SEC ISSUES FLURRY OF NEW RULES IN ACCORDANCE WITH SARBANES-OXLEY DEADLINE

Overview

Since its enactment on July 30, 2002, the Sarbanes-Oxley Act of 2002 has generated a great deal of activity in the name of corporate governance and disclosure reform, both in the boardrooms and office buildings of corporate America,[1] and in the hallowed halls of government, mostly at the Securities and Exchange Commission. A substantial portion of Sarbanes-Oxley's intended reforms were explicitly to be effected through rulemaking by the SEC. Congress set tight deadlines for this rulemaking, one of which was January 26, 2003.[2] In the weeks immediately prior to that date, the SEC adopted a substantial body of new rules on the following subjects in accordance with the congressionally-mandated deadline:

- The use of non-GAAP financial measures;
- The definition of and disclosures regarding audit committee financial experts;
- The disclosure of the existence of and waivers from codes of ethics for senior officers;
- Disclosure of off-balance sheet arrangements; Auditor independence;
- Attorney conduct in connection with SEC reporting;
- The retention of audit records; and
- Insider trading during pension fund blackout periods.

The final rule releases implement rules that were proposed by the SEC in the months preceding the January 26, 2003 deadline. The SEC, in its usual fashion, solicited comments on its proposed rules, albeit with accelerated comment deadlines. Some of the rules, e.g., the rules on insider trading during pension fund blackout periods, were enacted substantially as proposed. Others, e.g., the attorney conduct rules, were changed significantly in the face of substantial public opposition.

The new rules are part of a series of new laws or rules implemented or required by Sarbanes-Oxley. Annex A to this Alert sets forth the principal rules enacted by or required under Sarbanes-Oxley and the most relevant associated deadlines and compliance dates.

Use of Non-GAAP Financial Measures

The SEC's adoption, in its Release No. 33-8176, of new rules regarding the use of financial measures not calculated in accordance with generally accepted accounting principles, or "GAAP," was one of the more significant elements of the January 26 rulemaking. In one sense, it is not terribly dramatic or surprising, given Sarbanes-Oxley's direction to adopt the rules and the SEC's long-standing informal policy

[1] And, to their chagrin, boardrooms of foreign companies listed in the United States.

[2] Many have found the fact that January 26 was a Sunday somewhat confusing. The statutory language imposing the deadline was "180 days after enactment," which just happened to be a Sunday. The fact that the deadline fell on a Sunday is indicative at some level of the haste with which Sarbanes-Oxley was enacted.

disfavoring such measures, particularly the ubiquitous "EBITDA" and similar measures. On the other hand, use of those measures is rampant, particularly in earnings releases (which were not heretofore typically filed with the SEC and therefore not subject to ordinary course SEC review). Thus, the new rules on the use of non-GAAP financial measures strike at the heart of a common practice, instituting formal rules in an area where none had existed before.

Statutory Scheme.

The core concepts of the new rules are contained in a new SEC regulation dubbed "Regulation G." Regulation G generally applies to any public statements made by a registrant that contain a non-GAAP financial measure and requires both a presentation of the most directly comparable GAAP financial measure and a reconciliation to that measure.

In addition to adopting the new Regulation G, existing Regulations S-K and S-B and Form 20-F have been amended to impose a similar requirement for statements made in an SEC filing as well as a requirement to disclose the reasons why management believes such presentation is useful and, to the extent material, the additional purposes for which management uses the measure.

Finally, the SEC will now require that, if a registrant chooses to issue an earnings release (as most registrants do), such release must be furnished to the SEC on Form 8-K within five business days of its public release.

Regulation G.

Basic Rule. Under Regulation G, registrants who choose to disclose "non-GAAP financial measures" in their public statements must also present the "most directly comparable" GAAP financial measure and provide a reconciliation to that measure. Regulation G also makes it clear that such statements are governed by the same 10b-5 liability standard as other public statements.[3]

Definitions. Under Regulation G, a non-GAAP financial measure is "a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) Excludes amounts … that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the [registrant's financial statements]; or

(ii) Includes amounts … that are excluded from the most directly comparable measure so calculated and presented."

Regulation G specifically excludes from the definition of non-GAAP financial measures "operating and other financial measures and ratios or statistical measures calculated using exclusively one or both of: (i) financial measures calculated in accordance with GAAP; and (ii) operating measures or other measures that are not non-GAAP financial measures" and "measures required to be disclosed by GAAP, [SEC] rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant."

Application to EBITDA. Given the specificity of the definition and the safe harbors described above, it seems likely that identifying what is or is not a non-GAAP financial measure will not be terribly challenging. What is likely to present a challenge, however, will be identifying the "most comparable" GAAP measure. Clearly, the most commonly used non-GAAP financial measure is EBITDA, or Earnings Before Interest, Taxes, Depreciation and Amortization. EBITDA is *both* a measure of a company's available, or "free," cash flow, and of that company's operating performance.[4] The SEC's treatment of EBITDA has

[3] See Rules 100(b) and 102 of Regulation G. It would seem that this Rule is unnecessary, given the scope of Rule 10b-5 and its applicability to public statements by registrants generally. Query whether its inclusion was intended to, or will, have the effect of reducing the importance of the scienter requirement for 10b-5 liability associated with the disclosure of non-GAAP financial measures.

[4] A comprehensive explication of the nature and uses of EBITDA is beyond the scope of this alert. However, one useful way of evaluating EBITDA is as a measure of a company's operating performance that is independent of that company's capital structure or acquisition history. Each of the elements of EBITDA supports that interpretation. Earnings is the common starting point. Depreciation and amortization are added back because they are non-cash charges, and because

reflected that dichotomy. When reviewing registration statements, the SEC routinely requires registrants to "balance" the disclosure of EBITDA with cash flows from operating, investing and financing activities when EBITDA is presented in the summary or selected historical financial information tables. On the other hand, when EBITDA is discussed in the text of the prospectus summary or business description, the SEC routinely requires that disclosure to be "balanced" with net income or operating income data. Thus, while it is difficult to identify any one GAAP financial measure that is "most comparable" to EBITDA, one would hope that the SEC will continue to expect disclosure consistent with their historical practice vis-à-vis EBITDA.

