

WACHTELL, LIPTON, ROSEN & KATZ

AUDIT COMMITTEE GUIDE

2013

Preface

Few responsibilities in corporate governance are more important than that of service on the audit committee of a public company. Congress, the Securities and Exchange Commission, the New York Stock Exchange, NASDAQ and the Public Company Accounting Oversight Board have placed great responsibilities on—and displayed significant confidence in—the audit committee and its members. Among other things, the audit committee is expected to monitor the integrity of the company’s financial statements and internal controls, the qualifications and independence of the company’s independent auditor, the performance of both the company’s internal audit function and its independent auditor, compliance by the company with legal and regulatory requirements and, for many companies, risk oversight. In particular, the risk oversight function continues to receive heightened focus in the wake of the recent financial crisis, as evidenced by the Dodd-Frank Wall Street Reform and Consumer Protection Act and many other recent regulatory initiatives from the SEC and the PCAOB. As a result, the audit committee plays a crucial part in reassuring investors that corporate governance represents an effective system for controlling large public companies, for enhancing companies’ ability to create value and for fairly and completely reporting their financial results to investors and others.

To assist those who serve on the audit committee with their special role, this Guide provides an overview of the key rules applicable to audit committees of NYSE- and NASDAQ-listed companies and describes some of the best practices that audit committees should consider. In addition, attached as exhibits are a Model Audit Committee Charter for New York Stock Exchange-listed companies, a Model Audit Committee Charter for NASDAQ-listed companies, a Model Audit Committee Responsibilities Checklist, a Model Audit Committee Member Financial Expertise and Independence Questionnaire, a Model Audit Committee Pre-approval Policy, Model Policies and Procedures with respect to Related Person Transactions and Model Whistleblower Procedures. These models are just that—models that can and should be adapted by a company to fit its own circumstances.

In today’s financial and enhanced regulatory enforcement climate, the audit committee must be vigilant not only in monitoring financial reporting and compliance, but also in following appropriate procedures in performing its duties. It is incumbent upon every audit committee to ensure that its policies and procedures are “state of the art.” We hope that this Guide will assist audit committees in doing so.

Martin Lipton
July 2004 / *updated* March 2013

About this Guide and Exhibits

This Guide provides an overview of the key rules applicable to audit committees of NYSE- and NASDAQ-listed U.S. companies and best practices that audit committees should consider. This Guide outlines an audit committee member's responsibilities, reviews the composition and procedures of audit committees and considers important legal standards and regulations that govern audit committees and audit committee members. Although generally geared toward directors who are members of a public company audit committee, this Guide also is relevant to members of a private company audit committee, especially if the private company may at some point consider accessing the public capital markets.

In particular, this Guide is written to help audit committee members fulfill their duties in the current environment. To this end, this Guide proposes specific practices designed to promote effective audit committees. A well-run audit committee—*i.e.*, an audit committee composed of financially knowledgeable, independent members who are focused on the right areas of inquiry and intent on asking tough questions of management, internal auditors and the independent auditor—can assist the company in its financial reporting, risk management and compliance obligations.

A few necessary caveats are in order. This Guide is not intended as legal advice, cannot take into account particular facts and circumstances, and does not generally address individual state corporation laws. That said, we believe that this Guide will offer directors sound guidance in terms of the general rules and practices that audit committee members should follow.

The exhibits to this Guide include sample charters, policies and procedures. All of these exhibits are to some extent useful in assisting the audit committee in performing its functions and in monitoring compliance. However, it would be a mistake to simply copy published models. The creation of charters and written policies and procedures is an art that requires experience and careful thought. In order to be “state of the art” in its governance practices, it is not necessary that a company have everything another company has. When taken too far, a tendency to expand the scope of charters, procedures and policies can be counterproductive. For example, if an audit committee charter or procedure requires review or other action to be taken and the audit committee has not made that review or taken that action, the failure may be considered evidence of lack of due care. Each company should tailor its own audit committee materials, limiting audit committee charters and written procedures to what is truly necessary and what is feasible to accomplish in actual practice. These materials should be carefully reviewed each year to prune unnecessary items and to add only those items that will in fact help directors in discharging their duties.

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I

Audit Committee Oversight Duties

Since the New York Stock Exchange (NYSE) first mandated in 1978 that each of its listed companies appoint an audit committee of independent directors, the audit committee has played a leading role in corporate governance. Over the past decade, that role has become more and more important, as the oversight duties that Congress, the Securities and Exchange Commission (SEC), the NYSE, the NASDAQ Stock Market (NASDAQ) and the Public Company Accounting Oversight Board (PCAOB), as well as the expectations corporate stakeholders, have placed on audit committees and their members have continuously increased in scope and nature.

In a context of ever-growing regulation and guidance concerning companies' financial reporting and risk management oversight, the audit committee has become the principal means by which the board discharges its duty to monitor financial and disclosure compliance. Accordingly, boards should carefully select audit committee members, and, to the greatest extent possible, be attuned to the quality of the audit committee's performance. In view of the audit committee's centrality to the board's duties of financial review, it also is important for a board as a whole to receive periodic reports from the audit committee and to be comfortable that the audit committee, the auditors and management are satisfied that the financial position and results of operations of the company are fairly presented in its financial reports. At a minimum, an audit committee is charged with assisting the board in its oversight of the following:

- the qualifications, independence and performance of an outside auditor;
- the performance of a company's internal audit function;
- the integrity of a company's financial statements; and
- a company's compliance with legal and regulatory requirements.

This Chapter focuses on key aspects of an audit committee's oversight duties and offers practices that an audit committee might find useful in performing its duties. Additional required functions of an audit committee are discussed in Chapter II: "Audit Committee Charter."

A. Overseeing the Independent Auditor

It is an audit committee's responsibility to select a company's independent auditor. An audit committee, in most instances, will depend to some extent on a company's financial reporting executives for information about an independent auditor's qualifications. However, the retention process should be organized to effectively signal that an independent auditor's client is the audit committee, not company management.

By carefully reviewing an auditor's independence and competence, as well as the auditor's proposed audit plan, the audit committee will highlight to the independent auditor the responsibilities such independent auditor has toward an audit committee. The factors that an audit committee should evaluate in assessing an auditor's independence and competence are discussed in Chapter V: "Relationship with the Independent Auditor."

No aspect of an audit committee's role is more vital than its oversight of the audit process. An audit committee should pay close attention to the audit fee, and use the fee to measure and reward the scope of audit work. An audit committee should benchmark the fee of the independent auditor against the fees of auditors of comparable companies. The idea is not to economize on the audit fee but, rather, to spot an audit fee that seems low or high in relation to peer companies. A low fee may signal an inadequately thorough audit. A high fee may indicate inefficiency in the audit or even raise questions regarding an auditor's independence. An audit committee should have procedures in place to ensure that it stays abreast of evolving standards and best practices in this area. In the wake of the recent financial crisis and European credit crisis, and in light of the challenges that the global interconnectedness of businesses, markets and risks pose, the PCAOB has been particularly active, both in terms of strengthening its independence and ethics rules and in terms of proposing and adopting a number of auditing standards relating to the transparency and quality of audit reports and the effectiveness of communications between an audit committee and the independent auditor. The PCAOB's rules and proposals relating to the audit work are discussed in Chapter V: "Relationship with the Independent Auditor."

Finally, an audit committee should insist that the financial disclosures and the accounting judgments made in preparing financial statements have the independent auditor's support. An audit committee may consult with legal counsel or other accountants if it has questions about the performance of an independent auditor.

B. Supervising Internal Audit

Each NYSE-listed company must have an internal audit function to provide management and the audit committee with ongoing assessments of a company's risk management processes and systems of internal control. Internal auditors, when carefully selected and appropriately managed, are a powerful safeguard against defects in financial controls or financial statements. For example, the whistleblower in the WorldCom situation was WorldCom's internal auditing department. A strong, well-performing internal audit function also may help to moderate the fees of an independent auditor and to facilitate the independent auditor's audit of a company's internal controls required by Section 404(b) of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and currently governed by PCAOB's Auditing Standard No. 5 (PCAOB AS No. 5) (discussed in Chapter VII: "Internal Controls and Oversight Effectiveness").

Although a company may choose to outsource the internal audit function to a third-party service provider other than its independent auditor, internal auditors typically are full-time employees and should have access to all of the inputs into a company's financial statements and risk assessments. It is important to keep in mind, however, that there are potential weaknesses inherent in the internal audit function because of the status of the internal auditors as employees. Accordingly, an audit committee should seek to insulate the internal auditors from undue corporate pressures. It can do this by taking an active role in the selection and the evaluation of the performance of the internal auditor. First, although not required, an audit committee should have ultimate authority over the selection of the senior internal auditor. Second, an audit committee should be involved in performance reviews of the senior internal auditor and should review compensation levels and structures. In that respect, it should be noted that most forms of incentive pay tied to stock price, sales or other measures of financial performance potentially create a conflict of interest for an internal auditor.

An audit committee should meet regularly and privately with the internal auditor and satisfy itself that the internal auditor has direct access to the audit committee. An audit committee also should be comfortable that the internal audit staff is afforded, and avails itself of, the opportunity to stay professionally current, and otherwise has adequate resources.

C. Integrity of a Company's Financial Statements

The fundamental responsibility for a company's financial statements and disclosures rests with management and the independent auditor. However, audit committee members must have the financial literacy to understand a company's

financial reporting in order to pass appropriately on the adequacy and integrity of the company's financial statements and management's discussion and analysis (MD&A).

The complexity of the financial statements of large public companies makes it unlikely that audit committee members will be able to explain the accounting aspects of each transaction. Still, an audit committee should satisfy itself as to the business purposes, the appropriate accounting and the general risks associated with all major transactions. An audit committee should not hesitate to enlist the services of management and the independent auditor, as well as any outside advisors in special situations where it deems necessary, to help describe for the audit committee—comprehensively and comprehensibly—the financial condition of the company and its results of operations. A thorough presentation of a company's financial condition should be made by senior management to new directors as soon as possible after their election to the board.

In addition, an audit committee should discuss with the independent auditor the accounting principles and critical accounting policies and judgments made in connection with the preparation of the company's financial statements. An audit committee should discuss possible alternative accounting treatments whenever the independent auditor either has discussed these alternatives with management or believes that these alternative policies would better reflect the underlying economic transactions and values. An audit committee should understand the range of results that would follow if alternative accounting methods had been used and why the method chosen was appropriate. Audit committees, particularly of financial institutions, should also focus on the methods and assumptions used in determining the "fair value" of financial assets and, if applicable, should satisfy themselves as to the reliability of information obtained by third-party pricing services that may be used by management to develop such "fair value" estimates. With the help of the independent auditor, directors should not hesitate to "drill down" into key accounting issues and review a company's financial statements and audit report critically. While an audit committee is not expected to make any of the assumptions and judgments used in the preparation of a company's financial statements, an audit committee should understand the material assumptions and judgments, to assess their basis and their reasonableness.

An audit committee should also discuss with the independent auditor its judgments about the quality, not just the acceptability, of a company's accounting principles as applied in its financial reporting. In that respect, both the PCAOB and the SEC have recently put an emphasis on significant unusual transactions and complex financial transactions and how they are reflected in a company's

financial statements. Independent auditors are now required to identify and communicate to the audit committee a company's "significant unusual transactions", e.g. transactions that are outside the normal course of a company's business or that otherwise appear to be unusual due to their timing, size or nature, and the policies and practices management used to account for such transactions. Recent SEC initiatives have also focused on intra-quarter liquidity fluctuations and transactions such as short-term borrowings, securities lending transactions and repurchase agreements, with a view that financial reporting fairly "tells the story" of a company's financial condition and does not merely reflect such company's period-end position. An audit committee should pay particular attention to these transactions and, as mandated by the PCAOB, discuss with the independent auditor its understanding of the business rationale for such transactions. In this regard, an audit committee should bear in mind its oversight function of both the integrity of a company's financial reporting and a company's risk management and risk exposure and how they might be affected by these transactions. These initiatives are discussed in Chapter VII: "Internal Controls and Oversight Effectiveness."

An audit committee's discussions with the independent auditor should include a period during which management is excused. During these executive sessions, explicit inquiry should be made concerning significant discussions between the independent auditor and a company's chief executive officer (CEO), chief financial officer (CFO), treasurer, comptroller or other senior officers. The NYSE has stated that an audit committee should review with the independent auditor any audit problems or difficulties encountered by the independent auditor, as well as management's response. However, even when there have been no disagreements between the independent auditor and management, an audit committee should inquire as to the nature and extent of issues that the independent auditor and management spent time discussing during the audit.

As a general practice, audit committee members are entitled to rely on presentations, reports and information provided by management, the internal auditor, the independent auditor, legal counsel and other advisors, absent a reason to doubt their competence or fidelity. Of course, if an audit committee discovers credible evidence to the contrary, it must be diligent in pursuing any concerns. The SEC regulations adopted under Sarbanes-Oxley require an audit committee to have the power to engage independent counsel and other advisors as it determines necessary to carry out its duties. A company also is required to provide sufficient funding to the audit committee to pay the independent auditor and any advisors employed by the audit committee, as well as the administrative expenses of the audit committee that are incurred in carrying out its duties. While it is important for an audit committee to be able to use this power in appropriate circumstances,

it is not necessary, and often counterproductive, for audit committees routinely, or reflexively, to retain separate advisors.

D. Compliance Oversight and Risk Management

The recent financial crisis, the European sovereign debt crisis and recent major criminal and regulatory enforcement investigations (including the LIBOR-fixing cases and BP's \$4 billion in fines in connection with the Deepwater Horizon disaster) have underscored the need for global, enterprise-wide risk management and compliance oversight processes. The "enterprise risk management" approach aims at developing a robust and holistic top-down view of the key risks a company faces. Consistent with the public and political perception that inadequate risk management played a central role in the recent financial crisis and its aftermath, the SEC has increased disclosure requirements regarding the board's role in company risk oversight, including how the board administers its oversight function and the effect that this has on the board's leadership structure (*e.g.*, whether the persons who oversee risk management report directly to the board as whole, to the audit committee or another standing committee of the board) and whether and how the board, or such committee, monitors risk.

Most boards delegate oversight of risk management to the audit committee, which is consistent with the NYSE listing standard that requires an audit committee to discuss policies with respect to risk assessment and risk management. Financial companies covered by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) must have dedicated risk management committees. At other companies, the appropriateness of a dedicated risk committee—instead of delegating such task to the audit committee—will depend on the industry and specific circumstances of the company. Given the NYSE requirement, however, if a company oversees some or all risk management through a process that does not include the audit committee, these processes should nonetheless be reviewed in a general manner by the audit committee (but they need not be replaced or duplicated by the audit committee). Boards should also bear in mind that the expertise of different committees may be best suited to oversee risk management of different types of risk—an advantage that may outweigh any benefit from having a single committee specialize in risk management oversight. For instance, boards are also required to oversee risks arising from compensation policies and programs (and, to discuss such risks in the company's proxy statement to the extent they are reasonably likely to have a "material adverse effect" on the company), which oversight may be best effected by the compensation committee. The board should implement a coordinated approach toward risk oversight and ensure an effective flow of information among the directors, senior management and risk managers in

order to satisfy itself as to the adequacy of the risk oversight function and understand the company's overall risk exposures.

If a company charges the audit committee with overseeing risk management (as opposed to establishing a separate risk committee or subcommittee), the audit committee should schedule time in its agenda for periodic reviews of risk management outside the context of its role in reviewing financial statements and accounting compliance. The goal should be to permit, through one means or another, serious and thoughtful board-level attention to the company's risk management process and system.

An audit committee that oversees enterprise risk management should review whether management has adequately identified the major categories of risk that the company faces, regularly updates the risk profile of the company as such evolves and has adopted and implemented proper risk assessment and risk management strategies that are responsive to the company's risk profile and consistent with the company's business strategies. For instance, an audit committee should make inquiry as to whether each relevant category of risk is adequately addressed by the company's risk management procedures, and ensure that effective communication and coordination exist between the different departments charged with overseeing each category of risk. In carrying out its responsibilities, an audit committee may rely on the knowledge and expertise of management and other advisors, although it should be wary of any "red flags" regarding their competence or knowledge. An audit committee that oversees enterprise risk management does not have a duty to eliminate risk, nor should it be involved in actual day-to-day risk management, but it is responsible for overseeing the implementation of appropriate risk monitoring and management systems, and taking appropriate action when it becomes aware of a problem and believes management is not properly dealing with it.

Specific types of actions that an audit committee should consider taking include the following:

- review with management the company's risk appetite and risk tolerance, the ways in which risk is measured on an aggregate company-wide basis, the setting of aggregate and individual risk limits (quantitative and qualitative, as appropriate), the policies and procedures in place to hedge against or mitigate risks, and the actions to be taken if risk limits are exceeded;
- review with management the categories of risk the company faces, including any risk concentrations and risk interrelationships, as

well as the likelihood of occurrence, the potential impact of those risks and mitigating measures;

- review with management the assumptions and analysis underpinning the determination of the company's principal risks and whether adequate procedures are in place to ensure that new or materially changed risks are properly and promptly identified, understood and accounted for in the actions of the company;
- review with committees and management the board's expectations as to each group's respective responsibilities for risk oversight and management of specific risks to ensure a shared understanding as to accountabilities and roles;
- review the company's executive compensation structure to ensure it is appropriate in light of the company's articulated risk appetite and to ensure it is creating proper incentives in light of the risks the company faces;
- review the risk policies and procedures adopted by management, including procedures for reporting matters to the board and audit committee and providing updates, in order to assess whether they are appropriate and comprehensive;
- review management's implementation of its risk policies and procedures to assess whether they are being followed and are effective;
- review with management the quality, type and format of risk-related information provided to the directors and audit committee;
- review the steps taken by management to ensure adequate independence of the risk management function and the processes for resolution and escalation of differences that might arise between risk management and business functions;
- review with management the design of the company's risk management functions, as well as the qualifications and backgrounds of senior risk officers and the personnel policies applicable to risk management, to assess whether they are appropriate given the company's size and scope of operations;

- review with management the means by which the company’s risk management strategy is communicated to all appropriate groups within the company so that it is properly integrated into the company’s enterprise-wide business strategy;
- review internal systems of formal and informal communication across divisions and control functions to encourage the prompt and coherent flow of risk-related information within and across business units and, as needed, the prompt escalation of information to management (and to the board or board committees as appropriate); and
- review reports from management, independent auditors, internal auditors, legal counsel, regulators, stock analysts and outside experts as considered appropriate regarding risks the company faces and the company’s risk management function.

Where risks facing a company are highly complex, such as those involving complex derivative instruments or financial structures, the audit committee should request that management or other advisors explain the company’s positions and risks, including, perhaps, scheduling risk tutorials. An audit committee should discuss with management a sensitivity analysis or “stress test” regarding the company’s exposures and the steps management has taken to prepare for each. Under the Dodd-Frank Act, regular periodic stress tests are mandated for larger banking institutions and the audit committee of such institutions should discuss with management and oversee the integrity of these tests. An audit committee also should seek to ascertain whether these risks and plans are adequately described in the company’s risk factor and MD&A disclosure. Risk management and risk oversight in general are further discussed in our memorandum *Risk Management and the Board of Directors, an Update for 2012*, December 2011.

In addition, audit committees of regulated financial institutions should understand the principal general risk areas being identified, from time to time, by regulators through supervisory letters, speeches, enforcement or supervisory actions involving peer institutions and the like, and understand how their institutions are positioned with respect to such risks. At many financial institutions, regulators work with company personnel on a daily basis, and an audit committee should satisfy itself that there is an adequate procedure in place to promptly alert senior management to problems or tensions that develop in that relationship. Audit committees should periodically review the structure of the company’s legal and regulatory compliance departments to assure proper lines of authority and reporting, as well as the structure of the conflict review function.

Compliance officers should report to the audit committee periodically about the company's relationships with its regulators and its compliance with legal and regulatory rules, as well as with the company's internal codes of ethics, conduct and compliance (including disciplinary measures taken due to any failure to comply). If these matters have been delegated to a different committee of the board – for instance, a separate risk management committee as required for certain financial institutions under the Dodd-Frank Act – the audit committee should at least understand the scope of the other committee's processes and insure that there are no material gaps or inconsistencies between the work of the risk management committee and its own oversight responsibilities for risk management.

An audit committee should meet regularly with the general counsel, including in executive session, to monitor compliance with legal and regulatory requirements. An audit committee should oversee an annual review of the company's compliance programs and its information and reporting systems, and receive an opinion from the general counsel as to their adequacy. Where there is a serious investigation or litigation that is being handled by outside counsel, direct reports by such counsel to the board or the audit committee are desirable. These meetings and reports should be designed to permit an audit committee to monitor a company's overall compliance program. Such monitoring is especially significant, given that the U.S. Sentencing Commission has amended the Organizational Sentencing Guidelines to define more stringently the criteria for effective compliance programs and to place greater responsibility on directors and officers for the oversight and management of compliance programs. The federal sentencing guidelines promote comprehensive compliance procedures and careful monitoring by requiring that directors be knowledgeable about compliance programs, be informed by those with day-to-day responsibility over compliance and participate in compliance training. The most recent amendments to the guidelines also reward with sentencing reductions companies that provide their chief compliance officers with direct reporting responsibility to the company's audit committee (defined as the "express authority to communicate personally" to the audit committee either "promptly" when reporting potential criminal conduct or at least annually when evaluating the implementation and effectiveness of the compliance and ethics program).

An audit committee also should review the company's internal controls over financial reporting. This is a critical area in light of Sarbanes-Oxley's mandate that a company's independent auditor conduct an audit of the company's internal controls. An audit committee's responsibilities for oversight of internal control over financial reporting and compliance with the SEC and PCAOB

requirements are discussed in Chapter VII: “Internal Controls and Oversight Effectiveness.”

E. Managing the Intersection of Management, Internal Audit and Independent Auditor

An audit committee is the critical nexus among the independent auditor, the internal auditors and management. An audit committee must have direct, unmediated access to each of these three groups and must be able to communicate in confidence with them. This permits an audit committee, in overseeing the performance of these three groups, to enlist the services of each in order to assist in monitoring the others. Thus, in separate meetings, each group should be encouraged to offer suggestions as to how the performance of the others can be improved.

II

Audit Committee Charter

Both the NYSE and NASDAQ have specific rules regarding audit committee charters. Also, while not specifically requiring a charter, federal statutes and the rules of the SEC prescribe various specific responsibilities to audit committees. This Chapter discusses key aspects of such requirements.

A. NYSE Requirements

The NYSE requires that each audit committee have a formal written charter, approved and adopted by the board. An audit committee charter must provide for an annual performance evaluation of the audit committee. It also is good practice for an audit committee to review and reassess the adequacy of its charter on a regular basis.¹

1. Specific Duties and Responsibilities

An audit committee charter must set out in sufficient detail the specific duties and responsibilities of the audit committee. These specific duties derive in part from outside requirements, such as applicable statutes, the rules promulgated by the SEC and other relevant regulatory bodies, the NYSE's listing rules, and best practices derived from suggestions by accounting and other experts, and in part, from internal requirements reflecting the company's particular business and corporate structure. These duties and responsibilities must include:

- Being directly responsible for the appointment, compensation, retention and oversight of the company's independent auditor (including resolution of financial reporting disputes between management and the independent auditor) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the company, and ensuring the direct reporting relationship of the independent auditor to the audit committee. Companies still may seek shareholder approval or ratification of independent auditor selection, but the audit

¹ NYSE Listed Company Manual, Rule 303A.07.

committee must be responsible for making the recommendation or nomination to shareholders.

- Obtaining and reviewing, at least annually, a report from the company's independent auditor describing such independent auditor's internal quality-control procedures, any material issues raised by the most recent internal quality-control review or peer review of the independent auditor, or by any inquiry or investigation by governmental or professional authorities within the past five years regarding an independent audit carried out by such independent auditor, any steps taken to deal with such issues and (to assess the auditor's independence) all relationships between the independent auditor and the company.
- Meeting to review and discuss the annual and quarterly financial statements with management and the independent auditor (including the company's specific disclosures in MD&A).
- Discussing earnings, press releases, financial information and earnings guidance provided to analysts and ratings agencies.
- Discussing the company's policies with respect to risk assessment and risk management.
- Holding periodic mandatory executive sessions with each of management, internal auditors and the independent auditor.
- Reviewing with the independent auditor any audit problems or difficulties (including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management) and management's response. Among the items an audit committee may want to review with the independent auditor are:
 - any accounting adjustments that were noted or proposed by the independent auditor but were "passed" (as immaterial or otherwise);
 - any "management" or "internal control" letter issued, or proposed to be issued, by the independent auditor to the company; and

- responsibilities, budget and staffing of the company's internal audit function.
- Having the authority to engage independent counsel and other advisors, and having sufficient funding to pay these advisors, as well as the independent auditor and ordinary administrative expenses incurred in the course of carrying out its duties.
- Setting clear hiring policies for employees or former employees of the independent auditor, taking into account the pressures that may consciously or subconsciously exist for auditors seeking a job with the company they audit.
- Establishing procedures for receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of concerns about questionable accounting or auditing matters.
- Reporting regularly to the board.

Each NYSE issuer also should conduct an appropriate review of all related-party transactions required to be disclosed in the company's public filings for potential conflicts of interest on an ongoing basis, and such transactions should be subject to the approval of the audit committee or a comparable body. See Chapter VIII: "Audit Committee Report, Disclosure Obligations and Financial Reporting Integrity."

2. Model Audit Committee Charter for NYSE-listed Companies

Attached as *Exhibit A* is a model audit committee charter for NYSE-listed companies. Note that this audit committee charter is only a model intended to reflect the requirements of an audit committee charter for a NYSE-listed company. Companies should customize the model to their particular needs and circumstances.

B. NASDAQ Requirements

NASDAQ also requires that an audit committee have a formal written charter. In addition, NASDAQ requires that an audit committee review and reassess the adequacy of its charter on an annual basis.²

1. Specific Duties and Responsibilities

An audit committee charter must specify the scope of the audit committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements. These specific responsibilities derive in part from outside requirements such as applicable statutes, the rules of the SEC and other relevant regulatory bodies, NASDAQ's listing rules, and best practices derived from suggestions by accounting and other experts, and in part from internal requirements reflecting the company's particular business and corporate structure. In particular, the charter must provide that the audit committee has the following duties and responsibilities:

- Ensuring that the audit committee receives from the independent auditor a formal written statement delineating all of the relationships between the independent auditor and the company.
- Actively engaging in a dialogue with the independent auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor.
- Taking, or recommending that the full board take, appropriate action to oversee the independence of the outside auditor.
- Overseeing the accounting and financial reporting processes of the company and the audits of the financial statements of the company.
- Being directly responsible for the appointment, compensation, retention and oversight of the independent auditor (including resolution of disputes between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or

² NASDAQ Listing Rule 5605.

attest services for the company, and ensuring the direct reporting relationship of the independent auditor to the audit committee.

- Establishing procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of concerns about questionable accounting or auditing matters.
- Having authority to engage independent counsel and other advisors.
- Having sufficient funding to pay such advisors as well as the independent auditor and ordinary administrative expenses incurred in the course of carrying out its duties.

