

## Client Alert

# New NYSE and Nasdaq Corporate Governance Rules Take Effect in 2004

### A. Introduction

Final New York Stock Exchange and Nasdaq corporate governance rules were approved by the Securities and Exchange Commission on November 4, 2003.<sup>1</sup> The new rules, which are designed to strengthen corporate governance practices of listed companies and to increase the independence of their boards of directors, generally require compliance by listed companies by the earlier of (i) a company's first annual meeting after January 15, 2004 or (ii) October 31, 2004. However, the rules do not require companies with classified boards to replace directors who would not normally stand for election at the company's first annual meeting after January 15, 2004 in order to meet the new standards. Instead, these companies have until their second annual meeting after January 15, 2004, but no later than December 31, 2005, to meet the new standards.

### B. Independent Directors

#### NYSE Rules

The new NYSE rules require that the board of directors of each NYSE-listed company be comprised of a majority of independent directors. In order for a director to be "independent", the board of directors must affirmatively determine that the director has no material relationship<sup>2</sup> with the company and the company must disclose these determinations in the company's annual proxy statement (or, if the company does not file a proxy statement, in its Form 10-K). In addition, the new NYSE rules specifically preclude the following directors from being considered independent:

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<sup>1</sup> Securities and Exchange Commission Release No. 34-48745; File Nos. SR-NYSE-2002-33, SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138, SR-NASD-2002-139, and SR-NASD-2002-141. A copy of the Release is available on the SEC website at [www.sec.gov/rules/sro/34-48745.htm](http://www.sec.gov/rules/sro/34-48745.htm).

<sup>2</sup> Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships. However, the NYSE does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

- a director who is an employee, or whose immediate family member<sup>3</sup> is an executive officer, of the company is not independent until three years after the end of the employment relationship;<sup>4</sup>
- a director who receives, or whose immediate family member receives, more than \$100,000 per year in direct compensation from the 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), is not independent until three years after he or she ceases to receive more than \$100,000 per year in such compensation;<sup>5</sup>
- a director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company is not independent until three years after the end of the affiliation or the employment or auditing relationship;
- a director who is employed, or whose 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 is not independent until three years after the end of such service or the employment relationship; and
- a director who is an executive officer or an employee, or whose immediate family member is an executive officer, 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, is not independent until three years after such payments fall below that threshold.<sup>6</sup>

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<sup>3</sup> 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.

<sup>4</sup> Employment as an interim Chairman or CEO does not disqualify a director from being considered independent following that employment.

<sup>5</sup> Compensation received by a director for former service as an interim Chairman or CEO and compensation received by an immediate family member for service as a non-executive employee of the company need not be considered in determining independence.

<sup>6</sup> The payments and the consolidated gross revenues to be measured are those reported in the last completed fiscal year. The three-year "look-back" provision applies solely to the financial relationship between the listed company and the director's or immediate family member's current employer. The company need not consider former employment of the director or immediate family member. Charitable organizations are not considered "companies" for purposes of this standard, provided that the listed

For each of the above independence standards that contains a three-year "look-back" provision, the NYSE rules provide for a transition period until November 4, 2004 during which the company need only apply a one-year "look-back".

### Nasdaq Rules

The new Nasdaq rules require that a majority of the board of directors of Nasdaq-listed companies be comprised of "independent directors", defined as a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.<sup>7</sup> The Nasdaq rules require the board to make an affirmative determination that no such relationship exists and specifically preclude the following directors from being considered independent:

- a director 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;
- a director who accepted, or who has a family member<sup>8</sup> who accepted, any payments from the company or any parent or subsidiary of the company in excess of \$60,000 during the current or any of the past three fiscal years, other than:
  - 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 Exchange Act, provided that audit committee members are subject to the additional more stringent requirements under the Nasdaq rules;

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company discloses contributions that would otherwise be covered by this standard in its annual proxy statement, or if the company does not file a proxy statement, in its Form 10-K.

<sup>7</sup> Ownership of a company's stock, by itself, would not preclude a board finding of independence.

<sup>8</sup> A "family member" includes a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home.

- a director who is a family member of any 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;
- 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<sup>9</sup> to which the company made, or from which the company received, payments for property or services in the current 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:
  - payments arising solely from investments in the company's securities; or
  - payments under non-discretionary charitable contribution matching programs;
- a director 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 listed company served on the compensation committee of such other entity; or
- a director who is, or has a family member who 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 three years.

The Nasdaq rules provide that a company must disclose in its annual proxy statement (or, if the company does not file a proxy statement, in its Form 10-K) those directors determined by the board to be independent. If the company fails to comply with the majority of independent directors requirement due to one vacancy, or one director ceasing to be independent due to circumstances beyond the director's control, then the company must comply with the independence requirement by the earlier of its next annual shareholder meeting or one year from the occurrence of the event that resulted in its noncompliance. A company relying on this cure provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

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<sup>9</sup> The term "organization" includes charitable organizations and other not-for-profit entities.

