



A Director's Guide to the Final  
NASDAQ Corporate Governance Rules

March 26, 2004 ▲

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## Introduction and Use of this Guide

On November 4, 2003, the Securities and Exchange Commission (the "SEC") approved the final amendments to the corporate governance standards proposed and filed with the SEC by the National Association of Securities Dealers, Inc. (the "NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"). This guide is intended to summarize the Nasdaq corporate governance standards contained in the final rules approved by the SEC.

The rules are designed to further the ability of honest and well-intentioned directors, officers and employees to perform their functions effectively. Many of these provisions impose new or different responsibilities on Nasdaq-quoted companies and their officers and directors.

While some of the provisions took effect immediately upon receipt of SEC approval, other provisions will take effect at a later date. Except as otherwise noted in this guide, we have noted the effective dates of each of the respective rule changes in the section of the guide captioned "Implementation of New Rules." Until the provisions take effect, the current corporate governance rules contained in the NASD Manual will remain in effect.

Shaw Pittman has been monitoring other laws, rules and regulations adopted or proposed to be adopted by Congress, the SEC and the New York Stock Exchange relating to the restoration of public confidence in the honesty and integrity of the public securities markets. As of the date of this guide, Shaw Pittman has prepared the following memoranda and alerts on this subject:

- A Director's Guide to the Sarbanes-Oxley Act of 2002 on Corporate Responsibility (Current Version – March 26, 2004)

- A Director's Guide to the Final NYSE Corporate Governance Rules – March 26, 2004

- Shaw Pittman Alerts

  - First Ruling in Whistleblower Case under Sarbanes-Oxley Finds in Favor of Former Chief Financial Officer – February 2004

  - Important Rules Implementing Employment Aspects of Sarbanes-Oxley Issued or Proposed by the U.S. Department of Labor, U.S. Securities and Exchange Commission, and National Stock Exchanges Regarding Whistleblower Protection and Code of Ethics – June 2003

  - Effect on REITs of SEC Final Rules Regarding Use of Non-GAAP Financial Measures – March 2003

  - Final Rules on Notice Requirements for Blackout Periods in Individual Account Plans – February 2003

  - President Bush Signs into Law New Protections for Corporate Whistleblowers – August 2002

For additional information on anything discussed in this guide, please contact your attorney at Shaw Pittman or any of our attorneys listed under the section of this guide captioned "Contact Information."

## Implementation of New Rules

Except as otherwise noted in this Guide, companies must comply with the new rules by the following dates:

- for foreign private issuers and small business issuers, by July 31, 2005, and
- for all other Nasdaq-quoted companies, by the earlier of
  - the company's first annual shareholders' meeting after January 15, 2004, and
  - October 31, 2004.

If a company has a staggered board, and if the new rules relating to board and committee composition require the company to change a director who would not normally stand for election at an earlier meeting, the rules contain a transition period whereby the company must implement the new rules by the second annual meeting after January 15, 2004, but not later than December 31, 2005. The transition period does not apply with respect to the audit committee composition requirements described under the section of this guide captioned "Audit Committee Provisions."

## Board of Director Provisions

### Majority Independent Directors and Independence Definition

Pursuant to the revised rules, a majority of the members of the board of directors must be "independent." Each company is required to disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its Form 10-K or 20-F) the directors that the board has determined to be independent.

"Independent director" means any person other than an individual having a relationship which, in the opinion of the company's board, would interfere with the individual's exercise of independent judgment in carrying out his or her responsibilities as a director.

