Item 14 in the company's Form 10-K. For additional guidance concerning the audit committee pre-approval requirements, see Frequently Asked Questions: Application of the January 2003 Rules on Auditor Independence (August 13, 2003) <<http://www.sec.gov/info/accountants/ocafaquidind080703.htm>>.

## SEC Rules - Proxy Statement

Subject	Discussion
	<ul style="list-style-type: none"> <li>➤ if the nominating committee does not have a policy concerning the consideration of candidates recommended by security holders, the basis for the view of the board of directors that it is appropriate for the nominating committee not to have such a policy,</li> <li>➤ the nominating committee's process for identifying and evaluating candidates to be nominated as directors,</li> <li>➤ any minimum qualifications for nominating committee-recommended nominees,</li> <li>➤ whether the company pays any third party a fee to assist in identifying and evaluating nominees,</li> <li>➤ whether the nominating committee has rejected a candidate recommended within the preceding year by a beneficial owner of more than 5% of the company's voting common stock, and</li> <li>➤ the category of persons or entities (i.e., security holder, non-management director, chief executive officer, other executive officer, third-party search firm or other, specified source) that recommended each director nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or who are standing for re-election).</li> </ul> <p><i>(Item 7(d)(2) of Schedule 14A)</i></p>
<p><i>Security Holders' Communications with the Board of Directors</i></p>	<ul style="list-style-type: none"> <li>• A company must disclose whether or not the board of directors has a process for security holders to send communications to directors (and, if not, the basis for the view of the board of directors that such a process is inappropriate). <i>(Item 7(h)(1) of Schedule 14A)</i></li> <li>• If the company has such a process, the proxy statement must include (i) a description of the procedures for communications to the board of directors or specified individual directors and (ii) if such communications are screened, the process for determining which communications will be relayed to the board of directors. Alternatively, the company can post this information on its Internet website and provide in its proxy statement the website address where the information can be obtained. <i>(Item 7(h)(2) of Schedule 14A)</i></li> </ul>
<p><i>Board Attendance Policies</i></p>	<p>A company must disclose the company's policy regarding director attendance at annual meetings of shareholders and the number of directors who attended the prior year's annual meeting. Alternatively, the company can post this information on its Internet website and provide in its proxy statement the website address where the information can be obtained. <i>(Item 7(h)(3) of Schedule 14A)</i></p>
<p><i>Section 16(a) Beneficial Ownership Reporting Compliance</i></p>	<ul style="list-style-type: none"> <li>• Effective August 29, 2002, the SEC shortened the deadline for Form 4 filings under Section 16(a) of the Securities Exchange Act to generally two business days after the date of a reportable transaction. A company must identify</li> </ul>

**SEC Rules - Proxy Statement**

Subject	Discussion
	<p>in its proxy statement all directors, officers and beneficial owners of more than 10% of the company's stock who, in the preceding year, failed to file timely any Forms 3, 4, or 5. <i>(Item 7 of Schedule 14A and Item 405 of Regulation S-K)</i>.<sup>13</sup></p> <ul style="list-style-type: none"> <li>In connection with the adoption by the SEC, effective June 30, 2003, of the requirement that all Section 16(a) reports be filed electronically, the SEC granted temporary relief from the proxy statement disclosure for any filing made not later than one business day following the due date of the filing. The relief applies to filings made during the period July 1, 2003 through June 30, 2004. <i>(Release No. 34-47809 (May 7, 2003))</i></li> </ul>

**SEC Rules - Form 10-Q**

Subject	Discussion
<i>Company Repurchases of Common Stock</i>	<p>Forms 10-Q (and, in the case of a company's fourth quarter, its Forms 10-K) for periods ending on or after March 15, 2004 must include a table showing the following information, presented on a monthly basis, with respect to repurchases (whether in reliance on Securities Exchange Act Rule 10b-18 or otherwise) by the company or an "affiliated purchaser" (as defined by Rule 10b-18) of any of the company's equity securities registered under Section 12 of the Securities Exchange Act:</p> <ul style="list-style-type: none"> <li>the total number of shares repurchased,</li> <li>the average price paid per share,</li> <li>the number of shares repurchased as part of a publicly announced plan or program, and</li> <li>the maximum number or approximate dollar value of shares that may yet be purchased under such plan or program.</li> </ul>
<i>Changes to Nominating Committee Procedures</i>	<p>Additional details about any publicly announced repurchase plans or programs must be included in a footnote. <i>(Item 2(e) of Form 10-Q and Item 5(c) of Form 10-K)</i></p> <p>As discussed above, a company must describe in its Form 10-Q any material changes to the procedures by which security holders may recommend nominees to the board, where those changes are implemented after the most recent nominating committee disclosures contained in the proxy statement. For instance, if a company with a calendar fiscal year end changes its nominating committee procedures after the company's annual meeting in May 2004, the company would be required to disclose such changes in its Form 10-Q for the quarter ended June 30, 2004. <i>(Item 401(j) of Regulation S-K)</i></p>

<sup>13</sup> This information also must be included directly or by incorporation by reference under Item 10 in the company's Form 10-K.