## C. Non-Management or Independent Director Executive Sessions

### NYSE Rules

The new NYSE rules require non-management directors to meet at regularly scheduled executive sessions without management. Non-management directors are all those who are not company officers and can include directors who are not independent under the new rules. If a company's non-management directors include any who are not independent, the independent directors should meet separately in executive session at least once a year. The NYSE rules provide that there need not be a single presiding director at all executive sessions, but if one director is selected 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. Each company also must disclose in its annual proxy statement a method for interested parties to communicate with the presiding director, if any, or the non-management directors as a group.

### Nasdaq Rules

The Nasdaq rules require independent directors to have regularly scheduled meetings at which only independent directors are present. The Nasdaq rules contemplate that these executive sessions will occur at least twice a year, and perhaps more frequently, in conjunction with regularly scheduled board meetings.

## D. Nominating/Corporate Governance Committee

### NYSE Rules

The new NYSE rules provide that listed companies must have a nominating/corporate governance committee<sup>10</sup> that is composed entirely of independent directors and has a written charter that must address:

- 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,<sup>11</sup> and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders;

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<sup>10</sup> Boards may allocate the responsibilities of the nominating/corporate governance committee to committees of their own denomination, provided that any such committee is composed entirely of independent directors and has a published committee charter.

<sup>11</sup> If a company is legally required to provide third parties with the ability to nominate directors (such as preferred stock rights to elect directors, shareholder agreements or management agreements), the selection and nomination of such directors need not be subject to the committee's process.

- develop and recommend to the board a set of corporate governance principles applicable to the corporation; and
- oversee the evaluation of the board and management; and
- an annual performance evaluation of the committee.

The nominating/corporate governance committee charter also should address the following:

- committee member qualifications;
- committee member appointment and removal;
- committee structure and operation, including authority to delegate to subcommittees; and
- committee reporting to the board.

#### Nasdaq Rules

The new Nasdaq rules require that director nominees be selected, or recommended for the board's selection, either by:

- a majority of the independent directors; or
- a nominating committee comprised solely of independent directors.<sup>12</sup>

Each company must certify that it has adopted a board resolution or a formal written charter addressing the nomination process and related matters as may be required under the federal securities laws.<sup>13</sup>

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<sup>12</sup> If the nominating committee is comprised of at least three members, one director, who is not independent and is not a current officer or employee or a family member of an officer or employee, may be appointed to the committee, if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and discloses, in the proxy statement for the next annual meeting (or if the company does not file a proxy statement, in its Form 10-K), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

The Nasdaq rules exempt controlled companies from the requirement to have a compensation committee composed entirely of independent directors.

<sup>13</sup> This rule is not applicable to a company subject to a binding obligation that requires a director nomination structure inconsistent with this rule where such obligation predates November 4, 2003. In addition, independent director oversight of director nominations shall not apply in cases where the right to nominate a director legally belongs to a third party. However, the company must comply with Nasdaq's committee composition requirements.

## E. Compensation Committee

### NYSE Rules

The new NYSE rules provide that listed companies must have a compensation committee<sup>14</sup> that is composed entirely of independent directors and has a written charter that must address:

- the committee's purpose and responsibilities—which, at minimum, must be to have direct responsibility 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;<sup>15</sup>
  - make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans; and
  - produce a compensation committee report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report on Form 10-K filed with the SEC; and
- an annual performance evaluation of the committee.

The compensation committee charter also should address the following:

- committee member qualifications;
- committee member appointment and removal;
- committee structure and operation, including authority to delegate to subcommittees; and
- committee reporting to the board.

### Nasdaq Rules

The new Nasdaq rules require that compensation of executive officers be determined, or recommended to the board for determination, either by:

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<sup>14</sup> Boards may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that any such committee is composed entirely of independent directors and has a published committee charter.

<sup>15</sup> The NYSE has indicated that the new rules should not be construed so as to preclude discussion of CEO compensation with the board generally.

- a majority of the independent directors; or
- a compensation committee comprised solely of independent directors.<sup>16</sup>

In the case of CEO compensation, the CEO may not be present during voting or deliberations.

#### F. Audit Committee

##### Exchange Act Rule 10A-3

Rule 10A-3 under the Exchange Act requires national securities exchanges and associations to prohibit the listing of securities of companies that are not in compliance with the standards set forth in the rule. Rule 10A-3 provides that each member of the audit committee must be independent and, for purposes of the "independence" definition, may not (other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee):

- 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 issuer (provided that such compensation is not contingent in any way on continued service); or
- be an affiliated person, or an affiliate, of the company or any subsidiary thereof.

