

Client Advisory

November 2003

SEC Approves NYSE and NASDAQ Corporate Governance Rules

On November 4, 2003, after more than a year of consideration and negotiations, the Securities and Exchange Commission (SEC) approved new corporate governance rules for companies with securities listed on the New York Stock Exchange (NYSE) and companies with securities listed on The NASDAQ Stock Market (NASDAQ). Companies with securities listed on either the NYSE or NASDAQ must now comply with the final rules approved on November 4, 2003, in addition to the rules promulgated by the SEC pursuant to the Sarbanes-Oxley Act of 2002 (the "S-O Act").

In response to both the SEC's February 13, 2002 request that the NYSE and NASDAQ "review their corporate governance and listing standards" and the corporate scandals that rattled investor confidence in the securities markets, the NYSE and NASDAQ originally proposed revised corporate governance rules in August 2002 and October 2002, respectively. Since then, several amendments to the proposals were filed in response to comments made by the public and the SEC. Until the release of the final rules in early November 2003, the SEC worked to harmonize the proposed NYSE and NASDAQ rules regarding the enhancement of corporate governance practices. For example, the NYSE's original proposed rules called for imposing a five-year look-back period to consider a director's independence. After comments from the SEC, the look-back period for the NYSE was narrowed to three years to conform to the NASDAQ proposal. Although some differences remain, the final NYSE and NASDAQ rules are substantially similar in most material respects.

In general, the new rules require a majority of each company's board to be comprised of independent directors, impose stricter definitions of independence, require independent directors to meet in executive session, require independent directors to approve director nominations and executive officer compensation, and require the establishment of a publicly available code of conduct for all employees and directors.

Unless otherwise indicated in the summary below, each company will be required to comply with the new corporate governance requirements by the earlier of its first annual shareholders meeting after January 15, 2004, or October 31, 2004. Please note, however, that companies with staggered boards of directors will generally have until their second annual meeting after January 15, 2004, but not later than December 31, 2005, to comply with the new director independence requirements, although the audit committees of any such company must comply with the heightened independence requirements set forth under Section 301 of the S-O Act by the earlier of its first annual shareholders meeting after January 15, 2004, or October 31, 2004.

The NYSE rules apply in full to all companies listing common equity securities, unless otherwise indicated in the summary below. Except as otherwise indicated in the summary below, the NYSE rules do not apply to closed-end or open-end management investment companies that are registered under the Investment Company Act of 1940 (the "Investment Company Act") or companies listing

only preferred or debt securities. Except as otherwise indicated in the summary below, the new NASDAQ corporate governance rules do not apply to limited partnerships.

The SEC's order approving the new rules may be viewed at <http://www.sec.gov/rules/sro/34-48745.htm>.

The complete NYSE rules may be viewed at <http://www.nyse.com/pdfs/finalcorpgovrules.pdf>.

The NASDAQ rules will be available at <http://www.NASDAQ.com/about/RecentRuleChanges.stm>.

The following chart summarizes the new NYSE and NASDAQ corporate governance rules. For your convenience, the summary is organized by rule subject matter as noted in the far left column.

Rule	NYSE	NASDAQ
Board Independence	A majority of board members must be "independent." Listed companies must disclose in their annual proxy statement those directors that the board of directors has determined to be independent. <u>Exemptions</u> "Controlled" companies are exempt from the requirement to have a majority independent board. A controlled company is a company of which more than 50% of the voting power is held by an individual, group or another company. A controlled company relying upon this exemption must disclose in its annual proxy statement that it is a controlled company and the basis for that determination. Limited partnerships, companies in bankruptcy, closed-end and open-end management investment companies, and passive business organizations in the form of trusts are exempt from the requirement to have a majority independent board.	A majority of board members must be "independent." Listed companies must disclose in their annual proxy statement those directors that the board of directors has determined to be independent. <u>Exemptions</u> "Controlled" companies are exempt from the requirement to have a majority independent board. A controlled company is a company of which more than 50% of the voting power is held by an individual, group or another company. A controlled company relying upon this exemption must disclose in its annual proxy statement that it is a controlled company and the basis for that determination. Investment companies registered under the Investment Company Act are exempt from the requirement to have a majority independent board.
Definition of "Independent Director"	No director is "independent" unless the board of directors determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). Companies must disclose these determinations in their annual proxy statements.	No director is "independent" unless the board of directors determines that the director has no relationship that would impair such director's independence.