However, pursuant to the revised rules, the following directors will not be deemed independent:

- a director who is an officer or employee of the company or its subsidiaries,
- a director who is, or was at any time during the past three years, employed by the company or by any parent or subsidiary of the company,
- a director who accepted or has a family member who accepted any payments from the company, or any parent or subsidiary of the company, in excess of \$60,000 during the current fiscal year or any of the past three 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, and
  - certain loans permitted under the federal securities laws,

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- a director who is a family member of an individual who is, or was at any time during the past three years, employed by the company or by any parent or subsidiary of the company as an executive officer,
- a director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization (including charities) to which the company made, or from which the company received, payments for property or services in the current fiscal year, or in any of the past three fiscal years, that exceed 5% of the recipient's consolidated gross revenues for that year, or \$200,000, whichever is more, other than the following:
  - payments arising solely from investments in the company's securities, and
  - payments under non-discretionary charitable contribution matching programs,
- a director of the company who is, or has a family member who is, employed as an executive officer of another entity where, at any time during the past three years, any of the executive officers of the company served on the compensation committee of such other entity, and
- a director who is, or has a family member who is, a current partner of the company's outside auditor (regardless of whether the person worked on the audit of the company), or was a partner or employee of the company's outside auditor and worked on the company's audit at any time during the past three years.

The term "family member" is defined to include a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

*Observation: The provision prohibiting a director from being independent if the director or a family member of the director receives any payments in excess of \$60,000 is intended to capture situations where a payment is made directly to, or for the benefit of, the director or a family member of a director. For example, consulting or personal service contracts with a director or family member of a director, or political contributions to the campaign of a director or family member of a director, would be considered under that provision.*

*The safe harbor for payments under "tax qualified retirement plans" from the provision prohibiting a director from being independent if the director or a family member of the director receives any payments in excess of \$60,000 is narrower than the safe harbor for determining Audit Committee independence under Rule 10A-3 of the Securities Exchange Act of 1934 (the "Exchange Act"). Under Rule 10A-3, an Audit Committee member may not, other than in his or her capacity as a committee or board member, 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 company (provided that such compensation is not contingent in any way on continued service). As a result, payments to directors under non-qualified plans could result in the director being deemed non-independent for Nasdaq purposes, but independent for purposes of Audit Committee membership under the Exchange Act.*

*Under exceptional circumstances (such as in the case of a director that has direct, significant business holdings), Nasdaq has indicated that it may be appropriate to apply the corporate measurements of the 5% of revenues/\$200,000 test, rather than the individual measurements of the \$60,000 test. Companies should contact Nasdaq if they wish to apply the rule in this manner.*

*The provisions above regarding director independence do not apply to:*

- *management investment companies registered under the Investment Company Act of 1940,*
- *asset-backed issuers,*
- *“controlled companies,”*
- *certain other “passive issuers” (as defined below), and*
- *certain cooperative entities (such as agricultural cooperatives that are structured to comply with relevant state law and federal tax law and that do not have a publicly traded class of common stock).*

*A “controlled company” is a company of which more than 50% of the voting power is held by an individual, a group, or another company. A company relying on this exemption is required to disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its Form 10-K or 20-F) that it is a controlled company and discuss the basis for this determination. However, the independent directors of a controlled company still are required to hold regularly scheduled meetings at which only independent directors are present (see “- Executive Sessions of Independent Directors” below).*

*Passive issuers are companies organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding (as well as administering and distributing amounts with respect to) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the Nasdaq-quoted securities. Passive issuers include unit investment trusts.*

*The final rules provide that the references to a company’s “subsidiary” in the definition of independence cover each entity that the company controls and consolidates with its financial statements filed with the SEC (but not an entity that the company reflects solely as an investment in its financial statements).*

### **Executive Sessions of Independent Directors**

Independent directors are required to have regularly scheduled meetings at which only independent directors may be present. Nasdaq contemplates that at least two executive sessions should be held each year.

### **Cure Period**

If a company fails to comply with the independence requirement because of one vacancy on the board, or if one director ceases to be independent due to circumstances beyond his or her reasonable control, the company must reestablish its compliance with this rule by the earlier of its next annual shareholders' meeting or one year from the occurrence of the event that caused the failure to comply with the rule. Any company relying on this provision must provide notice to Nasdaq immediately upon learning of the event that caused the noncompliance.