A person is deemed not to be an affiliate of a specified person for purposes of this requirement if the person:

- is not the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person; and
- is not an executive officer of the specified person.

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<sup>16</sup> If the compensation committee is comprised of at least three members, one director, who is not independent and is not a current officer or employee or a family member of an officer or employee, may be appointed to the committee, if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and discloses, in the proxy statement for the next annual meeting (or if the company does not file a proxy statement, in its Form 10-K), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

The foregoing safe harbor does not create a presumption that a person who is the beneficial owner, directly or indirectly, of more than 10% of any class of voting equity securities of the specified person is an affiliate of the specified person.

However, the following are deemed to be affiliates:

- an executive officer of an affiliate;
- a director who also is an employee of an affiliate;
- a general partner of an affiliate; and
- a managing member of an affiliate.

Rule 10A-3 also provides that the audit committee must:

- be directly responsible for the appointment, compensation, retention and oversight of the work of the company's independent auditor (including resolution of disagreements between management and the auditor regarding financial reporting) and that each such independent auditor must report directly to the audit committee;
- establish procedures for:
  - the receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters; and
  - the confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters;
- have the authority to engage independent counsel and other advisors, as it determines necessary to carry out its duties; and
- receive appropriate funding, as determined by the audit committee, for payment of:
  - compensation to any independent auditor;
  - compensation to independent counsel and other advisors employed by the audit committee; and
  - ordinary administrative expenses of the audit committee that are necessary or appropriate in carrying out its duties.

## NYSE Rules

The new NYSE rules require that listed companies have an audit committee that satisfies the requirements of Rule 10A-3, has a minimum of three members who are also independent under the NYSE rules and has a written charter that addresses:

- the committee's purpose—which, at minimum, must be to:
  - assist board oversight of the integrity of the company's financial statements, the company's compliance with legal and regulatory requirements, the independent auditor's qualifications and independence, and the performance of the company's internal audit function and independent auditors; and
  - prepare an audit committee report as required by the SEC to be included in the company's annual proxy statement;
- an annual performance evaluation of the audit committee; and
- the duties and responsibilities of the audit committee—which, at a minimum, must include those set out in Rule 10A-3, as well as to:
  - at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; 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, relating to one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the company;
  - discuss the company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including the company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations";
  - discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies;<sup>17</sup>

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<sup>17</sup> The audit committee's responsibility to discuss earnings releases, financial information and earnings guidance may be done generally (*i.e.*, discussion of the types of information to be disclosed and the type of presentation to be made). The audit committee need not discuss in advance each earnings release or each instance in which a company may provide earnings guidance.

- discuss policies with respect to risk assessment and risk management;<sup>18</sup>
- meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;
- review with the independent auditor any audit problems or difficulties and management's response;<sup>19</sup>
- set clear hiring policies for employees or former employees of the independent auditors; and
- report regularly to the board of directors.

The NYSE rules also require that each member of the audit committee 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. The rules provide that the board may presume that a person who satisfies the definition of "audit committee financial expert" under SEC Regulation S-K has accounting or related financial management expertise.

The NYSE rules also require that listed companies have an internal audit function to provide management with an ongoing assessment of the company's risk management process and system of internal control.

### Nasdaq Rules

The Nasdaq rules provide that companies must have, and certify to Nasdaq that they have and will continue to have, an audit committee of at least three members, each of whom must:

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<sup>18</sup> The audit committee must discuss guidelines and policies (but need not replace existing guidelines and policies) to govern the process by which the assessment and management of the company's exposure to risk is handled.

<sup>19</sup> The audit committee may also want to review any accounting adjustments that were noted or proposed by the auditor but were "passed" (as immaterial or otherwise); any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement; and any "management" or "internal control" letter issued, or proposed to be issued, by the audit firm to the company.

- be independent under the Nasdaq rules;<sup>20</sup>
- be independent under Rule 10A-3;
- 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; and
- be able to read and understand fundamental financial statements, including a company's balance sheet, income statement and cash flow statement.

In addition, each company must certify that it has, and will continue to have, at least one audit committee member who has:

- past employment experience in finance or accounting;
- requisite certification in accounting; or
- any other comparable experience or background which results in the individual's financial sophistication (including being or having been a CEO, CFO or other senior officer with financial oversight responsibilities).