In addition, each NASDAQ issuer must conduct an appropriate review of all related-party transactions required to be disclosed in the company's public filings for potential conflict-of-interest situations on an ongoing basis, and such transactions should be subject to the approval of the audit committee or a comparable body. See Chapter VIII: "Audit Committee Report, Disclosure Obligations and Financial Reporting Integrity."

2. Model Audit Committee Charter for NASDAQ-listed Companies

Attached as *Exhibit B* is a model audit committee charter for NASDAQ-listed companies. Note that this audit committee charter is only a model intended to reflect the requirements of an audit committee charter for a NASDAQ-listed company. Companies should customize the model to their particular needs and circumstances.

III

Audit Committee Meetings and Chairperson

An audit committee must meet sufficiently often to address its duties and should devote adequate time to planning the timing and agenda and to notifying participants of its meetings. The minimum number of meetings that an audit committee should hold annually is four. The precise number of meetings an audit committee should hold depends upon various factors, including the scope of the audit committee's responsibilities and the size and business of the company. Neither the SEC nor the major securities markets have specific guidelines in this regard, although the NYSE requirement that an audit committee meet to discuss the company's annual and quarterly financial statements effectively means that an audit committee must meet at least quarterly.

The SEC requires that the proxy statement disclose the number of audit committee meetings held during the prior fiscal year, as well as the name of any director who attended fewer than 75% of the aggregate number of meetings of the full board and the committees on which such director served. Starting this year, Institutional Shareholder Services (ISS), the corporate governance and proxy adviser, will recommend that shareholders vote "against" or "withhold" their votes for (1) individual directors who attended less than 75% of the number of full board and committee meetings for the period for which they served, unless an acceptable reason is disclosed in an SEC filing, and (2) individual directors for whom the proxy disclosure is insufficient to determine whether such directors met the 75% attendance threshold.

A. Regular Meetings

An audit committee should meet prior to the filing of the company's quarterly and annual reports to discuss the proposed disclosures in such reports and related earnings announcements. Note that an audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be fulfilled in a general manner (*i.e.*, through discussion of the types of information to be disclosed and the type of presentation to be made). An audit committee need not discuss in advance each earnings release or each instance in which a company may provide earnings guidance. After each of these meetings, an audit committee should meet separately with each of management, the independent auditor and the internal auditors, and in executive session.

In addition to reviewing a company's financial information and reports, the audit committee should annually discuss the audit plan and the performance, retention and compensation of the independent and internal auditors. The factors an audit committee should evaluate in assessing the independent auditor's independence and competence are discussed in Chapter V: "Relationship with the Independent Auditor."

An audit committee also should schedule time to address its other responsibilities, including oversight of the functioning of internal controls, risk assessment guidelines and review of related-party transactions. See Chapter VII: "Internal Controls and Oversight Effectiveness." Management and the independent auditor should bring to the attention of the audit committee any significant deficiencies in, or problems with, the company's internal controls and any steps that have been taken to remedy these deficiencies and problems. An audit committee also should be apprised of complaints from whistleblowers or communications from regulatory agencies regarding the company's accounting, internal controls or auditing matters. See Chapter IX: "Audit Committee Whistleblower Rules and Ethics Codes."

Audit committee meetings, like board meetings, have become longer and more substantive than was common practice before the enactment of Sarbanes-Oxley and related reforms. Many companies often schedule their audit committee meetings for the day prior to full board meetings to permit adequate time to consider and discuss agenda items.

Given the above, an audit committee should create at the beginning of the fiscal year a responsibilities checklist or calendar that identifies the tasks to be performed and their timing according to its charter to ensure that all tasks identified in the charter are being performed during the year. Attached as *Exhibit C* is a model audit committee responsibilities checklist for NYSE-listed companies. Note that this audit committee responsibilities checklist is only a model intended to reflect the requirements included in the model audit committee charter for a NYSE-listed company attached as *Exhibit A*. Companies should customize the model to their particular needs and circumstances and in accordance with the tasks identified in their audit committee charter.

B. Audit Committee Meeting Minutes

Audit committees typically prepare minutes of their meetings, including their executive sessions where significant matters were discussed. It is common and prudent practice for such minutes to identify the topics discussed at the meetings rather than attempt to include detailed summaries. Enough information

should be recorded, however, to establish that the audit committee sought the information it deemed relevant, reviewed the information it received and otherwise engaged in whatever actions and discussions it deemed appropriate in light of the then-known facts and circumstances. It bears emphasis that courts and regulators frequently regard minutes as the best record of what happened at a board or committee meeting. As a result, audit committee minutes should reflect the substance of the discussions at audit committee meetings, the time the audit committee spent on significant issues, and make clear reference to the documents that were furnished to the directors before and after an audit committee meeting. If there were significant discussions with or among directors prior to or after an audit committee meeting, consideration should be given to making appropriate reference to them in the minutes. Drafts of minutes should be prepared promptly after an audit committee meeting and circulated promptly to the directors involved in the audit committee meeting.³

An audit committee should provide a report or a copy of the minutes of each audit committee meeting to the full board (see Chapter VIII: “Audit Committee Report, Disclosure Obligations and Financial Reporting Integrity”). Directors who do not serve on the audit committee should have the opportunity to ask the audit committee questions, including about financial reporting, audit process, internal controls and other matters relating to the audit committee’s responsibilities or the topics covered at audit committee meetings. Some audit committees also prepare an annual report to the full board summarizing the audit committee’s activities, conclusions and recommendations of the prior year and the proposed agenda for the upcoming year.

C. Audit Committee Chairperson

While the effectiveness of an audit committee turns on the diligence and energy of each of its members, an audit committee chairperson has a special role. An audit committee chairperson is responsible for ensuring that audit committee meetings run efficiently and that each agenda item receives the appropriate level of attention. An audit committee chairperson also often is the key contact

³ In one Delaware decision, *In re Netsmart Technologies, Inc. Shareholders Litigation*, C.A. 2563-VCS (Mar. 14, 2007), Vice Chancellor Leo Strine criticized the common practice of providing drafts of board and committee meeting minutes to directors for approval a substantial (several months, in the case in question) period of time after the meeting. In the words of Vice Chancellor Strine, this practice is “to state the obvious, not confidence-inspiring.”

between the audit committee and the other board members, senior management, internal audit staff and the independent auditor.

In choosing an audit committee chairperson, the board should seek to select a director with leadership skills, including the capability of forging productive working relationships (among committee members and with other board members, senior management, internal audit staff and the independent auditor). An audit committee chairperson often is an audit committee financial expert (see Chapter IV: “Audit Committee Membership”). No matter who is appointed audit committee chairperson, as part of the annual review of the audit committee, the audit committee and the board should review the combination of talents, knowledge and experience of audit committee members to assure that the audit committee has the right mix.

D. Consideration of Additional Compensation for Audit Committee Members and Chairperson

The increased time commitment demanded from directors by the current regulatory environment may call for additional director compensation, and this pressure will likely be greatest with respect to service on the audit committee. Although there are reasons that would support a judgment not to discriminate in compensation among directors (*e.g.*, concerns that greater compensation for audit committee members could create or exacerbate a feeling on the part of other directors that financial disclosure and statements in MD&A are not really their responsibility but that of others who are paid more to deal with them), reasonable additional fees for audit committee members are legal and may be appropriate. Additional compensation for committee chairs is another way to give fair compensation for those most burdened with responsibilities. In most public companies, the compensation committee reviews the compensation for board members, including directors serving on audit committees.

IV

Audit Committee Membership

A. Composition of the Audit Committee

An audit committee must be composed solely of directors who meet the listing standards for director independence of the company's particular securities market, as well as the audit committee independence standards of the securities market as prescribed under the federal securities laws.

The major securities markets require a minimum of three members on an audit committee, and an audit committee typically consists of three to five independent directors. In addition, mindful of the time commitment necessary to being an effective audit committee member, the NYSE discourages directors from serving on too many audit committees. Under the NYSE's listing standards, if a company does not limit to three or less the number of public company audit committees on which its audit committee members may serve, and if an audit committee member simultaneously serves on the audit committees of more than three public companies, then the board must affirmatively determine that such simultaneous service does not impair the ability of the director to serve effectively on the company's audit committee. This determination must be disclosed in the company's proxy statement. Every prospective audit committee member should evaluate carefully the existing demands on his or her time before undertaking this commitment.

B. Financial Literacy and Financial Expertise

An audit committee should be comprised of individuals or members with sufficient understanding of the language of accounting and corporate finance to act as effective overseers of the integrity of a company's financial reporting process and its financial statements.

1. Financial Literacy

The major securities markets require that each member of an audit committee be able to read and understand fundamental financial statements.⁴

Under the NYSE listing standards, it is the board's duty to make a determination, in its business judgment, that each member of the audit committee is financially literate. The board's determination of financial literacy may be expressed: *"By reason of education or experience and in light of all of the factors of which the Board of Directors has become aware, it appears that [Name of Director] possesses such degree of financial literacy as is required to select and oversee the performance of the independent and internal auditors; to monitor the integrity of the Corporation's financial statements; and otherwise to faithfully execute the charter of the Audit Committee."*

Members should be adjudged competent when they are selected and agree to serve. Companies should also provide audit committee members during their tenure with professional advice and continuing education in evolving audit committee concepts and responsibilities, including updates on important accounting, auditing, finance and legal developments, and should consider the usefulness of regular tutorials (by internal and external experts) to help keep directors abreast of current industry and company-specific developments and specialized issues (whether legal, accounting or operational).

2. Financial Expertise

The NYSE requires that at least one member of the audit committee have accounting or related financial management expertise as determined by the board in its business judgment. The expertise requirement generally is fulfilled by a background in finance that permits a board to conclude in good faith that the director is capable of understanding the most complex issues of accounting and finance that are likely to be encountered in the course of a company's business. The NYSE permits a board to presume that an individual who is an "audit committee financial expert" within the meaning of the SEC's rules (described in Section 3 below) has the requisite "accounting or related financial management expertise" to satisfy the NYSE's listing standards.

⁴ The NYSE permits members to become financially literate within a reasonable period of time after being appointed to an audit committee but the NASDAQ does not.

Under the NASDAQ rules, at least one member of an audit committee must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication, including being or having been a CEO, CFO or other senior officer with financial oversight responsibilities. An individual who is an "audit committee financial expert" within the meaning of the SEC's rules is deemed to fulfill this latter requirement.

3. Audit Committee Financial Expert

Under the direction of Sarbanes-Oxley, the SEC issued rules requiring a public company to disclose in its annual reports (or annual proxy statements) whether any member of its audit committee qualifies as an audit committee financial expert (as defined below), as determined by the board in its business judgment. If a board determines that there is at least one audit committee member who is a financial expert, then the company must disclose the name of at least one such member and whether such member is independent. If no audit committee member qualifies, then the company must state why its audit committee lacks a financial expert. If a board determines that the audit committee has more than one member who qualifies as a financial expert, the company may, but is not required to, disclose the names of those additional members. If a company does disclose the names of any such additional financial experts serving on the audit committee, it also must indicate whether they are independent.

The SEC regulations define an "audit committee financial expert" as an individual who has *all* of the following attributes:

- an understanding of GAAP and financial statements;
- the ability to assess the general application of GAAP in connection with accounting for estimates, accruals and reserves;
- experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that can reasonably be expected to be raised by the company's financial statements, or experience actively supervising persons engaged in such activities;
- an understanding of internal controls and procedures for financial reporting; and
- an understanding of audit committee functions.

An individual must have acquired the five audit committee financial expert attributes listed immediately above through any one or more of the following:

- 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;
- experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;
- experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or
- other relevant experience.

In addition to CFOs, chief accounting officers and public accountants, the SEC's definition enables many CEOs and people actively engaged in professions such as investment banking, venture capital investment and financial analysis to qualify as audit committee financial experts. The SEC noted, however, that the mere fact that a CFO reports to a CEO would not necessarily qualify the CEO as an audit committee financial expert unless the CEO engaged in active supervision of the CFO.

It is important to note that there should be no additional liability under federal law for an audit committee financial expert. An individual who is determined by a board to be an audit committee financial expert will not be deemed to be an *expert* (a term that has special legal significance under the Securities Act of 1933) for any purpose as a result of being so designated, and will not be subject to any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such individual as a member of the audit committee and board in the absence of such designation. Nor does the designation of a member of the audit committee as an audit committee financial expert alter or affect the duties, obligations or liability of any other member of the audit committee or the board. Although this safe harbor provision does not expressly apply to state laws, the SEC has stated that it did not believe the designation of a director as an audit committee financial expert would increase that individual's exposure to liability under state law.

C. Independence Criteria of the Major Securities Markets

The major securities markets require the audit committees of all listed companies to consist *entirely* of independent directors (with a limited exception under the NASDAQ rules, discussed below). All independent directors must be identified as independent in proxy disclosure. Both the NYSE and NASDAQ have adopted specific rules as to who can qualify as an independent director. The NYSE and NASDAQ independence rules are in addition to the audit committee independence requirements imposed by the federal securities laws (discussed later in this Chapter), and both the NYSE and NASDAQ explicitly require compliance with those independence requirements. Both markets require the board of any listed company to make an affirmative determination, which must be publicly disclosed (along with the basis for such determination), that each director designated as “independent” has no material relationship with the company that would impair his or her independence. Such disqualifying relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, ownership of a significant amount of stock, or affiliation with a major shareholder, should not, in and of itself, preclude a board from determining that an individual is independent. In addition, the revised listing standards of both the NYSE and NASDAQ set forth circumstances that constitute *per se* bars to a determination of independence.

As a general matter, a director will be viewed as independent only if the director is a non-management director free of any family relationship or any material business relationship, other than stock ownership and the directorship, with the company or its management, and has been free of such relationships for three years. The following relationships bar a director from satisfying the independence standards of the NYSE or NASDAQ, as applicable:

- the director is, or has been within the last three years, an employee⁵ of the company or of any parent or subsidiary of the company;⁶

⁵ Both the NYSE and NASDAQ provide that former employment as an interim executive officer does not, in and of itself, disqualify a director from being considered independent following such employment. Under the NASDAQ rules, however, such interim employment cannot last more than one year. The NASDAQ rules stress, however, that the board still must consider whether such former employment would interfere with a director’s exercise of independent judgment in carrying out the responsibilities of a director.

⁶ Both the NYSE and NASDAQ define “company” to include a parent or subsidiary in a consolidated group with the company.

- an immediate family member of the director is, or has been within the last three years, an executive officer of the company or of any parent or subsidiary of the company;
- the director is a current partner (or employee, under the NYSE rules) of a firm that is the company's external auditor (or internal auditor, under the NYSE rules);
- an immediate family member of the director is a current partner of a firm that is the company's external auditor (or internal auditor, under the NYSE rules);
- under the NYSE rules, an immediate family member of the director is a current employee of the company's internal or external auditor and personally works on the company's audit;
- the director or an immediate family member was within the last three years a partner or employee of a firm that is the company's external auditor (or internal, under the NYSE rules) and worked on the company's audit at any time within that time;
- under the NYSE rules, the director or an immediate family member of the director is, or has been within the last three years, an executive officer of another company where any of the company's present executive officers at the same time serves or served on that other company's compensation committee;
- under the NASDAQ rules, the director or an immediate family member of the director is an executive officer of another entity where at any time during the past three years any of the executive officers of the company served on the compensation committee of such other entity;
- under the NYSE rules, the director is a current employee, or an immediate family member of the director is a current executive officer, of a company that has made payments to, or received payments from, the company for property or services in an amount that, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues;

- under the NASDAQ rules, the director, or an immediate family member of the director, is a partner, controlling shareholder or an executive officer of any organization to which the company made, or from which the company received, payments for property or services, in the current 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;⁷
- under the NYSE rules, the director or an immediate family member of the director has received during any 12-month period within the last three years more than \$120,000 in direct compensation⁸ from the company (other than in director and committee fees and pension or other forms of deferred compensation for prior service (*provided* that such compensation is not contingent in any way on continued service) and compensation received by an immediate family member for service as a non-executive employee);⁹
- under the NASDAQ rules, the director or an immediate family member of the director accepted any compensation¹⁰ from the company in excess of \$120,000 during any 12-month period within the last three years (other than director or committee fees, benefits under tax-qualified retirement plans, or nondiscretionary

⁷ The NASDAQ excludes from the calculation payments arising solely from investments in the company's securities and payments under nondiscretionary charitable contribution matching programs.

⁸ The NYSE focuses on direct compensation. Consequently, investment income from the company (such as dividend or interest income) would not count toward the \$120,000 threshold. In addition, the NYSE's focus on direct compensation means that *bona fide* and documented reimbursement of expenses also may be excluded. Note, however, that the NYSE considers payments to a director's solely owned business entity to be direct compensation.

⁹ The NYSE also permits companies to exclude from the \$120,000 threshold compensation received by a director for former service as an interim executive officer of the company.

¹⁰ Unlike the NYSE, the NASDAQ rule is not limited to direct compensation. Accordingly, even indirect compensation must be included in the calculation of the \$120,000 threshold. For instance, NASDAQ provides that political contributions to the campaign of a director or an immediate family member of the director would be considered indirect compensation, and, as such, must be included for purposes of the \$120,000 threshold.

compensation, and compensation paid to an immediate family member for service as a non-executive employee);¹¹ and

- under the NASDAQ rules, the director, while serving as an interim executive officer, 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.

Independence determinations must be based on all relevant facts and circumstances. Thus, even if a director meets all the bright-line criteria set out above, a board is still required to make an affirmative determination that the director has no material relationship with the company. Under the NYSE rules, the principles underlying the determination of independence also must be publicly disclosed in the company's annual report or proxy statement. In addition, under the SEC disclosure rules and the NYSE rules that mandate compliance with such disclosure rules, for each director that is identified as independent, a company must describe, by specific category or type, any transactions, relationships or arrangements (other than transactions already disclosed as related-party transactions) that were considered by the board under the company's applicable director independence standards (*e.g.*, the NYSE or NASDAQ independence rules).

Under the NASDAQ rules, one director who does not meet its independence criteria may be appointed to the audit committee if the board, under exceptional and limited circumstances, determines that membership on the audit committee by the individual is required in the best interests of the company and its shareholders, *provided* that:

- such individual meets the SEC's independence criteria (discussed below);
- such individual is not a current officer or employee or family member of an officer or employee;

¹¹ The NASDAQ permits companies to exclude from the \$120,000 threshold compensation received by a director for former service as an interim executive officer of the company as long as such interim employment did not last longer than one year. The NASDAQ rules stress, however, that the board still must consider whether such compensation would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director.

- the board discloses, in the next annual proxy statement subsequent to such determination, the nature of the relationship and the reasons for that determination; and
- a member appointed under this exception serves no longer than two years and does not chair the audit committee.

D. Audit Committee Member Independence Standards under Federal Securities Laws

In addition to the requirement that all members of an audit committee be independent as defined by the listing standards of the securities market(s) on which a company's securities are traded, audit committee members of public companies also must satisfy the special definition of audit committee independence set forth in Sarbanes-Oxley and SEC Rule 10A-3.

This special definition is, in some respects, more stringent than the major securities markets' definitions of director independence. Audit committee members may not, directly or indirectly, receive any compensation from the company—such as consulting, advisory or similar fees—other than their director fees, and may not be affiliates of the company. The affiliate disqualification covers any individual that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the company. The prohibition on acceptance of compensatory fees precludes audit committee service if the company makes any such payments either directly to the director, or indirectly, to the director's spouse, minor child or stepchild, child or stepchild sharing a home with the director, or to law firms, accounting firms, consulting firms, investment banks or financial advisory firms in which the director is a partner, member, managing director, executive officer or holds a similar position.

E. Model Audit Committee Member Financial Expertise and Independence Questionnaire

Attached as *Exhibit D* is a model audit committee member financial expertise and independence questionnaire.

F. Getting Prospective or New Audit Committee Members Up to Speed

Assuming they comply with the relevant independence and financial expertise requirements outlined in this Chapter, prospective and new audit committee members also should make sure they obtain whatever background information they deem appropriate. At a minimum, they will need to understand

the duties and responsibilities of an audit committee, the expected time commitment, and an overview of the business and financials of the company. Prospective and new members also should comprehend the key risks, claims and litigation facing the company, and its internal controls and financial reporting systems. Reviewing recent meeting books (given to audit committee members prior to audit committee meetings) and minutes of the audit committee may prove helpful in this regard.

In particular, a prospective or new audit committee member might consider asking the following questions:

- Are the company's public disclosures, especially regarding financial affairs and legal and regulatory compliance, clear, transparent and comprehensible?
- Who are the company's principal advisors and independent auditor and what are their roles?
- What are the audit committee's mandate and responsibilities as set forth in its charter?
- Who are the audit committee members and what are the procedures followed by the audit committee?
- What skills, knowledge or experience will I bring to the audit committee and what role is intended for me?

G. Term of Service

There is no rule regarding length of audit committee service. When assessing how long a director should serve on an audit committee, the board needs to strike the right balance. An audit committee with high turnover may not be as effective as possible given the investment of time required of audit committee members to understand a company's business, financial and other relevant information. An audit committee with no or very low turnover risks losing the benefits and perspective that a new member might bring. To accommodate these competing goals, a board should consider periodically rotating qualified directors onto the audit committee.

V

Relationship with the Independent Auditor

The PCAOB is the primary regulator of independent public accounting firms. Every public accounting or audit firm that prepares, issues or participates in the preparation or issuance of public company audits must register with the PCAOB, including non-U.S. accounting or audit firms that audit non-U.S. companies listed in the United States or that otherwise file reports with the SEC. The PCAOB has authority to (1) adopt auditing, quality control, ethics, independence and other standards relating to the preparation of audit reports, (2) enforce the applicable SEC and PCAOB requirements, and (3) conduct inspections and, where needed, investigations of public accounting or audit firms registered with the PCAOB. SEC rules and PCAOB rules both regulate the relationship between an audit committee and the independent auditor, mandating the audit committee to oversee an auditor's independence and performance.

A. Audit Committee Oversight of Auditor Independence and Performance

An audit committee must make a specific inquiry about an auditor's independence and competence. An audit committee should present its conclusions with respect to an independent auditor to the full board.

1. Independence Inquiry

The importance of ensuring compliance with the SEC's auditor independence requirements is clearly apparent, given that a public company must have its financial statements and internal controls audited by an "independent" auditor.

As a general matter, the SEC will not recognize an auditor as independent *vis-à-vis* an audit client if the auditor is not capable of exercising objective and impartial judgment on all issues encompassed within the auditor's engagement. In determining whether or not this standard has been met, the SEC will consider all relevant circumstances, including all relationships between the accountant and the audit client, focusing on whether any such relationship: (1) creates a mutual or conflicting interest between an auditor and the audit client; (2) places an auditor in the position of auditing its own work; (3) results in an auditor acting as management or as an employee of the audit client; or (4) places an auditor in a position of being an advocate of an audit client.

As part of the inquiry concerning an auditor's independence, an audit committee should examine carefully the scope of work that the independent auditor has undertaken for the company and the value of that work to the auditor, including any related fees. An independent auditor also should be vetted carefully for any relationships that might be perceived as affecting its independence, such as the presence of its former employees, or relatives of its employees, on a company's audit committee or among a company's senior financial staff, as well as any financial or other business relationships between an independent auditor and a company or its officers, directors or substantial shareholders. Provision of certain non-audit services to a company or services to members of an audit committee or to a company's senior executives also may impair the independent auditor's independence. See Chapter VI: "Prohibited Independent Auditor Activities and Pre-approval Policy."

In addition, the PCAOB has adopted ethics and independence rules¹² that require an audit firm to disclose in writing to the audit committee all relationships between the auditor and the company that, in the auditor's professional judgment, may reasonably be thought to bear on its independence and to affirm to the audit committee that the auditor is independent. Such written communication should be discussed with and addressed to the audit committee before the initial engagement of the auditor, and on at least an annual basis thereafter. The rules also require the audit firm to document the substance of its discussion with the audit committee. Relatedly, a company is required to disclose in its annual proxy statement whether the audit committee received the written disclosures and letters required by these PCAOB rules and whether it has discussed with the auditor its independence.¹³

a. Rotation of Audit Partners (and Audit Firms)

An important aspect of auditor independence is the auditor's partner rotation and other staffing and personnel policies. For each client of a registered public accounting firm, both the lead and concurring audit partners must be rotated at least once every five years, with a five-year cooling-off period thereafter. Audit partners who are not lead or concurring partners must be rotated every seven years, with a two-year cooling-off period thereafter. The SEC interprets the rotation requirements as covering tax or other specialty (non-audit)

¹² PCAOB, Ethics and Independence Rule 3526, SEC Release No. 34-58415 (August 22, 2008).

¹³ Item 407(d)(3)(i)(C) of Regulation S-K, SEC Release Nos. 33-8961; 34-5856 (September 26, 2008).

partners who serve as the “relationship” partner for a company and have a high level of contact with its management and its audit committee.

There is currently no requirement that the auditing firm itself be rotated, although the NYSE recommends that each audit committee consider whether, in the interest of assuring continuing auditor independence, there should be regular rotation of the independent auditor. In August 2011, the PCAOB proposed making such rotation mandatory, particularly for audit tenures of 10 years or more, to more effectively ensure auditor independence, objectivity and professional skepticism.¹⁴ The proposed rule has been forcefully opposed by audit firms and other stakeholders, the U.S. Chamber of Commerce as well as Congress, based on arguments that a mandatory audit firm rotation would increase risks of audit failures, interfere with the role of audit committees to hire and fire independent auditors and give rise to substantial costs and disruptions for companies. As a result, the proposed rule is currently on hold in the United States. However, similar proposals are under review in the European Union and other jurisdictions and their adoption could re-open the debate in the United States.

If a change in independent auditor is being considered, an audit committee should review:

- any disagreements within the past three years between the company’s senior financial management and the current independent auditor regarding accounting and financial statements;
- any consultations within the past three years between the company and a proposed new auditor regarding the application of accounting principles; and
- whether, in seeking an engagement, a proposed new auditor has proposed a change in accounting principles, or the manner in which the company has been doing business, which would result in a material increase in reported revenues or earnings or in a material change in assets or liabilities.

¹⁴ PCAOB Release No. 2011-006, *Concept Release on Auditor Independence and Audit Firm Rotation*, PCAOB Rulemaking Docket No. 37 (August 16, 2011). Similarly, in November 2011, the European Commission proposed limiting the period in which an independent auditor can perform audits for public companies to six years, with a nine-year window for companies opting for voluntary joint audits.

b. *Business and Financial Relationships between the Company and the Independent Auditor*

Other than the provision of professional services, an independent auditor is restricted from having any direct or material indirect business relationship with the company or its officers, directors or substantial shareholders. This restriction extends to certain categories of individuals called “covered persons”:

- all members of the audit engagement team;
- any partner or employee with supervisory authority over the audit (including senior members of the independent auditors);
- any other partner or managerial employee who has provided at least ten hours of non-audit services to the company during the audit engagement period or who expects to provide at least ten hours of such services on a recurring basis; or
- any partner from the same office in which the lead audit engagement team partner primarily practices in connection with the audit.