**SEC Rules - Form 8-K**

<b>Subject</b>	<b>Discussion</b>
<i>Amendments and Waivers to Code of Ethics</i>	A company must disclose within five business days any amendment to, or waiver of, any provision of the Senior Officer Code of Ethics (as contemplated by Item 406 of Regulation S-K), either in a Form 8-K filing or on its Internet website. ( <i>Item 10 of Form 8-K</i> ) Under Nasdaq's new corporate governance listing standards, a Nasdaq-listed company also must disclose within five days any waiver of any provision of the code of conduct for directors or executive officers on Form 8-K.

**New York Stock Exchange Listing Standards**

The amendments to the NYSE corporate governance listing standards adopted in 2003 include a number of provisions that will or could affect a listed company's public disclosures.<sup>14</sup> The compliance deadline for both the NYSE and Nasdaq corporate governance changes is generally the earlier of (i) the company's first annual meeting after January 15, 2004, and (ii) October 31, 2004. The NYSE has advised that its new disclosure requirements do not take effect until the implementation deadline for the substantive corporate governance requirements.<sup>15</sup> Accordingly, the new NYSE disclosures need not be included in either a Form 10-K filed before a company's 2004 annual meeting or in its proxy materials for the 2004 annual meeting. However, companies with a December 31, 2003 year end, for a variety of reasons, may wish to consider voluntary compliance with the new disclosure requirements in their Form 10-K and in connection with their 2004 annual meeting.

**NYSE Listing Standards - Form 10-K**

<b>Subject</b>	<b>Discussion</b>
<i>Corporate Governance Guidelines and Committee Charters</i>	Each NYSE-listed company must have corporate governance guidelines. Each NYSE-listed company also must have (i) an audit committee, (ii) a nominating/corporate governance committee, and (iii) a compensation committee, each of which must have a written charter. The corporate governance guidelines and the charters of the company's "most important committees" (including the audit, nominating/corporate governance, and compensation committee) must be posted on the company's website, and the company in its Form 10-K must state that (i) the documents are available on the company's Internet website and (ii) are available in print for any shareholder who requests it. ( <i>Section 303A.09 of the NYSE Listed Company Manual</i> )
<i>Code of Business Conduct and Ethics</i>	Each NYSE-listed company must have a code of business conduct and ethics for directors, officers and employees (which is broader in scope, but may encompass, the Senior Officer Code of Ethics). This code of business conduct and ethics must be posted on the company's website, and the company in its Form 10-K must state that (i) the documents are available

<sup>14</sup> The NYSE has indicated that it will issue FAQs relating to its new corporate governance listing standards.

<sup>15</sup> See 2004 Corporate Governance Obligations – Domestic Listed Companies (November 14, 2003) <<http://www.nyse.com/pdfs/transitionletter.pdf>>.

**NYSE Listing Standards - Form 10-K**

Subject	Discussion
	on the company's Internet website and (ii) are available in print for any shareholder who requests it. A company must also disclose promptly to shareholders any waiver of such code for directors and executive officers, although the NYSE rules do not specify the manner in which this disclosure must be made. <i>(Section 303A.10 of the NYSE Listed Company Manual)</i>

**NYSE Listing Standards - Annual Report to Shareholders**

Subject	Discussion
<i>CEO Certification</i>	The CEO of a listed company must certify to the NYSE each year that he or she is not aware of any violation by the company of the NYSE's corporate governance listing standards. This certification, along with any CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure, must be disclosed in the company's Annual Report to Shareholders. As with the Form 10-K disclosures required by the new NYSE corporate governance listing standards, this requirement does not take effect until after a company's 2004 annual meeting. However, listed companies may want to consider voluntary compliance in a Form 10-K filed before their next annual meeting. In addition, the NYSE has stated that it intends to require any listed company that does not voluntarily comply with the new certification requirement in its Annual Report to Shareholders to submit to the NYSE following its annual meeting a written affirmation that it is in compliance with the new corporate governance requirements. <i>(Section 303A.12(a) of the NYSE Listed Company Manual)</i>

**NYSE Listing Standards - Proxy Statement**

Subject	Discussion
<i>Board Independence Disclosures</i>	<p>Under the NYSE's new corporate governance rules, a majority of the directors, as well as each member of the audit, nominating/corporate governance, and compensation committees, must qualify as "independent." A director's qualification as "independent" must be affirmatively determined by the board of directors. The process of determining independence may trigger disclosures in the company's proxy statement under the following circumstances:</p> <ul style="list-style-type: none"> <li>• In order to qualify as "independent," a director cannot have a material relationship with the company. If a director has a relationship (other than one of the five per se disqualifying relationships), but the board of directors determines that the relationship is not material, the basis for the board's determination must be disclosed in the proxy statement.</li> </ul>