Reconciliation. To the extent a registrant chooses to present a non-GAAP financial measure, Regulation G requires a presentation of the most comparable GAAP financial measure and a reconciliation, by schedule or other clearly understandable method, to that measure. This requirement is absolute for historical information, and is required "to the extent available without unreasonable efforts" for forward-looking information. There is no definition of "unreasonable effort," either in the rules or in the release.

Method of Disclosure. In the notes to Regulation G, the SEC contemplates registrants disclosing non-GAAP financial measures orally, telephonically, by webcast, by broadcast or by other similar means. Presumably this refers to the quarterly earnings calls held by most public companies. In such case, a registrant may satisfy its Regulation G obligations by providing the required reconciliation on its web site and disclosing its location during the call. While most third party call providers will likely begin including a reference to this location during the "disclaimers" portion of the call, registrants can take some comfort in the fact that failure to comply with Regulation G will not render a registrant ineligible for Form S-3 or the current disclosure requirement of Rule 144.[5]

Liability Issues. Regulation G contains a recitation of the typical formulation of Rule 10b-5 liability and applies that standard to disclosure made in compliance with Regulation G.[6] In addition, Regulation G contains an explicit statement to the effect that "neither the requirements of … Regulation G … nor a person's compliance or non-compliance with [its] requirements … shall in itself affect any person's liability under [Exchange Act] Section 10(b) … or [Rule 10b-5]… ." One would have thought that the statement in the second sentence of this paragraph would make the statement in the first sentence unnecessary. However, the SEC went to lengths in the adopting release to remind registrants of its December 2001 release and of the *Trump Casinos* action, each indicative of the SEC's view that, in certain cases, the disclosure of non-GAAP financial measures can be misleading and can give rise to a Rule 10b-5 action.[7] Indeed, the SEC explicitly made this point in a footnote to the adopting release noting that undisclosed changes in the method of calculating a non-GAAP financial measure from period to period could create liability concerns.[8]

Covered Entities. Regulation G applies to any entity that *is required* to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act. Note the use of the term "required." As a technical matter, Regulation

they are reflective of the company's history of acquiring capital goods, intangibles, goodwill (prior to the adoption of FASB 142) and, in some cases, the company's history of being acquired itself. Interest is added back because it reflects the company's choice of debt over equity in its capital structure, often debt that was incurred to fund acquisitions. Finally, taxes are added back because they are dependent on the company's net income, which is in turn dependent in part on the foregoing. Thus, while EBITDA is not always calculated on a consistent basis from company to company, by its nature it allows performance comparisons between companies in a manner that is independent of their acquisition histories or capital structures.

[5] See footnote 23 to the adopting release.

[6] Rule 100(b) states that "[a] registrant, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading."

[7] See Release No. 33-8039 (Dec. 4, 2001) [59 FR 63731] and *In the Matter of Trump Hotels & Casino, Inc.*, Release No. 34-45287 (Jan. 16, 2002).

[8] See footnote 23 to the adopting release.

G will not apply to so-called "voluntary filers,"[9] although it seems likely that, due to market practice and 10b-5 liability concerns, voluntary filers are likely to comply at least with the spirit of Regulation G in their public statements. Registered investment companies are excluded from the coverage of Regulation G.

Business Combinations. Regulation G does not apply to any disclosure made in connection with a proposed business combination. This is a curious exemption. One would think the underlying policy of Regulation G would apply equally in that context. The original proposed rules would have applied to business combinations, but the SEC received a number of comment letters opposing that treatment.[10] The commentators focused on the speed with which Rule 425 filings must be made (same day) and the fact that most of the covered information would be "forward-looking" in nature. Notwithstanding the "unreasonable efforts" exception for forward looking information already contained in Rule 100(a)(2), the SEC accepted the commentators view and provided a blanket exemption from Regulation G for non-GAAP financial information "included in a disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto…" so long as the information is filed pursuant to Rule 425.

Foreign Private Issuers. Regulation G does apply to foreign private issuers, however, it contains a number of accommodations that should reduce the compliance burden. As it relates to foreign private issuers, Regulation G makes it clear that GAAP generally refers to home country GAAP,[11] not U.S. GAAP, nothwithstanding the fact that foreign private issuers are generally required to present a reconciliation to U.S. GAAP in their SEC filings.[12] In addition, Rule 100(c) exempts disclosure by foreign private issuers if:

- the securities of the foreign private issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
- the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP; and
- the disclosure is made (or is included in a written communication that is released) by or on behalf of the foreign private issuer outside of the United States.

Note the interaction between the second bullet above and the definition of GAAP. Thus, to the extent a non-GAAP measure is calculated based on U.S. GAAP, the Rule 100(c) exemption from Regulation G is destroyed and, under Rule 101(b), the measure must be reconciled to U.S. GAAP.

Foreign private issuers are given yet another degree of comfort by note 2 to Rule 100 of Regulation G, which clarifies that the foreign private issuer exemption will continue to apply even if:

- a written communication is released both inside and outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;
- foreign journalists, U.S. journalists or other third parties have access to the information;[13]

[9] See Question No. 1 in *Sarbanes-Oxley Act of 2002 – Frequently Asked Questions* (November 8, 2002) available on the SEC's web site.

[10] See, for example, the comment letters of the Association of the Bar of the City of New York, Special Committee on Mergers, Acquisitions, and Corporate Control Contests and the Association of the Bar of the City of New York, Committee on Securities Regulation.

[11] Unless the non-GAAP measure is derived from a measure calculated in accordance with U.S. GAAP.

[12] See, e.g., Item 17(c) of Form 20-F.

[13] Compare the following exclusion from the definition of "directed selling efforts" in Rule 902(c) of Regulation S: "[Directed selling efforts shall not include]… providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States, or to written press-related materials released outside the United States."

- the information appears on the issuer's web site, so long as it is not available exclusively to, or targeted at, persons located in the United States; or

- following the disclosure or release of the information outside the United States, the information is filed or furnished to the SEC on Form 6-K.

Compliance Date. Regulation G will apply to all covered disclosures made on or after March 28, 2003.