## Audit Committee Provisions

### Additional Independence Requirement and Other Rule 10A-3 Requirements

The revised rules require each company to establish an Audit Committee composed of at least three members, all of whom must be independent directors. In addition, each member of the Audit Committee must:

- meet the criteria for independence set forth in Rule 10A-3 under the Exchange Act (subject to the exemption provided in Rule 10A-3(c) under the Exchange Act), and
- 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 three years.

*Rule 10A-3 Independence Requirement.* To be considered independent for Audit Committee purposes only, directors must meet the Audit Committee independence requirements of Rule 10A-3 of the Exchange Act. Rule 10A-3 directs Nasdaq to prohibit the quotation of any securities of a public company that is not in compliance with the following:

- each member of the Audit Committee must be “independent,” meaning that:
  - a member may not, other than in his or her capacity as a committee or board member, 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 company (provided that such compensation is not contingent in any way on continued service), or
  - a member may not be an “affiliated person” of the company.

An “affiliated person” of any company is defined as a person that directly, or indirectly controls, or is controlled by, or is under common control with, the person specified. The final rules create a safe harbor whereby a person who is not an executive officer of a company and is not the beneficial owner of more than 10% of any class of the voting equity securities of the company is deemed not to be an affiliated person of the company.

*Observation: Any partner in a law firm that receives payments from the company is ineligible to serve on the company's Audit Committee. Nasdaq recommends that a company disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its Form 10-K or 20-F) if any director is deemed independent, but falls outside the “affiliated person” safe harbor provision described above.*

*Exemptions from Rule 10A-3 Independence Requirement.* Based on significant input from foreign regulators and foreign private issuers, Rule 10A-3 includes several provisions that seek to address the special circumstances of particular foreign jurisdictions. These provisions include:

- allowing a non-management employee to serve as an Audit Committee member if the employee is elected or named to the board of directors or Audit Committee of the foreign private issuer pursuant to the issuer's governing law or documents, an employee collective bargaining or similar agreement, or other home country legal or listing requirements,
- allowing one non-independent member of the Audit Committee of a foreign private issuer if (i) the member is an affiliate of the issuer or a representative of the affiliate, (ii) the member has only observer status on, and is not a voting member or chair of, the Audit Committee, and (iii) neither



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the member nor the affiliate is an executive officer of the issuer,

- allowing one non-independent member of the Audit Committee of a foreign private issuer if (i) the member is a representative of a foreign government or foreign governmental entity that is an affiliate of the issuer, and (ii) the member is not an executive officer of the issuer, and
- acknowledging that the Audit Committee oversight function does not conflict with any requirement under the foreign private issuer's governing law or documents or other home country requirements that require shareholders to ultimately vote on, approve, or ratify the oversight function.

*Other Rule 10A-3 Requirements.* The Nasdaq rules also provide that the Audit Committee must comply with other Rule 10A-3 requirements. As a result, the Audit Committee must:

- directly appoint, retain, compensate, evaluate and terminate the company's independent auditors, and approve any significant non-audit engagements with the independent auditor,
- establish procedures for the receipt, retention, and treatment of complaints received from company employees on accounting, internal accounting controls, or auditing matters, as well as the confidential, anonymous submission by company employees of concerns regarding questionable accounting or auditing matters,
- obtain advice and assistance from outside legal, accounting or other advisors as the Audit Committee deems necessary, and
- receive appropriate funding, as determined by the Audit Committee, from the company for payment of compensation to the auditors and outside legal, accounting or other advisors employed by the Audit Committee.

