VEDDER PRICE

Capital Markets and Securities

A bulletin prepared by the Capital Markets Group at Vedder Price designed to keep corporate executives and investment banking professionals informed of major developments in the securities industry.

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NEW NYSE AND NASDAQ LISTING STANDARDS APPROVED

The SEC has approved new listing standards for the NYSE and Nasdaq designed to improve corporate governance practices of listed companies. Companies that list equity securities on the NYSE or Nasdaq must comply with the applicable listing standards by the date of their first annual meeting occurring after January 15, 2004, but no later than October 31, 2004. A significant exception applies to companies with classified or staggered boards of directors. If necessary to comply with the applicable listing standards, these companies may replace directors not slated for election in 2004 by the second annual meeting occurring after January 15, 2004, but must do so no later than December 31, 2005. The SEC's director independence standards applicable to audit committee members will apply without exception to all companies as of the original compliance deadline.

New NYSE Listing Standards

The new NYSE rules:

- increase the role and authority of independent directors,
- tighten the definition of an independent director,
- require nominating/corporate governance and compensation committees,
- increase the responsibilities of the audit committee and add new audit committee qualification requirements, and
- require companies to adopt corporate governance guidelines and a code of business conduct and ethics.

The Role of Independent Directors. The new rules increase the role and authority of independent directors by requiring that a listed company's board of directors be comprised of a majority of independent directors. Additionally, companies are required to convene regularly scheduled executive sessions in which non-management directors meet outside of the presence of management. For purposes of the NYSE rules, non-management directors are those who are not company officers. This includes directors who are not independent by virtue of a marital relationship, former status or family relationship, or for any other reason. The NYSE recommends that, if the group of non-management directors includes directors who are not independent under the new rules, independent

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directors convene in executive session at least once a year. To enable interested parties to communicate with independent directors, a listed company must disclose in its annual proxy statement the name of the director presiding at non-management director executive sessions.

A director cannot qualify as independent unless the board of directors of which he is a member affirmatively determines that he or she has no material relationship with the company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). In determining whether a director is independent, the board should broadly consider all relevant facts and circumstances, including any commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships that a director may have with management. A company must disclose the basis for the board's determination in its annual proxy statement or, if the company does not file a proxy statement, in its annual report on Form 10-K. A board may establish and disclose categorical standards to assist it in making determinations of independence and make general disclosure if a director meets those standards. A determination of independence for a director who does not meet the company's independence standards must be specifically explained.

"In determining whether a director is independent, the board should broadly consider all relevant facts and circumstances, including any commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships that a director may have with management."

Additionally, the new rules prohibit directors with certain relationships with the company from being considered independent. A director is not independent if:

- he or she is an employee, or his or her immediate family member is an executive officer, of the company until three years after the end of such employment relationship,
- he or she receives more than $100,000 per year in direct compensation from the listed company, except certain permitted payments, until three years after he or she ceases to receive more than $100,000 in such compensation,
- he or she is affiliated with or employed by a present or former internal or external auditor of the listed company until three years after the end of the affiliation or the employment or auditing relationship,
- he or she 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 three years after the end of such service or employment relationship, and
- he or she is an executive officer or an employee of a company that makes payments to, or receives payments from, the listed company for property or services in an amount that, in any single fiscal year, exceeds the greater of $1 million or 2% of such other company's consolidated gross revenues, until three years after falling below such threshold (subject to certain conditions, a charitable organization will not be considered a "company" for purposes of this provision).

As a phase-in mechanism, the NYSE will allow a one-year look-back until November 4, 2004 in respect of the above categories of relationships. The full three-year look-back will apply after that date.

The independence standards relate not only to the subject person, but also his or her immediate family

members. For purposes of the new rules, an "immediate family member" includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law and anyone (other than domestic employees) who shares such person's home. Additionally, references to a "company" include any parent or subsidiary in a consolidated group with the company.

Nominating/Corporate Governance Committees. Each listed company must form a nominating/corporate governance committee comprised solely of independent directors. The committee must have a written charter addressing the minimum responsibilities of the committee, including conducting an annual performance evaluation of the committee and identifying individuals qualified to become board members.

Compensation Committees. Each listed company must have a compensation committee comprised solely of independent directors. The committee must have a written charter addressing minimum committee responsibilities. Those responsibilities include producing a compensation committee report and conducting an annual performance evaluation of the committee. The compensation committee, either acting alone or with the other independent directors, also must determine and approve the CEO's compensation level based on its evaluation of the CEO's performance.