Non-GAAP Financial Information in SEC Filings

Basic Rule. In addition to the adoption of Regulation G, the SEC has amended Regulations S-K and S-B and Form 20-F to regulate the use of non-GAAP financial information in SEC filings. Not surprisingly, the requirements for using non-GAAP financial data in SEC filings are more restrictive than those contained in Regulation G. The basic rule requires that, when presenting such information, the registrant must also present:

- the most directly comparable GAAP measure *with equal or greater prominence*;

- a reconciliation similar to that required by Regulation G;

- a statement as to why management believes that the non-GAAP financial measure provides useful information to investors regarding the company's financial condition and results of operations; and

- to the extent material, a statement disclosing the additional purposes, if any, for which management uses the non-GAAP financial measure.

Note the additional requirement of presenting the most directly comparable GAAP measure *with equal or greater prominence*. Note also the addition of the one or two statements by management regarding the utility and purpose of the non-GAAP financial information. Each of these additional requirements is consistent with the SEC's long-standing informal policies on the presentation of EBITDA and similar measures in registration statements. For example, in a footnote to the adopting release, the SEC noted that the mere fact that analysts use the measure in evaluating the company will not be a sufficient rationale. This is consistent with the SEC's informal position on EBITDA. One would hope that the same presentation techniques commonly used to satisfy the SEC staff on such matters will continue to be sufficient to meet these requirements.

The statements by management regarding the utility and purpose of the non-GAAP information need not be repeated if those in the registrant's latest annual report remain current.

Definition of Non-GAAP Financial Measures. The definition of what is, and what is not, a non-GAAP financial measure is generally consistent with Regulation G; however, there are two curious differences. In the carveout for operating data, Item 10 of Regulation S-K uses the phrase "operating and other *statistical* measures," whereas Regulation G uses the term "operating and other *financial* measures." Presumably, Regulation S-K reflects the SEC's intentions in that regard. Second, in the carveout for non-GAAP financial measures required by GAAP, SEC rules or other regulatory requirements, Regulation S-K and Form 20-F require the measure to be presented outside of the financial statements (unless it is required *or expressly permitted* to be presented therein). Regulation G contains no such requirement, presumably because press releases do not typically contain a full set of financial statements, although they do often contain a condensed financial statement presentation similar to the summary financial data usually presented in a registration statement.

Specific Prohibitions. The amendments also specifically provide that registrants may not:

- Exclude charges or liabilities that were, or ultimately will become, cash charges, from non-GAAP liquidity measures other than earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

- Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the charge or gain is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years;

- Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

- Present non-GAAP financial measures on the face of any Article 11 pro forma financial information; or

- Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

Note the triple-negative exception for cash charges and EBIT/EBITDA. Presumably, this exception recognizes that the IT in EBITDA refers to interest and taxes, two indisputably cash charges. Query whether the exception goes, or is intended to go, beyond those two cash items.

Also note the prohibition on presenting non-GAAP financial measures on the face of the registrant's financial statements. One would hope that this does not mean that EBITDA can not be presented in the summary financial table that is *de rigueur* in marketed public offerings. Rather, one would hope that, in accordance with the SEC's existing practice, the measure could be presented in that table if clearly identified and accompanied by the appropriate comparable GAAP measure and explanatory note.

As proposed, the amendments would have prohibited the use of non-GAAP per share measures. That proposal was dropped in the face of substantial public opposition, however, in the adopting release the SEC indicated its continued skepticism about the use of such measures.

Business Combinations. The amendments to Regulations S-K and S-B and Form 20-F also do not apply to any disclosure made in connection with a proposed business combination.

Foreign Private Issuers. The amendments for Form 20-F largely mirror the amendments to Regulations S-K and S-B, with the same accommodations for foreign private issuers that are contained in Regulation G. The amendments will not apply to materials submitted to the SEC on Form 6-K. However, if the Form 6-K is incorporated by reference into a registration statement, the amendments would apply to that information. The additional data required could presumably be included directly in the registration statement itself or by submitting an amended Form 6-K.

Compliance Date. The amendments to Regulations S-K and S-B and Form 20-F will become effective for any annual or quarterly report filed with respect to a period ending after March 28, 2003.[14]

Furnishing Earnings Releases on Form 8-K

Basic Rule. In addition to the adoption of Regulation G and the amendments to Regulations S-K and S-B and Form 20-F, the SEC has added an additional mandatory disclosure item to Form 8-K. Under the new rules, registrants who choose to issue earnings announcements or releases will be required to *furnish* those releases to the SEC under a new Item 12 of Form 8-K. The requirement applies both to public announcements made by the registrant and announcements made on the registrant's behalf. It also applies both to initial earnings announcements or releases and to updates of such announcements or releases. Repetition of previously furnished information will not trigger a new Form 8-K requirement; updating or materially supplementing such information will.

Application of Regulation G. Regulation G will, perforce, apply to the types of disclosures covered by new Item 12 of Form 8-K. In addition, Item 12 incorporates the Regulation S-K amendments, including the requirements that the most directly comparable non-GAAP measure be given equal or greater prominence and that management comment as to the utility and purpose of the non-GAAP financial measure. The latter requirement may be satisfied by

[14] The release is silent on the point, but presumably the amendments will also be effective for registration statements containing financial statements for periods ending after March 28, 2003.

including such a statement in the registrant's most recent annual report on Form 10-K, updated to the extent necessary by more recent filings.

Timing. Registrants must furnish information required under new Item 12 within five business days of its release. The SEC has noted, however, that as part of a broader rulemaking project relating to Form 8-K, it is considering accelerating that filing deadline to two business days. Notwithstanding the technical filing deadlines, there are two good reasons why registrants will be well served to furnish earnings releases to the SEC contemporaneously with their public release. The first is Regulation FD, which requires the public release of any material non-public information that is disclosed to market professionals contemporaneously with such disclosure. While furnishing information on a Form 8-K is not the only means of satisfying that requirement, it is one of those means, and thus is as good a method as any for complying with Regulation FD.[15] Two birds; one stone. Second, as described below, registrants need not furnish an additional Form 8-K in connection with its earnings calls, webcasts or broadcasts, so long as the Item 12 Form 8-K was furnished *prior to the presentation*. Given that earnings releases are generally not made publicly available until shortly before the earnings call, it seems likely that the only way to satisfy that requirement will be to furnish the information on an Item 12 Form 8-K contemporaneously with its public release.