Certain financial relationships between an auditor and a company will also prevent an auditor from being considered independent under the SEC rules. Specifically, an independent auditor, a covered person and any immediate family member of a covered person, cannot have any direct investment in the company, such as stocks, bonds, notes, options or other securities. In addition, a company and its officers or directors cannot lend to or borrow from its independent auditor or from any of the individuals referred to in the preceding sentence.

c. *Employing Members of the Independent Auditor*

Under the SEC rules, a company’s auditor will not be independent if a current partner or professional employee of the auditor is employed by the company or serves on its board. In addition, the employment by a company, in an accounting or financial reporting oversight role,¹⁵ of a close family member of a

¹⁵ The SEC defines a person in a “financial reporting oversight role” as someone who is in a position to, or does, exercise influence over the contents of the financial statements and related information, including MD&A, or anyone who prepares such statements or information. This would include a director, chief
(footnote continued)

“covered person” (defined as (1) any person on the audit engagement team, (2) any partner or employee of the independent auditor with supervisory authority over the audit (including senior members of the independent auditor), (3) any other partner or managerial employee of the independent auditor who has provided at least ten hours of non-audit services to the company during the audit engagement period or who expects to provide at least ten hours of non-audit services to the company on a recurring basis, or (4) any partner from the same office in which the lead audit partner primarily practices in connection with the audit), automatically will cause the auditor not to be considered independent.

An auditor’s independence also will be deemed impaired if the company employs a former partner or professional employee of the audit firm in an accounting or financial reporting oversight role, and if the former partner or professional employee maintains some influence over the independent auditor’s operations or financial policies, has a capital balance remaining with the independent auditor, or has a financial arrangement with the independent auditor (other than certain fixed payments, such as pursuant to a retirement plan).

In addition, under the PCAOB’s independence rules, ongoing discussions between a company and a member of its audit engagement team (or an individual in a position to influence the audit engagement) over potential future employment of such individual by the company taint the auditor’s independence. Such individuals must be removed immediately from the audit engagement and the independent auditor then must review such individual’s work during the audit engagement. While the PCAOB standard is directed at independent auditors (rather than their clients), public companies should be mindful of this standard and exercise care in approaching any member of their independent auditor about the possibility of employment with the company. It is advisable for companies to establish procedures that company personnel must abide by before approaching, and during discussions with, members of the independent auditor about the possibility of employment with the company. As noted in Chapter II: “Audit Committee Charter,” the charter of an NYSE-listed company’s audit committee must charge the audit committee with the responsibility to set clear hiring policies for employees or former employees of the independent auditor.

financial officer, chief operating officer, general counsel, chief accounting officer, controller, director of internal audit, director of financial reporting, treasurer or any equivalent position. The SEC takes the position that every member of an audit engagement team is subject to a one-year “cooling-off” period prior to working in any such position for the audited company or any of its subsidiaries.

A one-year “cooling-off” period is required before members of an audit engagement team for a public company can accept employment with that company in a “financial reporting oversight role.” The cooling-off period runs from the date such individual last served on the audit engagement team until one year after the date the company files its annual financial statements for the period in which such individual served on the audit engagement team. In other words, the restriction requires that the independent auditor complete one annual audit subsequent to when the conflicted individual served on the audit engagement team.

d. Compensation for Non-Audit Engagements

Under the SEC rules, the independence of an auditor is automatically compromised if, at any point during an engagement period, any audit partner receives compensation (including indirectly, such as through allocation of equity shares in the audit firm) based on the audit partner procuring engagements with the audit client to provide non-audit services.

2. Competence Inquiry

When assessing an independent auditor’s competence, an audit committee should pay particular attention to:

- the independent auditor’s expertise in the company’s industry;
- the education and experience of the key partners on the audit team and any partners who are expected to replace them in the near future under the partner rotation requirements;
- if a company has significant operations outside the United States, information with respect to an independent auditor’s offices or affiliates in the relevant countries;
- the scope, plan and staffing of the independent auditor’s audit and attestation services, including whether the proposed staffing and fees are adequate and appropriate relative to the scope of the work contemplated; and
- any recent inquiries or investigations of, or litigations against, an independent auditor by governmental or professional regulators, whether an independent auditor is subject to any orders or consent decrees of the SEC, PCAOB or other regulator, material

settlements, adjudications of liability or other involvement in notable private litigation, as well as any other material reputational issues.

An audit committee should make inquiry as to whether an independent auditor's registration with the PCAOB and its annual reports and other recent materials filed with the PCAOB are in good order. An audit committee should also inquire about the results of an independent auditor's inspection by the PCAOB, noting that such discussions "can have value for an audit committee not only in relation to the audit committee's oversight and evaluation of the audit engagement generally, but also in relation to the audit committee's role in the oversight of the company's financial reporting process."¹⁶ To foster such discussions, the PCAOB has identified questions that an audit committee may wish to ask an independent auditor, both during the inspection and when the PCAOB has issued a final inspection report, including:

- whether the company's audit has been selected for review in an inspection and, if so, information regarding the areas of the audit being reviewed and whether any deficiency in the audit was identified;
- whether anything suggests the possibility that an audit opinion on the company's financial statements is not sufficiently supported or that otherwise reflects negatively on the independent auditor's performance on the audit; and what the audit firm has done or plans to do about it;
- whether a question has been raised about the fairness of the company's financial statements or the adequacy of its disclosures;
- whether a question has been raised about the auditor's independence relative to the company;
- whether the PCAOB has identified deficiencies in other audits that involved auditing or accounting issues similar to issues presented in the company's audit; and

¹⁶ PCAOB Release No. 2012-003, *Information for Audit Committees about the PCAOB Inspection Process* (August 1, 2012).

- how issues described by the PCAOB in general reports summarizing inspection results across groups of firms relate to the independent auditor's practices, and potentially the audit of the company's financial statements, and how the independent auditor is addressing those issues.

The PCAOB has also invited audit committees to view with skepticism partial or unresponsive answers from independent auditors, particularly with respect to findings by the PCAOB of deficiencies in the performance of the audit. As applicable, an audit committee should satisfy itself that appropriate remediation measures are implemented by the independent auditor.

In addition, it is good practice for an audit committee to assess an independent auditor's leadership and integrity. Such an assessment should focus on the performance of the audit partners, whether the audit team is able to work effectively with and challenge management, the independent auditor's compliance with the partner rotation requirements and the possible impact of such rotation on the quality of the independent auditor's services. The evaluation of the lead partner of the independent auditor should take into account the opinions of management and a company's internal auditors.

Evaluating competence requires an assessment of an independent auditor's system of internal controls and procedures. To satisfy itself that those procedures are adequate, an audit committee should consider (1) how the independent auditor resolves technical issues, including the roles of the reviewing partner and the national office, (2) the results of the most recent peer review and, as discussed above, the PCAOB inspection of the independent auditor, (3) the independent auditor's recent record with respect to restatements and changes in previously issued audit reports, and (4) any information regarding any other complaints that the independent auditor has received and its response to such complaints.

3. Avoiding Improperly Influencing an Independent Auditor

Acting on the direction of Section 303 of Sarbanes-Oxley, the SEC has made more robust the protections against improper influences on independent auditors by audit clients. Directors and officers are expressly prohibited from taking any action, direct or indirect, to coerce, manipulate, mislead or "fraudulently influence" any public accountant engaged in an audit of a company's financial statements if they know or should have known that their action, if successful, could result in rendering the company's financial statements false or materially misleading. Some examples of prohibited actions include: actions taken to lead an independent auditor to issue or reissue a report that is not

warranted in the circumstances; actions taken to prevent an independent auditor from performing audit procedures required by generally accepted auditing standards or from withdrawing an issued report; or actions taken to obstruct an independent auditor's communication of matters to a company's audit committee. The SEC has taken the position that the rule, which is enforceable only by the SEC and not through a private right of action, may be violated by merely negligent behavior and that intent to defraud is not required—although the SEC does not intend the rule to reach honest and reasonable mistakes or to be triggered by active debate regarding auditing and accounting issues. The prohibition covers not only directors and officers, but also any other person acting under the direction of an officer or director, whether or not directly supervised or controlled by such director or officer. Thus, potential liability under this rule extends to include customers, vendors, creditors, attorneys, securities professionals and other advisors, as well as other partners or employees of the independent auditor on which improper pressure is being exerted.

B. Enhanced Audit Quality And Communications with Auditors

1. Enhanced Review and Transparency of the Audit Report

The Sarbanes-Oxley Act directed the PCAOB to adopt quality and independence standards relating to the preparation of an audit report, including a requirement for each audit firm to “provide a concurring or second partner review and approval of [each] audit report (and other related information), and concurring approval in its issuance...”¹⁷ Pursuant to that mandate, the SEC approved PCAOB Auditing Standard No. 7 (PCAOB AS No. 7) relating to engagement quality review which expands and strengthens the previous practice of many audit firms to perform a concurring partner review prior to issuing an audit report.¹⁸

Pursuant to PCAOB AS No. 7, “engagement quality review” requires that a reviewer evaluate the significant judgments made and related conclusions reached by the auditor's team in forming the overall conclusion on the audit and in preparing the audit report. PCAOB AS No. 7 also establishes specific guidance and procedures for the performance of the engagement quality review. When the review is effected in-house (*e.g.*, within the audit firm that performed the audit),

¹⁷ Section 103 of the Sarbanes-Oxley Act.

¹⁸ SEC, Release No. 34-61363 (January 15, 2010); PCAOB Release No. 105-2009-004 (August 11, 2009).

the reviewer must either be a partner or in an equivalent position and is subject to the same independence requirement as the audit team conducting the audit. Alternatively, a qualified reviewer from outside the audit firm may be engaged.

When reviewing an audit report, an audit committee might find it helpful to review the engagement quality review documentation to assist in its assessment of the auditing team's independence, judgments and work quality.

To further improve the transparency of audit reports, the PCAOB proposed, in October 2011, to require audit firms to disclose the name of the engagement partner in the audit report as well as the name of any other audit firms and other persons that participated in the audit. In response to comments received from the audit community, the PCAOB is currently revising the proposed standard.¹⁹

2. Enhanced Quality of the Audit Report

In June 2011, the PCAOB issued a concept release on potential changes to the form and content of audit reports on audited financial statements.²⁰ As noted by the PCAOB, "auditors, as a result of the performance of required audit procedures, often have significant information regarding a company's financial statements and the audit of such financial statements, that is not today reported in the standard auditor's report to the financial statements users." The PCAOB has proposed four alternative reporting models:

- *Auditor's Discussion and Analysis, similar to the MD&A or Compensation Discussion and Analysis:* the auditor would discuss the audit risks, procedures and results and the auditor independence. It would also include the auditor's views on the company's critical accounting policies, practices and issues;
- *Required and Expanded Use of Emphasis paragraphs:* the auditor would include in its report additional paragraphs to emphasize the most significant matters in the financial statements and identify where these matters are disclosed in the financial statements;

¹⁹ PCAOB Release No. 2011-007, *Improving the Transparency of Audit Firms: Proposed Amendments to PCAOB Auditing Standards and Form 2*, PCAOB, Rulemaking Docket Matter No. 29 (October 11, 2011).

²⁰ PCAOB Release No. 2011-003, *Concept Release on Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements*, Rulemaking Docket Matter No. 34 (June 21, 2011).

- *Auditor Assurance on Other Information Outside the Financial Statements:* the auditor would audit information outside the financial statements such as the MD&A, earning announcements and non-GAAP information in company releases; and
- *Clarification of the Standard Auditor’s Report:* the audit report would not dramatically change, but the auditor would provide a description and explanation of its role and responsibilities as well as clarification of key concepts, such as “reasonable assurance”.

In November 2012, the PCAOB announced that the proposed changes to the audit report have received little support, based on the view that it is the responsibility of management or the audit committee, not the auditors, to provide any information about the company’s financial statements (although the auditing community is generally supportive of certain changes to the audit report).²¹ An audit committee should pay particular attention to the debates relating to the content of the audit report as the proposed changes and others, if adopted, may have a significant effect on the audit committee’s relationship with an independent auditor as well as the role of the audit committee itself.

3. Enhanced Communications Between the Independent Auditor and the Audit Committee

The SEC rules mandate that independent auditors make specific disclosures to audit committees of the companies they are auditing. Prior to the filing of its audit report with the SEC, an independent auditor must report to a company’s audit committee:

- all critical accounting policies and practices to be used;
- the alternative accounting treatments in compliance with U.S. generally accepted accounting principles (GAAP) available for material items that have been discussed with management, including a discussion of the different impact of management’s versus the independent auditor’s preferred treatment; and

²¹ PCAOB Standing Advisory Group Meeting, *Auditor’s Reporting Model* (November 15 to 16, 2012).

- any material written communication between the independent auditor and management (such as any management letter or schedule of unadjusted differences).

These communication requirements imposed on an independent auditor also enhance an audit committee's oversight responsibility *vis-à-vis* an independent auditor.

PCAOB AS No. 5 requires an independent auditor, prior to issuing its report on a company's internal controls over financial reporting, to communicate in writing to the audit committee and management all material weaknesses. An independent auditor must communicate to the audit committee all significant deficiencies and communicate to management all deficiencies (and inform the audit committee when that communication has been made) in internal controls identified during an audit. In addition, an independent auditor must communicate in writing to the board of directors if it concludes that the oversight of the company's financial reporting and internal control by an audit committee is ineffective. Also, under both the PCAOB standard and Section 10A of the Securities Exchange Act of 1934, as amended (Exchange Act), an independent auditor is required to inform the appropriate level of management and assure that the audit committee is adequately informed if possible fraud or other illegal acts are detected during the audit.

The PCAOB recently adopted Auditing Standard No. 16 (PCAOB AS No. 16) to further enhance communications between an independent auditor and the audit committee and improve the audit process.²² The new standard should provide an audit committee with a broader range of information about the audit earlier in the process (prior to the issuance of the audit report), and an audit committee should utilize the additional information in the fulfillment of its oversight duties. Among other things, PCAOB AS No. 16 requires an independent auditor to identify and discuss with the audit committee:

- any significant issues that the independent auditor discussed with management regarding the independent auditor's appointment or retention, including any significant discussions regarding the application of accounting principles and auditing standards;

²² PCAOB Release No. 2012-004, Auditing Standard No. 16, *Communications with Audit Committees; Related Amendments to PCAOB Standards; and Transitional Amendment to AU sec. 380* (August 15, 2012).

- an overview of the audit strategy, including the timing of the audit and the significant risks identified during the independent auditor's risk assessment procedures;
- the company's most important accounting policies, practices and estimates;
- significant unusual transactions, and the policies and practices management used to account for significant unusual transactions; and
- whether the audit committee is aware of matters relevant to the audit, including violations or possible violations of laws or regulations.

PCAOB AS No. 16 also provides that when an independent auditor conducts a review of interim financial information, it should determine whether any of the aforementioned matters have been identified and should communicate such matters to the audit committee in a timely manner and prior to the company's filing of its quarterly report with the SEC.

An audit committee should review with the independent auditor key audit focus areas, as well as items that may require special procedures during the audit. Any findings of an independent auditor regarding such special audit procedures should be reviewed with an eye toward recommending any appropriate modifications of corporate policies and procedures.

VI

Prohibited Independent Auditor Activities and Pre-approval Policy

Sarbanes-Oxley, the SEC rules promulgated thereunder and the PCAOB rules impose a number of restrictions regarding the services that an independent auditor is permitted to provide to its audit clients without tainting its independence. These restrictions, as well as recommended pre-approval policies and procedures for permitted services, are discussed in this Chapter.

A. Prohibited Independent Auditor Activities

1. SEC Auditor Independence Rules

Under the SEC's auditor independence rules, independent auditors are significantly limited in the types of additional services they can perform for a company. Under the rules, the independence of an auditor will be impaired if, at any point during the audit and professional engagement period, the independent auditor performs any of the following services for a company:

- Bookkeeping and other services related to accounting records or financial statements, unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements.
- Financial information systems design and implementation (*e.g.*, managing a company's local area network(s), or designing or implementing a hardware or software system that aggregates source data underlying the financial statements, or generates information that is significant to the financial statements or other financial information systems taken as a whole), unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements.
- Appraisal or valuation services, fairness opinions or contribution-in-kind reports, unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements.

- Actuarial services that involve the determination of amounts recorded in the financial statements and related accounts for a company, other than assisting company personnel in understanding the methods, models, assumptions and inputs used in computing an amount, unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements.
- Internal audit services, unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements.
- Management functions (*e.g.*, serving as a director, officer, employee or in any decision-making, supervisory or ongoing monitoring capacity).
- Human resources (*e.g.*, recruiting, testing and evaluation, reference checking, negotiation and referral services). However, an independent auditor is permitted, upon a company's request, to interview candidates and advise a company as to candidates' competence for financial accounting, administrative or control positions.
- Broker-dealer, investment advisor or investment banking services.
- Legal services.
- Expert services unrelated to an audit, such as the provision of an expert opinion or other expert service for the purpose of advocating a company's interests in litigation or in a regulatory or administrative proceeding or investigation. For example, an auditor's independence would be impaired if the independent auditor were engaged to provide forensic accounting services to a company's legal counsel in connection with the defense of an investigation by the SEC Division of Enforcement. Additionally, an auditor's independence would be impaired if a company's legal counsel, in order to acquire the requisite expertise, engaged the independent auditor to provide such services in connection with a litigation, proceeding or investigation. However, an independent auditor is permitted to provide factual accounts (including in the form of testimony) of work performed or to explain positions taken

or conclusions reached during the performance of any service provided by the independent auditor.

The SEC also will consider an auditor's independence impaired if, at any point during the audit engagement period, the independent auditor provides any service or product for a contingent fee or a commission, or receives a contingent fee or commission from the audit client.

2. PCAOB Rules

PCAOB rules list the services that an independent auditor is prohibited from providing to its audit clients. In particular, PCAOB rules prohibit an independent auditor from providing an audit client any non-audit service during the engagement period that relates to marketing, planning or opining in favor of the tax treatment of transactions that are (1) confidential transactions under Internal Revenue Service regulations or (2) "aggressive tax transactions," which the PCAOB defines as any transaction that was recommended initially by the independent auditor and a significant purpose of which is tax avoidance, unless the proposed tax treatment is at least more likely than not to be allowable under applicable tax laws. The PCAOB has made clear, however, that the prohibition on opining on aggressive tax transactions is limited to opining *in favor of* its tax treatment; it does not restrict an independent auditor from advising an audit client *not* to engage in an aggressive transaction. The PCAOB's rules also preclude independent auditors from providing tax services to members of management who have a financial reporting oversight role at the audit client or a material affiliate of the audit client during the engagement period, or to their immediate family members. The rules provide a transition period for individuals who are hired or promoted into a financial reporting oversight role, which allows for tax services in process at the time of such hiring or promotion to be completed within 180 days.

Moreover, permitted tax services provided by independent auditors have to meet enhanced pre-approval requirements under the PCAOB's rules. The rules require an audit firm to supply the audit committee with detailed documentation regarding the nature and scope of the tax service, and any compensation arrangement or other agreement, such as a referral agreement or fee-sharing arrangements, between the independent auditor and any person (other than the audit client) with respect to the promoting, marketing or recommending of a transaction covered by the service. In addition, the independent auditor would be required to discuss with the audit committee the potential effects of the service on the auditor's independence and document the substance of that discussion.

The PCAOB rules contain other restrictions, such as a prohibition on contingent fees, which overlap with the SEC's auditor independence requirements.

3. Cautionary Note on Internal Control-Related Services

The provision of internal control-related services by an independent auditor to an audit client is a sensitive area. Given the independent auditor's audit of internal controls required by Section 404(b) of Sarbanes-Oxley, the provision of internal control-related services by an auditor carries with it the risk of compromising the independence of the independent auditor if the independent auditor's own work is the subject of audit procedures. As noted above, the SEC's independence rules prohibit a company's independent auditor from providing internal auditing services, such as those relating to internal accounting controls, financial systems or financial statements, unless it is reasonable to conclude that the results of these services would not be subject to audit procedures during an audit of the financial statements. The SEC has stated, however, that a company's independent auditor may assist management in documenting internal controls, *e.g.*, for purposes of assisting in the preparation of management's assessment of internal controls under Section 404(a) of Sarbanes-Oxley, but only if management is "actively involved"; management's acceptance of responsibility for the documentation and testing performed by the independent auditor will not, in and of itself, satisfy the SEC's auditor independence rules. Given the red flags that have been raised on this point by regulators, audit committees contemplating pre-approving internal control-related services by an independent auditor need to be sure that there is a strong basis and record for doing so and that they clearly understand why this approach is more advisable than obtaining the same services from another source. As a matter of practice, most companies have opted to hire separate providers for internal control-related services.

B. Independent Auditor Activities Requiring Audit Committee Pre-approval

Audit committees must approve in advance all audit services (including comfort letters in connection with securities underwritings) provided by an independent auditor, either specifically or in accordance with established policy and procedures.²³ Similarly, independent auditors may provide non-audit services

²³ For purposes of the approval of both the external audit function and any non-audit services, the audit committee of a parent company may function as the audit committee of wholly-owned subsidiaries that are
(footnote continued)

to their audit clients that are not specifically prohibited (including general tax planning and advice), but only if such services, like all audit services, are approved in advance by the audit committee (either specifically or in accordance with established policies and procedures).²⁴

1. Pre-approval of Permitted Tax Services

As discussed above, PCAOB rules increase the responsibilities of an independent auditor and of an audit committee in pre-approving tax services permitted to be provided by an independent auditor to its audit clients by requiring the independent auditor to supply the audit committee with written documentation of the scope of the proposed tax service and the fee structure for the engagement, discuss with the audit committee the potential effects of the performance of the service on the auditor's independence, and document the substance of that discussion.

2. Pre-approval of Services Related to Internal Controls

PCAOB AS No. 5 does not specifically require case-by-case pre-approval of internal control-related non-audit services. However, as with the rules governing pre-approval of permissible tax services, the rules require an independent auditor to supply the audit committee with a written description of the scope of the proposed service, discuss with the audit committee the potential effect of the proposed service on the auditor's independence and document the substance of that discussion in connection with the pre-approval of any internal control-related non-audit services.

also issuers for purposes of satisfying the pre-approval requirements. In this situation, the subsidiary's disclosure should include the pre-approval policies and procedures of the subsidiary as well as those of the parent company.

²⁴ Where a company has foreign subsidiaries that are audited by independent auditors that are members of the same network of international independent auditors as the company's principal independent auditor, any audit services performed by such member independent auditors for the company's foreign subsidiaries are subject to the pre-approval requirements. Likewise, if the company's foreign subsidiaries are audited by independent auditors that are not members of the principal independent auditor's network, audit services performed for the company's foreign subsidiaries by such non-member independent auditors also are subject to the pre-approval requirements. However, failure of an audit committee to pre-approve audit services to be provided by another independent auditor does not affect the independence of the principal auditor.

3. *De Minimis* Exception for Non-Audit Services

There is a *de minimis* exception to the pre-approval requirement for non-audit services aggregating less than 5% of an independent auditor's annual revenues from a company. The *de minimis* exception is available only if the services in question (1) were not recognized by the company at the time as non-audit services, (2) were promptly brought to the audit committee's attention, and (3) were approved by the audit committee prior to the completion of the audit and disclosed in the company's SEC filings. The *de minimis* exception applies only to non-audit services.

4. Pre-approval Policies

When using established policies and procedures (rather than case-by-case evaluation) to approve any services to be provided by an independent auditor, an audit committee must be especially mindful of the following constraints:

- Such pre-approval policies and procedures must be detailed as to the particular services provided.
- Pre-approval policies and procedures may not provide for broad, categorical approvals—for example, monetary limits may not be the only criterion for the pre-approval. To give another example, licensing or selling income tax preparation software to an audit client is subject to audit committee review and may be pre-approved as a permissible tax service so long as the functionality is limited to preparation of tax returns. However, if the software performs additional functions, each function should be evaluated separately for its potential effect on an auditor's independence.
- An audit committee must be informed about each service. In other words, pre-approval policies must be designed to ensure that an audit committee knows precisely what services it is being asked to pre-approve so that it can make a well-reasoned assessment of the impact of the service on an auditor's independence. Where applicable, requests for pre-approval should be accompanied by detailed documentation regarding the specific services for which pre-approval is being sought.
- Policies and procedures must not result in the delegation of an audit committee's authority to management. To satisfy this constraint, policies should be sufficiently detailed as to the

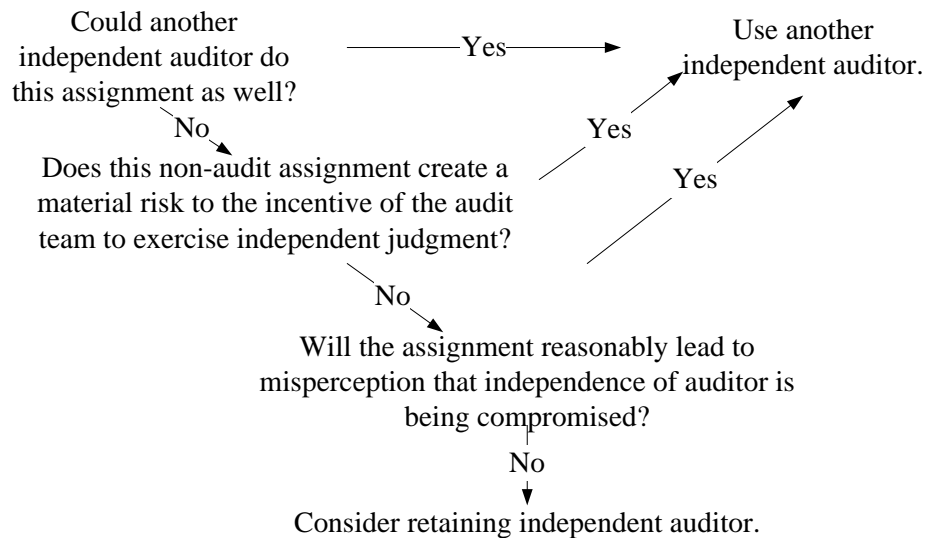
particular services to be provided so that a member of management is not called upon to make a judgment as to whether a proposed service fits within the pre-approved services.

5. When Bills Materially Exceed Estimates, Re-approve

Where the fee for a pre-approved service or group of services is materially in excess of the amount estimated at the time of approval by an audit committee, the audit committee should specifically approve payment of such excess amount prior to payment of the excess amount.

6. Control of Non-Audit Assignments

Ultimately, the audit committee must control all non-audit assignments given to an independent auditor that are not among the prohibited services discussed in this Chapter. With respect to any such assignment, an audit committee should ask the following questions:



C. Model Audit Committee Pre-approval Policy

Attached as *Exhibit E* is a model audit committee pre-approval policy. Companies should customize the model to their particular needs and circumstances.

VII

Internal Controls and Oversight Effectiveness

Management is primarily responsible for designing and implementing internal controls. This includes establishing and maintaining adequate internal control structures and procedures for financial reporting, evaluating the effectiveness of internal controls at least annually, identifying in a timely manner weaknesses and deficiencies in internal controls, taking appropriate corrective actions where deficiencies or weaknesses exist and notifying the independent auditor and audit committee of significant internal control deficiencies and any acts of fraud.