*Exemption from Rule 10A-3 Independence and Other Requirements.* In addition, Section 10A-3 exempts foreign private issuers from the Rule 10A-3 independence and other requirements if:

- the issuer has a board of auditors (or similar body), or statutory auditors, established and selected pursuant to home country legal or listing requirements requiring or permitting the board or similar body,
- the board, body or statutory auditors are required under home country legal or listing requirements to be either:
  - separate from the board of directors, or
  - composed of one or more members of the board of directors and one or more members that are not also members of the board of directors,
- the board, body or statutory auditors are not elected by management and no executive officer of the issuer is a member of the board, body or statutory auditors,
- home country legal or listing provisions provide for standards for the independence of the board, body or statutory auditors from the issuer or its management,
- the board, body or statutory auditors are responsible, in accordance with standards prescribed by home country legal or listing provisions or the issuer's governing documents, for the appointment, retention and oversight of the work of the issuer's auditor (including, to the extent permitted by law, resolution of disagreements between management and the auditor regarding financial



reporting) for the purpose of preparing and issuing an audit report or performing other audit, review or attest services for the issuer, and

- the audit committee requirements of Rule 10A-3 apply to this body to the extent permitted by applicable law.

*Observation: These Rule 10A-3 provisions apply to all Nasdaq-quoted companies.*

### **Other Composition Requirements**

Audit Committee members must be able to read and understand fundamental financial statements (including a balance sheet, income statement and cash flow statement).

In addition, at least one member of the Audit Committee must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the person's financial sophistication (including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities). A director who qualifies as an "audit committee financial expert" under Item 401(h) of Regulation S-K promulgated under the Exchange Act is presumed to qualify as a financially sophisticated Audit Committee member for purposes of this requirement.

### **Exceptions to Independence Requirement**

One director who:

- does not meet the Nasdaq standards of independence required for independent members of the full board of directors described under the section of this guide captioned "Board of Directors Provisions – Majority Independent Directors and Independence Definition,"
- meets the criteria regarding independence required for members of the Audit Committee described under the section of this guide captioned "Audit Committee Provisions – Additional Independence Requirement and Other Rule 10A-3 Requirements," and
- is not a current officer or employee of the company or a family member of any current officer or employee,

may be appointed to the Audit Committee if the board, under exceptional and limited circumstances, determines that the director's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual proxy statement subsequent to such determination (or, if the company does not file a proxy statement, in its Form 10-K or 20-F), the nature of the relationship and the reasons for that determination. A member appointed under this exception shall not serve on the Audit Committee for longer than two years and shall not be permitted to chair the Audit Committee.

*Observation: The criteria that must be satisfied for a company to utilize this exception are extremely onerous. The board must determine in the exercise of its fiduciary obligations that the best interests of the company and its shareholders would suffer from the individual's absence from the Audit Committee. A board's assessment of the exception's availability would be fact specific. The most likely situations under which the exception would be available would involve a director with a unique set of skills or experience that represent a substantial value to the company and that may be extremely costly to replace.*

Rule 10A-3 also contains a limited exemption from the Audit Committee independence requirement for companies (excluding investment companies) listing securities pursuant to an initial public offering. These companies are required to have one independent member of the Audit Committee at the time of listing or initial quotation, a majority of independent members within 90 days after the effective date of the registration statement and a fully independent Audit Committee within one year after the effective date of the registration statement.

The use of any of these exemptions, and the company's assessment of whether and how reliance on the exemption materially adversely affects the ability of the Audit Committee to act independently, must be disclosed in the company's annual proxy statement or annual report on Form 10-K or 20-F filed with the SEC.

*Observation: Asset-backed issuers and certain other passive issuers are exempt from these requirements.*

### **Committee Charter**

The revised rules require each company to certify that it has adopted a formal, written Audit Committee charter and that its Audit Committee has reviewed and assessed the adequacy of the formal, written charter on an annual basis. The new rules also require that the charter discuss the following:

- the committee's specific purpose of overseeing the accounting and financial reporting processes and the audits of the financial statements of the company,
- the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, processes and membership requirements,
- the outside auditor's accountability to the committee, and
- the committee's responsibility to ensure the objectivity and independence of the outside auditors.

The revised rules also require that the charter include the Audit Committee's responsibilities and authority under Rule 10A-3 described under "– Other Rule 10A-3 Requirements" above.

*Observation: Please contact us if you would like us to review and make suggested modifications to your company's existing Audit Committee charter to comply with the revised Nasdaq rules.*

### **Cure Periods**

If a Nasdaq-quoted company fails to comply with the Audit Committee composition requirements under the relevant SEC rule and the revised rules because an Audit Committee member ceases to be independent for reasons outside of his or her reasonable control, then the Audit Committee member may remain on the 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 requirements.