Web Site Posting. A registrant is not required to furnish a Form 8-K when disclosing information orally, telephonically, by webcast, broadcast or similar means if:

- the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K *prior to the presentation*;
- the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast, or by similar means;
- the financial and other statistical information contained in the presentation is provided on the registrant's web site, together with any additional information required under Regulation G; and
- the presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the registrant's web site where the information would be available.

There is no technical requirement for the period of time that such web site posting must remain available, however, the SEC does suggest that registrants should maintain availability for a minimum of 12 months.

Furnished, not filed. Note that the requirement is for the information to be furnished with the SEC, rather than filed. This is a distinction that was first developed in connection with the SEC's adoption of Regulation FD.[16] Information that is *furnished* to the SEC on Form 8-K is not subject to Section 18 of the Exchange Act, is not subject to the amendments to Regulation S-K described in the previous section, and is not automatically incorporated by reference into a registrant's registration statements that permit such incorporation. The latter is an advantage for information on which the registrant does not wish to take Section 11 or Section 12(a)(2) liability. Registrants should consider, however, whether they will need to have such information incorporated by reference in order to avoid an *omission* in their registration statement. That can be remedied for a Form 8-K that is already on file by *specifically* incorporating it by reference in such registration statement. In order to incorporate an earnings release by reference into a pre-existing registration statement, a registrant must file it under Item 5 of Form 8-K.

Compliance Date. New Item 12 to Form 8-K will become effective on March 28, 2003.

[15] Registrants adopting this approach should indicate that it is being furnished *both* pursuant to Item 9 and Item 12 of Form 8-K.

[16] See SEC Release No. 33-7881 (August 15, 2000).

Audit Committee Financial Experts

Basic Rule. In its Release No. 33-8177, the SEC amended Regulations S-K and S-B and Form 20-F[17] to require a registrant to disclose whether or not it has an "audit committee financial expert," and if so, to disclosure the name of that person and whether that person is independent. If it does not have one, the registrant must disclose why not.[18] For clarity's sake, the requirement is not that a registrant have an audit committee financial expert--rather it is that a registrant must disclose whether or not it has one.

Definition of Audit Committee Financial Expert. Item 401, as amended, defines the term "audit committee financial expert" as a person who has each of the following attributes (emphasis added):

(i) An *understanding of* generally accepted accounting principles and financial statements;

(ii) The ability to assess the *general application* of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) Experience preparing, auditing, *analyzing or evaluating* financial statements that present a breadth and level of complexity of accounting issues that are *generally comparable* to the breadth and complexity of issues that can *reasonably be expected* to be raised by the registrant's financial statements, or *experience actively supervising* one or more persons engaged in such activities;

(iv) An *understanding of* internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

The big news on the definition of audit committee financial expert is not what is in the definition, rather it's what was not included from the original proposal. As originally proposed, it was widely acknowledged that few people could meet the definition. Someone famously noted that neither Alan Greenspan nor Warren Buffet would pass the test, which for any rational observer would indicate that the test was ill-conceived and poorly constructed. Some of the more noteworthy changes from the original proposal are as follows:

- The SEC chose to use the term "audit committee financial expert" rather than "financial expert" to clarify the limited nature of the designation.

- The SEC amended the language of the proposed rule to eliminate the implication that the designee's expertise or experience be with comparable companies or in the same industry. Rather the requirement is that the designee have experience with financial statements that present a breadth and complexity of accounting issues generally comparable to that presented by the registrant's.

- The designee's experience need not be limited to *preparing or auditing* financial statements. Rather, experience *preparing, auditing, analyzing or evaluating* financial statements will be sufficient. This change will allow persons like venture capitalists, investment bankers and financial analysts to be designated as an audit committee financial expert.

- The SEC also added experience *actively supervising* persons engaged in preparing, auditing, analyzing or evaluating financial statements to the definition. In doing so, the SEC made it clear that a simple hierarchical reporting relationship will not be sufficient. In particular, the release specifically noted that experience as a CEO should not automatically qualify one as an audit committee financial expert absent some direct involvement in the financial reporting process.

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[17] The SEC had originally proposed to add a new Item 309 to Regulation S-K. Upon consideration, it decided to add the disclosure requirement to existing Item 401, which among other things requires certain disclosures regarding a registrant's board of directors.

[18] There has been a fair amount of ink spilled on the question of whether the market will accept, or punish, registrants who disclose that they do not have an audit committee financial expert. The answer remains to be seen.

- The SEC eliminated the requirement that a designee have *experience with* internal controls, in favor of an *understanding of* internal controls.

- With respect to foreign private issuers, an instruction was added to clarify that the designee's understanding of GAAP need not necessarily be of U.S. GAAP.

Becoming an Audit Committee Financial Expert. An important, if curious, aspect of the definition of audit committee financial expert is the detailed rules surrounding how one can obtain the necessary expertise. The new rules provides that a "person *shall* have acquired such attributes through:

(i) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(ii) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(iii) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(iv) Other relevant experience."

If the designee is relying on clause (iv) as his or her mandatory experience qualifier, such experience must be disclosed. Given that a director's experience at least for the previous five years must already be disclosed under existing rules, it would seem that the inclusion of clause (iv) arguably makes the entire experience requirement redundant or illusory. One thing is clear, however--a person may not qualify as an audit committee expert by education alone; inexperienced persons need not apply. Prior experience as an audit committee member will not, in itself, be sufficient to "grandfather" a person as an audit committee financial expert.

The SEC had originally proposed a set of non-exclusive qualitative factors by which a registrant could assess a candidate's financial expertise. That proposal was eliminated, based in part on concerns that registrants would adopt a checklist mentality in assessing a candidate's financial expertise.