The Nasdaq rules also provide that if a company fails to comply with the audit committee composition requirements under Rule 10A-3 and the new Nasdaq rules because an audit committee member ceases to be independent due to circumstances beyond the director's control, the 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 resulted in its noncompliance. A company relying on this cure provision must provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

The Nasdaq rules require each listed company to certify that it has adopted a formal written audit committee charter and that the committee has reviewed and assessed the adequacy of the charter on an annual basis. The charters must specify:

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<sup>20</sup> One director, who is independent under Rule 10A-3, but not independent under the Nasdaq rules, and is not a current officer or employee or a family member of an officer or employee, may be appointed to the audit committee, if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and discloses, in the proxy statement for the next annual meeting (or if the company does not file a proxy statement, in its Form 10-K), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve as chairman or for longer than two years.

- the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer; and
- the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3.

## G. Code of Business Conduct and Ethics

### NYSE Rules

The new NYSE rules require listed companies to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers. A listed company's website must include its code of business conduct and ethics and its annual report on Form 10-K must state that the code of business conduct and ethics is available on its website and in print to any shareholder who requests it. Companies are free to determine their own policies, but should address the following topics:

- prohibition of conflicts of interest, which occur when an individual's private interest interferes in any way, or even appears to interfere, with the interests of the corporation as a whole;
- prohibition of appropriation of corporate opportunities;
- maintenance of confidentiality;
- fair dealing with the company's customers, suppliers, competitors and employees;
- protection and proper use of company assets;
- compliance with laws, rules and regulations (including insider trading laws); and
- encouraging the reporting of any illegal or unethical behavior.

### Nasdaq Rules

The Nasdaq rules require each company to adopt and make publicly available a code of conduct applicable to all directors, officers and employees. Such code of conduct must comply with the "code of ethics" definition set forth in the Sarbanes-Oxley Act of 2002 and any regulations thereunder. The Sarbanes-Oxley Act defines "code of ethics" as such standards as are reasonably necessary 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 the periodic reports required to be filed by the issuer; and
- compliance with applicable governmental rules and regulations.

Item 406 of Regulation S-K expanded this definition to require that such standards be designed to determine wrongdoing, as well as to promote the following additional factors:

- the prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and
- accountability for adherence to the code.

The Nasdaq rules require that such codes of conduct provide for an enforcement mechanism that ensures:

- prompt and consistent enforcement of the code;
- protection for the 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 on Form 8-K (including the reasons for the waiver) within five business days.

The new Nasdaq rules for codes of conduct are effective May 4, 2004.

## H. Compliance with Corporate Governance Rules

### NYSE Rules

The new NYSE rules require a listed company's CEO to certify to the NYSE each year that, as of the date of certification, he or she is not aware of any violation by the company of NYSE corporate governance listing standards. This certification must be disclosed in the company's annual report to shareholders or, if the company does not prepare an annual report to shareholders, in the company's Form 10-K. In addition, the CEO must promptly notify the NYSE in writing after any executive officer of the listed company becomes aware of any material noncompliance with any provisions of the new corporate governance rules.

The new rules also provide that the NYSE may issue a public reprimand letter to any listed company that violates a NYSE listing standard. Repeated or flagrant violations of the NYSE listing standards may result in suspension or delisting.

#### Nasdaq Rules

The new Nasdaq rules require that companies provide Nasdaq with prompt notification after an executive officer of the company becomes aware of any material noncompliance by the company with the Nasdaq corporate governance rules.

### I. Corporate Governance Guidelines

#### NYSE Rules

The NYSE rules provide that listed companies must adopt and disclose corporate governance guidelines that should address the following topics:

- director qualification standards that should, at minimum, reflect the new director independence requirements, but may also address other substantive qualification requirements, including policies limiting the number of boards on which a director may serve, and director tenure, retirement and succession;
- director responsibilities, which should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials;
- director access to management and, as necessary and appropriate, independent advisors;
- director compensation guidelines that should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate);<sup>21</sup>
- director orientation and continuing education;
- management succession planning that should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO; and

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<sup>21</sup> The NYSE has noted that boards should be aware that questions as to directors' independence may be raised when directors' fees and emoluments exceed what is customary. Similar concerns may be raised when the company makes substantial charitable contributions to organizations in which a director is affiliated, or enters into consulting contracts with (or provides other indirect forms of compensation to) a director. The board should critically evaluate each of these matters when determining the form and amount of director compensation, and the independence of a director.

- self-evaluation at least annually to determine whether the board and its committees are functioning effectively.

## J. Conflicts of Interest

### Nasdaq Rules

The new Nasdaq rules provide that companies must conduct an appropriate review of all related party transactions on an ongoing basis and all such transactions must be approved by the audit committee or another independent body of the board. These new rules for conflicts of interest are effective January 15, 2004.

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January 12, 2004

## For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at [www.chadbourne.com/publications/sub\\_Publications.html](http://www.chadbourne.com/publications/sub_Publications.html). If you have any questions regarding the NYSE or Nasdaq corporate governance rules, please contact any of the following:

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