If a company fails to comply with the Audit Committee composition requirements due to one vacancy on the committee, and the cure period described above is not otherwise being relied upon for another Audit Committee member, then the company has until the earlier of the next annual shareholders' meeting or one year from the occurrence of the event that caused the failure to comply with this requirement.

A company relying on either of these provisions is required to provide notice to Nasdaq immediately upon learning of the event or circumstances that caused the noncompliance.

## Nomination of Directors

### Procedure for Nominating Directors to the Board

Pursuant to the revised rules, director nominees must be selected, or recommended for the board's selection, either by:

- a majority of independent directors, or
- a Nominations Committee composed solely of independent directors.

*Observation: Companies that choose not to adopt a Nominations Committee and that rely instead on a majority of the independent directors to discharge responsibilities under the rule are required to meet the majority independent board requirement within one year after the date of initial quotation on Nasdaq. Companies transferring from other markets with a substantially similar requirement are given the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement must comply within one year after the date of initial quotation on Nasdaq.*

This nominations process does not apply in any case where:

- the right to nominate a director legally belongs to a third party; provided, however, that the company is not relieved of its obligation to comply with any applicable audit and compensation committee composition requirements under the revised rules, or
- the company is subject to a binding obligation that requires a director nomination structure that is inconsistent with this provision and such obligation pre-dates November 4, 2003.

### Exceptions to Independence Requirement

If the company has a Nominations Committee, and the committee is composed of at least three members, then one director who is not independent (as defined above) is permitted to be appointed to the committee if:

- the director is not a current officer or employee of the company;
- the director is not a family member of a current officer or employee of the company;
- the board, under exceptional and limited circumstances, determines that the director's membership on the committee is required by the best interests of the company and its shareholders; and
- the board discloses, in the next annual proxy statement subsequent to such determination (or, if the company does not file a proxy statement, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination.

A member appointed under this exception shall not serve on the Nominations Committee for longer than two years.

In addition, companies that are or will be quoted on Nasdaq in conjunction with their initial public offering, and that elect to form a Nominations Committee, are afforded an exemption from the independence requirement for the composition of the Nominations Committee. These companies are required to have one independent member of the Nominations Committee at the time of listing or initial quotation, a

majority of independent members within 90 days after the effective date of the registration statement and a fully independent Nominations Committee within one year after the effective date of the registration statement.

*Observation: The following types of companies are exempt from the requirements under the revised rules relating to the role of independent directors in nomination decisions:*

- *management investment companies registered under the Investment Company Act of 1940,*
- *asset-backed issuers,*
- *controlled companies,*
- *certain other passive issuers,*
- *and certain cooperative entities.*

#### **Charter or Board Resolution Formalizing the Nominations Process**

The company is required to certify that:

- in the event that the company has a Nominations Committee, the issuer has adopted a formal written charter of the nominations committee, or
- in the event that the company does not have a Nominations Committee, the company has adopted a board resolution,

in either case, addressing the nominations process and related matters as may be required under securities laws.

## Compensation of Officers

### Determination of Compensation of Officers

Pursuant to the revised rules, the compensation of the officers of a company, including the chief executive officer, must be determined, or recommended to the board for determination, either by:

- a majority of the independent directors, or
- a Compensation Committee composed solely of independent directors.

The chief executive officer of the company may not be present during the deliberations and voting relating to the independent directors' determination of the chief executive officer's compensation.