"Independence" of Audit Committee Financial Expert. If the registrant discloses that it has an audit committee financial expert, it must disclose that person's name and whether that person is "independent." The proposing release used the definition of independence contained in Section 10A(m)(3) of the Exchange Act. This caused some confusion because that definition uses the term "affiliated person," which has multiple definitions under the federal securities laws.[19] The final definition refers to Item 7(d)(3)(iv) of Schedule 14A, which in turn refers to the applicable NYSE, Amex or Nasdaq definition of independence.[20] Those rules are, of course, currently in the process of being revised to tighten their respective definitions of independence.

Liability Concerns. Item 401(h)(4) purports to contain a safe harbor from liability for being named as an audit committee financial expert. The safe harbor provides that:

- An audit committee financial expert will not be deemed an expert for any purpose, including for purposes of section 11 of the Securities Act, as a result of being so designated.

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[19] The adopting release points, as an example, to Section 2(a)(3) of the Investment Company Act of 1940 (defining "affiliated person" as, among other things, any person with the power to vote 5% or more of an entity's outstanding voting securities), as compared to Rule 405 under the Securities Act (defining an "affiliate" as a person that controls or is controlled by, or is under common control with a specified person).

[20] This is a change that only a lawyer can truly appreciate. That seemingly insignificant change eliminated the need for several scholarly articles, countless hours of client counseling and untold pain and heartache on the part of securities lawyers across the globe.

- The designation of a person as an audit committee financial expert does not impose on such person any duties, obligations or liability greater than those imposed on such person as a member of the audit committee and board of directors in the absence of such designation.

- The designation of a person as an audit committee financial expert does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

This safe harbor presents a fascinating analytical issue, one which will not likely be settled until it has had its day in court. On the one hand, the SEC has clearly articulated the policy behind the safe harbor, i.e., that there is no support found in Sarbanes-Oxley for additional liability for audit committee financial experts, that increasing liability for such persons would be contrary to the goals of the statute and the rulemaking and, likely, the interests of investors. This policy rationale is sound and courts would be well-advised to heed the SEC's views on this matter. On the other hand, it is not ultimately the SEC's decision. Director liability is largely a creature of state law, and the seminal Delaware case on the subject, *Escott v. BarChris,*[21] assessed each individual director's liability based, at least in part, on the role such director played on the board. Until a judicial determination is made, it would be unwise to assume that the position of an audit committee financial expert does not come with any additional liability.

Mechanics. The audit committee financial expert disclosure rules present a number of mechanical questions.

- *Locating the disclosure.* The disclosure is required to be included in a registrant's annual report. It is permitted, but not required, to be incorporated by reference from the registrant's proxy statement. It need not appear in both places.

- *Designating the expert*. The rules are not explicit on this point, but the adopting release strongly suggests that it is the role of the registrant's board of directors to designate the audit committee financial expert. It suggests that such determination should be subject to the business judgment rule, but again, that is a matter of state corporate law and is not within the SEC's jurisdiction. Registrants should adopt the appropriate resolutions in connection with their annual meeting process.

- *Multiple audit committee financial experts.* A registrant is permitted, but not required, to disclose that it has more than one audit committee financial expert on its audit committee. If a registrant chooses to disclose multiple audit committee financial experts, it must disclose the independence of each.

Foreign Private Issuers. While the audit committee financial expert disclosure rules do generally apply to foreign private issuers (other than the need to disclose the independence of an audit committee financial expert), the SEC requested further comment about the application of these rules to foreign private issuers, particularly in light of the pending rulemaking required by Section 301 of Sarbanes-Oxley (addressing public company audit committees). Comments are due on February 18, 2003.

As noted above, the relevant GAAP for determining the qualifications of an audit committee financial expert for a foreign private issuer is home country GAAP. Experience with U.S. GAAP is helpful, but not required.

Compliance Date. Companies other than small business issuers must comply with the audit committee financial expert disclosure requirements in annual reports for fiscal years ending on or after July 15, 2003. Small business issuers must comply for fiscal years ending on or after December 15, 2003.

[21] Escott v. BarChris Constr. Corp., 283 F.Supp. 643 (S.D.N.Y 1968).

Code of Ethics Disclosure

Basic Rule. In its Release No. 33-8177, the SEC amended Regulations S-K and S-B and Forms 20-F and 40-F to require a registrant to disclose whether or not it has adopted a code of ethics applicable to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions, and if so, to disclosure the name of that person and whether that person is independent. If it has not done so, the registrant must disclose why not.[22] The rules will also require "immediate disclosure of waivers of and amendments to the code of ethics.

Definition of "Code of Ethics." The SEC adopted what may seem to be a rather pedestrian definition of "code of ethics." The only curiosity in the definition is its very existence, although the SEC had little choice but to do so under the terms of Section 406 of Sarbanes-Oxley. Under the definition, a code of ethics is a set of written standards "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 registrant files with, or submits to, the Commission and in other public communications made by the registrant;
- Compliance with applicable governmental laws, rules and regulations;
- 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."[23]

While any reasonable code of ethics would likely have addressed each of these issues, registrant's should be vigilant to ensure that they do in order to avoid a foot fault under the new disclosure requirements.

Persons Covered. Section 406 of Sarbanes-Oxley did not require the code of ethics disclosure to address whether the code covered a registrant's principal executive officer.[24] The SEC wisely chose to include the CEO. Otherwise, there is enormous flexibility in who would be covered by a code of ethics and how. For example, a registrant could adopt a special code that applied to the enumerated persons, and maintain a separate code for all employees generally. Alternatively, it could adopt an omnibus code, certain portions of which apply to the enumerated persons. Or it could cause the entire code to apply to all employees. In the adopting release, the SEC noted that it does not believe there is a one size fits all solution to this issue. We would expect to see a wide variety of ethics codes adopted by public companies.

Waivers. The new rules will require "immediate" public disclosure of any amendments or waivers, including implicit waivers, of its code of ethics for senior officers. For purposes of this disclosure, the term "waiver" means the approval by the registrant of a material departure from a provision of the code of ethics for a senior officer and the term "implicit waiver" means the registrant's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer of the registrant.