Rule	NYSE	NASDAQ
	<u>Lack of independence</u> A director is <u>not</u> independent if: (i) such director is an employee, or his or her immediate family member, as defined below, is an executive officer, of the company, until <u>three</u> years after the end of such employment relationship. (ii) such director (or immediate family member) receives more than \$100,000 per year in direct compensation from the listed company other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent on continued service), until <u>three</u> years after he or she ceases to receive more than \$100,000 per year in such compensation. (iii) such director (or immediate family member) is affiliated with or employed by a present or former internal or external auditor of the company, until <u>three</u> years after the end of the affiliation or the auditing relationship. (iv) such director (or immediate family member) is employed as an executive officer of another company where any of the listed company's present executives serve on that company's compensation committee, until <u>three</u> years after the end of such service or the employment relationship. (v) such director (or immediate family member) is an executive officer or such director is an employee of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues, until <u>three</u> years after falling below such threshold.	<u>Lack of independence</u> A director is <u>not</u> independent if: (i) such director is, or at any time during the past <u>three</u> years was, employed by the company or by any parent or subsidiary of the company. (ii) such director (or Family Member, as defined below) accepted any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current year or any of the past <u>three</u> fiscal years, other than the following: • compensation for board or board committee service; • payments arising solely from investments in the company's securities; • compensation paid to a Family Member who is a non-executive employee of the company or a parent or subsidiary of the company; • benefits under a tax-qualified retirement plan, or non-discretionary compensation; or • loans permitted under Section 13(k) of the Securities Exchange Act of 1934 (the "Exchange Act"). (iii) such director is a Family Member of an individual who is, or at any time during the past <u>three</u> years was, employed by the company or by any parent or subsidiary of the company as an executive officer. (iv) such director 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 in the current or any of the past <u>three</u> fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more,

Rule	NYSE	NASDAQ
	<u>Definition of “immediate family member”</u> An “immediate family member” includes a person’s spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, and anyone (other than domestic employees) who shares such person’s home. Note, when applying the look-back rule (discussed below), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or who have died or become incapacitated. Business development companies are not required to determine director independence based on the above standards. Instead, a director of a business development company will be independent if the director is not an “interested person” of the company, as defined in Section 2(a)(19) of the Investment Company Act.	other than the following: • payments arising solely from investments in the company’s securities, or • payments under non-discretionary charitable contribution matching programs. (v) such director (or Family Member) is employed as an executive officer of any other entity where at any time during the past <u>three</u> years any of the executive officers of the listed company served on the compensation committee of such other entity; or (vi) such director (or Family Member) 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 <u>three</u> years. <u>Definition of “Family Member”</u> A “Family Member” means a person’s spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person’s home. Note: The reference to marriage is intended to capture relationships specified in the rule (parents, children and siblings) that arise as a result of marriage, such as “in-law” relationships. Business development companies are not required to determine director independence based on the above standards. Instead, a director of a business development company will be independent if the director is not an “interested person” of the company, as defined in Section 2(a)(19) of the Investment Company Act.