An audit committee should review the adequacy and effectiveness of a company's internal controls over financial reporting, the process for monitoring compliance with applicable regulations and laws, and any other legal matters that could have a significant impact on a company's financial reports (as discussed above, in certain companies operating in highly regulated industries, such as financial institutions, certain compliance oversight responsibilities may be assigned to the board or to committees of the board other than the audit committee). This Chapter focuses upon an audit committee's oversight of internal controls over financial reporting, as well as an audit committee's monitoring of the compliance and internal controls environment generally.

As part of its review of internal controls over financial reporting, an audit committee should satisfy itself that there is a proper system and allocation of responsibilities for the day-to-day monitoring of financial controls (and that the audit committee understands such system and allocation), but it should not seek to do the monitoring itself. An audit committee may obtain this understanding through reports and discussions with management, an internal auditor and an independent auditor. An audit committee also should understand the extent to which the internal and independent auditors review a company's internal controls protocols, including by understanding the material features of the audit plan of the independent auditor with respect to internal controls.

A. Audits of Internal Controls

Reflecting the importance of effective internal controls, Section 404 of Sarbanes-Oxley and the SEC rules promulgated thereunder require public companies to include in their annual reports both an assessment by management of the company's internal control over financial reporting, and, unless the company is a "non-accelerated" issuer (generally, a smaller company), an

independent auditor's attestation report on the company's internal controls and financial reporting. Sarbanes-Oxley made clear that an independent auditor's attestation under Section 404(b) must be based on the independent auditor's own audit of the company's internal controls and directed the PCAOB to adopt standards to govern that audit. Adopted pursuant to that mandate, PCAOB AS No. 5 prescribes the standards by which an independent auditor must conduct the Section 404(b) audit of a company's internal control over financial reporting.

Under the Dodd-Frank Act, non-accelerated issuers (public companies with a public float of less than \$75 million) are exempted from complying with Section 404(b) of Sarbanes-Oxley, *e.g.*, from obtaining an independent auditor's attestation report on the effectiveness of the company's internal controls over financial reporting. The Jump start Our Business Startups (JOBS) Act expands this exemption to companies with a market capitalization of less than \$1 billion that have been public for less than five years. While this exemption may alleviate audit fees for smaller public companies, the duties and responsibilities of management and audit committee members with respect to internal controls remain unchanged.

B. Definition of "Internal Control Over Financial Reporting"

The SEC and the PCAOB define the term "internal control over financial reporting" as a process designed by, or under the supervision of, a company's principal executive and principal financial officers, or individuals performing similar functions, and effected by the company's board, management and other personnel, to provide "reasonable assurance" regarding the reliability of financial reporting and preparation of financial statements for external purposes in accordance with GAAP. Under the PCAOB's standards, "reasonable assurance" is a high level of assurance, but not absolute assurance—leaving room for the possibility that an audit conducted in accordance with the PCAOB standards may not detect a material weakness in internal controls or a material misstatement in the financial statements on a timely basis.

Internal control policies include those policies and procedures that:

- pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of a company;
- provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP, and that receipts and expenditures of a

company are being made only in accordance with authorizations of management and directors of the company; and

- provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of a company's assets that could have a material effect on the financial statements.

C. Disclosure of Deficiencies Depends on Severity

PCAOB AS No. 5 uses the concepts of “deficiency,” “significant deficiency” and “material weakness” in grading the severity of internal control defects. Under PCAOB AS No. 5:

- A “deficiency” exists when the “design” or “operation” of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis. A deficiency in “design” exists when (1) a control necessary to meet the control objective is missing, or (2) an existing control is not properly designed so that, even if the control operates as designed, the control objective would not be met. A deficiency in “operation” exists when a properly designed control does not operate as designed, or when the person performing the control does not possess the necessary authority or competence to perform the control effectively.
- A “significant deficiency” is a deficiency, or a combination of deficiencies, in internal controls that is less severe than a material weakness, yet important enough to merit attention by those responsible for oversight of a company's financial reporting.
- A “material weakness” is a deficiency, or a combination of deficiencies, in internal controls such that there is a “reasonable possibility” that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis. There is a “reasonable possibility” of an event when the likelihood of the event is either “reasonably possible” or “probable” as those terms are used in Financial Accounting Standards Board Statement No. 5, *Accounting for Contingencies*.

PCAOB AS No. 5 requires an independent auditor, prior to issuing its report on a company's internal controls over financial reporting, to communicate

in writing to the audit committee and management all material weaknesses. In addition, an independent auditor must communicate all significant deficiencies to the audit committee and must communicate to management all deficiencies (and inform the audit committee when that communication has been made) in internal controls identified during an audit.

In December 2012, the PCAOB expressed concerns about the number and significance of deficiencies identified in independent auditors' audits of internal control.²⁵ The PCAOB stated that an audit committee should consider discussing with the independent auditor how the internal controls tested by the independent auditor address the risks of material misstatement and whether the independent auditor has adjusted as necessary the nature, timing, and extent of its control testing and substantive audit procedures in response to risks related to identified control deficiencies.

D. Compliance and Internal Controls Environment Generally

In overseeing compliance with applicable laws and regulations and the integrity of the financial statements, an audit committee is encouraged to pay close attention to the compliance and internal controls environment generally. The U.S. Sentencing Commission, as well as the SEC, the United States Department of Justice (DOJ) and the PCAOB, have stressed the singular importance in this area of management's setting the right "tone at the top" and creating an organizational culture that encourages a commitment to compliance with law. To that end, an audit committee may wish to review with management:

- Is management setting the right tone at the top? How?
- Is there an appropriate supervisory and compliance structure?
- Is senior management's compliance message communicated throughout the organization?
- Is there a sophisticated understanding of the inventory of regulatory and reputational risks faced by the company's businesses?

²⁵ PCAOB, *Observations from 2010 Inspections of Domestic Annually Inspected Firms Regarding Deficiencies in Audits of Internal Control Over Financial Reporting* (December 10, 2012)

- Is there an early warning system to identify and respond to emerging areas of regulatory focus?
- Is there specialized training for supervisors?
- Is information concerning regulatory and reputational risks and issues promptly brought to the attention of senior management and compliance personnel?
- Is internal discipline used effectively to reinforce the compliance message?

In addition, an audit committee should ask management to regularly update the audit committee on the company's overall internal controls protocols. The Committee of Sponsoring Organizations of the Treadway Commission (COSO) set forth five interrelated elements of an effective internal control system: (1) control environment; (2) risk assessment; (3) control activities; (4) information and communication; and (5) monitoring activities.²⁶ Both the SEC and the PCAOB have endorsed these five COSO elements as a suitable and appropriate framework for management's assessment over internal controls. Given the impact faulty internal controls can have on the integrity of the financial statements, an audit committee would be well served by reviewing how a company's control systems perform when measured against the five COSO elements.

E. Increased Efforts on Financial Risks Oversight

As noted earlier, the recent financial and credit crises have placed into sharper focus the need for monitoring of financial risks and financial statements. In this environment, audit committees are facing increased expectations to exert enhanced efforts on financial risks oversight, including:

- understanding balance sheet and off-balance sheet exposures (*e.g.*, cash, accounts payable and debt agreements versus ability to access credit and capital, the cost of capital and interest rates);

²⁶ In September 2012, COSO released a public exposure draft of the updated version of its report, the *Internal Control – Integrated Framework* which retains these five components of an effective internal control system. COSO intends to publish the updated Framework in 2013.

- placing greater focus on debt and banking covenants, liquidity, available credit under revolving or other lines of credit, access to financing and counterparty risk;
- more frequent monitoring of the financial position of counterparties, including the financial conditions of and the company's dependence on key vendors and customers;
- reconsidering critical accounting policies in light of the current environment (*e.g.*, focusing on stock-based compensation, goodwill and intangible asset impairments, receivables, valuation allowances related to deferred tax assets and fair value accounting);
- when necessary, given the recent volatility in the financial markets, considering treasury and cash management policies, including the impact of hedging transactions;
- considering the renewal of credit lines and other financing arrangements; and
- understanding the effects of the recent financial crisis, and volatility, on a company's significant vendors and customers, and thinking through "implicit contingent liabilities," *i.e.*, relationships where a company may be called upon for financial support outside of previously agreed contractual terms (for instance, stepping in to support a key vendor or customer).

In the wake of the recent financial and credit crises, a particular emphasis has been placed on the importance of liquidity risk management, both for regulated financial institutions and public companies in general. With respect to financial institutions, the Interagency Policy Statement on Funding and Liquidity Risk Management, issued in 2010 by the federal banking regulators, has significantly strengthened the existing requirements relating to liquidity risk management, providing extensive guidelines on how liquidity risks should be monitored and measured. According to the Policy Statement, a company's board of directors and, more particularly, a company's audit committee, should oversee the establishment and approval of liquidity management strategies, policies and procedures, and review them at least annually.

Noting that companies in general have undertaken increasingly diverse and complex types of financing activities, the SEC has revised its interpretative

guidance relating to the discussion of liquidity and capital resources in the MD&A in order to clearly cover instances in which period-end liabilities reflected in a company's financial statements do not communicate adequately the risks and uncertainties attendant to material intra-quarter fluctuations in liquidity, and any types of short-term financing not otherwise fully captured in period-end balance sheets, such as repurchase agreements, securities lending transactions and other off-balance sheet arrangements.²⁷ Simultaneously, the SEC has proposed new disclosure requirements on short-term borrowings in the MD&A, including a general description of a company's short-term borrowings per category of arrangements, the key metrics and the business purpose of those arrangements.²⁸ In parallel, the recently adopted PCAOB AS No. 16 requires auditors to thoroughly review and identify to the audit committee significant unusual transactions, assess their financial statement presentation and disclosure, and discuss with the audit committee the accounting treatment and disclosure of such transactions as well as the independent auditor's understanding of their business rationale. See Chapter V: "Relationship with the Independent Auditor."

The SEC has also issued disclosure guidance on the exposure and risks arising from the European sovereign debt crisis, requiring that exposure be disclosed, country by country, and detailing the type of counterparties and of financial instruments as well as the risk management procedures established to identify and monitor such exposure.²⁹ Similarly, the PCAOB has issued an audit practice alert discussing how the recent economic environment, particularly in Europe, may challenge fair value measurements and estimates of European assets held by U.S. companies.³⁰

An audit committee, as part of its oversight duty of financial reporting and risk, should review these types of short-term financing, liquidity and exposure risks and discuss the adequacy of their accounting treatment and disclosure with senior management and the independent auditor.

"End-user" derivatives transactions have also received particular focus and, under the Dodd-Frank Act, are to be reviewed and approved by an

²⁷ SEC Release No. 33-9144 (September 17, 2010).

²⁸ SEC Release No. 33-9143 (September 17, 2010).

²⁹ SEC CF Disclosure Guidance, Topic No. 4 (January 6, 2012).

³⁰ PCAOB, Staff Audit Practice Alert No. 9, *Assessing and Responding to Risks in the Current Economic Environment* (December 6, 2011).

“appropriate committee” of the board. For financial institutions, regulations proposed under other Dodd-Frank Act provisions, such as the Volcker Rule, envision board involvement in overseeing significant new compliance regimes. While the audit committee may appear to be the appropriate body to assume some of these responsibilities, alternatives should be carefully considered in light of the already substantial workloads borne by audit committee members. If the audit committee is selected, its charter should be revised to reflect this new function.

F. Recent Areas of Focus

An audit committee, while overseeing disclosure compliance and the effectiveness of internal controls, should also pay attention to the recent areas of risks highlighted by the SEC and the PCAOB.

In October 2011, the SEC issued “Cybersecurity” disclosure guidance, encouraging companies to review on an ongoing and comprehensive basis, the adequacy of their disclosure relating to cyber security risks and cyber incidents, including in the risk factors section and the MD&A of their periodic reports. Given the recent emphasis on digital technologies, an audit committee that oversees risk management should also ensure that management has implemented effective procedures to track, report and reduce cyber risks and cyber incidents. As necessary and appropriate, an audit committee that oversees risk management should receive direct reports from a company’s chief information officer on the effectiveness of a company’s cyber security and how cyber risks could affect a company’s operations and should assess whether the company’s exposure to cyber risks is effectively managed, including by devoting adequate resources.

The PCAOB has also recently cautioned auditors and reminded audit committee members that heightened fraud risk factors may exist in some emerging markets, including discrepancies between a company’s financial records and audit evidence obtained from third parties.³¹ In parallel, the DOJ and the SEC have underscored that enforcement of the Foreign Corrupt Practices Act (FCPA) continues to be a top priority.³² An audit committee should discuss such risks with senior management as well as the independent auditor.

³¹ PCAOB, Staff Practice Alert No. 8, *Audit Risk in Certain Emerging Markets* (October 3, 2011).

³² Criminal Division of the U.S. Department of Justice and the Enforcement Division of the SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 14, 2012)

The enhanced risks oversight required from audit committee members combined with an increased level of financial and operational risk complexity call for increased, continuing and specialized tutorials for audit committee members. The content of orientation and training programs for audit committee members should be reviewed to make sure that such programs enable audit committee members to fully understand a company's business environment, and include a detailed picture of all the material risks facing a company as well as the company's processes for managing risk.

In performing its monitoring function, an audit committee and the board should be sensitive to "red flags" and "yellow flags." When such warning signs appear, an audit committee should observe and investigate as appropriate and document its monitoring activities in minutes that accurately convey the time and effort directors devote to decision-making, even when the outcome is to take no action. Influential courts have indicated that directors may be held liable for lack of good faith in situations where they utterly fail, in "ostrich-like" fashion, to exercise *any* oversight. See Chapter XI: "Audit Committee Member Liability Issues." However, none of these cases contemplate director liability where directors use common sense and appropriate diligence in performing their oversight function. Directors remain fully protected by the business judgment rule when they make corporate decisions with the exercise of due care.

VIII

Audit Committee Report, Disclosure Obligations and Financial Reporting Integrity

Under the rules of the SEC and major securities markets, there are several audit committee or audit committee-related disclosure obligations that must be complied with. Key obligations are discussed in this Chapter.

A. Audit Committee Report and Audit Committee-Related Disclosure Obligations

1. Audit Committee Report to the Board of Directors

An audit committee is required to provide a report to the board recommending whether or not a company's audited financial statements should be included in the company's annual report on Form 10-K. This recommendation should be based on:

- the audit committee's review of, and discussions with management about, the financial statements, it being important that the conversations with management include discussions about the quality, not just the acceptability, of the accounting principles reflected in the financial statements, the reasonableness of significant judgments, and the clarity of disclosures in the financial statements;
- the audit committee's discussions with the independent auditor relating to matters required to be discussed by Statement on Auditing Standards No. 114; and
- the audit committee's discussions with the independent auditor regarding its independence and receipt of written disclosures and the letter from the independent auditor as required by Independence Standards Board Standard No. 1.

A company's proxy statement must include a report from the audit committee discussing the audit committee's actions with respect to the foregoing. The name of each member of the audit committee must appear below such disclosure.

2. Audit Committee-Related Annual Report and Proxy Statement Disclosure Obligations

An audit committee should also monitor a company's public filings to assure that the company is, as required, disclosing in its annual reports and proxy statements various items that relate to audit committees, including:

- whether the company has a separately designated audit (or functionally equivalent) committee and the identity of each committee member;
- whether or not the audit committee includes at least one member who is an "audit committee financial expert" (and, if not, why not), the individual's name and whether he or she is independent under the listing standards of the company's applicable securities market;
- the audit committee's pre-approval policies and procedures;
- the audit fees, audit-related fees, tax fees and all other fees billed by the independent auditor for each of the last two years (see also "Fee Disclosures Required" below); and
- if greater than 50%, the percentage of hours expended on the independent auditor's engagement to audit the company's financial statements for the most recent fiscal year attributable to work performed by persons other than the independent auditor's full-time, permanent employees.

In addition, companies are required to disclose in proxy statements additional audit committee-related items, including:

- whether members of the audit committee are independent under applicable listing standards (and if the company is utilizing specific independence exemption(s));
- if a company does not limit to three or less the number of audit committees on which its audit committee members may serve, the board must determine and disclose that the service by an audit committee member on more than three audit committees would not impair his or her ability to serve effectively on the company's audit committee; and

- whether a current copy of the audit committee charter is available on the company’s website, and, if so, provide the company’s website address. If a current copy of the audit committee charter is not available on the company’s website, a copy of the audit committee charter must be included as an appendix to the proxy statement at least once every three fiscal years and whenever the audit committee charter has been materially amended since the beginning of the last fiscal year. If a current copy of the audit committee charter is not available on the company’s website and is not being included in the company’s proxy statement, the company must identify in which of the prior fiscal years the audit committee charter was so included.

3. Disclosure of Independent Auditor’s Fees

Companies must disclose the fees paid to its independent auditors in the two most recent years, segregated into four categories:

- (1) audit fees;
- (2) audit-related fees;
- (3) tax fees; and
- (4) all other fees.

“Audit-related fees” are fees for assurance and related services by the independent auditor that are traditionally performed by the independent auditor and that are reasonably related to the performance of the audit or review of the company’s financial statements. They include fees for employee benefit plan audits, due diligence related to mergers and acquisitions, accounting consultations and audits in connection with acquisitions, internal control reviews, attest services related to financial reporting that are not required by statute or regulation, and consultation concerning financial accounting and reporting standards. Fees for operational audit services are not related to the audit or review of the financial statements and should be included in “all other fees,” with a narrative description of such services.

An audit committee should satisfy itself that the company is in compliance with the above requirements.

B. Financial Reporting Integrity

An audit committee should take appropriate steps to satisfy itself that the company's CEO and CFO are meeting their obligations to the audit committee, the independent auditor and the public under the certification requirements established by the SEC, the company's securities market and Sarbanes-Oxley.

1. Section 302 and Section 906 Certifications

Section 302 of Sarbanes-Oxley (Section 302) requires a company's CEO and CFO to certify in each quarterly and annual report that, among other things:

- based on their knowledge, the report is not misleading;
- based on their knowledge, the financial statements and other financial information included in the report fairly present, in all material respects, the financial condition and results of operations of the company;
- they are responsible for establishing and maintaining, and have performed certain specified tasks with respect to, the company's internal controls and disclosure controls and procedures; and
- they have disclosed to the audit committee and auditors all significant deficiencies and material weaknesses in the design or operation of internal controls, as well as any fraud that involves management or other employees with a significant role in the company's internal controls.

The Section 302 certifications must be filed as exhibits to the periodic reports. The CEO and CFO are required to sign separate Section 302 certificates and amendments to periodic reports that contain financial statements and require new certifications to be filed.

The certification required by Section 906 of Sarbanes-Oxley (Section 906) requires that each periodic report containing financial statements be accompanied by a statement by the company's CEO and CFO that (1) the report fully complies with the requirements of Section 13(a) or 15(d) of the Exchange Act; and (2) the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the company.

While not a substitute for other procedures, it may be appropriate for the CEO and CFO to obtain "sub-certifications" or other affirmations from selected

members of management and/or heads of key business or staff units. Sub-certifications may have the salutary effect of reinforcing the importance of financial statement accuracy throughout the management structure of a company. In doing so, these employees need to consider and confirm within their respective areas of responsibility that the report does not contain any material misstatement or omission, that the financial statements and other financial information (to the extent the financial statements and other financial information or elements thereof are within such individual's purview) fairly present, in all material respects, the financial condition of the company, and that there is no weakness in the disclosure controls and procedures that has resulted in or could be reasonably likely to result in the disclosure controls and procedures not being effective. The sub-certifications should be tailored to the areas of responsibilities of the individual making the sub-certification. If a company decides to obtain such sub-certifications, a mechanism should also be devised so that reasonable disagreements between individuals asked to give sub-certifications can be resolved, with any resolution appropriately documented.

2. "Fairly Presents" Standard of Disclosure

The CEO/CFO certification requirements have established a standard of financial disclosure above and beyond GAAP. The SEC states specifically that the standard of "fairly presents" is meant to be broader than GAAP. The fairly presents standard is meant to encompass the selection and proper application of accounting policies, the disclosure of financial information that is informative and reasonably reflects the underlying events, and the inclusion of other information necessary to give investors a materially complete picture of a company's financial condition, results of operations and cash flows. The CEO, the CFO and all other company employees making accounting or disclosure judgments must base their decisions not just on GAAP but on the fairly presents standard. While it might be argued that this was always the case, it was not always the practice. Now it must be.

3. Non-GAAP Financial Information and Reconciliation to GAAP

It also is good practice for an audit committee to review any *pro forma* information released by the company. Under Sarbanes-Oxley, *pro forma*, or non-GAAP, financial information must be reconciled to GAAP in public disclosures. The SEC rules define a "non-GAAP financial measure" and specify that a company that presents material information including a non-GAAP financial measure also must present the most directly comparable GAAP financial measure and a reconciliation between the two. Although the rules do not place direct

responsibility on an audit committee to ensure that a company's disclosures comply with these regulations, an audit committee should oversee the process by which the company decides whether to present non-GAAP financial measures, and an audit committee should understand and approve the reasons for doing so. An audit committee should inquire as to whether any such disclosure adds to investors' understanding of a company's financial position rather than confuses or complicates the picture.

4. Management's Reports on Internal Controls

As noted earlier, Section 404 of Sarbanes-Oxley and the SEC rules adopted thereunder require management to report annually on a company's internal controls over financial reporting. The SEC rules also require management to make quarterly disclosures of any material changes in a company's internal controls. While it is not the audit committee but management that is responsible for these disclosures, an audit committee will necessarily be involved in their development and should adequately monitor the related proposed disclosures. Also, if there is going to be disclosure that there have been material changes to internal controls over financial reporting during a quarter, an audit committee should inquire whether any significant deficiencies or material weaknesses underlying such changes are proposed to be specially disclosed, and, if it is determined that they will not be, ensure that this has been a properly considered decision and that there is a firm and reasonable basis for the decision not to disclose.

5. The Future of IFRS in the United States

An audit committee should be aware of the SEC's ongoing consideration of incorporating International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board (IASB), into the U.S. financial reporting system.

In November 2008, the SEC originally issued a proposed "Roadmap" for the potential use of IFRS contemplating limited early usage of IFRS by selected issuers in 2010 and calling for the SEC to determine in 2011 whether mandating the adoption of IFRS by U.S. issuers in 2014 is in the public interest.³³ After receiving numerous comments on the Roadmap, the SEC developed and executed a "Work Plan" to examine the regulatory effects of mandating IFRS for U.S.

³³ SEC Release No. 33-8982 (Nov. 14, 2008).

issuers and evaluate the overall readiness of and impact on U.S. issuers.³⁴ In its final report on the Work Plan, issued in July 2012, the SEC acknowledged that mandating the adoption of IFRS was not supported by the vast majority of participants in the U.S. capital markets and was not consistent with the methods of incorporation employed by other major capital markets around the world.³⁵ To date, the SEC has not made any policy decision as to whether IFRS should be incorporated into the financial reporting system for U.S. issuers, and how and when any such incorporation, if it were to occur, should be implemented.

C. Review, Approval and Disclosure of Related-Party Transactions

There is nothing inherently improper about transactions between a company and its officers or directors; such transactions often are in the best interests of a company and its shareholders, offering efficiencies and other benefits that might not otherwise be available. It is entirely appropriate for an informed board, on a proper record, to approve such arrangements through its disinterested directors. An audit committee often serves this function.

As a matter of compliance and best practices, however, a company should give careful attention to all related-party transactions. Full disclosure of all material related-party transactions and full compliance with proxy, periodic reporting and financial footnote disclosure requirements is essential. Management should make sure that all related-party transactions have been fully and carefully reviewed with the board. A board should reevaluate a company's policies and procedures for reviewing such transactions on both an initial and ongoing basis, and for determining that all continuing related-party transactions remain in the best interest of the company.

Under the SEC rules, disclosure must be made in a company's annual proxy and annual report on Form 10-K regarding any transaction, since the beginning of the company's last fiscal year, or any currently proposed transaction, in which the company was or is to be a participant and the amount involved exceeds \$120,000, and in which any related person (defined below) had or will

³⁴ SEC Release Nos. 33-9109; 34-61578 (Feb. 24, 2010), Appendix A; and *Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers, Progress Report* (Oct. 29, 2010).

³⁵ SEC Staff Report, *Work Plan for the Consideration of Incorporating International Financial Reporting Standards into the Financial Reporting System for U.S. Issuers* (July 13, 2012).

have a direct or indirect material interest. Subject to certain exceptions, the following must be disclosed regarding any such transaction:

- the name of the related person and the basis on which the person is a related person;
- the related person's interest in the transaction, including the related person's position or relationship with, or ownership in, a firm, company or other entity that is a party to, or has an interest in, the transaction;
- the approximate dollar value of the amount involved in the transaction;
- the approximate dollar value of the amount of the related person's interest in the transaction (computed without regard to profit or loss);
- in the case of indebtedness, disclosure of the amount involved in the transaction must include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness; and
- any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Under the SEC rules, a "related person" means (1) any person who, at any time during the specified period for which disclosure is required, was a director (or nominee if disclosure is being presented in the company's proxy statement) or executive officer; (2) any person covered by Item 403(a) of Regulation S-K who at the time of the transaction was a security holder of more than 5% of the company's securities; or (3) any immediate family member of the foregoing. An "immediate family member" means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law, and any person (other than a tenant or employee) sharing the household of the director (or nominee), executive officer or security holder.

Under the SEC rules, a company must describe its policies and procedures for the review, approval or ratification of related-party transactions. While the rules acknowledge that a company's policies and procedures will vary depending on the particular circumstances, the rules state that examples of such features may include, in given cases:

- the types of transactions that are covered by such policies and procedures;
- the standards to be applied pursuant to such policies and procedures;
- the persons or groups of persons on the board or otherwise who are responsible for applying such policies and procedures; and
- a statement of whether such policies and procedures are in writing, and, if not, how such policies and procedures are evidenced.

A company also must identify any related-party transaction since the beginning of the company's prior fiscal year where such policies and procedures did not require review, approval or ratification, or where such policies and procedures were not followed.

As noted above, the SEC rules mandate that companies disclose the persons or groups of persons on the board or otherwise who are responsible for applying the company's policies and procedures regarding related-party transactions. The NASDAQ rules require, and the NYSE rules recommend, that an audit committee or another independent body of the board approve all related-party transactions. In light of this, a board should consider assigning to an audit committee, or to another committee consisting solely of directors who are both independent and disinterested with respect to the transaction under consideration, the job of reviewing any newly proposed related-party transactions. The committee should have the authority to hire such outside financial, legal and other advisors as it deems appropriate to assist it in its evaluation of such transactions. If a related-party arrangement is of material significance to a company, a board should consider whether additional steps are necessary to ensure that such transactions are properly monitored and evaluated. For example, a board should take active measures to determine that the entities providing related-party services are being held to the same standards the company would demand of unaffiliated third-party service providers and that there is a clear reason for procuring the service from a related party.