*Observation: Companies that choose not to adopt a Compensation Committee and that rely instead on a majority of the independent directors to discharge responsibilities under the rule are required to meet the majority independent board requirement within one year after the date of initial quotation on Nasdaq. Companies transferring from other markets with a substantially similar requirement are given the balance of any grace period afforded by the other market. Companies transferring from other listed markets that do not have a substantially similar requirement must comply within one year after the date of initial quotation on Nasdaq.*

### Exceptions to Independence Requirement

If the issuer has a Compensation Committee, and the committee is composed of at least three members, then one director who is not independent (as defined above) is permitted to be appointed to the committee if:

- the director is not a current officer or employee of the company,
- the director is not a family member of a current officer or employee of the company,
- the board, under exceptional and limited circumstances, determines that the director's membership on the committee is required by the best interests of the company and its shareholders, and
- the board discloses, in the next annual proxy statement subsequent to such determination (or, if the company does not file a proxy statement, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination.

A member appointed under such an exception is not permitted to serve on the committee for longer than two years.

In addition, companies that are or will be quoted on Nasdaq in conjunction with their initial public offering, and that elect to form a Compensation Committee, are afforded an exemption from the independence requirement for the composition of the Compensation Committee. These companies are required to have one independent member of the Compensation Committee at the time of listing or initial quotation, a majority of independent members within 90 days after the effective date of the registration statement and a fully independent Compensation Committee within one year after the effective date of the registration statement.

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*Observation: The following types of companies are exempt from the requirements under the revised rules relating to the role of independent directors in compensation decisions:*

- *Management investment companies registered under the Investment Company Act of 1940,*
- *asset-backed issuers,*
- *controlled companies,*
- *certain other passive issuers, and*
- *certain cooperative entities.*

## Code of Business Conduct and Ethics

Pursuant to the revised rules, a company is required to adopt a code of conduct that applies to all directors, officers and employees of the company. The company must make the code publicly available.

The code of conduct must comply with the definition of a "code of ethics" that is set forth in the Exchange Act and certain SEC regulations.

Under the Exchange Act, a code of ethics is a codification of standards that is reasonably designed to deter wrongdoing and to promote:

- honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships,
- full, fair, accurate, timely and understandable disclosure in reports and documents that a company files with, or submits to, the SEC and in other public communications made by the company,
- compliance with applicable governmental laws, rules and regulations,
- the prompt internal reporting to an appropriate person or persons identified in the code of violations of the code, and
- accountability for adherence to the code.

Under the Nasdaq rules, the code must also provide for the following:

- an enforcement mechanism that ensures the prompt and consistent enforcement of the code,
- protection for persons reporting questionable behavior,
- clear and objective standards for compliance, and
- a fair process by which to determine violations.

Any waivers of the code for directors or executive officers must be approved by the board and disclosed, along with the reasons for the waiver(s), in a Form 8-K within five business days. Foreign private issuers must disclose such waivers either in a Form 6-K or the next Form 20-F.

*Observation: This rule becomes effective on May 4, 2004. The code of business conduct and ethics requirement is broader than the Exchange Act code of ethics provision, which only applies to the CFO and senior financial officers.*

*By requiring companies to adopt codes of conduct, Nasdaq intends to demonstrate to investors that the boards and management of Nasdaq issuers have carefully considered the requirement of ethical dealing and have put in place a system to ensure that they become aware of and take prompt action against any questionable behavior. Nasdaq further believes that, for company personnel, a code of conduct with enforcement provisions provides assurance that reporting of questionable behavior is protected and encouraged, and fosters an atmosphere of self-awareness and prudent conduct.*

*Although the Nasdaq rule requires disclosure of waivers of the code to be made by means of a Form 8-K filing, because the instructions to Form 8-K allow disclosure of any waiver of the code by posting on the company website within five business days following the date the company granted the waiver, in lieu of filing a Form 8-K, we believe that*



*website posting will satisfy the Nasdaq requirement of public disclosure of waivers of the code. A company that seeks to take advantage of that alternative must have disclosed in its most recently filed annual report its Internet address and its intention to provide disclosure through the website.*

*Because management investment companies registered under the Investment Company Act of 1940 already are subject to a pervasive system of federal regulation, they are exempt from this rule. Asset-backed issuers and certain other passive investors also are exempt from this rule.*

*Please contact us if you would like us to assist you in preparing a code of business conduct and ethics or if you would like us to review and make suggested modifications to your company's existing code of business conduct to comply with the revised Nasdaq rules.*

## Public Announcement of Audit Opinions with Going Concern Qualifications

Pursuant to the revised rules, if a company receives an audit opinion that contains a going concern qualification, it must make a public announcement through the news media disclosing the receipt of the qualification. Prior to the release of the public announcement, the company must provide the text of the public announcement to Nasdaq. The public announcement must be provided to Nasdaq and released to the media not later than seven calendar days following the filing of the audit opinion in a public filing with the SEC.