Audit Committees. Each listed company must form an audit committee comprised of at least three members, each of whom is independent. The audit committee must have a written charter that vests in it responsibility for, among other things, at least annually obtaining and reviewing independent auditors' reports, discussing annual audited financial statements and quarterly financial statements with management and the independent auditor and meeting periodically with each of management, the internal auditors and independent auditors. Additionally, each audit committee must comply with the SEC's new audit committee rules.

In addition to complying with the audit committee member requirements of the SEC's rules, each member of the audit committee must be financially literate or must become financially literate within a reasonable time after his or her appointment to the audit committee. Furthermore, least one member of the audit committee is required to have accounting or related financial management expertise. If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, each board is required to determine that such service would not impair the ability of such member to serve effectively on the listed company's audit committee and to disclose such determination.

Corporate Governance Guidelines. Each listed company must adopt and disclose corporate governance guidelines addressing, among other things, director qualification standards, director responsibilities, management succession and annual performance evaluation of the board. A company must post its corporate governance guidelines on its website.

Code of Conduct and Business Ethics. Each listed company must adopt a code of business conduct and ethics applicable to its directors, officers and employees and post its code on its website. A listed company must also include a statement in its annual report on Form 10-K that its code is available on its website as well as in print upon shareholders' request. Additionally, a company must disclose any waivers of the code.

New Nasdaq Listing Standards

The new Nasdaq rules:

- increase board independence,
- tighten the definition of independent director,
- strengthen the role of independent directors in director nomination decisions,
- strengthen the role of independent directors in officer compensation decisions,

- expand the scope of the audit committee charter,
- heighten the standards of independence for audit committee members,
- require adoption of a code of business conduct and ethics, and
- require review of all related party transactions.

Board Independence. The new rules increase board independence by requiring a board of directors be comprised of a majority of independent directors and require that a board's independent directors convene in regularly scheduled executive sessions.

"Under the new Nasdaq rules, director nominees must be selected or recommended for the board's selection either by a majority of independent directors or by a nominations committee comprised solely of independent directors."

Under the new Nasdaq rules, a director would not be independent if he or she has a relationship that, in the opinion of the company's board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.

Additionally, the new rules provide a list of relationships that would preclude a board finding of independence. A director is not independent if:

- he or she is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company,
- he or she accepts 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 certain permitted payments,
- he or she is a family member of an individual who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company as an executive officer,
- he or she 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 year or 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 certain permitted payments,
- he or she is employed, or was employed during the past three years, as an executive officer of another entity where any of the executive officers of the listed company serve on the compensation committee of such other entity, and
- he or she is a current partner of the company's outside auditor, or was a partner in or employee of the company's outside auditor, and worked on the company's audit, at any time, during the past three years.

The rules also apply to a person's family members. For purposes of the new Nasdaq rules, a family member is a person's spouse, parent, child or sibling, whether by blood, marriage or adoption, or anyone residing in such person's home.

Nomination Decisions. Under the new Nasdaq rules, director nominees must be selected or recommended for the board's selection either by a majority of independent

directors or by a nominations committee comprised solely of independent directors. Each issuer must certify that it has adopted a formal written charter or a board resolution, as applicable, addressing the nominations process as may be required under the federal securities laws. If a listed company forms a nominations committee, then, under exceptional and limited circumstances, a director who is not independent may serve on the committee for no longer than two years.

Officer Compensation Decisions. The new Nasdaq rules require the compensation of the CEO and the other officers of a listed company to be determined or recommended to the board for determination either by a majority of the independent directors or by a compensation committee comprised solely of independent directors. If a listed company forms a compensation committee, then, under exceptional and limited circumstances, a director who is not independent may serve on the committee for no longer than two years.

Audit Committee Charter. Previously existing Nasdaq rules require every listed company to adopt a formal written audit committee charter. The new rules expand the scope of the audit committee charter to include the audit committee's responsibilities, the means by which the committee carries out those responsibilities, the outside auditor's accountability to the committee and the committee's responsibility to ensure the independence of the outside auditors.

Independence for Audit Committee Members. The new Nasdaq rules require that each listed company maintain an audit committee comprised of at least three members, each of whom satisfy the definition of independence contained in the proposed Nasdaq rules. Additionally, each audit committee member must satisfy the SEC's rules for audit committee member independence, be able to read and understand financial statements and 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 three years. At least one member of the audit committee must also have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication. Under exceptional and limited circumstances, a director who is not independent may serve on the audit committee for no longer than two years, but may not chair the committee.

Code of Conduct and Ethics. The new rules require each listed company to adopt a code of conduct applicable to all directors, officers and employees and make the code publicly available. The code of conduct must comply with the code of ethics required by the Sarbanes-Oxley Act. Any waiver of the code must be approved by the board and disclosed in a Form 8-K within five days.