Financial firms affiliated with banks or other FDIC-insured depository institutions are subject to additional extensive restrictions on transactions with affiliated parties, including loans or other extensions of credit to directors and officers and a variety of transactions between an FDIC-insured institution and other affiliates of its bank holding company.

Attached as *Exhibit F* are model policies and procedures with respect to related person transactions. Note that this is only a model for policies and procedures, and companies should customize the model to their particular needs and circumstances.

IX

Audit Committee Whistleblower Rules and Ethics Codes

A. Whistleblower Complaints and Procedures

Under Sarbanes-Oxley, an audit committee must establish procedures for the receipt, retention and treatment of complaints received by a company regarding accounting, internal controls or auditing matters. Employees must be able to submit, on a confidential and anonymous basis, concerns regarding questionable accounting or auditing matters, or any deliberate or unintentional gaps in a company's internal controls. Since audit committees generally do not have their own staff, they will likely require the process of receiving and organizing complaints to be managed by internal or external legal counsel, the director of internal audit, the corporate secretary or another appropriate person.

In May 2011, the SEC adopted a whistleblower program, implemented under the Dodd-Frank Act, with a system of cash incentives to encourage and reward whistleblowers who come forward to the SEC.³⁶ Whistleblowers may hope to receive between 10% to 30% of any monetary sanction over \$1 million that results from their report of "original information" to the SEC. During the first full year of operation of the whistleblower program (through September 2012), the SEC received a total of 3,001 whistleblower reports, with the highest number of complaints relating to "corporate disclosures and financials."³⁷ While the first SEC bounty payment was modest (approximately \$50,000), outsized bounties in other white collar settings were awarded in 2012, including a \$104 million award to the whistleblower in the case of a financial institution's undeclared overseas accounts held by U.S. taxpayers. The flow of whistleblower-inspired reports is bound to continue and may accelerate as a result of the awards publicized in 2012. Whistleblower-inspired investigations and the white collar and regulatory enforcement environment in general are further discussed in our memorandum *White Collar and Regulatory Enforcement: Emerging Trends and What to Expect in 2013*, January 2013.

³⁶ SEC Release No 34-64545, *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934* (August 12, 2011).

³⁷ SEC, *Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2012* (November 2012).

The SEC whistleblower program contains, however, several significant incentives for employees to first report their concerns to the company:

- if they report first to the company, and then either the company or employee reports to the SEC within 120 days of that first internal report, the employee's "place in line" will date from his/her first internal report to the company;
- if a monetary sanction does result, an employee will likely get a larger reward (within the 10% to 30% range) if he/she reported first to the company (and less if not); and
- if the company ultimately reports to the SEC a broader set of concerns than the employee initially had, the employee will get full credit for the entire set of concerns reported by the company.

Reminding employees of these rules will not only increase the chances that employees will decide to first report their concerns to the company, it will also provide a well-documented record of a company's good faith effort to establish a culture of compliance. Companies should also regularly review the overall structure of their compliance and ethics policies and procedures, with an eye to finding more effective ways to embed a compliance component in day-to-day operations.

Companies are subject to potential civil, and, in some cases, criminal, liability if they can be shown to have taken retaliatory action against a whistleblower who is an employee. In responding to this legal and regulatory environment, there can be a temptation to establish a special committee of independent directors to investigate every whistleblower complaint. This temptation should be resisted in favor of a procedure that filters whistleblower complaints, as such investigations can be extremely disruptive. Boards should determine that an anonymous whistleblower hotline has been established by management and that a well-documented policy for evaluating whistleblower complaints exists, but they should also be judicious in deciding which complaints truly warrant further action.

An audit committee should, at regular intervals, receive a summary of each complaint that has been submitted with respect to accounting, internal accounting controls, auditing matters or risk management, and discuss with management the necessary or appropriate steps to address any such complaint that is legitimate. Legal counsel or other outside advisors should be retained as needed to resolve any difficult issues. Management should inform an independent

auditor of any changes made as a result of these complaints or any significant issues and their resolutions.

1. Up-the-ladder Reporting by Attorneys

Federal rules also require internal and outside lawyers for public companies to report, in certain circumstances, credible evidence that a material violation of securities laws or a breach of duty or similar violation by the company or any of its directors, officers, employees or agents occurred, is occurring or is about to occur. To the extent an audit committee is determined to be the appropriate committee to receive any such reports, there should be a process in place for receiving, reviewing and responding to such reports. When in doubt, an audit committee should consult with counsel (including outside counsel, if appropriate) for advice.

2. Whistleblower Procedures May Provide Early Warnings

Effective whistleblower procedures can serve as an early warning system, alerting an audit committee to issues when they can be addressed and rectified without undue adverse consequences. For instance, the report of the Examiner in the Lehman Brother's bankruptcy indicates that, had the whistleblower communication regarding the "Repo 105" transactions been handled effectively by the independent auditor, the audit committee would have learned of the existence and volume of such transactions and been in a position to potentially control or request disclosure of such transactions. The specific procedures will vary depending on what works best within a particular company, and the SEC does not mandate any particular set of procedures. In many cases, a general counsel will be the right initial person to receive and handle complaints and concerns on behalf of, and under the supervision of, the audit committee. Procedures should include a system for tracking the handling and disposition of complaints received and for assuring that there is no retaliation against individuals submitting complaints lawfully and in good faith.

In response to the issues raised by the recent financial crisis and the Lehman Examiner's Report, the PCAOB adopted a suite of eight auditing standards to enhance the effectiveness of the auditor's assessment of and response to the risks underlying the audit process and procedures.³⁸ The independent auditor is required, as part of its overall assessment of risks of fraud or material

³⁸ SEC Release No. 34-62919; File No. PCAOB-2010-01 (September 15, 2010).

misstatements, to make specific inquiries of management and the audit committee regarding tips or complaints about the company's financial reporting and to determine whether the board or audit committee understands and exercises oversight responsibility over financial reporting.³⁹ The independent auditor is also required to ask the audit committee whether it is aware of matters relevant to the audit, including any violations or possible violations of laws or regulations. See Chapter V: "Relationship with the Independent Auditor."

3. Civil Right of Action for Employees

Sarbanes-Oxley also provides a civil right of action for employees of public companies who believe they have been discharged or subjected to other adverse employment action because they have provided information to supervisors or the government regarding conduct they reasonably believe to violate securities or antifraud laws.

4. Model Whistleblower Procedures

To assist an audit committee, attached as *Exhibit G* are model whistleblower procedures. Note that this is only a model for procedures and companies should customize the model to their particular needs and circumstances.

B. Codes of Ethics

An audit committee also may be asked to monitor compliance with the Sarbanes-Oxley rule that requires a company to disclose whether it has adopted a code of ethics for its CEO, CFO, principal accounting officer, controller or individuals performing similar functions (and if it has not adopted such a code, why not), as well as compliance with listing standards that also mandate adoption of codes of conduct and ethics.

The code of ethics contemplated by Sarbanes-Oxley, the existence of which (or lack thereof) must be disclosed under the Sarbanes-Oxley rules, should include standards that are 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 the company's SEC reports

³⁹ PCAOB, Auditing Standard No. 12, *Identifying and Assessing Risks of Material Misstatement*.

and other public communications; compliance with applicable governmental rules and regulations; prompt internal reporting of violations of the code to appropriate persons identified in the code; and accountability for adherence to the code.

The code of conduct and ethics required by the NYSE and NASDAQ rules should apply to all directors, officers and employees of a company. The code of conduct required by the NASDAQ rules must comply with the definition of a “code of ethics” set out in the Sarbanes-Oxley rules and thus address the same topics. The code of business conduct and ethics called for by the NYSE rules should specifically address conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of company assets, compliance with laws, rules and regulations (including insider trading laws) and encouragement of the reporting of any illegal or unethical behavior. Both the NYSE and NASDAQ require that any waivers given to directors or executive officers must be approved by the board (or, in the case of the NYSE, by the board or a board committee). Furthermore, any such waiver must be disclosed within four business days of its approval by filing a current report on Form 8-K with the SEC (or, in the case of the NYSE, by press release or website disclosure).

X

Cautionary Note on Disclosures to Government Investigators

A. Audit Committees Must Be Apprised of Possible Material Illegal Acts

As a result of Sarbanes-Oxley and related regulatory initiatives, boards of directors—and especially audit committees—today increasingly are called upon to conduct internal investigations. Section 10A of the Exchange Act requires an independent auditor to inform the audit committee if, in the course of conducting an audit, the independent auditor becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the company) has or may have occurred. If the independent auditor subsequently determines that the illegal act has a material effect on the financial statements of the company and that the audit committee has not taken timely and appropriate remedial actions to address it, the independent auditor must report to the full board, which must immediately inform the SEC.

Section 10A was intended to be, in the words of one commentator, “a modest statute with limited significance.”⁴⁰ However, the SEC has adopted an aggressive interpretation of the statute’s application and its own enforcement authority thereunder, and independent auditors have responded with overly risk-averse behavior. Section 10A does create numerous interpretive difficulties for accounting firms, and, increasingly, independent auditors are resolving uncertainties on the side of requesting investigations. As a result, the requirements of Section 10A are becoming more burdensome to companies than Congress ever anticipated. It is becoming all too common for an independent auditor that finds an issue even remotely questionable to insist that the audit committee hire outside counsel to investigate. Such investigations may be a waste of resources and time and, in some cases, have interfered with the progress of major corporate transactions, to the detriment of the company and its shareholders.

An audit committee that finds itself facing a request by the independent auditor to hire counsel and investigate a situation should not be afraid to use its own business judgment. Certainly, when circumstances appear to merit a

⁴⁰ Thomas L. Riesenberg, *Trying to Hear the Whistle Blowing: The Widely Misunderstood “Illegal Act” Reporting Requirements of Exchange Act Section 10A*, 56 BUS. LAW. 1417, 1458 (2001).

thorough investigation, an audit committee should promptly commit adequate resources and take all appropriate steps. Nonetheless, audit committee members should recognize the fact that independent auditors may go beyond the requirements of Section 10A in their eagerness to protect themselves from exposure, and directors, therefore, should consider carefully before bringing in outside counsel and conducting a large-scale investigation.

B. Reports to Government May Be Discoverable

In responding to reports from independent auditors pursuant to Section 10A, and generally in responding to demands for internal investigations, directors should be mindful of the fact that any reports they make to government investigators regarding audit committee findings may be discoverable by plaintiffs in shareholder lawsuits. On the one hand, a company often will have good reasons for voluntarily sharing its findings with the DOJ, the SEC, state authorities or other regulators. This, however, has to be weighed against the risk that voluntary reports to government investigators may later be subject to discovery by plaintiffs in parallel shareholder class actions or derivative litigation.

In the past, the pressure for companies to waive the attorney-client privilege stemmed in large part from the so-called “Thompson Memo”—the 2003 DOJ document identifying the factors to be considered in determining whether to indict a company—which flatly made waiver of privilege a valid criterion for prosecutors to consider when assessing a company’s cooperation and culpability. In an apparent response to public outcry over the practice, the DOJ, on December 12, 2006, in a memo from Deputy Attorney General Paul J. McNulty (the so-called “McNulty Memo”), issued revised guidance on the prosecution of companies that superseded the Thompson Memo. The policy continues to require prosecutors to consider a company’s “timely and voluntary disclosure of wrongdoing and its willingness to cooperate,” in determining whether to seek an indictment. However, the revised principles state that corporate waiver of attorney-client and work-product protections “is not a prerequisite to a finding that a company has cooperated” and directs that such waivers may be requested only “when there is a legitimate need for the privileged information to fulfill . . . law enforcement obligations” and not when “merely desirable or convenient.” Prosecutors may seek “purely factual information,” such as attorney notes of witness statements or attorney-prepared chronologies or summaries of key events, from a company, but only after obtaining written approval by the U.S. Attorney, who is required to consult with the Assistant Attorney General for the Criminal Division. The McNulty Memo imposes additional restrictions when prosecutors seek legal advice or attorney work-product from a company. Such privileged information may be sought only in “rare circumstances” and after obtaining

written authorization from the Deputy Attorney General. Moreover, if a company declines to provide such a waiver, “prosecutors must not consider this declination against the corporation in making a charging decision.”⁴¹

These principles have significance for any company responding to a federal criminal investigation. In the past, because of the Thompson Memo’s now-superseded language, many companies assumed that waiver of the attorney-client privilege was virtually mandatory. Not surprisingly, corporate waivers had become increasingly common. That assumption no longer applies, and the policy change brought about by the McNulty Memo has opened a broader range of strategies and tactical choices for companies.

It still may make sense in some cases for a company voluntarily to waive privilege. Indeed, the McNulty Memo provides that “prosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.” Moreover, nothing in the McNulty Memo changes the fundamental principle that companies are liable, in virtually all cases, for criminal misconduct by their employees. Thus, prosecutors will continue to have leverage over companies, and companies will, in turn, continue to have incentives to be cooperative. Over time, however, this tactical retreat by the DOJ may also lead companies in appropriate cases to choose to defend employee conduct more aggressively than in the past.

C. Disclosure to Government May Constitute Waiver of Privilege

Federal Rule of Evidence 502 provides that any agreement on the effect of disclosure in a federal or state proceeding is effective only as to the parties to the agreement, unless it is incorporated into a court order. Accordingly, any confidentiality agreement with the DOJ, the SEC or any other government agency seeking to preserve the attorney-client privilege or attorney work-product

⁴¹ The McNulty Memo also adopts a position regarding advancement of legal fees that effectively codifies the June 2006 decision in *U.S. v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. June 26, 2006), which held, in a case against former KPMG partners and employees, that the Thompson Memo’s provision on advancing counsel fees, and the actions of the U.S. Attorney’s Office, in implementing those provisions, violated Fifth and Sixth Amendment rights of the defendants. The McNulty Memo states that, in weighing a company’s cooperation, “[p]rosecutors generally should *not* take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment.” Companies now are free to advance legal fees to employees in compliance with their charters, by-laws and policies without fear of being deemed uncooperative.

protection for any information disclosed to that agency will not overcome a claim of waiver by third parties, such as plaintiffs in private litigation, or prevent the information's disclosure in discovery or otherwise in a federal or state court proceeding, unless the confidentiality agreement has been incorporated into a court order. Thus, before a company voluntarily discloses to government investigators an internal review conducted by outside counsel for an audit committee, the board of directors or audit committee should consider seeking, preferably by an application made jointly with the government agency, a court-ordered non-waiver agreement that preserves as to third parties the attorney-client privilege and work-product protection attached to such materials. However, it is unclear how receptive courts will be to granting such orders.⁴² Absent such order, if disclosure made to a federal agency has the effect of waiving the attorney-client privilege or work-product privilege as to that disclosure, there is also a risk under Federal Rule of Evidence 502 that the waiver will extend to undisclosed communications or information – a so-called subject matter waiver – but only if “the disclosed and undisclosed communications or information concern the same subject matter” and “they ought in fairness to be considered together.” If a court order cannot be obtained preserving the attorney-client privilege and work-product protection as to any disclosure contemplated to be made to the DOJ or SEC, the board of directors or audit committee should consider the importance of making the disclosure to the federal agency notwithstanding the possibility that doing so may act as a waiver as to third parties, as well as precisely what should be disclosed in order to minimize the effect of any such waiver and the possibility of the waiver being deemed to extend beyond the specific information disclosed.

D. Disclosure to the Full Board of Directors (But Not Disclosure to the Independent Auditor) May Constitute Waiver of Privilege

Moreover, in certain situations, disclosures by a special committee of the board to the company's full board may also vitiate the attorney-client privilege. In particular, in the context of stock option backdating, the Delaware Chancery Court, in *Ryan v. Gifford*, Civ. Action No. 2213-CC (Del. Ch. Nov. 30, 2007), held that, when a special committee formed by a company's board of directors

⁴² See “Disclosure Stipulation Agreement and Proposed Protective Order,” Judge Rakoff, U.S. District Court, Southern District of New York, dated October 14, 2009, in connection with a lawsuit commenced by the SEC: “the Court wishes to make clear, however, that it interprets the proposed Protective Order as simply protecting [X] against any claim that the stipulated waiver implicitly effectuates a broader waiver; but the Protective Order in no way precludes any party in this or any other case from challenging on any other ground [X]'s assertion of attorney-client privilege or work-product protection regarding any information.”

shares the findings of its outside counsel's special investigation with the company's full board, which included individual board members who were under investigation for alleged wrongdoing, such special committee waived the attorney-client privilege and the work-product privilege that may have attached to the materials reviewed by the special committee and the communications with the outside counsel. More specifically, the court found that the relationship between the individual defendant board members and the special committee was "adversarial in nature," and that, therefore, the attorney-client privilege did not survive. In the absence of internal conflict, an audit committee does not regularly engage its own separate counsel, but, instead, usually interacts with the general counsel of the company and expects such communications to be privileged. However, if an internal conflict is perceived, an audit committee may find it advisable to retain its own separate counsel and not share such counsel's report with third parties (including, as appropriate, the full board).

With respect to an independent auditor, however, the D.C. Circuit made it clear, in *United States v. Deloitte LLP*, 2010 WL 2572965 (D.C. Cir. June 29, 2010), that disclosure of work product to an independent auditor, such as reports prepared by the general counsel or an outside counsel, does not constitute a waiver of the work-product privilege. The U.S. Court of Appeals' reasoning was based on the fact that an independent auditor is not a potential litigation "adversary" (as opposed to the aforementioned *Ryan* case) and that the company had a reasonable expectation of confidentiality given an auditor's professional confidentiality obligations.

E. Caution Recommended

The best practice is caution. Boards of directors in general, and audit committees in particular, should do their best to establish from the outset of an internal investigation the basis for a valid claim of privilege and weigh very carefully whether a disclosure to the government (or, if a special committee has been formed, the full board) is appropriate. If it is necessary or prudent to report to the government, a board should seek to negotiate the strongest possible confidentiality agreement with the government. At all times, companies must act with an understanding of the fact that there is no certainty that a confidentiality agreement will shield a company from a finding that a disclosure to the government effected a waiver of privilege.

XI

Audit Committee Member Liability Issues

Understandably, no subject will be of more concern to one asked to serve on an audit committee than that of any potential for personal liability arising from that service. The good news for an audit committee member is that the risk of liability is very slight if he or she acts conscientiously. Neither Sarbanes-Oxley nor any other development has fundamentally affected the fact that an independent audit committee member who performs his or her duties in good faith is unlikely to be found liable for losses suffered by reason of such performance. It is true that neither the company nor its legal counsel can issue guarantees, but it is equally true that insulations against personal liability are perfectly adequate today, notwithstanding the fact that they are not, nor can they be expected to be, perfect.

A. The Business Judgment Rule Protection Remains

A few years ago, headlines regarding personal liability of corporate directors, such as those describing the Enron and WorldCom settlements⁴³ and the Emerging Communications case,⁴⁴ caused increasing anxiety for directors of public companies. The Enron and Worldcom cases, however, were among the most egregious of the series of scandals that followed the bursting of the Millennium Bubble, involved billions in fraudulent misstatements and were brought under the strict liability provisions of the federal securities laws, not the fiduciary duty requirements of state law. Furthermore, as settlements rather than judicial decisions of liability, they did not have any precedential value for future judicial determinations, and to date, there is no legal reason for directors to be overly concerned. As Chancellor Leo E. Strine, Jr. put it, “an informed, disinterested business judgment still commands judicial respect in Delaware.”⁴⁵

⁴³ The former non-management directors of Enron agreed to pay \$13 million out of their own pockets to settle shareholder lawsuits. The WorldCom settlement of securities fraud litigation relating to public offerings of WorldCom securities called for 12 former directors to pay approximately \$25 million of their own money and insurers to pay \$35 million.

⁴⁴ In the 2004 case involving the leveraged buyout of Emerging Communications, the Delaware Chancery Court ruled that a director with particularly relevant expertise could not reasonably rely upon the advice of an outside consultant who opined incorrectly on the fairness of the price to be paid per share.

⁴⁵ Vice Chancellor Leo E. Strine, Jr., *Big Deals and Independent Directors: Tips for Being a Successful Fiduciary in the Transactional Setting*, Remarks at the Directors’ Education Institute, Duke University (Mar. 17, 2005).

Three considerations should give directors of large companies comfort that fear of personal liability is unwarranted in normal circumstances. First, with respect to the fiduciary duties of a director to a company and its shareholders, *the business judgment rule remains available* as a protection to directors who meet its prerequisites: namely, lack of conflicting interests, good faith and reasonable attentiveness. Second, most state corporation laws contain a provision such as Section 141(e) of the Delaware General Corporation Law, which provides that directors may rely upon the reports of retained experts or corporate officers so long as due care was used in selecting such persons (or, more broadly, that a reasonable director under the circumstances would have relied on such agents).⁴⁶ Third, most states have adopted provisions such as Section 102(b)(7) of the Delaware General Corporation Law, which permits companies to adopt charter provisions to waive liability for monetary damages arising from breach of a director's duty of care, and most public companies have adopted charter amendments incorporating such a waiver into their charter.

While Sarbanes-Oxley signaled toughness by substantially increasing criminal penalties for securities fraud and by creating a criminal offense of knowingly executing, or attempting to execute, a scheme to defraud shareholders of public companies, as well as by prohibiting loans to directors and coercion of auditors (violations of which could result in SEC enforcement actions), it did not otherwise change the elements of civil liability under the securities laws or create new rights of civil actions for which directors may be liable.

B. Audit Committee Members' Duties of Risk Oversight and Personal Liability

With respect to directors' duties for risk management, the Delaware courts developed the basic rule under the *Caremark* line of cases that directors can be liable for a failure of board oversight only where there is "sustained or systemic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists," noting that this is a "demanding test." *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959, 971 (Del. Ch. 1996). Despite increasing political and media focus on and criticism of risk assessment and risk management efforts by corporate boards,

⁴⁶ In the *Emerging Communications* case, the director with relevant expertise who was found to have unreasonably relied on the advice of an outside consultant was not independent; the court determined that he had acted to further his own business interests at the expense of the shareholders. *In re Emerging Communications, Inc. Shareholders Litig.*, 2004 Del. Ch. LEXIS 70, at *145-*146 (May 3, 2004).

the decisions *In Re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106 (Del. Ch. 2009), and *Goldman Sachs Group, Inc. Shareholder Litigation*, 2011 WL 4826104 (Del.Ch.), by the Delaware Court of Chancery reaffirms the *Caremark* fundamental standard and shows that the business judgment rule will survive the financial crisis intact.

The plaintiffs in *In re Citigroup Inc. Shareholder Derivative Litigation*, decided in 2009, alleged that the defendant directors of Citigroup had breached their fiduciary duties by not properly monitoring and managing the business risks that Citigroup faced from subprime mortgage securities, and by ignoring alleged “red flags” that consisted primarily of press reports and events indicating worsening conditions in the subprime and credit markets. Declaring that “oversight duties under Delaware law are not designed to subject directors, even expert directors, to personal liability for failure to predict the future and to properly evaluate business risk,” the court dismissed these claims, reaffirming the “extremely high burden” plaintiffs face in bringing a claim for personal director liability for a failure to monitor business risk and that while directors could be liable for a failure of board oversight, “only a sustained or systemic failure of the board to exercise oversight [...] will establish the lack of good faith that is a necessary condition to liability.” Notably, the court drew an important distinction between oversight liability with respect to business risks and oversight liability with respect to illegal conduct, emphasizing that courts will not permit oversight jurisprudence to be distorted by “attempts to hold director defendants personally liable for making (or allowing to be made) business decisions that, in hindsight, turned out poorly.”

More recently, in *Goldman Sachs Group, Inc. Shareholder Litigation*, decided in October 2011, the Delaware Chancery Court dismissed claims against directors of Goldman Sachs based on allegations that they failed to properly oversee the company’s alleged excessive risk taking in the subprime mortgage securities market and caused reputational damage to the company by hedging risks in a manner that conflicted with the interests of its clients. Chief among the plaintiffs’ allegations was that Goldman Sachs’ compensation structure, as overseen by the board of directors, incentivized management to take on ever riskier investments with benefits that inured to management but with the risks of those actions falling to the shareholders. In dismissing the plaintiffs’ *Caremark* claims, the court reiterated that, in the absence of “red flags,” the manner in which a company evaluates the risks involved with a given business decision is protected by the business judgment rule and will not be second-guessed by judges.

Audit committee members can also take comfort in the Examiner’s Report in the Lehman bankruptcy. That Report highlighted the failure of both the

independent auditor and management to disclose to and discuss with Lehman's directors, and particularly audit committee members, the use and scope of so-called "Repo 105" transactions, which, according to the report, allowed Lehman to paint "a misleading picture of its financial condition."⁴⁷ The report pointed out that Lehman's independent auditor also failed to apprise Lehman's audit committee of a senior management whistleblower's allegations about the end-of-quarter use of "Repo 105" transactions to manipulate the quarterly balance sheet. The examiner concluded that this oversight gave rise to a "colorable claim of malpractice" on the part of the auditor, which was sued by New York's Attorney General for fraud. With respect to Lehman's audit committee, however, the report noted that audit committee members did not breach their duties as minutes showed that they were never informed of the "Repo 105" transactions and had explicitly requested to be apprised of all of such employee allegations.

Overall, these cases reflect that it is difficult to show a breach of fiduciary duty for failure to exercise oversight and that the board, and more particularly, the audit committee of the board, is not required to undertake extraordinary efforts to uncover non-compliance within the company, *provided* a monitoring system is in place. Nonetheless, in the past year, the SEC has clearly indicated more rigorous enforcement actions with regard to audit committee chairs and members. Although involving particularly egregious facts and circumstances, the SEC entered into a settlement in November 2011 with three outside directors and members of the audit committee of DHB Industries charged for ignoring obvious signs of fraud, including failing to understand and acquit their responsibilities as audit committee members, in light of DHB's chief executive officer's misappropriation of more than \$10 million and manipulation of the company's financial statements. In this heightened enforcement context, companies should adhere to reasonable and prudent practices and should not structure their risk oversight practices around the minimum requirements needed to satisfy the business judgment rule.

When complex legal, governance or accounting issues arise, it will be useful for a director to ask the following simple questions:

⁴⁷ The Examiner's report defines a "Repo 105" transaction as a device designed to temporarily remove securities inventory from a balance sheet, similar to standard repurchase and resale transactions used to secure short-term financing.

- Have I acted with undivided loyalty to the company and its shareholders, and have all my personal interests in this matter been fully disclosed?
- Have I exercised due care in examining the issues underlying the proposed action, including receiving advice as to whether the action is in compliance with applicable rules and regulations?
- Will the proposed action and the relevant facts and circumstance be candidly disclosed to all affected parties?

If the answers to those questions are yes, a director should be fully protected in exercising his or her business judgment, and, even if, with the benefit of hindsight, the judgment proves flawed, the director should not be faulted.

C. Liability Protections—Director and Officer Liability Insurance

While D&O insurance has become more expensive, there is no change in law that limits the availability of this protection. The nature and extent of D&O coverage is always a matter requiring reference to the particular contract language involved since these contracts may vary in material ways. In particular, one must consider the policy period (in recent years these policies have become shorter, not infrequently covering only one year); the policy limits (which pertain to all claims during the policy period); the retention (or self-insurance) amount; co-insurance requirements; and policy exclusions.