The SEC adopted a new Item 10 of Form 8-K to be used for such disclosures; however, consistent with the

[22] Once again, the question is whether the market will forgive, or punish, a registrant for electing not to adopt such a code of ethics. It is hard to imagine why one would choose to test the market's magnanimity on this point.

[23] The definition as adopted contains the following variations from definition in Section 406 of Sarbanes-Oxley: (1) the full disclosure prong adds the concept of "other public communications" to Section 406's reference to periodic reports; (2) the compliance with rules and regulations prong adds a reference to laws that was curiously missing from Section 406; and (3) the prompt reporting and accountability prongs are new.

[24] Section 406 of Sarbanes-Oxley referred only to "senior financial officers."

language of Sarbanes-Oxley, disclosure on a registrant's web site will suffice, so long it has previously disclosed its intention to do so. The deadline for the Form 8-K filing is five business days from the date of the amendment or waiver. Query how this deadline would be calculated with respect to an "implicit waiver."

Filing. The SEC's original proposal would have required a registrant to file the code of ethics as an exhibit to its SEC filings. As adopted, the code must simply be publicly available. That availability can be satisfied by:

- Filing the code as an exhibit to the registrant's SEC filings;
- Making the code available on the registrants web site; or
- Undertaking in its annual report to shareholders to provide copies of the code, free of charge, to any person who requests it.

Foreign Private Issuers. Foreign private issuers will be subject to the new code of ethics disclosure requirement in their annual reports on Form 20-F. Foreign private issuers will not, however, be required to provide "immediate disclosure" of any change to, or waiver from, the company's code of ethics for their senior officers, on Form 6-K or otherwise. They will be required to disclose any such change or waiver during the past fiscal year in their annual reports on Form 20-F. Foreign private issuers are, however, encouraged to make more timely disclosure by alternative means "in the interest of promptness."

Compliance Date. Registrants must comply with the code of ethics disclosure requirements in their annual reports for fiscal years ending on or after July 15, 2003. They also must comply with the requirements regarding disclosure of amendments to, and waivers from, their ethics codes on or after the date on which they file their first annual report in which disclosure of their code of ethics is required.

Off-Balance Sheet Disclosure Rules

Basic Rule. In its Release No. 33-8182, the SEC amended Regulations S-K and S-B and Forms 20-F and 40-F to require disclosure of "off-balance sheet arrangements that have or are reasonably likely to have a current or future effect on the registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, capital expenditures or capital resources that is material to investors." The disclosure, which is required to be set forth in a separately captioned section of MD&A (but may specifically incorporate by reference information set forth in the footnotes to the registrant's financial statements), must include the following, to the extent necessary to an understanding of such arrangements and effect, as well as such other information as is necessary for such an understanding:

- The nature and business purpose of such off-balance sheet arrangements;
- The importance of such off-balance sheet arrangements to the registrant's liquidity, capital resources, market risk support, credit risk support or other benefits;
- The revenues, expenses and cash flows arising from such arrangements; the nature and amounts of any interests retained, securities issued and other indebtedness incurred in connection with such arrangements; and the nature and amounts of any other obligations or liabilities (including contingent obligations or liabilities) arising from such arrangements that are or are reasonably likely to become material and the triggering events or circumstances that could cause them to arise; and
- Any known event, demand, commitment, trend or uncertainty that will result in or is reasonably likely to result in the termination, or material reduction in availability to the registrant, of its off-balance sheet arrangements that provide material benefits to it, and the course of action that the registrant has taken or proposes to take in response to any such circumstances.

The SEC has also amended Regulations S-K and S-B and Forms 20-F and 40-F to require tabular disclosure of known contractual obligations, aggregated by type of contractual obligation and period due.

In an earlier release,[25] the SEC had issued similar guidance on the disclosure of off-balance sheet arrangements and contractual obligations. The amendments supersede that earlier guidance.

Definition of Off-Balance Sheet Arrangement. The term "off-balance sheet arrangement" generally includes any contractual arrangement to which an unconsolidated entity is a party, under which the registrant has:

- Any obligation under certain guarantee contracts;
- A retained or contingent interest in assets transferred to an unconsolidated entity or similar arrangement that serves as credit, liquidity or market risk support for such assets;
- Any obligation under certain derivative instruments;
- Any obligation under a material variable interest held by the registrant in an unconsolidated entity that provides financing, liquidity, market risk or credit risk support to the registrant, or engages in leasing, hedging or research and development services with the registrant.

The stated goal of the definition is to force disclosure of the means through which companies typically structure off-balance sheet transactions or otherwise incur risks of loss that are not fully transparent to investors. The SEC tried to harmonize the rule with the relevant accounting literature, and as a result the term "off-balance sheet arrangement" is highly technical, incorporating a number of references to relevant authorities within the accounting literature.[26]

[25] See Commission Statement, Release No. 33-8056 (Jan. 22, 2002).

[26] These include FASB Interpretation No. 45 "Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others," FASB Statement of Financial Accounting Standards No. 133 "Accounting for Derivative Instruments and Hedging Activities" and FASB Interpretation No. 46 "Consolidation of Variable Interest Entities."

Tabular Disclosure of Contractual Obligations. Under the new rules, registrants will be required to include a table setting forth their latest known contractual obligation, aggregated by type and by period due. The rule suggests the following format for the table:

	Payments due by period				
Contractual Obligations	**Total**	**Less than 1 year**	**1 - 3 years**	**3 - 5 years**	**More than 5 years**
[Long term debt obligations]					
[Capital lease obligations]					
[Operating lease obligations]					
[Purchase obligations]					
[Other Long-Term Liabilities Reflected on the Registrant's Balance Sheet under GAAP]					
Total					

Registrants should consider footnoting the table to disclose any additional information necessary for an investor's understanding of the data presented by the table.

The table is required for annual reports on Form 10-K, 20-F and 40-F, as well as for registration statements that require an MD&A section. The table need not be repeated for quarterly reports, however, it must be updated in such reports to the extent they have materially changed.

Small business issuers are not subject to the contractual obligation disclosure requirements.

Safe Harbor. The new rules provide that the safe harbor for forward-looking statements contained in the Private Securities Litigation Reform Act of 1995 will apply to the forward-looking elements of the new disclosure required.