Rule	NYSE	NASDAQ
	<u>Look-back period</u> Each of the above independence standards contains a three-year look-back provision. The look-back provisions will be phased in by applying only a one-year look-back for the first year after adoption of these rules. The three-year look-backs will begin to apply only from and after November 4, 2004.	<u>Look-back period</u> Each of the above independence standards contains a three-year look-back provision. Unlike the NYSE rules, the NASDAQ rules do not have a phase-in of the three-year look-back provision.
Required Executive Sessions of Board without Management	Non-management directors (those directors who are not company officers) must meet at regularly scheduled executive sessions without management. If one director is chosen to preside at these meetings, his or her name must be disclosed in the company's annual proxy statement. Alternatively, a company may disclose the procedure by which a presiding director is selected for each executive session. In addition, companies must disclose the manner in which interested parties may communicate with the presiding director or with the non-management directors as a group. If such executive session includes directors who are not independent, independent directors should, at least annually, schedule an executive session including only independent directors.	Independent directors must have regularly scheduled executive sessions at which only independent directors are present.
Audit Committee	<u>General</u> The audit committee must consist of at least three members, and each audit committee member must satisfy the new board independence requirements set forth above. Audit committee members must also satisfy Rule 10A-3(b)(1) under the Exchange Act, which requires that such member:	<u>General</u> The audit committee must consist of at least three members, and each audit committee member must satisfy the new board independence requirements set forth above. Audit committee members must also satisfy Rule 10A-3(b)(1) under the Exchange Act, which requires that such member:

Rule	NYSE	NASDAQ
	- not accept directly or indirectly any consulting, advisory, or other compensatory fee from the company or any subsidiary thereof, provided that, 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 company (provided that such compensation is not contingent in any way on continued service); and - if the company is not an investment company, such member may not be an affiliated person of the company or any subsidiary thereof; <u>or</u> if the company is an investment company, such member may not be an “interested person” of the company as defined in section 2(a)(19) of the Investment Company Act. Additionally, each member of the audit committee must be financially literate, as such qualification is interpreted by the company’s board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise, as the company’s board interprets such qualification in its business judgment. In the case of an audit committee member simultaneously serving on the audit committees of more than three public companies, of which at least one is a NYSE listed company that does not limit the number of audit committees on which its audit committee members serve, then in each case, the board of such NYSE listed company must determine and disclose in the listed company’s annual proxy statement that such audit committee member’s simultaneous service would	- not accept directly or indirectly any consulting, advisory, or other compensatory fee from the company or any subsidiary thereof, provided that, 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 company (provided that such compensation is not contingent in any way on continued service); and - if the company is not an investment company, such member may not be an affiliated person of the company or any subsidiary thereof; <u>or</u> if the company is an investment company, such member may not be an “interested person” of the company as defined in section 2(a)(19) of the Investment Company Act. Additionally, members must not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past <u>three</u> years. Members must also be able to read and understand fundamental financial statements, including the company’s balance sheet, income statement, and cash flow statement (or must become able to do so within a reasonable period of time). Additionally, each company must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual’s financial sophistication.

Rule	NYSE	NASDAQ
	not lessen such member's ability to effectively serve on the listed company's audit committee. <u>Charter</u> The company is required to adopt a written audit committee charter that addresses: - the committee's purpose - which, at minimum, must be to assist with the 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; - the preparation of an audit committee report as required by the SEC to be included in the company's annual proxy statement; - the required annual performance evaluation of the audit committee; and - the duties and responsibilities of the audit committee, including: - annually obtaining and reviewing a report by the independent auditor describing: (i) the firm's internal quality-control procedures; (ii) any material issues raised by the most recent internal quality-control review, or peer review, of the firm, 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 firm, and any steps taken to deal with any such issues; and (iii) (to assess the auditor's independence) all relationships between the independent auditor and the company; - discussing the company's annual audited financial	<u>Charter</u> The company is required to adopt a formal written audit committee charter that specifies the following: - the scope of the audit committee responsibilities, including overseeing the accounting and financial reporting processes of the company, and the means by which it carries out those responsibilities, including those responsibilities set forth in Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act relating to: - registered public accounting firms; - the establishment of procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters. - authority to engage advisors; and - funding as determined by the audit committee. - the outside auditor's accountability to the audit committee; and - the audit committee's responsibility to ensure the independence of the outside auditor. Audit committees for investment companies must also establish procedures for the confidential anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter or any other provider of accounting related services for the investment company, as well as employees of the investment company.