## NYSE Listing Standards - Proxy Statement

Subject	Discussion
<i>Contributions to Charitable Organizations</i>	<ul style="list-style-type: none"> <li>Alternatively, the board of directors can adopt and disclose “categorical standards” for evaluating the materiality of relationships. If the relationship of a director falls within the categorical standards, it will be sufficient for the board to state that the director meets the categorical standards, without describing the particular aspects of the relationship between the director and the company. While the NYSE rules do not state the manner in which the categorical standards are to be disclosed, disclosure in the proxy statement seems logical and should be sufficient. <i>(Section 303A.02 of the NYSE Listed Company Manual)</i></li> </ul> <p>A NYSE-listed company must disclose in its proxy statement all charitable contributions made to any charitable organization of which a director of the company is serving as an executive officer if, within the preceding three years, contributions in any year exceeded the greater of \$1 million or 2% of the charity’s consolidated gross revenues. <i>(Section 303A.02 of the NYSE Listed Company Manual)</i></p>
<i>Executive Sessions of Non-Management Directors</i>	<p>The new NYSE corporate governance rules require the non-management directors of a listed company to meet regularly in executive session.</p> <ul style="list-style-type: none"> <li>If one of the non-management directors is selected to preside at these sessions, his or her name must be disclosed in the proxy statement. Alternatively, the company may elect to disclose the procedures for the selection of the presiding director.</li> <li>The company also must disclose the method by which interested parties, including shareholders, can communicate directly with the presiding director or the non-management directors as a group.</li> </ul> <p><i>(Section 303A.03 of the NYSE Listed Company Manual)</i></p>
<i>Service on Multiple Audit Committees</i>	<p>If a NYSE-listed company does not limit the number of audit committees on which its audit committee members may serve and if an audit committee member is serving simultaneously on the audit committees of more than three public companies, the board of directors must determine that such service will not impair the ability of such member to serve effectively on the company’s audit committee. This determination must be disclosed in the proxy statement. <i>(Section 303A.07 of the NYSE Listed Company Manual)</i></p>
<i>Equity-Based Compensation Plans</i>  Possible Amendments to Equity-Based Compensation Plans	<p>Under the new NYSE corporate governance rules, the provisions for shareholder approval of “equity compensation plans” have been substantially revised. As a result, shareholder approval is required not only for new, nonexempt equity compensation plans, but also for a “material revision” to an existing plan. Companies with either a “formula plan” or a “discretionary plan” should review these plans to determine whether amendments are necessary during the transition period (which generally ends on the date of the company’s</p>

**NYSE Listing Standards - Proxy Statement**

Subject	Discussion
Elimination of Discretionary Voting by Broker-Dealers on Equity Compensation Plans	<p>next annual meeting) in order for the company to be able to continue making awards under the plan without shareholder approval. In some cases, shareholder approval of the plan as amended may be required in order for the company to be able to make new awards under the plan after the end of the transition period. (<i>Section 303A.08 of the NYSE Listed Company Manual</i>)<sup>16</sup></p> <p>The NYSE has amended its rules to prohibit member organizations from giving proxies to vote on equity compensation plans without instructions from the beneficial owner of the shares. Companies will need to take this change into account when describing the treatment of “broker non-votes” in the proxy statement. (<i>NYSE Rule 452</i>)</p>

**Nasdaq Stock Market Listing Standards**

The amendments to the Nasdaq corporate governance listing standards adopted in 2003 also include a number of provisions that will or could affect a listed company’s public disclosures. Nasdaq has taken a contrary position to the NYSE with respect to the implementation of its new corporate governance disclosure requirements. Nasdaq has issued interpretative guidance indicating that Nasdaq-listed companies are required to implement the new corporate governance disclosure standards relating to board independence and the “controlled company” exemption discussed below in proxy statements prepared for annual meetings after January 15, 2004.<sup>17</sup> Thus, these new disclosure requirements must be included in a company’s proxy materials for the 2004 annual meeting. Nasdaq-listed companies must implement the new code of conduct requirement by May 4, 2004.

**Nasdaq Listing Standards - Form 10-K**

Subject	Discussion
<i>Code of Conduct</i>	Each Nasdaq-listed company must adopt a code of conduct applicable to its directors, officers and employees. This code at a minimum must satisfy the requirements of the Senior Officer Code of Ethics contemplated by Item 406 of Regulation S-K (described above). In addition, the code must be publicly available and must provide for an enforcement mechanism. A company must disclose within five days any waiver of any provision of the code of conduct for directors and executive officers on a Form 8-K. ( <i>NASD Rule 4350(n)</i> )

<sup>16</sup> For additional information concerning the NYSE’s corporate governance rules applicable to equity compensation plans, see [Frequently Asked Questions](#) on Equity Compensation Plans (December 12, 2003).