It is important that directors (and their counsel) have an opportunity to review the particular terms of a D&O insurance policy, including any retentions or exclusions from coverage. Counsel should try to ensure that, in the event that a restatement is required at a future time, such restatement does not give the insurer a right to rescind the coverage. Another risk to directors in D&O insurance arises from a possible bankruptcy filing. Where the company itself is a beneficiary of the D&O insurance policy, a trustee in bankruptcy, as its successor, may have a conflict of interest with directors who are named in a suit. This risk can be managed by having the company purchase a special supplemental policy that covers just officers and directors and not the company.⁴⁸

⁴⁸ The bankruptcy court case of *National Century Financial Enterprises v. Gulf Insurance Co.* (Bankr. S.D. Ohio, Jan. 10, 2005) illustrates the importance of this point. The bankruptcy of NCFE resulted in a contest
(footnote continued)

As a matter of corporate law, rights to indemnification remain as they have been. The important feature for an audit committee member to understand is that these rights should commit the company to provide indemnification to the full extent permitted by law. Also, a new director should ascertain whether payments made in settlement of a claim are covered.

D. Audit Committee Can Be Its Own Best Protection

To be sure, prospective audit committee members must understand that more will be required of them—more time and more effort—than may have been demanded in the past. The legal standard for measuring the duties of audit committee members has not changed in theory. The law always has stated that a corporate director must exercise that degree of diligence that a reasonable person would exercise in all of the circumstances. This vague standard, like all negligence standards, looks to some social context to determine how a hypothetical “reasonable person” would have acted. It seems clear that all aspects of our legal system—from legislatures and regulators to judges and juries—are likely to demand greater attention and involvement (that is to say, greater commitment) from corporate directors in general, but especially from audit committee members, than in the past.

Failure to meet “reasonable person” expectations could in theory result in liability and in reputational injury. Each risk is a serious matter. When reputations earned over a lifetime for probity, diligence and sound judgment are injured, those audit committee members who sustain such injury cannot regard it as minor. Since one cannot prevent suits from being filed, the only protection against some reputational loss is conscientious and effective performance.

The courts understand the importance to corporate America of having candidates who are willing to serve on audit committees and the necessity of providing them with adequate pay, indemnification and insurance. They also understand that directors should not be seen as guarantors of good results or preventors of the malfeasance, misfeasance or nonfeasance of others, but should be entitled to rely in good faith on corporate documents, committees and experts to a significant degree in making their business judgments. Thus, when audit

between directors of NCFE and the company itself for the proceeds of NCFE’s primary D&O insurance policy. The court ruled that NCFE’s claim would be only partially subordinated to the directors’ claims, underscoring the importance for corporate officers and directors of ensuring that they will have adequate separate D&O insurance policy coverage available, for which they will not have to compete with their company.

committee members fulfill their duties in good faith, they should not be concerned that they will be held personally responsible for mistakes or bad faith actions of management or independent auditors.

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Exhibit A

MODEL AUDIT COMMITTEE CHARTER⁴⁹ (NYSE-listed Company)

Purpose

The Audit Committee is appointed by the Board of Directors (the “Board”) to assist the Board in monitoring (1) the integrity of the financial statements of the Company, (2) the independent auditor’s qualifications and independence, (3) the performance of the Company’s internal audit function and independent auditors, and (4) the compliance by the Company with legal and regulatory requirements.⁵⁰

The Audit Committee shall prepare the report required by the rules of the Securities and Exchange Commission (the “Commission”) to be included in the Company’s annual proxy statement.⁵¹

Committee Membership

The Audit Committee shall consist of no fewer than three members.⁵² The members of the Audit Committee shall meet the independence and experience requirements of the New York Stock Exchange (the “NYSE”), Section 10A(m)(3) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and the

⁴⁹ A written audit committee charter must be adopted by the Board pursuant to Section 303A.07(b) of the New York Stock Exchange Listed Company Manual. See also Item 7(d) of Schedule 14A, Item 407(d) and Instruction 2 to Item 407 of Regulation S-K, pursuant to which a company must disclose in its annual proxy statement whether it has adopted a written charter for the audit committee and whether a current copy of the audit committee charter is available on the company’s website (and, if so, the company’s website address). If a current copy of the audit committee charter is not available on the company’s website, a copy of the audit committee charter must be included as an appendix to the proxy statement at least once every three fiscal years or if the charter has been materially amended since the beginning of the last fiscal year. If a current copy of the audit committee charter is not available on the company’s website and is not being included in the company’s proxy statement, the company must identify in which of the prior fiscal years the audit committee charter was so included.

⁵⁰ NYSE Listed Company Manual Section 303A.07(b)(i)(A).

⁵¹ NYSE Listed Company Manual Section 303A.07(b)(i)(B). See Item 407(d) of Regulation S-K and Item 7(d) of Schedule 14A.

⁵² NYSE Listed Company Manual Section 303A.07(a).

rules and regulations of the Commission.⁵³ At least one member of the Audit Committee shall be an “audit committee financial expert” (as defined by the Commission).⁵⁴ Audit Committee members shall not simultaneously serve on the audit committees of more than two other public companies.⁵⁵

The members of the Audit Committee shall be appointed by the Board on the recommendation of the Nominating & Governance Committee.⁵⁶ Audit Committee members may be replaced by the Board.

Meetings

The Audit Committee shall meet as often as it determines necessary, but not less frequently than quarterly. The Audit Committee shall meet periodically in separate executive sessions with management (including the chief financial officer and chief accounting officer), the internal auditors and the independent auditor, and have such other direct and independent interaction with such persons

⁵³ NYSE Listed Company Manual Section 303A.07(a) requires that each member of an audit committee be (a) “independent” (as defined by the NYSE Listed Company Manual) and (b) “financially literate” (as such qualification is interpreted by the board in its business judgment) or must become financially literate within a reasonable period of time after his or her appointment. In addition, at least one member must have accounting or financial management expertise, as the board interprets such qualification in its business judgment. NYSE Listed Company Manual Section 303A.06 provides that all listed companies must have audit committees that satisfy the requirements of Rule 10A-3 under the Exchange Act. Rule 10A-3 (added by Section 301 of the Sarbanes-Oxley Act) requires the NYSE and NASDAQ to prohibit the listing of any company unless each member of the audit committee is “independent,” which is defined to mean that such individual may not, other than in his or her capacity as a member of the audit committee, the board, or any other board committee: (A) accept, directly or indirectly, any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof, *provided* that, unless the rules of the national securities exchange or national securities association provide otherwise, 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 (B) be an affiliated person of the issuer or any subsidiary thereof.

⁵⁴ See Item 407(d)(5) of Regulation S-K. Commentary to NYSE Listed Company Manual Section 303A.07(a) provides that a board may presume that an audit committee member possesses “accounting or financial management expertise” if he or she satisfies the Commission’s definition of an “audit committee financial expert.”

⁵⁵ Commentary to NYSE Listed Company Manual Section 303A.07(a) states that, if an audit committee member simultaneously serves on the audit committee of more than three public companies, and the NYSE-listed company does not limit the number of audit committees on which its audit committee members serve to three or less, then, in each case, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company’s audit committee and disclose such determination in the proxy statement.

⁵⁶ NYSE Listed Company Manual Section 303A.04 places responsibility for board committee nominations in the independent nominating & corporate governance committee.

from time to time as the members of the Audit Committee deem appropriate.⁵⁷ The Audit Committee may request any officer or employee of the Company or the Company's outside counsel or independent auditor to attend a meeting of the Audit Committee or to meet with any members of, or consultants to, the Audit Committee. Written minutes of Audit Committee meetings shall be maintained.

Committee Authority and Responsibilities

The Audit Committee shall have the sole authority to appoint or replace the independent auditor (subject, if applicable, to shareholder ratification).⁵⁸ The Audit Committee shall be directly responsible for the compensation and oversight of the work of the independent auditor (including resolution of disagreements between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work.⁵⁹ The independent auditor shall report directly to the Audit Committee.⁶⁰

The Audit Committee shall pre-approve all auditing services, internal control-related services and permitted non-audit services (including the range of fees and terms thereof) to be performed for the Company by the independent auditor, subject to the *de minimis* exception for non-audit services described in Section 10A(i)(1)(B) of the Exchange Act that are approved by the Audit Committee prior to the completion of the audit.⁶¹ The Audit Committee shall review and discuss with the independent auditor any documentation supplied by the independent auditor as to the nature and scope of any tax services to be approved, as well as the potential effects of the provision of such services on the auditor's independence.⁶² The Audit Committee may form and delegate authority

⁵⁷ NYSE Listed Company Manual Section 303A.07(b)(iii)(E).

⁵⁸ NYSE Listed Company Manual Section 303A.06 and Rule 10A-3 under the Exchange Act.

⁵⁹ Rule 10A-3(b)(2) under the Exchange Act (added by Section 301 of the Sarbanes-Oxley Act) requires an audit committee of each listed issuer, in its capacity as a committee of the board, to be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and an independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the listed issuer.

⁶⁰ Rule 10A-3(b)(2) under the Exchange Act (added by Section 301 of the Sarbanes-Oxley Act) requires each registered public accounting firm to report directly to the audit committee.

⁶¹ Sections 10A(h) and 10A(i) of the Exchange Act (added by Sections 201 and 202 of the Sarbanes-Oxley Act) require such pre-approval with respect to services provided by a registered public accounting firms to its audit clients.

⁶² This flows from PCAOB Rule 3524, PCAOB Release No. 2005-014 (July 26, 2005).

to subcommittees consisting of one or more members, when appropriate, including the authority to grant pre-approvals of audit and permitted non-audit services, *provided* that decisions of such subcommittee to grant pre-approvals shall be presented to the full Audit Committee at its next scheduled meeting.⁶³

The Audit Committee shall have the authority, to the extent it deems necessary or appropriate, to retain independent legal, accounting or other advisors.⁶⁴ The Company shall provide appropriate funding, as determined by the Audit Committee, for payment of compensation to the independent auditor for the purpose of rendering or issuing an audit report or performing other audit, review or attest services for the Company and to any advisors employed by the Audit Committee, as well as funding for the payment of ordinary administrative expenses of the Audit Committee that are necessary or appropriate in carrying out its duties.⁶⁵

The Audit Committee shall make regular reports to the Board.⁶⁶ The Audit Committee shall annually review the Audit Committee's own performance.⁶⁷

The Audit Committee, to the extent it deems necessary or appropriate, shall:

Financial Statement and Disclosure Matters

1. Review and discuss with management and the independent auditor the annual audited financial statements, including disclosures made in management's discussion and analysis, and recommend to the Board whether the audited financial statements should be included in the Company's Form 10-K.⁶⁸
2. Review and discuss with management and the independent auditor the Company's quarterly financial statements prior to the filing of

⁶³ Section 10A(i)(3) of the Exchange Act (added by Section 202 of the Sarbanes-Oxley Act).

⁶⁴ Rule 10A-3(b)(4) under the Exchange Act (adopted by the Commission pursuant to Section 301 of the Sarbanes-Oxley Act).

⁶⁵ Section 10A(m)(6) of the Exchange Act (added by Section 301 of the Sarbanes-Oxley Act).

⁶⁶ NYSE Listed Company Manual Section 303A.07(b)(iii)(H).

⁶⁷ NYSE Listed Company Manual Section 303A.07(b)(ii).

⁶⁸ NYSE Listed Company Manual Section 303A.07(b)(iii)(B); Item 407(d) of Regulation S-K.

its Form 10-Q, including the results of the independent auditor's review of the quarterly financial statements.⁶⁹

3. Discuss with management and the independent auditor significant financial reporting issues and judgments made in connection with the preparation of the Company's financial statements, including any significant changes in the Company's selection or application of accounting principles.⁷⁰
4. Review and discuss with management and the independent auditor any major issues as to the adequacy of the Company's internal controls, any special steps adopted in light of material control deficiencies and the adequacy of disclosures about changes in internal control over financial reporting.⁷¹
5. Review and discuss with management (including the senior internal audit executive) and the independent auditor the Company's internal controls report and the independent auditor's attestation report prior to the filing of the Company's Form 10-K.⁷²
6. Review and discuss quarterly reports from the independent auditors on:⁷³
 - (a) all critical accounting policies and practices to be used;
 - (b) all alternative treatments of financial information within U.S. generally accepted accounting principles (GAAP) that have been discussed with management, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the independent auditor;⁷⁴ and

⁶⁹ NYSE Listed Company Manual Section 303A.07(b)(iii)(B).

⁷⁰ General commentary to NYSE Listed Company Manual Section 303A.07(b).

⁷¹ General commentary to NYSE Listed Company Manual Section 303A.07(b).

⁷² Implicit in the audit committee's responsibility to oversee a company's internal auditing functions is its review with management and the independent auditor of management's internal control report and the independent auditor's attestation of that report pursuant to Item 308 of Regulation S-K. *See* SEC Release No. 33-8238.

⁷³ Sarbanes Oxley, Section 204(k).

⁷⁴ General commentary to NYSE Listed Company Manual Section 303A.07(b).

- (c) other material written communications between the independent auditor and management, such as any management letter or schedule of unadjusted differences.⁷⁵
- 7. Discuss with management the Company's earnings press releases, including the use of "*pro forma*" or "adjusted" non-GAAP information, as well as financial information and earnings guidance provided to analysts and rating agencies. Such discussions may be general (consisting of discussing the types of information to be disclosed and the types of presentations to be made), and each earnings release or each instance in which the Company provides earnings guidance need not be discussed in advance.⁷⁶
- 8. Discuss with management and the independent auditor the effect of regulatory and accounting initiatives, as well as off-balance-sheet structures on the Company's financial statements.⁷⁷
- 9. Discuss with management the Company's major financial risk exposures and the steps management has taken to monitor and control such exposures, including the Company's risk assessment and risk management policies⁷⁸ [and review and approve derivatives transactions].⁷⁹
- 10. Discuss with the independent auditor the matters required to be discussed by Statement on Auditing Standards No. 114 relating to the conduct of the audit, including any difficulties encountered in the course of the audit work, any restrictions on the scope of

⁷⁵ Section 10A(k) of the Exchange Act (added by Section 204 of the Sarbanes-Oxley Act) requires registered public accounting firms to provide such reports on a timely basis; *see also* commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(F).

⁷⁶ NYSE Listed Company Manual Section 303A.07(b)(iii)(C) and the commentary thereto, and the general commentary to NYSE Listed Company Manual Section 303A.07(b).

⁷⁷ General commentary to NYSE Listed Company Manual Section 303A.07(b).

⁷⁸ NYSE Listed Company Manual Section 303A.07(b)(iii)(D) and the commentary thereto.

⁷⁹ To be included if the Audit Committee is selected to review and approve derivatives transaction under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

activities or access to requested information, and any significant disagreements with management.⁸⁰

11. Review disclosures made to the Audit Committee by the Company's CEO and CFO during their certification process for the Form 10-K and Form 10-Q about any significant deficiencies in the design or operation of internal controls or material weaknesses therein and any fraud involving management or other employees who have a significant role in the Company's internal controls.⁸¹

Oversight of the Company's Relationship with the Independent Auditor

12. Before the engagement of an independent auditor and at least annually thereafter, review and discuss with the independent auditor the independent auditor's written communications to the Audit Committee regarding the relationships between the auditor and the Company that, in the auditor's professional judgment, may reasonably be thought to bear on its independence and affirm in writing to the audit committee that the auditor is independent.⁸²
13. Review and evaluate the lead partner of the independent auditor team.⁸³
14. Obtain and review a report from the independent auditor at least annually regarding: (a) the independent auditor's internal quality-control procedures; (b) any material issues raised by the most recent internal quality-control review, or peer review, of the independent auditor, or by any inquiry or investigation by governmental or professional authorities within the preceding five years respecting one or more independent audits carried out by the independent auditor; (c) any steps taken to deal with any such issues; and (d) all relationships between the independent auditor and the Company. Evaluate the qualifications, performance and independence of the independent auditor, including considering

⁸⁰ Item 407(d) of Regulation S-K and NYSE Listed Company Manual Section 303A.07(b)(iii)(F).

⁸¹ Exchange Act Rule 13a-14 (adopted by the Commission pursuant to Section 302 of the Sarbanes-Oxley Act) requires that the CEO and CFO certify in each 10-K and 10-Q that they have disclosed such information to a company's independent auditors and the audit committee.

⁸² Item 407(d)(3)(i)(C) of Regulation S-K. SEC Release Nos. 33-8961; 34-5856 (September 26, 2008).

⁸³ Commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(A).

whether the independent auditor's quality controls are adequate and the provision of permitted non-audit services is compatible with maintaining the auditor's independence, taking into account the opinions of management and internal auditors. The Audit Committee shall present its conclusions with respect to the independent auditor to the Board.⁸⁴

15. Ensure the rotation of the audit partners as required by law. Consider whether, in order to ensure continuing auditor independence, it is appropriate to adopt a policy of rotating the independent auditing firm on a regular basis.⁸⁵
16. Set policies for the Company's hiring of employees or former employees of the independent auditor.⁸⁶
17. Discuss with the independent auditor material issues on which the national office of the independent auditor was consulted by the Company's audit team.⁸⁷
18. Meet with the independent auditor prior to the audit to discuss the planning and staffing of the audit.⁸⁸

⁸⁴ NYSE Listed Company Manual Section 303A.07(b)(iii)(A) and the commentary thereto.

⁸⁵ Commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(A). Section 10A(j) of the Exchange Act (added by Section 203 of the Sarbanes-Oxley Act) makes it unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner having primary responsibility for the audit, or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the five previous fiscal years of that issuer.

⁸⁶ NYSE Listed Company Manual Section 303A.07(b)(iii)(G). Section 10A(l) of the Exchange Act (added by Section 206 of the Sarbanes-Oxley Act) makes it unlawful for a registered public accounting firm to perform for an issuer any audit service if a CEO, comptroller, CFO, chief accounting officer or any individual serving in an equivalent position for the issuer was employed by that registered public accounting firm and participated in any capacity in the audit of that issuer during the one-year period preceding the date of initiation of the audit; Commission and PCAOB rules further expand upon the impact the hiring of employees or former employees of the independent auditor may have on the auditor's independence.

⁸⁷ Commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(F).

⁸⁸ This is part of an audit committee's responsibility for having sole authority to retain the independent auditor and for approving all audit engagement fees and terms (*see* Rule 10A-3(b)(2) under the Exchange Act).

Oversight of the Company's Internal Audit Function

19. Review the appointment and replacement of the senior internal auditing executive.⁸⁹
20. Review the significant reports to management prepared by the internal auditing department and management's responses.⁹⁰
21. Discuss with the independent auditor and management the internal audit department's responsibilities, budget and staffing, and any recommended changes in the planned scope of the internal audit.⁹¹

Compliance Oversight Responsibilities

22. Obtain from the independent auditor assurance that Section 10A(b) of the Exchange Act has not been implicated.⁹²
23. Obtain reports from management, the Company's senior internal auditing executive and the independent auditor that the Company and its subsidiary/foreign affiliated entities are in conformity with applicable legal requirements and the Company's Code of Business Conduct and Ethics. Review reports and disclosures of insider and affiliated party transactions. Advise the Board with respect to the Company's policies and procedures regarding compliance with applicable laws and regulations and with the Company's Code of Business Conduct and Ethics.⁹³
24. Establish procedures for the receipt, retention and treatment of complaints received by the Company regarding accounting,

⁸⁹ NYSE Listed Company Manual Section 303A.07(c) requires each listed company to have an internal audit function, although it does not require companies to establish a separate internal audit department. A company may choose to outsource this function to a third-party service provider other than its independent auditor.

⁹⁰ This relates to one of an audit committee's principal purposes to assist board oversight of the performance of a company's internal audit function (*see* NYSE Listed Company Manual Section 303A.07(c)).

⁹¹ Commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(F).

⁹² Section 10A(b) of the Exchange Act requires an independent auditor, if it detects or becomes aware of any illegal act, to assure that the audit committee is adequately informed and to provide a report if the independent auditor has reached specified conclusions with respect to such illegal acts.

⁹³ This relates to one of an audit committee's principal purposes to assist board oversight of the company's compliance with legal and regulatory requirements (*see* commentary to NYSE Listed Company Manual Sections 303A.07(b)(iii)(D) and 303A.07(b)(iii)(H)).

internal accounting controls or auditing matters, and the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.⁹⁴

25. Discuss with management and the independent auditor any correspondence with regulators or governmental agencies and any published reports that raise material issues regarding the Company's financial statements or accounting policies.⁹⁵
26. Discuss with the Company's General Counsel legal matters that may have a material impact on the financial statements or the Company's compliance policies and internal controls.⁹⁶
27. Review and approve or ratify all related-party transactions in accordance with the Company's Policies and Procedures with respect to Related Person Transactions.⁹⁷

Limitation of Audit Committee's Role

While the Audit Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Audit Committee to plan or conduct audits or to determine that the Company's financial statements and disclosures are complete and accurate and are in accordance with GAAP, applicable rules and regulations. These are the responsibilities of management and the independent auditor.⁹⁸

⁹⁴ Rule 10A-3(b)(3) under the Exchange Act requires listed company audit committees to establish such procedures.

⁹⁵ This relates to one of an audit committee's principal purposes to assist board oversight of the integrity of a company's financial statements (*see* general commentary to NYSE Listed Company Manual Section 303A.07(b)).

⁹⁶ This relates to one of an audit committee's principal purposes to assist board oversight of the company's compliance with legal and regulatory requirements (*see* general commentary to NYSE Listed Company Manual Section 303A.07(b) and commentary to NYSE Listed Company Manual Section 303A.07(b)(iii)(H)).

⁹⁷ Commission rules mandate that companies disclose the persons or groups of persons on the board or otherwise who are responsible for applying the company's policies and procedures regarding related party transactions. Item 404 of Regulation S-K. Section 314 of the NYSE Listed Company Manual recommends that the audit committee or another independent body of the board be responsible for the review and oversight of related-party transactions. The term "related-party transaction" refers to transactions required to be disclosed pursuant to SEC Regulation S-K, Item 404.

⁹⁸ General commentary to NYSE Listed Company Manual Section 303A.07(b).

Exhibit B

MODEL AUDIT COMMITTEE CHARTER⁹⁹ (NASDAQ-listed Company)

Purpose

The Audit Committee is appointed by the Board of Directors (the “Board”) to oversee the accounting and financial reporting processes of the Company and the audits of the Company’s financial statements.¹⁰⁰ In that regard, the Audit Committee assists the Board in monitoring (1) the integrity of the financial statements of the Company, (2) the independent auditor’s qualifications and independence, (3) the performance of the Company’s internal audit function¹⁰¹ and independent auditors, and (4) the compliance by the Company with legal and regulatory requirements.

The Audit Committee shall prepare the report required by the rules of the Securities and Exchange Commission (the “Commission”) to be included in the Company’s annual proxy statement.¹⁰²

Committee Membership

The Audit Committee shall consist of no fewer than three members.¹⁰³ Each member of the Audit Committee shall meet the independence and

⁹⁹ Pursuant to NASDAQ Rule 5605(c)(1), each company must certify that it has adopted a formal written audit committee charter. *See also* Item 7(d) of Schedule 14A, Item 407(d) and Instruction 2 to Item 407 of Regulation S-K, pursuant to which the company must disclose in its annual proxy statement whether it has adopted a written charter for the audit committee and whether a current copy of the audit committee charter is available on the company’s website (and, if so, the company’s website address). If a current copy of the audit committee charter is not available on the company’s website, a copy of the audit committee charter must be included as an appendix to the proxy statement at least once every three fiscal years, or if the charter has been materially amended since the beginning of the last fiscal year. If a current copy of the audit committee charter is not available on the company’s website and is not being included in the company’s proxy statement, the company must identify in which of the prior fiscal years the audit committee charter was so included.

¹⁰⁰ NASDAQ Rule 5605(c)(1)(C).

¹⁰¹ Although NASDAQ does not require its listed companies to have an internal audit function, if an internal audit function exists at the listed company, it is appropriate for an audit committee to monitor its performance.

¹⁰² *See* Item 407(d) of Regulation S-K and Item 7(d) of Schedule 14A.

¹⁰³ NASDAQ Rule 5605(c)(2)(A).

experience requirements of the NASDAQ Listing Rulebook and the Securities Exchange Act of 1934, as amended (the “Exchange Act”).¹⁰⁴ All members of the Audit Committee shall be able to read and understand fundamental financial statements.¹⁰⁵ No member of the Audit Committee shall have participated in the preparation of the financial statements of the Company in the past three years.¹⁰⁶ At least one member of the Audit Committee shall be an “audit committee financial expert” as defined by the Commission.¹⁰⁷ However, one director who does not meet the NASDAQ definition of independence, but who meets the criteria set forth in Section 10A(m)(3) under the Exchange Act and the rules thereunder, and who is not a current officer or employee or a family member of such individual, may serve for no more than two years on the Audit Committee if the Board, under exceptional and limited circumstances, determines that such individual’s membership is required by the best interests of the Company and its shareholders.¹⁰⁸ Such individual must satisfy the independence requirements set forth in Section 10A(m)(3) of the Exchange Act, and may not chair the Audit Committee. The use of this “exceptional and limited circumstances” exception,

¹⁰⁴ NASDAQ Rule 5605(c)(2)(A) requires that each member of an audit committee be “independent” as defined by NASDAQ Rule 5605(a)(2), and not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years. NASDAQ Rule 5605(c)(2)(A) also provides that audit committee members must satisfy the independence requirements of Exchange Act Rule 10A-3(b) (subject to the exemptions provided in Rule 10A-3(c)). Exchange Act Rule 10A-3(b)(1) requires the NYSE and NASDAQ to prohibit the listing of any company unless each member of the audit committee is “independent,” which is defined to mean that such individual may not, other than in his or her capacity as a member of the audit committee, the board, or any other board committee: (A) accept, directly or indirectly, any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof, *provided* that, unless the rules of the national securities exchange or national securities association provide otherwise, 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 (B) be an affiliated person of the issuer or any subsidiary thereof.

¹⁰⁵ NASDAQ Rule 5605(c)(2)(A).

¹⁰⁶ NASDAQ Rule 5605(c)(2)(A)(iii). The Rule explains that “financial statements” includes a company’s balance sheet, income statement and cash flow statement.

¹⁰⁷ See Item 407(d)(5) of Regulation S-K. NASDAQ Rule 5605(c)(2)(A) requires that at least one audit committee member have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual’s financial sophistication, including being or having been a CEO, CFO or other senior officer with financial oversight responsibilities. The NASDAQ Interpretive Material states that this requirement will be deemed to be met by anyone who qualifies as an “audit committee financial expert” within the meaning of the Exchange Act Rules. See IM-5605-4.