Foreign Private Issuers. The new rules generally apply to foreign private issuers as well as domestic issuers. The disclosure should focus on home country GAAP, however, curiously, the definition of "off balance sheet arrangement" uses the same cross references to the U.S. accounting literature. Thus, a foreign private issuer must assess its guarantee contracts and variable interests pursuant to U.S. GAAP in order to identify what arrangements require disclosure. The SEC justifies this on the basis that foreign private issuers must already make this assessment when they reconcile or prepare their financial statements in accordance with U.S. GAAP.

Compliance Date. Registrants must comply with the off-balance sheet arrangement disclosure requirements in filings that include financial statements for fiscal years ending on or after June 15, 2003. Registrants must include the table of contractual obligations in filings that include financial statements for fiscal years ending on or after December 15, 2003.

Auditor Independence Rules

Basic Rule. In its Release No. 33-8183, the SEC adopted a series of amendments to Regulations S-X and S-K, Forms 10-K and 20-F and adopted a new rule 10A-2 relating to the independence of auditors. The new rules:

- Set forth a defined list of prohibited non-audit services;
- Require that a registrant's audit committee pre-approve all audit and permissible non-audit services provided by the registrant's audit firm;[27]
- Require mandatory partner rotation after five or seven years, depending on the partner's involvement in the audit;[28]
- Prohibit the use of an accounting firm if a person in a "financial reporting oversight role"[29] with the registrant was on the registrant's audit engagement team during the year preceding the commencement of the audit;[30]
- Require that auditors report certain matters to the audit committee, including "critical accounting policies"[31] used by the issuer; and
- Require disclosure of audit and non-audit services provided by, and fees paid to, a registrant's audit firm.

In addition, the new rules prohibit accounting firms from compensating partners based on the sale of engagements for services other than audit, review and attest services.

The rules operate, in most cases, not to absolutely prohibit the foregoing activities, but to cause any audit firm that engages in the prohibited activities to not be "independent" as to a particular client if it so engages. This is tantamount to a flat prohibition, because audit firms are in the business of being "independent" public accountants. Anything that destroys their independence destroys their business, or at least forces them to choose between the audit engagement and that other piece of business.

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[27] Note that this includes the provision of customary comfort letters in connection with registered public offerings or "Rule 144A" offerings. See Section 202 of Sarbanes-Oxley. This will require some foresight on the part of issuer's counsel to have the appropriate resolutions in place.

[28] Lead and concurring partners would be subject to a five year rotation cycle, with a five year "time out" before re-engaging with a particular client. Other "audit partners" (a new defined term) will be subject to seven year rotation and a two year "time out."

[29] "Financial reporting oversight role means a role in which a person is in a position to or does exercise influence over the contents of the financial statements or anyone who prepares them, such as when the person is a member of the board of directors or similar management or governing body, chief executive officer, president, chief financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer, or any equivalent position." Rule 2-01(f)(iii)(2) of Regulation S-X.

[30] The audit is deemed to have commenced on the day after the registrant's annual report for the prior year was filed with the SEC. Rule 2-01(c)(iii)(B)(3) of Regulation S-X.

[31] See also SEC Release No. 33-8040 regarding critical accounting policies.

By their terms, the rules apply to public companies. Private companies that aspire to go public, however, should consider these prohibitions with a view toward being able to use their current auditors if they do go public.

Prohibited Non-Audit Services. One of the more hotly contested areas of the new rules was the list of prohibited non-audit services. As adopted, the rules prohibit:

- Bookkeeping or other services related to the accounting records or financial statements of the audit client;
- Financial information systems design and implementation;
- Appraisal or valuation services, fairness opinions, or contribution-in-kind reports;
- Actuarial services;
- Internal audit outsourcing services;
- Management functions, i.e., acting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client;
- Human resources functions, including recommending a specific candidate for a specific job;[32]
- Broker-dealer, investment adviser, or investment banking services;
- Legal services, excluding tax consulting;[33] and
- Expert services unrelated to the audit.

The list of prohibited non-audit services are based on three principles: (1) an auditor cannot function in the role of management, (2) an auditor cannot audit his or her own work, and (3) an auditor cannot serve in an advocacy role for his or her client.[34]

Foreign Private Issuers. The new rules generally apply to foreign private issuers and accounting firms providing audit services to those issuers the same as domestic issuers.

Compliance Date. The new rules are generally effective 90 days after publication in the Federal Register and an audit firm's independence will not be impaired as a result of relationships in existence or services provided prior to that date.

Attorney Conduct Rules

Background. In its Release No. 33-8185, the SEC adopted rules of professional conduct for attorneys "practicing in front of the Commission." The rules actually adopted differed in a number of significant ways from those originally proposed. Most significantly, the original proposal had contained a "noisy withdrawal" feature that would have required attorneys under certain circumstances to report their clients to the SEC.[35] That and other aspects of the rules, both as proposed and as adopted, create or would have created a number of actual or perceived conflicts with an attorney's professional obligations in the jurisdiction in which he or she is admitted to practice

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[32] It is not intuitively obvious why these services should be broadly prohibited. The stated rationale is that the audit firm would have an interest in the success of that employee and would, therefore, be less likely to question the employee's performance in the course of an audit.

[33] There had been some debate as to whether tax services should be excluded from the prohibition on legal services. In the adopting release, the SEC reiterated "its long-standing position that an accounting firm can provide tax services to its audit clients without impairing the firm's independence." The SEC did, however, remind registrants that "merely labeling a service as a 'tax service' will not necessarily eliminate its potential to impair independence … [for example] accountants would impair their independence by representing an audit client before a tax court, district court, or federal court of claims. In addition, audit committees also should scrutinize carefully the retention of an accountant in a transaction initially recommended by the accountant, the sole business purpose of which may be tax avoidance and the tax treatment of which may be not supported in the Internal Revenue Code and related regulations."

[34] Preliminary note to Rule 2-01 of Regulation S-X.

[35] The noisy withdrawal feature is still under consideration at the SEC. The comment period for that aspect of the rules has been extended to March 30, 2003.

law. A full analysis of these and other of the many nuances of the new rules is beyond the scope of this alert. What follows is a brief summary of the rules as adopted.