<sup>17</sup> For additional information concerning the Nasdaq’s new corporate governance rules, including a discussion of certain compliance deadlines, see [Frequently Asked Questions: Corporate Governance](#) (December 17, 2003).

## Nasdaq Listing Standards - Proxy Statement

Subject	Discussion
<i>Board Independence</i>	<p>Under Nasdaq's new corporate governance rules, a majority of the board of directors, each member of the audit committee and each member of the compensation and nominating committees (if the company has such committees) must qualify as "independent." A director's qualification as "independent" must be affirmatively determined by the board of directors. Each Nasdaq-listed company must disclose in its annual proxy statement those directors whom the board of directors has determined to be "independent." (NASD Rule 4350(c)(1))</p>
<i>Controlled Company</i>	<p>Under Nasdaq's new corporate governance rules, a "controlled company" need not comply with certain requirements, including the requirement that a majority of its board members be independent. A "controlled company" is a company in which more than 50% of the voting power is held by an individual, a group, or another company. A company relying on the exemption for controlled companies must disclose its reliance, and its basis for that reliance, in its proxy statement. (NASD Rule 4350(c)(5))</p>
<i>"Exceptional and Limited Circumstances" Exemptions</i>	<p>As discussed above, the new Nasdaq corporate governance rules require directors serving on the audit, compensation and nominating committees to be "independent." This requirement is, however, subject to an exemption for one director on each committee in certain "exceptional and limited circumstances." (NASD Rules 4350(c)(3)(C), 4350(c)(4)(C) and 4350(d)(2)(B))</p> <ul style="list-style-type: none"> <li data-bbox="690 1012 1433 1526"> <p>• If one director on the audit, compensation, or nominating committee does not qualify as "independent," he or she may still be appointed to such committee if certain conditions are satisfied. The proposed member must not be a current officer or employee, or a family member of an officer or an employee, of the company. The board of directors must determine, under "exceptional and limited circumstances," that the appointment of such person is in the best interests of the company and its shareholders. The company must disclose in its proxy statement for the next annual meeting subsequent to this determination the nature of the relationship and the reasons for the determination. In addition, if the non-independent director is to serve on the audit committee, such director must meet the criteria set forth in Securities Exchange Act Rule 10A-3. (NASD Rules 4350(c)(3)(C), 4350(c)(4)(C) and 4350(d)(2)(B))</p> </li> <li data-bbox="690 1541 1433 1906"> <p>• Nasdaq has issued interpretative guidance indicating that a Nasdaq-listed company using any of the "exceptional and limited circumstances" provisions need not comply with the disclosure requirements in its proxy materials for the 2004 annual meeting. A Nasdaq-listed company could use these exceptions when it appoints members of the audit, compensation, and nominating committees, which will not occur until after the election of directors at the 2004 annual meeting; therefore, the disclosure is not required until the company files its proxy statement for the 2005 annual meeting. (<a href="#">Frequently Asked Questions: Corporate Governance</a> (December 17, 2003))</p> </li> </ul>

**Nasdaq Listing Standards - Proxy Statement**

Subject	Discussion
<i>Possible Amendments to Equity-Based Compensation Plans</i>	Under the new Nasdaq rules, the provisions for shareholder approval of "equity compensation plans" have been substantially revised. As a result, shareholder approval is required not only for a new, nonexempt equity compensation plan, but also for a "material amendment" to an existing plan. In some cases, shareholder approval of an existing "formula plan" or "discretionary plan" may be required in order for the company to be able to make new awards under the plan. (NASD Rule 4350(i); IM-4350-5)

**Conclusion**

The volume and scope of the new disclosure requirements, coupled with the fact that beginning in 2004 the Form 10-K filing deadline for "accelerated filers" is 75 days after the fiscal year end, emphasize the need for companies to give prompt attention to the new requirements. This includes, where necessary, reviewing and updating all of their schedules and systems supporting periodic reporting and annual meeting disclosure documents. Each company should devote particular attention to its disclosure controls and procedures, executive officer certification processes, director and officer questionnaires, board and committee meeting schedules and schedules of meetings with its independent auditors to ensure that it elicits the information necessary to satisfy the new disclosure requirements.

*David B.H. Martin  
D. Michael Lefever  
Kerry Shannon Burke*

If you would like to learn more about the Securities Practice Group at Covington & Burling, please call any of the following:

Washington	David Martin	202.662.5128
New York	Bruce Bennett	212.841.1060
San Francisco	Andi Vachss	415.591.7069
London	Edward Britton	+44.(0)20.7067.2119

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