¹⁰⁸ NASDAQ Rule 5605(c)(2)(B).

as well as the nature of the individual's relationship to the Company and the basis for the Board's determination, shall be disclosed in the annual proxy statement.¹⁰⁹

In addition, if an Audit Committee member ceases to be independent for reasons outside the member's reasonable control, his or her membership on the Audit Committee may continue until the earlier of the Company's next annual shareholders' meeting or one year from the occurrence of the event that caused the failure to qualify as independent.¹¹⁰ If the Company is not already relying on this provision, and falls out of compliance with the requirements regarding Audit Committee composition due to a single vacancy on the Audit Committee, then the Company will have until the earlier of the next annual shareholders' meeting or one year from the occurrence of the event that caused the failure to comply with this requirement.¹¹¹ The Company shall provide notice to NASDAQ immediately upon learning of the event or circumstance that caused the non-compliance, if it expects to rely on either of these provisions for a cure period.

The members of the Audit Committee shall be appointed and may be replaced by the Board.

Meetings

The Audit Committee shall meet as often as it determines necessary, but not less frequently than quarterly. The Audit Committee shall meet periodically in separate executive sessions with management, the internal auditors and the independent auditor, and have such other direct and independent interaction with such persons from time to time as the members of the Audit Committee deem appropriate. The Audit Committee may request any officer or employee of the Company or the Company's outside counsel or independent auditor to attend a meeting of the Audit Committee or to meet with any members of, or consultants to, the Audit Committee. Written minutes of Audit Committee meetings shall be maintained.

¹⁰⁹ Or, if the issuer does not file a proxy, in its Form 10-K or 20-F.

¹¹⁰ NASDAQ Rule 5605(c)(4)(A) provides this cure period for the independence requirement.

¹¹¹ NASDAQ Rule 5605(c)(4)(B) provides this additional cure period.

Committee Authority and Responsibilities¹¹²

The Audit Committee shall have the sole authority to appoint, determine funding for, and oversee the outside auditors (subject, if applicable, to shareholder ratification).¹¹³ The Audit Committee shall be directly responsible for the compensation and oversight of the work of the independent auditor (including resolution of disagreements between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work. The independent auditor shall report directly to the Audit Committee.¹¹⁴

The Audit Committee shall pre-approve all auditing services, internal control-related services and permitted non-audit services (including the range of fees and terms thereof) to be performed for the Company by the independent auditor, subject to the *de minimis* exception for non-audit services described in Section 10A(i)(1)(B) of the Exchange Act that are approved by the Audit Committee prior to the completion of the audit.¹¹⁵ The Audit Committee shall review and discuss with the independent auditor any documentation supplied by the independent auditor as to the nature and scope of any tax services to be approved, as well as the potential effects of the provision of such services on the auditor's independence.¹¹⁶ The Audit Committee may form and delegate authority to subcommittees consisting of one or more members when appropriate, including the authority to grant pre-approvals of audit and permitted non-audit

¹¹² NASDAQ Rule 5605(c)(3) provides that an audit committee must have the specific responsibilities and authority necessary to comply with Rules 10A-3(b)(2), (3), (4) and (5) under the Exchange Act (subject to the exemptions provided in Rule 10A-3(c)) concerning responsibilities relating to: (a) registered public accounting firms, (b) complaints relating to accounting, internal accounting controls or auditing matters, (c) authority to engage advisors and (d) funding as determined by the audit committee.

¹¹³ Rule 10A-3(b)(2) under the Exchange Act requires the audit committee of each listed issuer to be directly responsible for the appointment, compensation, retention and oversight of the work of any registered public accounting firm engaged (including resolution of disagreements between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report, or performing other audit, review or attest services for the listed issuer.

¹¹⁴ Exchange Act Rule 10A-3(b)(2).

¹¹⁵ Sections 10A(h) and 10A(i) of the Exchange Act (added by Sections 201 and 202 of the Sarbanes-Oxley Act) require such pre-approval with respect to services provided by the registered public accounting firms to its audit clients.

¹¹⁶ This flows from PCAOB Rule 3524, PCAOB Release No. 2005-014 (July 26, 2005).

services, *provided* that decisions of such subcommittee to grant pre-approvals shall be presented to the full Audit Committee at its next scheduled meeting.¹¹⁷

The Audit Committee shall have the authority, to the extent it deems necessary or appropriate, to engage and determine funding for independent legal, accounting or other advisors.¹¹⁸ The Company shall provide appropriate funding, as determined by the Audit Committee, for payment of compensation to the independent auditor for the purpose of rendering or issuing an audit report or performing other audit, review or attest services for the Company and to any advisors employed by the Audit Committee, as well as funding for the payment of ordinary administrative expenses of the Audit Committee that are necessary or appropriate in carrying out its duties.¹¹⁹

The Audit Committee shall make regular reports to the Board. The Audit Committee shall review and reassess the adequacy of this charter annually and recommend any proposed changes to the Board for approval.¹²⁰

The Audit Committee, to the extent it deems necessary or appropriate, shall:

Financial Statement and Disclosure Matters

1. Review and discuss with management and the independent auditor the annual audited financial statements, including disclosures made in management's discussion and analysis, and recommend to the Board whether the audited financial statements should be included in the Company's Form 10-K.¹²¹
2. Review and discuss with management and the independent auditor the Company's quarterly financial statements prior to the filing of

¹¹⁷ Section 10A(i)(3) of the Exchange Act (added by Section 202 of the Sarbanes-Oxley Act).

¹¹⁸ Rule 10A-3(b)(4) under the Exchange Act (adopted by the Commission pursuant to Section 301 of the Sarbanes-Oxley Act).

¹¹⁹ Exchange Act Rule 10A-3(b)(5).

¹²⁰ NASDAQ Rule 5605(c)(1). The company must certify that an audit committee has reviewed and reassessed the adequacy of the charter on an annual basis.

¹²¹ Under NASDAQ Rule 5605(c)(1)(C), an audit committee must oversee the accounting and financial reporting processes of the company and the audits of the company's financial statements. *See also* Item 407(d) of Regulation S-K.

its Form 10-Q, including the results of the independent auditor's review of the quarterly financial statements.¹²²

3. Discuss with management and the independent auditor significant financial reporting issues and judgments made in connection with the preparation of the Company's financial statements, including any significant changes in the Company's selection or application of accounting principles.¹²³
4. Review and discuss with management and the independent auditor any major issues as to the adequacy of the Company's internal controls, any special steps adopted in light of material control deficiencies and the adequacy of disclosures about changes in internal control over financial reporting.¹²⁴
5. Review and discuss with management (including the senior internal audit executive) and the independent auditor the Company's internal controls report and the independent auditor's attestation report prior to the filing of the Company's Form 10-K.¹²⁵
6. Review and discuss quarterly reports from the independent auditors on:
 - (a) all critical accounting policies and practices to be used;
 - (b) all alternative treatments of financial information within U.S. generally accepted accounting principles (GAAP) that have been discussed with management, ramifications of the

¹²² This flows from NASDAQ's requirement that an audit committee oversee the audits of a company's financial statements. NASDAQ Rule 5605(c)(1)(C).

¹²³ This responsibility flows from NASDAQ's requirement that an audit committee oversee the accounting and financial reporting processes of a company.

¹²⁴ See Paragraphs 78-84 of Appendix A and paragraph C15 of Appendix C to PCAOB Release No. 2007-005A.

¹²⁵ Implicit in an audit committee's responsibility to oversee a company's internal auditing functions is its review with management and the independent auditor of management's internal control report and the independent auditor's attestation report pursuant to Item 308 of Regulation S-K.

use of such alternative disclosures and treatments, and the treatment preferred by the independent auditor;¹²⁶ and

- (c) other material written communications between the independent auditor and management, such as any management letter or schedule of unadjusted differences.¹²⁷
- 7. Discuss with management the Company's earnings press releases, including the use of "*pro forma*" or "adjusted" non-GAAP information, as well as financial information and earnings guidance provided to analysts and rating agencies. Such discussion may be general (consisting of discussing the types of information to be disclosed and the types of presentations to be made).
- 8. Discuss with management and the independent auditor the effect of regulatory and accounting initiatives as well as off-balance sheet structures on the Company's financial statements.¹²⁸
- 9. Discuss with management the Company's major financial risk exposures and the steps management has taken to monitor and control such exposures, including the Company's risk assessment and risk management policies [and review and approve derivatives transactions].¹²⁹
- 10. Discuss with the independent auditor the matters required to be discussed by Statement on Auditing Standards No. 114 relating to the conduct of the audit, including any difficulties encountered in the course of the audit work, any restrictions on the scope of

¹²⁶ Rule 10A-3(b)(2) under the Exchange Act requires that an audit committee assume direct responsibility for the appointment, compensation, retention, termination and oversight of an independent auditor, *including* the resolution of disputes between management and the independent auditor regarding financial reporting.

¹²⁷ Section 10A(k) of the Exchange Act (added by Section 204 of the Sarbanes-Oxley Act) requires registered public accounting firms to provide such reports on a timely basis.

¹²⁸ This flows from an audit committee's duty to oversee the accounting and financial reporting processes of a company and the audits of a company's financial statements (NASDAQ Rule 5605(c)(1)(C)).

¹²⁹ To be included if the Audit Committee is selected to review and approve derivatives transaction under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

activities or access to requested information, and any significant disagreements with management.¹³⁰

11. Review disclosures made to the Audit Committee by the Company's CEO and CFO during their certification process for the Form 10-K and Form 10-Q about any significant deficiencies in the design or operation of internal controls or material weaknesses therein, and any fraud involving management or other employees who have a significant role in the Company's internal controls.¹³¹
12. Ensure that a public announcement of the Company's receipt of an audit opinion that contains a going concern qualification is made promptly.¹³²

Oversight of the Company's Relationship with the Independent Auditor

13. Before the engagement of the independent auditor and at least annually thereafter, review and discuss with the independent auditor the independent auditor's written communications to the audit committee regarding the relationships between the auditor and the company that, in the auditor's professional judgment, may reasonably be thought to bear on its independence and affirming in writing to the audit committee that the auditor is independent.¹³³
14. Review and evaluate the lead partner of the independent auditor team.¹³⁴
15. Obtain and review a report from the independent auditor at least annually regarding: (a) the independent auditor's internal quality-

¹³⁰ Item 407(d) of Regulation S-K.

¹³¹ Exchange Act Rule 13a-14 (adopted by the Commission pursuant to Section 302 of the Sarbanes-Oxley Act) requires that the CEO and CFO certify in each 10-K and 10-Q that they have disclosed such information to the company's independent auditors and the audit committee.

¹³² NASDAQ Rule 5250(b)(2) provides that an issuer that receives an audit opinion containing a going concern qualification must make a public announcement through the news media disclosing the receipt of such qualification (and, prior to such public announcement, provide notice to NASDAQ's Market Watch Department). The public announcement must be made no later than seven calendar days following the filing of such an audit opinion with the Commission.

¹³³ Item 407(d)(3)(i)(C) of Regulation S-K. SEC Release Nos. 33-8961; 34-5856 (September 26, 2008).

¹³⁴ This flows from the audit committee's responsibility to oversee the external audit process under NASDAQ Rule 5605(c)(1)(C).

control procedures; (b) any material issues raised by the most recent internal quality-control review or peer review of the independent auditor, or by any inquiry or investigation by governmental or professional authorities within the preceding five years respecting one or more independent audits carried out by the independent auditor; and (c) any steps taken to deal with any such issues. Evaluate the qualifications, performance and independence of the independent auditor, including considering whether the independent auditor's quality controls are adequate and the provision of permitted non-audit services is compatible with maintaining the auditor's independence, and taking into account the opinions of management and internal auditors. The Audit Committee shall present its conclusions with respect to the independent auditor to the Board.¹³⁵

16. Obtain from the independent auditor a formal written statement delineating all relationships between the independent auditor and the Company. It is the responsibility of the Audit Committee to actively engage in a dialogue with the independent auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the independent auditor and for purposes of taking, or recommending that the full Board take, appropriate action to oversee the independence of the outside auditor.¹³⁶
17. Ensure the rotation of the lead (or coordinating) audit partner having primary responsibility for the audit and the audit partner responsible for reviewing the audit as required by law. Consider whether, in order to assure continuing auditor independence, it is appropriate to adopt a policy of rotating the independent auditor on a regular basis.¹³⁷

¹³⁵ This flows from an audit committee's responsibility to oversee the external audit process under NASDAQ Rule 5605(c)(1)(C).

¹³⁶ NASDAQ Rule 5605(c)(1)(B); Item 407(d) of Regulation S-K.

¹³⁷ Under NASDAQ Rule 5605(c)(3) and Exchange Act Rule 10A-3(b)(2), an audit committee must have sole authority for appointment, compensation and oversight of the independent auditor. Section 10A(j) of the Exchange Act (added by Section 203 of the Sarbanes-Oxley Act) makes it unlawful for a registered public accounting firm to provide audit services to an issuer if the lead (or coordinating) audit partner, having
(footnote continued)

18. Recommend to the Board policies for the Company's hiring of employees or former employees of the independent auditor.¹³⁸
19. Meet with the independent auditor prior to the audit to discuss the planning and staffing of the audit.¹³⁹

Oversight of the Company's Internal Audit Function

20. Review the appointment and replacement of the senior internal auditing executive.¹⁴⁰
21. Review the significant reports to management prepared by the internal auditing department and management's responses.¹⁴¹
22. Discuss with the independent auditor and management the internal audit department responsibilities, budget and staffing, and any recommended changes in the planned scope of the internal audit.¹⁴²

Compliance Oversight Responsibilities

23. Obtain from the independent auditor assurance that Section 10A(b) of the Exchange Act has not been implicated.¹⁴³

primary responsibility for the audit, or the audit partner responsible for reviewing the audit, has performed audit services for that issuer in each of the five previous fiscal years of that issuer.

¹³⁸ Section 10A(l) of the Exchange Act (added by Section 206 of the Sarbanes-Oxley Act) makes it unlawful for a registered public accounting firm to perform for an issuer any audit service if a CEO, comptroller, CFO, chief accounting officer or any individual serving in an equivalent position for the issuer was employed by that registered public accounting firm and participated in any capacity in the audit of that issuer during the one-year period preceding the date of initiation of the audit. Commission and PCAOB rules further expand upon the impact the hiring of employees or former employees of the independent auditor may have on the auditor's independence.

¹³⁹ This is part of an audit committee's responsibility for having sole authority to retain the independent auditor and for approving all audit engagement fees and terms (*see* Rule 10A-3(b)(2) under the Exchange Act).

¹⁴⁰ This flows from an audit committee's obligation to oversee the external audit of a company.

¹⁴¹ This relates to one of an audit committee's principal purposes: to assist board oversight of the performance of a company's internal audit function.

¹⁴² This flows from an audit committee's obligation to oversee the external audit of a company.

¹⁴³ Section 10A(b) of the Exchange Act requires the independent auditor, if it detects or becomes aware of any illegal act, to assure that the audit committee is adequately informed and to provide a report if the independent auditor has reached specified conclusions with respect to such illegal acts.

24. Obtain reports from management, the Company's senior internal auditing executive and the independent auditor that the Company and its subsidiary/foreign affiliated entities are in conformity with applicable legal requirements and the Company's Code of Business Conduct and Ethics. Advise the Board with respect to the Company's policies and procedures regarding compliance with applicable laws and regulations, and with the Company's Code of Business Conduct and Ethics.
25. Review and oversee all related-party transactions in accordance with the Company's Policies and Procedures with respect to Related Person Transactions.¹⁴⁴
26. 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 concerns regarding questionable accounting or auditing matters.¹⁴⁵
27. Discuss with management and the independent auditor any correspondence with regulators or governmental agencies, and any published reports that raise material issues regarding the Company's financial statements or accounting policies.¹⁴⁶
28. Discuss with the Company's General Counsel legal matters that may have a material impact on the financial statements or the Company's compliance policies.¹⁴⁷

¹⁴⁴ Commission rules mandate that companies disclose the persons or groups of persons on the board or otherwise who are responsible for applying the company's policies and procedures regarding related-party transactions. Item 404 of Regulation S-K. NASDAQ Rule 5630(a) provides that each company that is not a limited partnership shall conduct appropriate review and oversight of all related-party transactions for potential conflict of interest situations on an ongoing basis by a company's audit committee or another independent body of the board. The term "related-party transaction" refers to transactions required to be disclosed pursuant to Commission Regulation S-K, Item 404.

¹⁴⁵ NASDAQ Rule 5605(c)(3) and Rule 10A-3(b)(3) under the Exchange Act.

¹⁴⁶ This relates to one of an audit committee's principal purposes: to assist board oversight of the integrity of a company's financial statements (NASDAQ Rule 5605(c)(1)(C)).

¹⁴⁷ This relates to one of an audit committee's principal purposes: to assist board oversight of a company's compliance with legal and regulatory requirements.

Limitation of Audit Committee's Role

While the Audit Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Audit Committee to plan or conduct audits, or to determine that the Company's financial statements and disclosures are complete and accurate and are in accordance with GAAP and applicable rules and regulations. These are the responsibilities of management and the independent auditor.

Exhibit C

MODEL AUDIT COMMITTEE RESPONSIBILITIES CHECKLIST¹⁴⁸

	Action	Frequency/Notes	Calendar
1.	Prepare the report required by the rules of the Securities and Exchange Commission (the “Commission”) to be included in the Company’s annual proxy statement. ¹⁴⁹	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
2.	The Audit Committee shall consist of no fewer than three members. ¹⁵⁰		<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
3.	The members of the Audit Committee shall meet the independence and experience requirements of the NYSE, Section 10A(m)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”) and the rules and regulations of the Commission. ¹⁵¹	Annually Review during Audit Committee self-evaluation	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
4.	At least one member of the Audit Committee shall be an “Audit Committee financial expert” as defined by the Commission. ¹⁵²	Annually Review during Audit Committee self-evaluation	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
5.	Audit Committee members shall not simultaneously serve on the Audit Committees of more than two other public companies. ¹⁵³	Annually Review of Audit Committee self-evaluation	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
6.	Meetings: The Audit Committee shall meet as often as it determines necessary, but not less frequently than quarterly.	At least quarterly	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
7.	Executive Sessions: The Audit Committee shall meet periodically in separate executive sessions (including the CFO and chief accounting officer),	Quarterly	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁴⁸ The items in this responsibilities checklist are presented in the order in which they appear in the Model Audit Committee Charter under their respective headings; the numbers (in the first column) are provided for convenience only and do not correspond to any numbering in the Model Audit Committee Charter.

¹⁴⁹ NYSE 303A.07(b)(i)(B); Schedule 14A, Item 7(d); Reg. S-K, Item 407(d).

¹⁵⁰ NYSE 303A.07(a).

¹⁵¹ Exchange Act 10A(m)(3).

¹⁵² Reg. S-K 407(d)(5); NYSE 303A.07(a) Commentary.

¹⁵³ NYSE 303A.07(a) Commentary.

	Action	Frequency/Notes	Calendar
	the internal auditors and the independent auditor, and have such other direct and independent interaction with such persons from time to time as the members of the Audit Committee deem appropriate. ¹⁵⁴		
8.	<p>Independent Auditor: The Audit Committee shall have the sole authority to appoint or replace the independent auditor (subject, if applicable, to shareholder ratification).</p> <p>The Audit Committee shall be directly responsible for the compensation and oversight of the work of the independent auditor (including resolution of disagreements between management and the independent auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work.¹⁵⁵</p>	<p>Annually</p> <p>Appointment of independent auditor may be undertaken in conjunction with the preparation of the proxy statement</p>	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
9.	<p>Audit, non-Audit, and internal-control related services: The Audit Committee shall pre-approve all auditing services, internal control-related services and permitted non-audit services (including the range of fees and terms thereof) to be performed for the Company by its independent auditor, subject to the <i>de minimis</i> exception for non-audit services described in Section 10A(i)(1)(B) of the Exchange Act that are approved by the Audit Committee prior to the completion of the audit.¹⁵⁶</p>	<p>As needed</p>	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
10.	<p>Pre-approval of all audit, non-audit, and internal-control related services: The Audit Committee may form and delegate authority to subcommittees consisting of one or more members when appropriate, including the</p>	<p>As needed</p>	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁵⁴ NYSE 303A.07(b)(iii)(E); PCAOB Release No. 2005-001, Parags. 24&57 of Appendix A and Parag. E68 of Appendix E.

¹⁵⁵ NYSE 303A.06; SEC Rule 10A-3; SOX 301; Exchange Act 10A(m)(2); Rule 10A-3(b)(2).

¹⁵⁶ NYSE 303A.07(b)(iii); SOX 201 and 202; Exchange Act 10A(h) and 10A(i); SEC Release 33-8183; SEC Regulation S-X, Rule 2-01(c)(7); Schedule 14A Item 9(e)(5)(i)(proxy statement); Form 10-K, Item 14.

	Action	Frequency/Notes	Calendar
	authority to grant pre-approvals of audit and permitted non-audit services, <i>provided</i> that decisions of such subcommittee to grant pre-approvals shall be presented to the full Audit Committee at its next scheduled meeting. ¹⁵⁷		
11.	Make regular reports to the Board. ¹⁵⁸	Quarterly and as needed ¹⁵⁹	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
12.	The Audit Committee shall review the Audit Committee's own performance. ¹⁶⁰	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
13.	Meet to review and discuss with management and the independent auditor the annual audited financial statements, including the Company's specific disclosures made in management's discussion and analysis, and recommend to the Board whether the audited financial statements should be included in the Company's 10-K. ¹⁶¹	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
14.	Meet to review and discuss with management and the independent auditor the Company's quarterly financial statements prior to the filing of its Form 10-Q, including the results of the independent auditor's review of the quarterly financial statements. ¹⁶²	Quarterly	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
15.	Discuss with management and the independent auditor significant financial reporting issues and judgments made in connection with the preparation of the Company's financial statements, including any significant changes in the Company's selection or application of accounting principles. ¹⁶³	Quarterly in conjunction with the preparation of Form 10-Qs and Form 10-K Quarterly accounting reviews should cover critical accounting policies, significant accounting items and material entries based	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁵⁷ Exchange Act 10A(i)(3).

¹⁵⁸ NYSE 303A.07(b)(iii)(H).

¹⁵⁹ This should also be a standing item on the Board calendar.

¹⁶⁰ NYSE 303A.07(b)(ii).

¹⁶¹ NYSE 303A.07(b)(iii)(B); Reg. S-K, Item 407(d).

¹⁶² NYSE 303A.07(b)(iii)(B); Reg. S-K, Item 407(d).

¹⁶³ NYSE 303A.07(b) (General commentary); PCAOB Release No. 2004-001, Parag. 58 of Appendix A and Parag. E68 of Appendix E.

	Action	Frequency/Notes	Calendar
		on management estimates and judgments	
16.	Review and discuss with management and the independent auditor any major issues as to the adequacy of the Company's internal controls, any special steps adopted in light of material control deficiencies and the adequacy of disclosures about changes in internal control over financial reporting. ¹⁶⁴	Quarterly in conjunction with the preparation of Form 10-Qs and Form 10-K Present SOX 302 evaluation of disclosure controls and procedures Review report on SOX program	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
17.	Review and discuss with management (including the senior internal audit executive) and the independent auditor the Company's internal controls report and the independent auditor's attestation report prior to the filing of the Company's Form 10-K. ¹⁶⁵	Annually, in conjunction with the preparation of Form 10-K Present annual SOX 404 evaluation of internal controls	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
18.	Review and discuss quarterly reports from the independent auditors on: (A) all critical accounting policies and practices to be used; (B) all alternative treatments of financial information within generally accepted accounting principles that have been discussed with management, ramifications of the use of such alternative disclosures and treatments, and the treatment preferred by the independent auditor; and (C) other material written communications between the independent auditor and management, such as any management letter or schedule of unadjusted differences. ¹⁶⁶	Quarterly prior to the filing of Form 10-K and prior to the filing of each Form 10-Q To be included under the quarterly and year-end financial reporting and review	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁶⁴ NYSE 303A.07(b) (General commentary); PCAOB Release No. 2004-001, Parag. 206 of Appendix A.

¹⁶⁵ Reg S-K Item 308; SEC Release 33-8183; PCAOB Release No. 2004-001, Parag. 59 of Appendix A and Parag. E61 of Appendix E.

¹⁶⁶ NYSE 303A.07(b) (General Commentary); NYSE 303A.07(b)(iii)(F); SOX 204; Exchange Act 10A(k).

	Action	Frequency/Notes	Calendar
19.	Discuss with management the Company's earnings press releases, including the use of " <i>pro forma</i> " or "adjusted" non-GAAP information, as well as financial information and earnings guidance provided to analysts and rating agencies. Such discussions may be general (consisting of discussing the types of information to be disclosed and the types of presentations to be made), and each instance in which the Company provides earnings guidance need not be discussed in advance. ¹⁶⁷	Quarterly and as needed	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
20.	Discuss with management and the independent auditor the effect of regulatory and accounting initiatives as well as off-balance sheet structures on the Company's financial statements. ¹⁶⁸	Quarterly and as needed Quarterly accounting review should include critical accounting policies, significant accounting items and material entries based on management estimates and judgment at each quarterly meeting.	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
21.	Discuss with management the Company's major financial risk exposures and the steps management has taken to monitor and control such exposures, including the Company's risk assessment and risk management policies. ¹⁶⁹	Quarterly and as needed Review risk management processes and reports (overall risk assessment, IT, audit, fraud, etc.)	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
22.	Discuss with the independent auditor the matters required to be discussed by Statement on Auditing Standards No. 114 relating to the conduct of the audit, including any difficulties encountered in the course of the audit work, any restrictions on the scope of activities or access to requested information, and any significant disagreements with management. ¹⁷⁰	At least annually, in conjunction with proxy statement, and, to the extent there are any difficulties or issues, quarterly follow-ups or updates	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁶⁷ NYSE 303A.07(b)(iii)(C); NYSE 303A.07(c) (General Commentary).

¹⁶⁸ NYSE 303A.07(b) (General Commentary).

¹⁶⁹ NYSE 303A.07(b)(iii)(D) and Commentary.

¹⁷⁰ NYSE 303A.07(b)(iii)(F); Reg. S-K, Item 407(d).

	Action	Frequency/Notes	Calendar
23.	Review disclosures made to the Audit Committee by the Company's CEO and CFO during their certification process for the Form 10-K and Form 10-Q about any significant deficiencies in the design or operation of internal controls or material weaknesses therein and any fraud involving management or other employees who have a significant role in the Company's internal controls. ¹⁷¹	Quarterly, in conjunction with the preparation of Form 10-Qs and Form 10-K	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
24.	Before the engagement of the independent auditor and at least annually thereafter, review and discuss with the independent auditor the independent auditor's written communications to the audit committee regarding the relationships between the auditor and the Company that, in the auditor's professional judgment, may reasonably be thought to bear on its independence and affirming in writing to the Audit Committee that the auditor is independent. ¹⁷²	Annually, in conjunction with the preparation of the proxy statement; this should also be done prior to engaging the independent auditor	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
25.	Review and evaluate the lead partner of the independent auditor team. ¹⁷³	Annually Review should be undertaken during an annual evaluation of overall audit services	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
26.	Obtain and review a report from the independent auditor at least annually regarding: (a) the independent auditor's internal quality-control procedures; (b) 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 respecting one or more independent audits carried out by the firm; (c) any steps taken to	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁷¹ SOX 302; SEC Rule 13a-14.