Basic Rule. The core of the new rules is an "up the ladder" reporting obligation whereby attorneys who become aware of evidence of a material violation of the securities laws or a material breach of fiduciary duty by the registrant or one of its directors, officers, employees or agents must report such violation to the registrant's chief legal officer (or chief executive officer) and, if no appropriate response is forthcoming within a reasonable time, to the audit committee, a committee consisting of independent directors or to the full board of directors.[36]

Practicing Before the Commission. The SEC adopted an extremely broad definition of "appearing and practicing before the Commission." Certainly, providing any securities law advice or representing an issuer before or communicating with the SEC on behalf of an issuer would fall under the rule. Assisting an issuer with the preparation of any SEC filing will also be covered.[37] Both in-house and outside counsel are covered.

The SEC did clarify that the lawyer's activities be conducted in the context of an attorney client relationship, helping to assuage the fears of former lawyers serving in a business capacity but retaining their license to practice law. The SEC also built in an exclusion for "non-appearing foreign attorneys," generally attorneys licensed outside of the United States who do not hold themselves out as practicing U.S. law and whose activities that may have been considered as "appearing and practicing before the Commission" are only incidental to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States or who are appearing only in consultation with counsel admitted or licensed to practice in the United States.

Sanctions. Section 205.6 of the attorney conduct rules provides that violations of the new rules will subject an attorney to any civil penalties and remedies for a violation of the federal securities laws available to the SEC. This includes both fines and barring an attorney from continuing to practice before the SEC.

Foreign Private Issuers. The attorney conduct rules do apply to attorneys representing foreign private issuers, however, non-U.S. attorneys are exempted to the extent they meet the definition of "non-appearing foreign attorney" discussed above.

Compliance Date. 180 days after publication in the Federal Register.

<u>Audit Record Retention Rules</u>

Basic Rule. In its Release No. 33-8180, the SEC has added a new rule, Rule 2-06, to Regulation S-X that requires accounting firms to retain records relevant to their audit and review of the financial statements of certain issuers of registered securities, entities that have filed and not withdrawn registration statements to sell securities and registered investment companies for a period of seven years from the time the audit or review is concluded.

Records Covered. Rule 2-06 defines these "records relevant to the audit or review" that must be retained as including workpapers and other documents that form the basis of the audit or review and memoranda, correspondence, communications, other documents, and records (including electronic records), which are created, sent or received in connection with the audit or review, and contain conclusions, opinions, analyses, or financial data related to the audit or review. "Workpapers" are defined, for purposes of this Rule, as any documentation of auditing or review procedures applied, evidence obtained, and conclusions reached by the accountants in the audit or review, as required by standards established or adopted by the SEC or by the Public Company Accounting Oversight board.

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[36] Section 205.3(b) of a new Part 205 of Title 17 of the Code of Federal Regulations.

[37] Section 205.2(a)(1)(iii) of the new rules states that appearing and practicing before the commission includes "Providing advice *in respect of the United States securities laws or the Commission's rules or regulations thereunder* regarding any document that the attorney *has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission*, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document;" (emphasis added).

The Rule specifically states that these records must be retained regardless of whether the conclusions, opinions, analyses, or financial data reached by the auditor support the auditor's final conclusion, or contain information or data, relating to a significant matter, that is inconsistent with that matter or the auditor's final conclusion on that matter or the audit or review. The Rule further provides that a matter's "significance" shall be determined based on an objective analysis of the facts and circumstances and that the records to which the Rule applies include those that document a consultation on or resolution of differences in professional judgment.

Compliance Date. Compliance is required for audits and reviews completed on or after October 31, 2003.

Pension Fund Blackout Rules

In its Release No. 34-47225, the SEC adopted new rules prohibiting insider trades during pension fund blackout periods. These new rules, which were enacted by the SEC as Regulation Blackout Trading Restriction or "Regulation BTR," clarify the operation of the trading prohibition and establishes several exemptions thereto, clarify the operation of the private remedy for violations of the prohibition and set forth the content and delivery requirements for the notice that issuers must provide to their directors and executive officers in connection with blackout periods. For a detailed explanation of the operation of Regulation BTR and its implications, please see our Alert of January 2003, entitled "Final SEC Rule on Employee Benefit Plan Blackout Period Provisions of the Sarbanes-Oxley Act," a copy of which can be obtained on our web site at www.kirkland.com.

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Annex A

The following chart sets forth the principal rules enacted by or required under Sarbanes-Oxley and the most relevant associated rulemaking deadlines and compliance dates. [1]

Rule	**Rulemaking Deadline**	**Compliance Date**
Prohibition on extending personal loans to executives	N/A	July 30, 2002
Forfeiture of bonuses and profits if company issues an accounting restatement as a result of misconduct	N/A	July 30, 2002
Ownership reports and trading by officers, directors and principal security holders	August 29, 2002	August 29, 2002
Principal executive and financial officer certification	August 29, 2002	August 29, 2002
Conditions for use of non-GAAP financial measures	January 26, 2003	March 28, 2003
Audit committee financial expert disclosure	January 26, 2003	July 15, 2003
Code of ethics disclosure	January 26, 2003	July 15, 2003
Insider trades during pension fund blackout periods	January 26, 2003	January 26, 2003
Retention of records relevant to audits and reviews	January 26, 2003	October 31, 2003
Certification of management investment company shareholder reports	N/A	March 1, 2003
Disclosure in management's discussion and analysis about off-balance sheet arrangements and aggregate contractual obligations	January 26, 2003	June 15, 2003 (off-balance sheet disclosure) December 15, 2003 (contractual obligations disclosure)
Auditor independence	January 26, 2003	90 days after publication in the Federal Register
Attorney conduct rules	January 26, 2003	180 days after publication in the Federal Register
Prohibition on listing securities of an issuer that fails to comply with the amended audit committee rules	April 26, 2003	Undetermined
Analyst conflicts of interest	July 30, 2003	Undetermined

[1] Many of the rules have complicated compliance date or transition period provisions. See the body of this client alert for more detail regarding the compliance dates for the rules discussed herein.