Rule	NYSE	NASDAQ
	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"; 3. discussing the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; 4. discussing policies with respect to risk assessment and risk management; 5. meeting separately, periodically, with management, with the internal auditors (or other personnel responsible for the internal audit function) and with the independent auditors; 6. reviewing with the independent auditors any audit problems or difficulties and management's response; 7. setting clear hiring policies for employees or former employees of the independent auditors; 8. reporting regularly to the board of directors; and 9. complying with Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act, relating to: • registered public accounting firms; • the establishment of procedures for the receipt, retention and treatment of complaints relating to accounting, internal accounting controls or auditing matters; • authority to engage advisors; and • funding as determined by the audit committee.	

Rule	NYSE	NASDAQ
	<u>Cure Period</u> Pursuant to Rule 10A-3(a)(3) of the Exchange Act, if a company fails to comply with the audit committee composition requirements because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of the company's next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with the requirement. A company must notify the NYSE immediately upon learning of the event or circumstances that caused the non-compliance. <i>Foreign private issuers will have until July 31, 2005 to comply with the new audit committee standards.</i> To the extent required by Rule 10A-3 under the Exchange Act, all companies listing only preferred or debt securities on the NYSE are required to comply with the audit committee requirements set forth in Rule 10A-3(b) under the Exchange Act, as described above. In addition, closed-end funds must also comply with the audit committee requirements described above, except that closed-end funds will not be required to comply with the requirement that calls for disclosure of a board's determination with respect to simultaneous service on more than three public company audit committees.	<u>Cure Period</u> Pursuant to Rule 10A-3(a)(3) of the Exchange Act, if a company fails to comply with the audit committee composition requirements because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of the company's next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with the requirement. A company must notify NASDAQ immediately upon learning of the event or circumstances that caused the non-compliance. A corporate general partner or co-general partner of a limited partnership must comply with the audit committee requirements described above.
Nominating/ Corporate Governance Committee	<u>General</u> Companies are required to have a nominating/corporate governance committee comprised <u>solely</u> of independent directors.	<u>General</u> The new rules require that director nominees be selected, or recommended for the board's selection, either by an independent nominating committee, or by a majority of the independent directors.

Rule	NYSE	NASDAQ
	<u>Charter</u> The nominating/corporate governance committee is required to adopt a written charter that addresses the committee’s purpose and responsibilities—which, at minimum, must be to: • identify individuals qualified to become board members, consistent with criteria approved by the board, and to 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 company; and oversee the evaluation of the board and management; and • require an annual performance evaluation of the committee. The nominating/corporate governance committee charter should also address the following items: • committee member qualifications; • committee member appointment and removal procedures; • committee structure and operations (including authority to delegate to subcommittees); • committee reporting to the board; and • nominating/corporate governance committee authority 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.	The NASDAQ rules do not require the creation of a nominating committee; however, if such committee is created, then it must be comprised <u>solely</u> of independent directors. <u>Charter</u> The company is required to adopt a board resolution or a formal written charter which addresses the nominations process.

Rule	NYSE	NASDAQ
	<u>Exemptions</u> “Controlled” companies, limited partnerships and companies in bankruptcy are exempt from these requirements. 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.	<u>Exemptions</u> “Controlled” companies are exempt from these requirements. This rule does not apply in cases where the right to nominate a director legally belongs to a third party. Investment companies registered under the Investment Company Act are exempt from this requirement.
Compensation Committee	<u>General</u> Companies are required to have a compensation committee comprised <u>solely</u> of independent directors. <u>Charter</u> The compensation committee is required to adopt a written charter that addresses the committee’s purpose and responsibilities—which, at minimum, must be 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; • make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans;	<u>General</u> The new rules require independent director approval of executive compensation, either by an independent nominating committee, or by a majority of the independent directors. The NASDAQ rules do not require the creation of a compensation committee; however, if such committee is created, then it must be comprised <u>solely</u> of independent directors. <u>Charter</u> NASDAQ does not specifically require that a charter be adopted by the company for the compensation committee.

