

A Biweekly  
Newsletter of  
Federal Securities,  
Corporate &  
Banking Law  
Developments

## NYSE Files Revised Listing Standards; SEC Approval Forthcoming

On October 8, 2003, the New York Stock Exchange filed with the Securities and Exchange Commission its revised listing standards regarding corporate governance, previously issued last April. (<http://www.nyse.com/pdfs/amend2-10-08-03.pdf>) The NYSE made the following changes, among others, relating to director independence:

- Reduced the look back period for determining director independence disqualifications from five years to three years; provided that for the first year after SEC approval, the look back period will be only one year;
- Disqualified any director for independence purposes who is an employee of the issuer or whose immediate family member is an executive officer of the issuer until three years after the end of such employment;
- Removed the rebuttable presumption of non-independence and replaced it with a direct finding of non-independence when a director receives more than \$100,000 in compensation from the issuer (other than directors' fees or pensions/deferred compensation); and
- Modified the criteria for determining when business between an independent director's company and the issuer nullifies that director's independence.

Please note that the NYSE's revised proposal contains additional changes and clarifications that will be discussed in a forthcoming firm memorandum. Notably, the revised standards eliminated the previously proposed 18 month compliance period for the majority of an issuer's directors to be independent. NYSE-listed companies will have only until the earlier of their first annual meeting after January 15, 2004, or October 31, 2004, to comply with all of the new standards.

**The SEC is expected to approve these revised standards by the end of this month, so NYSE-listed companies should begin taking the necessary steps to ensure compliance prior to their applicable compliance date.**

### ■ EMPLOYERS WHO MALICIOUSLY GIVE NEGATIVE REFERENCES MAY BE HELD LIABLE

The Wisconsin Court of Appeals recently found an employer who maliciously gave a negative reference liable for compensatory and punitive damages. (<http://www.wicourts.gov/html/ca/02/02%2D3158.htm>)

The plaintiff, a truck driver, filed a complaint against his former employer for negative comments made to the plaintiff's subsequent employer which resulted in his termination. In finding for the plaintiff, the court cited that employers have a conditional privilege to make statements about former employees, but found that the employer abused this privilege by providing negative comments with express malice (which requires a showing of ill will, bad intent, envy, spite, hatred, revenge, or other bad motives).

The employer argued that actual malice (defined as knowledge of falsity or reckless disregard for the truth), and not express malice, is necessary to show abuse of an employer's right to discuss former employees. In rejecting the employer's position, the appeals court found that Wisconsin law required only express malice, and upheld the award of \$283,000 to the plaintiff. **For companies whose policies permit the giving of references, appropriate personnel should be aware of this potential liability and policies should be modified to minimize this risk.**

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## ■ SEC ANNOUNCES 906 CERTIFICATIONS DO NOT APPLY TO FORM 8-K AND CERTAIN OTHER REPORTS

Both in public forum, and through informal advisements, the SEC has indicated that issuers will not be required to provide 906 certifications (i.e., certification of periodic financial reports) in connection with:

- Form 6-K (current reports for foreign private issuers);
- Form 8-K (current reports); and
- Form 11-K (annual reports of employee benefit plans).

The SEC reached this conclusion as a result of recent discussions with the Department of Justice and the President's Corporate Fraud Task Force. Prior to these statements, it was unclear whether the Sarbanes-Oxley Act and related SEC regulations required issuers to provide 906 certifications when filing financial reports in conjunction with the aforementioned SEC filings.

**CEOs and CFOs of publicly-held companies should provide 906 certifications only as exhibits to their Forms 10-K and 10-Q filings.**

## ■ YEAR-END TAX PLANNING FOR 2003

With the year-end rapidly approaching, individuals and small businesses must act quickly to take advantage of new tax savings opportunities established by the Jobs and Growth Tax Relief Reconciliation Act of 2003. Individuals should be aware of the following changes:

- Even though both ordinary income and capital gains tax rates have been reduced, capital gains rates were reduced more than ordinary income rates. Accordingly, the spread between ordinary income and capital gains rates is larger than ever; and

- During this transition year, capital gains may be taxed at 20 percent, 15 percent or as qualified dividends.

Small businesses should be aware that:

- The size of the Section 179 expensing deduction has quadrupled to \$100,000 annually; and
- The 30 percent bonus first-year depreciation has increased to 50 percent, if certain requirements are met.

Small businesses should note that both of these tax breaks are temporary and extensive use of the bonus depreciation may actually lower permissible Section 179 expensing deductions.

**Individuals and small businesses should consult with their personal tax advisors to discuss strategies that will take advantage of these changes.**

Kutak Rock LLP is a national law firm with more than 325 attorneys located in 16 offices throughout the United States practicing in the areas of corporate, banking and securities law, public and corporate finance and complex commercial litigation matters.

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