Related Party Transactions. Each listed company must conduct an appropriate review of all related party transactions for potential conflicts of interest on an ongoing basis, and all such transactions must be approved by the company's audit committee or another independent committee of the board of directors.

Comparison of NYSE and Nasdaq Rules

As a result of a lengthy SEC review and comment period, the NYSE and Nasdaq corporate governance rules are, in large part, consistent. However, there are a few notable areas in which the rules differ. First, NYSE listed companies must form nominating/corporate governance committees subject to formal written charters whereas Nasdaq listed companies may either form such committees or allow independent directors to make the decisions that would be otherwise made by such committees. Second, the Nasdaq rules permit a non-independent director to serve on a listed company's audit committee and, if applicable, nominating and compensation committees under "exceptional and limited circumstances" whereas the NYSE rules do not provide similar relief. Third, the NYSE rules require only a one-year look-back for determining board member independence during the first year of the new rules (with the three-year look back taking effect on November 4, 2004) whereas the Nasdaq rules do not contain a similar phase-in.

2004 Proxy Disclosure

The NYSE and Nasdaq rules require disclosure of several items of information in a listed company's proxy statement or, if the listed company does not a file a proxy statement, its annual report on Form 10-K. However, neither set of rules addresses whether the proxy statement disclosure requirements will apply to the 2004 proxy statement, which will be filed with the SEC and mailed to shareholders before the 2004 annual meeting of shareholders (when compliance with the new rules is required). Absent specific guidance from the NYSE, Nasdaq or SEC, companies should consider the spirit of the new rules and best corporate governance practices in deciding whether to include the new proxy disclosure items in their 2004 proxy statements.

SEC AMENDS STOCK REPURCHASE SAFE HARBOR

Rule 10b-18 under the Exchange Act has long served as a non-exclusive safe harbor for companies undertaking stock repurchase programs. The rule is intended to protect company repurchases of stock in situations where the company has no special incentive to interfere with the ordinary forces of supply and demand in the market.

A company is not deemed to have engaged in fraud or market manipulation when repurchasing its stock solely by reason of the time or price a purchase is made if the conditions of the Rule 10b-18 are followed. Highly sensitive corporate events such as mergers, tender offers and securities distributions are generally excluded from the protections afforded by Rule 10b-18. The revisions liberalize some of the purchasing conditions under Rule 10b-18 and, under certain circumstances, repurchases made during a merger or acquisition involving a recapitalization.

Purchasing Conditions

A number of the revisions to Rule 10b-18 relate to the purchasing conditions under the rule. The conditions now in effect are as follows:

- *One Broker or Dealer.* On any given day, the company must use only one broker or dealer, unless purchases are unsolicited. The new rule clarifies that companies can repurchase securities directly using electronic communication networks (ECNs) or other alternative trading systems (ATSs) provided a non-ECN or non-ATS broker-dealer is not also used on the same day.

- *Time of Purchases.* The rule previously prohibited a bid or purchase if it was the opening transaction and any bids or purchases during the last half-hour of trading on the NYSE (or applicable exchange). Bids or purchases at the opening of trading are still prohibited. However, purchases at the end of a trading day will now be based on average daily trading volume (ADTV) over the previous four weeks and public float.

  - Companies with an ADTV of $1 million or more and a public float of $150 million can effect purchases up until the last ten minutes before the close of trading.

  - All other companies can effect purchases until the last 30 minutes of trading.

  After-hours purchases will also be permitted while the consolidation system is open if the purchases are at prices that do not exceed the lower of the closing price of the primary trading market and any bid or sale prices subsequently reported in the consolidated system by other markets. A different broker-dealer from the one employed during normal trading hours can be used. Companies may not effect opening transactions in the after-hours market, but may purchase until termination of the period

for which last sales prices are reported in the consolidated reporting system. The ADTV volume limitation would carry over from the regular trading day to the after-hours session.

- *Price.* Rule 10b-18 previously provided that the purchase price could not be higher than the current independent bid quotation or the last independent sale price reported on the NYSE (or applicable exchange). The revised rule introduces a uniform price condition and limits all companies to purchasing their securities at a price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system. If a security is not quoted or reported in the consolidated system, reference can be made to the applicable exchange, or if the security is not exchange traded, to the highest independent bid obtained from three independent dealers.

"The revisions liberalize some of the purchasing conditions under Rule 10b-18 and, under certain circumstances, repurchases made during a merger or acquisition involving a recapitalization."