Rule	NYSE	NASDAQ
	• produce a compensation committee report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report on Form 10-K filed with the SEC; and • require an annual performance evaluation of the compensation committee. The compensation committee charter should also address the following items: • committee member qualifications; • committee member appointment and removal procedures; • committee structure and operations (including authority to delegate to subcommittees); and • committee reporting to the board. Additionally, if a compensation consultant is to assist in the evaluation of director, CEO 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. <u>Exemptions</u> "Controlled" companies, limited partnerships and companies in bankruptcy are exempt from these requirements.	<u>Exemptions</u> "Controlled" companies are exempt from these requirements. Investment companies registered under the Investment Company Act are exempt from these requirements.
Internal Audit Function	Each listed company must have an internal audit function. A company may choose to outsource this function to a third party service provider other than its independent auditor.	Not addressed in NASDAQ's rules.
Corporate Governance Guidelines	Listed companies must adopt and disclose corporate governance guidelines. Listed companies must publish their corporate governance guidelines and	Not addressed in NASDAQ's rules.

Rule	NYSE	NASDAQ
	the charters of their most important committees (including at least the audit, and if applicable, compensation and nominating committees) on their websites. Each company's annual report on Form 10-K must state the website location for such information and provide such materials to shareholders upon request. The corporate governance guidelines must address the following: • director qualification standards; • director responsibilities; • director access to management and, as necessary and appropriate, independent advisors; • director compensation; • director orientation and continuing education; • management succession; and • annual performance evaluation of the board.	
Code of Business Conduct and Ethics	Listed companies must adopt 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. Listed companies must publish their code on their website. Each company's annual report on Form 10-K must state the website location for such information and provide such materials to shareholders upon request. Waivers 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. The code must include the following topics: • conflicts of interest; • corporate opportunities; • confidentiality; • fair dealing; • protection and proper use of company assets;	Listed companies must adopt a code of conduct for all directors and employees, which must be made publicly available. Waivers to the code of conduct for executive officers and directors may only be granted by the company's board and must be disclosed. The code of conduct must include those elements necessary to meet the code of ethics requirements set forth in Item 406 of SEC Regulation S-K. <i>Note: Companies must comply by May 4, 2004.</i>

Rule	NYSE	NASDAQ
	• compliance with laws, rules and regulations (including insider trading laws); and • encouraging the reporting of any illegal or unethical behavior.	
Foreign Private Issuers	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.	NASDAQ has the ability to provide exemptions from its corporate governance listing rules to listed foreign issuers when provisions of the rules are contrary to law, rule or regulations of any public authority exercising jurisdiction over such company or that is contrary to generally accepted business practices in the company's country of domicile. A foreign private issuer that receives an exemption must disclose in its annual reports filed with the SEC each requirement from which it is exempted and describe the home country practice, if any, followed by the company. <i>Note: Companies must comply for new listing or filings made on or after January 1, 2004.</i>
Related Party Transactions	Not addressed by NYSE's rules.	Related-party transactions must be approved by the company's audit committee or another independent body of the board of directors. A "related party transaction" is any transaction which is required to be disclosed pursuant to Item 404 of SEC Regulation S-K. <i>Note: Companies must comply by January 15, 2004.</i>
CEO Certifications	Each listed company 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. Each listed company CEO must promptly notify the NYSE in writing after any executive officer of the listed	Not addressed by NASDAQ's rules.

Rule	NYSE	NASDAQ
	company becomes aware of any material non-compliance with any applicable provisions of the NYSE corporate governance listing standards. To the extent required by Rule 10A-3 under the Exchange Act, all companies listing only preferred or debt securities on the NYSE are required to comply with this CEO notification requirement. The NYSE certifications must be disclosed in the company's annual report to shareholders. Closed-end management investment companies are required to comply with these requirements.	

We Can Help

Every company with securities listed on the NYSE or NASDAQ should review its existing policies and procedures to determine what changes and/or additions are necessary for compliance with the requirements imposed by the final NYSE and NASDAQ corporate governance rules. Though a substantial number of companies may already meet a significant portion of these requirements, most companies will need to take at least some action to achieve full compliance. Katten Muchin Zavis Rosenman is available to discuss the implications of the final rules for your company and to assist you in addressing the requirements imposed by the final rules. To discuss these new rules, please contact one of the Co-Chairs of Katten Muchin Zavis Rosenman's Securities Practice:

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