*Observation: This rule became effective on November 4, 2003.*

## Related Party Transactions

Pursuant to the revised rules, a company must conduct an appropriate review of all related party transactions for potential conflicts of interest on an ongoing basis. All such transactions must be approved by the company's Audit Committee or another independent body of the board of directors.

*Observation: This provision became effective on January 15, 2004.*

## Notification of Noncompliance

A company is required to provide Nasdaq with prompt notification after an executive officer of the company becomes aware of any material noncompliance by the issuer with the requirements of the revised rules.

## Compliance by Foreign Private Issuers

Although all of the revised Nasdaq corporate governance rules apply to foreign private issuers, the revised rules provide that foreign private issuers are not required to take any action that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile. Upon application, Nasdaq may grant exemptions from the requirements of the revised rules as may be necessary or appropriate to carry out this intent.

The new rules clarify that the authority to grant exemptions from the corporate governance standards applies only to foreign private issuers and does not apply to the extent that such exemption would be contrary to the federal securities laws. A foreign private issuer that receives an exemption from the revised rules 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 issuer in lieu of these requirements. A foreign private issuer making its initial public offering or initial United States quotation on Nasdaq must disclose any such exemptions in its registration statement.

In order to receive an exemption, a foreign private issuer must provide a letter from its home country counsel, which includes a request for the exemption, a description of the company's practice with respect to the requirement that the exemption relates to, the grounds for the exemption, a representation as to the practice of the home country including the requirements on the primary market, a representation that the company's practice is in compliance with the home country practice as reflected by the requirements on the primary market, and a representation that the applicable Nasdaq rule is contrary to law, rule, regulation or generally accepted business practice in the home country.

The requirement that a foreign private issuer disclose the receipt of a corporate governance exemption from Nasdaq applies to new quotations and filings made after January 1, 2004.

*Observation: The Nasdaq corporate governance rules differ from those enacted by the New York Stock Exchange ("NYSE") in that all of the Nasdaq rules apply to foreign private issuers, unless they receive an exemption and that exemption is disclosed. Foreign private issuers are generally exempt from the NYSE's corporate governance standards, and these issuers must only disclose in their annual reports or on their websites a summary of any significant ways in which their corporate governance practices differ from those followed by domestic companies that are subject to NYSE listing standards. As a result, we believe that Nasdaq will be at a competitive disadvantage to the NYSE in attracting foreign private issuers.*

## About Shaw Pittman LLP

Shaw Pittman has a wide range of experience advising directors and officers on their duties and obligations under federal and state law. We have consulted with and are available to provide independent representation to boards of directors and audit committees, compensation committees, nominating/corporate governance committees and special committees of boards in connection with general day-to-day matters and specialized issues. We have extensive experience in conducting internal corporate investigations involving allegations of misconduct by officers, directors, employees and third parties. Those investigations have involved accounting and financial frauds, as well as a wide range of other potential violations of law, and have been conducted in response to whistleblower allegations, shareholder derivative actions and governmental investigations.

Shaw Pittman has offices in Washington, D.C., Northern California, Northern Virginia, New York, London and Taipei. The firm provides business and technology legal services on a global basis. We have transactional and regulatory experience in the areas of information technology and communications; outsourcing; intellectual property; emerging companies and IPOs; corporate finance and securities; health care; financial institutions; energy and the environment; government contracts; real estate and construction law; aviation; and employment, diversity counseling and employee benefits law.

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