- *Volume.* Under the revised rule, the total volume of Rule 10b-18 purchases on any one day may not exceed 25 percent of the ADTV. Block purchases must be included in calculating ADTV, except that, as discussed below, once each week a company can effect one block purchase instead of purchasing under the 25 percent ADTV limit. Companies were allowed under the prior rule to purchase an unlimited amount of securities if purchased in blocks and were not required to include block purchases in calculating ADTV. A "block" is defined as a quantity of stock that (i) has a purchase price of $200,000 or more, (ii) is at least 5,000 shares and has a purchase price of at least $50,000, or (iii) is at least 20 round lots of the security and totals 150 percent or more of the trading volume of that security. Blocks do not include transactions where a broker or dealer, acting as principal, has accumulated the stock for resale to the issuer if the issuer knows the stock was accumulated for such purpose.

  In order to aid small issuers with thinly traded stock that often rely on blocks to effect repurchases, Rule 10b-18 allows block purchases without regard to 25 percent ADTV limit if no other Rule 10b-18 purchases are effected that day and the block purchase is not included in calculating ADTV for purposes of other Rule 10b-18 purchases.

  Another exception to the 25 percent ADTV rule has been adopted for repurchase immediately after a marketwide trading suspension. In order to enhance market liquidity, a company can purchase up to 100 percent of ADTV in the session following a trading suspension.

- *Affiliates.* The affiliate purchaser provisions under Rule 10b-18 essentially remain unchanged. Purchases by "affiliated purchasers" of the company will be aggregated with purchases by the company and, unless made in compliance with Rule 10b-18, will jeopardize the Rule 10b-18 safe harbor. An "affiliated purchaser" is defined by the rule as (i) a person acting in concert with the company for the purpose of acquiring the company's securities; or (ii) an affiliate who, directly or indirectly, controls the company's Rule 10b-18 purchases of such securities, whose purchases are controlled by the company or

whose purchases are under common control with those of the company. Purchases effected by or for a company plan, including 401(k) plans, will not be considered affiliated purchases if the plan is administered by an agent independent of the company.

Mergers and Acquisitions

The SEC has loosened repurchase restrictions under Rule 10b-18 while an issuer is involved in certain merger or acquisition transactions. The general rule remains that repurchases of securities during a merger or acquisition involving a recapitalization will not fall under the protections of Rule 10b-18. The repurchase blackout period runs from the date of the public announcement of the transaction until the transaction is closed or voted upon by the targeted shareholders. However, the safe harbor will be available if:

- the transaction consideration is solely cash and there is no valuation period,
- the repurchases are in the ordinary course of the issuer's repurchase activity, where:
  - Rule 10b-18 purchases do not exceed the lesser of (i) 25 percent of ADTV or (ii) the issuer's average daily Rule 10b-18 purchases over the three full months preceding the transaction announcement date, and
  - block purchases do not exceed the average size and frequency of block purchases over the prior three months, or
- The repurchases are not otherwise restricted or prohibited (*e.g.*, under Regulation M or Rule 14e-5).

Riskless Principal Transactions

The rule now applies to purchases made in riskless principal transactions that are akin to agency transactions. A riskless principal transaction is defined under the rule as a transaction in which a broker or dealer, after having received a buy order from an issuer, buys the securities as principal to satisfy the issuer's buy order. The issuer's buy order must be effected at the same price per-share at which the broker or dealer bought the shares. Only the first leg of the transaction is reported under the applicable market rules. The broker-dealer must have specific policies and record keeping procedures in place in order to account for all riskless principal trades.

Exchange Act Disclosure

The SEC has amended the public company disclosure regulations to require disclosure of stock repurchases in Form 10-Q and Form 10-K reports. The disclosure would include the total shares purchased during a quarter, average price paid, shares purchased as part of a publicly announced repurchase plan, and the maximum number of shares that may yet be purchased. The identity of the broker-dealer used to effect the purchases need not be disclosed. Disclosure must also be provided about abandoned repurchase plans and the nature of a repurchase if effected other than pursuant to a plan.

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SEC PROPOSES SHAREHOLDER ACCESS RIGHTS TO NOMINATE DIRECTORS

The SEC is revisiting the issue of shareholder access to the director nomination process, a topic the SEC has reviewed and considered more than once over the past 25 years.

The proposed SEC rules would provide 5 percent shareholders who have held their securities for two years with a "limited access" right to have nominees for director included in company proxy materials if specified trigger events occur. The trigger events are tied to proxy practices that are viewed as unfair or closed to a company's shareholders.

Limited access rights would be available only if a shareholder nominee's election does not violate state or federal law or the rules of a national securities exchange.

Problems with the Current Nomination Process

The SEC rules address the perceived shortcomings in the current regulatory scheme for director elections. Many shareholders view the current director nomination and election process as contributing to a lack of board responsiveness and accountability to shareholders, due principally to:

- management control over director nominations,
- the use of plurality instead of majority voting by many companies for director elections, and
- the costly and inefficient alternative of undertaking a proxy context to gain board representation.

The SEC Proposal

The new SEC rules would, under certain circumstances, require companies to include shareholder nominees for director in company proxy materials. This "limited access" right becomes operative if:

- one of the management's nominees for a board seat receives "withhold" votes from 35 percent or more of the votes cast at the last annual meeting, or
- a shareholder "direct access" proposal (*i.e.*, a proposal that would give a 5 percent shareholder the right to nominate a director under the new rules) receives more than 50 percent of the votes cast on the proposal. A direct access proposal could be submitted only by a shareholder or group of shareholders entitled to vote on the proposal holding more than 1 percent of the company's securities for at least one year.

The SEC is also debating whether to include as a triggering event the failure of a company to implement any shareholder proposal that is included in the company's proxy statement in accordance with Exchange Act rules if the proposal receives a majority of the votes cast.

Eligible Shareholders

To be eligible to submit a nomination for director at a shareholder meeting under the proposals, a shareholder or group of shareholders would be required to:

- beneficially own 5 percent of the voting securities of the company for at least two years,
- intend to hold the securities through the date of the meeting, and
- report stock ownership on a Schedule 13G (as opposed to a Schedule 13D). A shareholder who wished to gain or exercise control over the company would not be eligible to exercise the limited access right.

Eligible Shareholder Nominees

To be eligible for nomination by a shareholder, the nominee must be independent of the shareholder. Independence in this context is not the same as independence for stock exchange listing purposes. The nominee cannot generally be the shareholder, any family member of the shareholder, or any employee of or person controlling the shareholder.

Number of Shareholder Nominees

The number of nominees that a company would be required to include in its proxy statement would depend on the number of directors on its board. If eight or fewer directors are on a board, only one nominee would be allowed. Two nominees would be allowed for boards with eight to 20 directors, and three nominees for boards with over 20 directors.

Affected Companies

The companies that are likely to be affected by the proposals are those that meet the definition of "accelerated filer" under the Exchange Act. Accelerated filers are generally seasoned issuers that file periodic reports with the SEC and have a common equity public float of $75 million or more.

Comment Period

Comments on the SEC limited access right proposals must be received by the SEC by December 22, 2003.

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NEW NOMINATING COMMITTEE AND SHAREHOLDER ACCESS DISCLOSURES

On November 19, 2004, the SEC adopted rules to improve disclosure to investors regarding the nominating committee processes of public companies. New disclosure rules were also announced targeting how shareholders may communicate with directors at the companies in which they invest. The purpose of the new rules is to enhance the transparency of the nomination and communications processes of public companies.

Nominating Committees

Under the new rules, public companies will be required to disclose information regarding a company's process for nominating directors, including:

- whether a company has a separate nominating committee and, if not, the reasons why it does not and who determines nominees for director,
- whether members of the nominating committee satisfy applicable director independence requirements,
- a company's process for identifying and evaluating candidates to be nominated as directors,
- whether a company pays any third party a fee to assist in the process of identifying and evaluating candidates,
- minimum qualifications and standards that a company seeks for director nominees,
- whether a company considers candidates for director nominees put forward by shareholders and, if so, its process for considering such candidates, and

- whether a company has rejected candidates put forward by large, long-term shareholders or groups of shareholders.

Shareholder Access

Public companies will also be required to disclose information regarding shareholder communications with directors, including:

- whether a company has a process for communications by shareholders to directors and, if not, the reasons why it does not,
- the procedures for communications by shareholders with directors,
- whether such communications are screened and, if so, by what process, and
- the company's policy regarding director attendance at annual meetings and the number of directors that attended the prior year's annual meeting.

The rules apply to proxy and information statements for 2004 annual meetings.

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Capital Markets and Securities bulletin is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and other interested parties informed of developments in corporate finance and securities matters. It is not a substitute for professional advice.

If you have any questions regarding material in this issue of *Capital Markets and Securities*, or suggestions for a specific topic you would like addressed in a future issue, please contact the executive editor, Steven J. Gray, at 312/609-7528 or at sgray@vedderprice.com.

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Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with more than 210 attorneys in Chicago, New York City and Livingston, New Jersey. The attorneys in the firm's Capital Markets Group regularly represent corporations and investment bankers, both foreign and domestic, in a wide variety of matters, including:

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