¹⁷² Item 407(d)(3)(i)(C) of Regulation S-K. SEC Release Nos. 33-8961; 34-5856 (September 26, 2008).

¹⁷³ NYSE 303A.07(b)(iii)(A) and Commentary.

	Action	Frequency/Notes	Calendar
	deal with any such issues; and (d) all relationships between the independent auditor and the Company. Evaluate the qualifications, performance and independence of the independent auditor, including considering whether the auditor's quality controls are adequate and the provision of permitted non-audit services is compatible with maintaining the auditor's independence, taking into account the opinions of management and internal auditors. The Audit Committee shall present its conclusions with respect to the independent auditor to the Board. ¹⁷⁴		
27.	Ensure the rotation of the audit partners as required by law. Consider whether, in order to ensure continuing auditor independence, it is appropriate to adopt a policy of rotating the independent auditing firm on a regular basis. ¹⁷⁵	As needed Review process for replacing the lead client partner; review and consider rotation of the independent audit firm	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
28.	Set policies for the Company's hiring of employees or former employees of the independent auditor. ¹⁷⁶	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
29.	Discuss with the independent auditor material issues on which the national office of the independent auditor was consulted by the Company's audit team. ¹⁷⁷	Quarterly and as needed To be included under the quarterly and year-end financial reporting and review	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
30.	Meet with the independent auditor prior to the audit to discuss the planning and staffing of the audit. ¹⁷⁸	Annually Review the independent auditor's client service plan for the next fiscal year	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁷⁴ NYSE 303A.07(b)(iii)(A) (Commentary).

¹⁷⁵ NYSE 303A.07(b)(iii)(A) (Commentary); Exchange Act 10A(j); SOX 203.

¹⁷⁶ NYSE 303A.07(b)(iii)(G); SOX 206; Exchange Act 10A(l).

¹⁷⁷ NYSE 303A.07(b)(iii)(F) (Commentary); PCAOB Release No. 2004-001, Parag. 58 of Appendix A and Parag. E68 of Appendix E.

¹⁷⁸ NYSE 303A.07(b)(iii)(F) (Commentary); Exchange Act Rule 10A-3(b)(2).

	Action	Frequency/Notes	Calendar
31.	Review the appointment and replacement of the senior internal auditing executive. ¹⁷⁹	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
32.	Review the significant reports to management prepared by the internal auditing department and management's responses. ¹⁸⁰	Quarterly Review should include findings of key audits and status of internal audit plan	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
33.	Discuss with the independent auditor and management the internal audit department's responsibilities, budget and staffing and any recommended changes in the planned scope of the internal audit. ¹⁸¹	Annually and as needed	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
34.	Obtain from the independent auditor assurance that Section 10A(b) of the Exchange Act has not been implicated. ¹⁸²	Annually	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
35.	(A) Obtain reports from management and the Company's senior internal auditing executive and the independent auditor that the Company and its subsidiary/foreign affiliated entities are in conformity with applicable legal requirements and the Company's Code of Business Conduct and Ethics. (B) Review reports and disclosures of insider and affiliated party transactions. (C) Advise the Board with respect to the Company's policies and procedures regarding compliance with applicable laws and regulations and with the Company's Code of Business Conduct and Ethics. ¹⁸³	Quarterly and in conjunction with proxy statement	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
36.	Establish procedures for the receipt, retention	Quarterly	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

¹⁷⁹ NYSE 303A.07(c).

¹⁸⁰ NYSE 303A.07(c).

¹⁸¹ NYSE 303A.07(b)(iii)(F).

¹⁸² Exchange Act 10A(b).

¹⁸³ NYSE 303A.10.

	Action	Frequency/Notes	Calendar
	and treatment of complaints received by the Company regarding accounting, internal accounting controls or auditing matters, and the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters. ¹⁸⁴	Receive reports on employee complaints, if any, on accounting and auditing matters	
37.	Discuss with management and the independent auditor any correspondence with regulators or governmental agencies and any published reports that raise material issues regarding the Company's financial statements or accounting policies. ¹⁸⁵	Quarterly	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
38.	Discuss with the Company's General Counsel legal matters that may have a material impact on the financial statements or the Company's compliance policies and internal controls. ¹⁸⁶	Quarterly and as needed	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
39.	Review and approve or ratify all related party transactions in accordance with the Company's Policies and Procedures with respect to Related Person Transactions. ¹⁸⁷	Quarterly and as needed To be included under the quarterly and year-end financial reporting and review	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4
40.	Review the Company's risk management programs and internal corporate risk management reports. ¹⁸⁸	Quarterly and as needed	<input type="checkbox"/> Q1 <input type="checkbox"/> Q2 <input type="checkbox"/> Q3 <input type="checkbox"/> Q4

† The prohibitions on tax shelter advice, aggressive tax planning advice and tax services for certain corporate officers flow from the PCAOB's adoption of certain auditor independence and ethics rules in July 2005. *See* PCAOB Release No. 2005-014 (July 26, 2005).

¹⁸⁴ NYSE 303A.07(b)(iii); SOX 301; Exchange Act 10A(m)(4); SEC Rule 10A-3(b).

¹⁸⁵ NYSE 303A.07(b) General Commentary; SOX 301; Exchange Act 10A(m)(4).

¹⁸⁶ NYSE 303A.07(b); NYSE 303A.07(b)(iii)(H); PCAOB Release No. 2004-001, Parag. 9, Section I.

¹⁸⁷ Reg. S-K Item 404.

¹⁸⁸ NYSE 303A.07(b)(iii)(D).

Exhibit D

MODEL AUDIT COMMITTEE MEMBER FINANCIAL EXPERTISE AND INDEPENDENCE QUESTIONNAIRE

The following questionnaire seeks information necessary to prepare the Company's annual report and proxy statement. The annual report and proxy statement will be filed with the Securities and Exchange Commission and made available to the public. Specifically, the information provided will be used to assist the Board of Directors of the Company in determining your level of financial expertise/literacy and independence within the meaning of the federal securities laws and the major securities markets listing standards for purposes of eligibility for service on the Audit Committee of the Board of Directors. **It is extremely important that your answers be complete and accurate. Accordingly, great care should be exercised in the completion of this questionnaire and the verification of any information about you that is provided herein.**

Please read the Instructions on Page D-3 before completing this questionnaire. Although the questionnaire is designed to be as direct as possible, certain questions, of necessity, require the use of technical terms. It is important that you understand the meaning of these terms before completing the questions. Definitions of such terms are provided in the Explanatory Note/Definitions on Page D-18. Please read the definitions before answering any question that includes one of these defined terms.

Please return your completed questionnaire to [Name] at the address below by [Date]. If you have questions regarding this questionnaire, please call [Name] at [Number], [Name] at [Number] or [Name] at [Number].

[Name]
[Title]
[Address]

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INSTRUCTIONS

1. Answer All Questions. Please answer fully and completely all questions that apply to you.
2. Date of Response. Your responses should be accurate as of [**Date**]. If you are unable to respond as of such date, please note why you are unable to do so and clearly indicate the date of the information included in your response.
3. Insufficient Space to Respond. If there is insufficient space to respond to any question in this questionnaire, please attach additional sheets of paper to this questionnaire as necessary.
4. Question Not Applicable. If the answer to any question is “No” or “Not Applicable,” please so state. Should you fail to provide any answer, it will be assumed such answer is negative.
5. Defined Terms. Bolded and capitalized terms are defined in the Explanatory Note/Definitions (Page D-18).

QUESTIONNAIRE

1. Financial Expertise/Literacy

- a. Do you have an understanding of generally accepted accounting principles (“GAAP”) and financial statements?

Yes No

If your answer to Question 1.a is yes, please explain how you acquired the above understanding (include relevant positions, organizations, dates and job duties):

- b. Do you have the ability to assess the general application of GAAP in connection with the accounting for estimates, accruals and reserves?¹⁸⁹

Yes No

If your answer to Question 1.b is yes, please explain how you acquired the above capability (include relevant positions, organizations, dates and job duties):

¹⁸⁹ In considering Question 1.b, please note that estimates, accruals and reserves need not be generally comparable to the estimates, accruals and reserves used in the Company’s financial statements (*i.e.*, need not be in the same industry). It is the ability to assess, not experience applying, the accounting principles that is the focus of the question.

- c. Do you have experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that generally are comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the Company's financial statements, or experience **actively supervising** one or more persons engaged in such activities?¹⁹⁰

Yes No

If your answer to Question 1.c is yes, please explain how you acquired the above experience (include relevant positions, organizations, dates and job duties):

- d. Do you have an understanding of internal controls and procedures for financial reporting?

Yes No

If your answer to Question 1.d is yes, please explain how you acquired the above understanding (include relevant positions, organizations, dates and job duties):

¹⁹⁰ In considering Question 1.c, please note that the relevant experience can include working directly and closely with financial statements in a way that provides familiarity with their contents and the processes behind them. Experience also includes active engagement in industries the same as those engaged in by the Company and significant direct and close exposure to, and experience with, financial statements and related processes. A principal executive officer with considerable operations involvement, but little financial or accounting involvement, likely would not be exercising the necessary active supervision; your experience must be with financial statements that present the breadth and level of complexity of accounting issues generally comparable to the breadth and complexity of the accounting issues that can reasonably be expected to be raised by the company's financial statements (although such experience need not be either in the same industry or with an Exchange Act reporting company).

e. Do you have an understanding of audit committee functions?

Yes No

If your answer to Question 1.e is yes, please explain how you acquired the above understanding (include relevant positions, organizations, dates and job duties):

f. Have you taken formal courses related to financial or accounting matters?

Yes No

If your answer to Question 1.f is yes, please describe (include name of course, name of institution and dates):

g. Do you hold any degrees relating to financial or accounting matters?

Yes No

If your answer to Question 1.g is yes, please describe (include degree, name of institution and date of graduation):

- h. Have you taught any courses or published any books or articles relating to financial or accounting matters?

Yes No

If your answer to Question 1.h is yes, please describe (include name of courses, name of institution, dates of teaching, names of books or articles, publisher and dates of publication):

- i. Have you held any positions (such as CEO, CFO, controller, public accountant or auditor, principal accounting officer or any other position involving the performance of similar functions) that involved accounting, financial management or the analysis and interpretation of financial statements?

Yes No

If your answer to Question 1.i is yes, please describe (include relevant positions, dates of positions and summary of duties of each position):

- j. Have you invested in an enterprise that required you to analyze or interpret financial statements?

Yes No

If your answer to Question 1.j is yes, please describe (include the relevant investments and descriptions of the analyses or interpretations you performed with respect to them):

- k. Do you regularly read publications relating to financial or accounting matters?

Yes No

If your answer to Question 1.k is yes, please describe (include content and length of time that you currently spend, and over the last five years have spent, on such activity):

- l. Do you engage, or have you engaged, in any other activities that relate to financial or accounting matters?

Yes No

If your answer to Question 1.l is yes, please describe:

- m. Do you hold any financial or accounting-related professional certificates or licenses or are you a member in good standing of a financial or accounting-related professional association?

Yes No

If your answer to Question 1.m is yes, please describe (include list of certificates and licenses, dates received and professional associations of which you are a member, including the length of time you have been a member in good standing of such associations):

- n. Please describe any other relevant qualifications or experience that would assist you in understanding and evaluating the Company's financial statements and other financial information and other information that you believe would be appropriate for the Board of Directors of the Company to consider in determining your **Financial Literacy** or whether you are a **Financial Expert** within the meaning of the federal securities laws.

2. Independence

- a. Since [insert first day of last fiscal year], have you accepted, directly or indirectly,¹⁹¹ any consulting, advisory or other compensatory fee¹⁹² from the Company or any of its subsidiaries, other than fees for services rendered as a member of the Company's Audit Committee, the Board of Directors or any other committee of the Board of Directors?

Yes No

If your answer to Question 2.a is yes, please describe:

- b. Are you an **affiliate**¹⁹³ of the Company or any of its subsidiaries, other than in your capacity as a director of the Company? (Note: If you are not an executive officer or a holder of more than 10% of any class of the Company's voting securities, you should check "no.")

Yes No

If your answer to Question 2.b is yes, please describe:

¹⁹¹ "Indirect" acceptance of payments includes fees paid to your spouse, minor child or stepchild or a child or stepchild sharing a home with you. "Indirect" acceptance of payment also includes fees paid to an entity that provides accounting, consulting, legal, investment banking or financial advisory services to the company in which you are a partner, a member, an officer such as a managing director occupying a comparable position or executive officer, or you occupy a similar position (other than serving as a limited partner, non-managing member or similar position if, in each such case, you do not have an active role in providing services to the company).

¹⁹² You do not need to report any compensation paid to you under a retirement plan (including deferred compensation) for prior service to the Company so long as that compensation is not contingent in any way on continued service.

¹⁹³ You are an "affiliated person" of the Company if you, directly, or indirectly through one or more intermediaries, control, are controlled by, or are under common control with, the company. For purposes of this definition, "control" is defined as the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the company, whether through the ownership of voting securities, by contract or otherwise.

2A. Independence – NYSE-Listed Companies

a.

- i. Are you now or have you at any point been within the last three years an employee of the Company (references to “the Company” in this Section 2A include any parent or subsidiary in a consolidated group with the Company)?

Yes No

- ii. Is any member of your immediate family, or has any such individual been within the last three years, an executive officer of the Company?¹⁹⁴

Yes No

- iii. Have you or any member of your immediate family received more than \$120,000 during any 12-month period within the last three years in direct compensation (other than in director and committee fees and retirement or deferred pay for prior service (*provided* that such compensation is not contingent in any way on continued service) and compensation received by an immediate family member for service as a non-executive employee) from the Company?¹⁹⁵

Yes No

¹⁹⁴ For purposes of this question and the immediately following question, former service as an interim Chairman or CEO or other executive officer is not considered former service as an executive officer or employee of the company. If you are currently employed as an interim executive officer, you are considered a current executive officer and an employee of the company. Please separately disclose and describe in an attachment any former service to the company as an interim executive officer.

¹⁹⁵ Compensation you received for former service as an interim Chairman or CEO or other executive officer need not be included in the calculation, but please separately disclose and describe such compensation in an attachment.

iv. Are you or any member of your immediate family currently a partner of a firm that is the Company's internal or external auditor?

Yes No

v. Are you currently an employee of a firm that is the Company's internal or external auditor?

Yes No

vi. Is any member of your immediate family a current employee of a firm that is the Company's internal or external auditor and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice?

Yes No

vii. Have you or has any member of your immediate family been a partner or employee of a firm that is the Company's internal or external auditor and personally worked on the Company's audit within the past three years?

Yes No

viii. Have you or any member of your immediate family been employed within the last three years, or are you or any member of your immediate family currently employed, as an executive officer of another company where any of the Company's present executive officers at the same time served or serves on that company's compensation committee?

Yes No

- ix. Are you now a current employee, or is any member of your immediate family a current executive officer, of an enterprise that has made or received payments to or from the Company for property or services in an amount that, in any of the last three fiscal years, exceeds the greater of \$1 million or 2% of the consolidated gross revenues of such enterprise?

Yes No

2B. Independence – NASDAQ-Listed Companies

a.

- i. Are you now or have you at any point within the past three years been an employee of the Company or any parent or subsidiary of the Company?¹⁹⁶

Yes No

- ii. Have you or any member of your immediate family received during any 12-month period within the past three years more than \$120,000 in direct compensation (other than in director and committee fees, 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 an affiliate and tax-qualified retirement or non-discretionary pay)?¹⁹⁷

Yes No

¹⁹⁶ For purposes of this question, former service as an interim Chairman or CEO or other executive officer is not considered service as an employee of the Company as long as such interim employment did not last longer than one year. If you are currently employed as an interim executive officer, you are considered a current employee of the Company. Please separately disclose and describe in an attachment any former service to the Company as an interim executive officer.

¹⁹⁷ Compensation you received for former service as an interim Chairman or CEO or other executive officer need not be included in the calculation as long as such interim employment did not last longer than one year. Please separately disclose and describe in an attachment any compensation received while serving as an interim executive officer of the Company.

iii. Is any member of your immediate family, or has any such individual been at any point within the past three years, an executive officer of the Company or any parent or subsidiary of the Company?

Yes No

iv. Are you, or is any member of your immediate family, a partner in, a controlling shareholder of or an executive officer of an enterprise that makes or receives payments to or from the Company in the current or any of the past three fiscal years in an amount that exceeds the greater of \$200,000 or 5% of the recipient's consolidated gross revenues in that fiscal year?¹⁹⁸

Yes No

v. Are you, or is any member of your immediate family, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the Company served on the compensation committee of such other entity?

Yes No

vi. Are you, or is any member of your immediate family, a current partner of the Company's independent auditor, or were you or any member of your immediate family a partner or employee of the Company's independent auditor who worked on the Company's audit at any time during any of the past three years?

Yes No

¹⁹⁸ Payments arising solely from investments in the Company's securities or payments under non-discretionary charitable contribution matching programs need not be included in the calculation.

vii. Have you participated at any point within the past three years in the preparation of the financial statements of the Company or any current subsidiary of the Company?

Yes No

3. **Membership on Boards and Board Committees**

- a. Other than the Company, list any **Entity** (including any publicly held company and investment company registered under the Investment Company Act of 1940) of which you are or have been a member of such **Entity**'s board of directors and the relevant dates for your service on such board of directors.

- b. Other than the Company, list any **Entity** (including any publicly held company and investment company registered under the Investment Company Act of 1940) of which you are or have been a member of any committee (including audit committee) of such **Entity**'s board of directors and the relevant committees and dates for your service on any such committee.

- c. If not described above, please list all the audit committees on which you currently serve or have been selected to serve in the future.

4. Other

- a. Are you now or have you ever been the subject of any disciplinary action that could bear on your suitability as a Company Audit Committee member?

Yes No

If your answer to Question 4.a is yes, please describe:

- b. Please provide any other information that you believe would be appropriate for the Board of Directors of the Company to consider in determining whether you are independent within the meaning of the federal securities laws and major securities markets listing standards.

5. Name and Business Address

EXPLANATORY NOTE/DEFINITIONS

Active Supervision of a person who prepares, audits, analyzes or evaluates financial statements means:

- (1) More than mere traditional hierarchical reporting relationship.
- (2) Participation in, and contribution to, the process of addressing, at a supervisory level, the same general type of issues regarding preparation, auditing, analysis or evaluation of financial statements as those addressed by the person or persons being supervised.
- (3) Experience that has contributed to the general expertise necessary to prepare, audit, analyze or evaluate financial statements that is at least comparable to the general expertise of those being supervised.

Affiliate means “a person that directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with” a specified person or Entity. Two persons or Entities will be deemed to be affiliates if, by reason of the foregoing definition, they are affiliates of the same person or Entity at the same time. The term “**Affiliate**” includes a subsidiary, sibling company, predecessor, parent company, or former parent company.

Entity means a partnership, joint venture, corporation, trust, limited liability company, company or business entity, or other organization, whether for profit or not-for-profit.

Financial Literacy includes the ability to read and understand fundamental financial statements, including a company’s balance sheet, income statement, and cash flow statement.

Immediate Family or Immediate Family Member means an individual’s spouse, parents, children, brothers and sisters, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than employees) who shares such individual’s home.

ATTESTATION

After reasonable investigation, I certify that, to the best of my information, knowledge and belief, the answers to these questions are true, correct and complete. I will promptly notify you of any change in the information set forth in this questionnaire after I become aware of any such change.

Signed: _____

Date: _____

Exhibit E

MODEL AUDIT COMMITTEE PRE-APPROVAL POLICY

I. STATEMENT OF PRINCIPLES

The Audit Committee must pre-approve the audit and non-audit services performed by the independent auditor in order to ensure that the provision of such services does not impair the auditor's independence. Before the Company or any of its subsidiaries engages the independent auditor to render a service, the engagement must be either:

- (1) specifically approved by the Audit Committee; or
- (2) entered into pursuant to this Pre-approval Policy.

The Audit Committee shall review and discuss with the independent auditor any documentation supplied by the independent auditor as to the nature and scope of any tax services to be approved, as well as the potential effects of the provision of such services on the auditor's independence.¹⁹⁹

The appendices to this Pre-approval Policy describe in detail the particular audit, audit-related tax and other services that have the pre-approval of the Audit Committee pursuant to this Pre-approval Policy.²⁰⁰ The term of any pre-approval is 12 months from the date of pre-approval, unless the Audit Committee specifically provides for a different period. The Audit Committee shall periodically revise the list of pre-approved services.

II. DELEGATION

The Audit Committee may delegate pre-approval authority to one or more of its members. The member or members to whom such authority is delegated shall report any pre-approval decisions to the Audit Committee at its next scheduled meeting. The Audit Committee may not delegate to management the

¹⁹⁹ This flows from PCAOB Rule 3524, PCAOB Release No. 2005-014 (July 26, 2005).

²⁰⁰ The services listed in the appendices are for illustrative purposes only.

Audit Committee's responsibilities to pre-approve services performed by the independent auditor.

III. AUDIT SERVICES

The Audit Committee must specifically pre-approve the terms of the annual audit services engagement. The Audit Committee shall approve, if necessary, any changes in terms resulting from changes in audit scope, Company structure or other matters.

In addition to the annual audit services engagement approved by the Audit Committee, the Audit Committee may grant pre-approval for other audit services, which are those services that only the independent auditor reasonably can provide. The Audit Committee has pre-approved the audit services listed in Appendix A. All other audit services not listed in Appendix A must be specifically pre-approved by the Audit Committee.

IV. AUDIT-RELATED SERVICES

Audit-related services, including internal control-related services, are assurance and related services that are reasonably related to the performance of the audit or review of the Company's financial statements and/or the Company's internal control over financial reporting and that are traditionally performed by the independent auditor. The Audit Committee believes that the provision of audit-related services does not impair the independence of the auditor, and has pre-approved the audit-related services listed in Appendix B. All other audit-related services not listed in Appendix B must be specifically pre-approved by the Audit Committee.

V. TAX SERVICES

The Audit Committee believes that the independent auditor can provide tax services to the Company, such as tax compliance, tax planning and tax advice, without impairing the auditor's independence. However, the Audit Committee shall scrutinize carefully the retention of the independent auditor in connection with any tax-related transaction initially recommended by the independent auditor. The Audit Committee has pre-approved the tax services listed in Appendix C. All tax services not listed in Appendix C must be specifically pre-approved by the Audit Committee.

VI. OTHER SERVICES

The Audit Committee may grant pre-approval to those permissible non-audit services classified as other services that it believes would not impair the independence of the auditor, including those that are routine and recurring services. The Audit Committee has pre-approved the other services listed in Appendix D. Permissible other services not listed in Appendix D must be specifically pre-approved by the Audit Committee.

A list of the Securities and Exchange Commission's (the "SEC") prohibited non-audit services is attached to this Pre-approval Policy as Exhibit 1. The rules of the SEC and the Public Company Accounting Oversight Board (PCAOB), and relevant guidance should be consulted to determine the precise definitions of these services and the applicability of exceptions to certain of the prohibitions.

VII. PRE-APPROVAL FEE LEVELS

The Audit Committee may consider the amount or range of estimated fees as a factor in determining whether a proposed service would impair the auditor's independence. Where the Audit Committee has approved an estimated fee for a service, the pre-approval applies to all services described in the approval. However, in the event the invoice in respect of any such service is materially in excess of the estimated amount or range, the Audit Committee must approve such excess amount prior to payment of the invoice. The Audit Committee expects that any requests to pay invoices in excess of the estimated amounts will include an explanation as to the reason for the overage.²⁰¹ The Company's independent auditor will be informed of this policy.

VIII. SUPPORTING DOCUMENTATION

With respect to each proposed pre-approved service, the independent auditor must provide the Audit Committee with detailed back-up documentation regarding the specific services to be provided.

²⁰¹ It is understood that estimated amounts that are denominated in dollars, but are ordinarily paid in another currency are subject to foreign exchange rate fluctuations. Thus, variances from estimated amounts arising as a result of changes in foreign currency exchange rates from the time of preparation of the relevant approval request will not be considered to be variances from the budgeted amount and payment of the related invoices will not require a subsequent approval.

IX. PROCEDURES

The Company's management shall inform the Audit Committee of each service performed by the independent auditor pursuant to this Pre-approval Policy.

Requests or applications to provide services that require separate approval by the Audit Committee shall be submitted to the Audit Committee by both the independent auditor and the [CFO, Treasurer or Controller²⁰²], and must include a joint statement as to whether, in their view, the request or application is consistent with the SEC's and the PCAOB's rules on auditor independence.

²⁰² Or other designated officer.

Appendix A

Pre-approved Audit Services for Fiscal Year 2013²⁰³

Dated: _____, 2013

<u>Service</u>	<u>Estimated Range of Fees</u>
Statutory audits or financial audits for subsidiaries or affiliates of the Company	
Services associated with SEC registration statements, periodic reports and other documents filed with the SEC or other documents issued in connection with securities offerings (e.g., comfort letters, consents), and assistance in responding to SEC comment letters	
Consultations by the Company's management as to the accounting or disclosure treatment of transactions or events and/or the actual or potential impact of final or proposed rules, standards or interpretations by the SEC, PCAOB, FASB, or other regulatory or standard-setting bodies (Note: Under the SEC rules, some consultations may be "audit-related" services rather than "audit" services)	

²⁰³ The services listed in these appendices are for illustrative purposes only and may not be applicable to a particular company.

Appendix B

Pre-Approved Audit-Related Services for Fiscal Year 2013

Dated: , 2013

<u>Service</u>	<u>Estimated Range of Fees</u>
Due diligence services pertaining to potential business acquisitions/dispositions	
Financial statement audits of employee benefit plans	
Agreed-upon or expanded audit procedures related to accounting and/or billing records required to respond to or comply with financial, accounting or regulatory reporting matters	
Consultations by the Company's management as to the accounting or disclosure treatment of transactions or events and/or the actual or potential impact of final or proposed rules, standards or interpretations by the SEC, PCAOB, FASB, or other regulatory or standard-setting bodies (Note: Under the SEC rules, some consultations may be "audit" services rather than "audit-related" services)	
Attest services not required by statute or regulation	

Pre-Approved Tax Services for Fiscal Year 2013

Dated: _____, 2013

<u>Service</u>	<u>Estimated Range of Fees</u>
U.S. federal, state and local tax planning and advice	
U.S. federal, state and local tax compliance	
International tax planning and advice	
International tax compliance	
Review of U.S. federal, state, local and international income, franchise and other tax returns	
Licensing [or purchase] of income tax preparation software ²⁰⁴ from the independent auditor, <i>provided</i> that the functionality is limited to preparation of tax returns	

²⁰⁴ Licensing or purchasing income tax preparation software is permitted so long as the functionality is limited to preparation of tax returns. If the software performs additional functions, each function must be evaluated *separately* for its potential effect on the auditor's independence.

Appendix D

Pre-approved Other Services for Fiscal Year 2013

Dated: _____, 2013

<u>Service</u>	<u>Estimated Range of Fees</u>

Exhibit 1

Prohibited Non-Audit Services

- Bookkeeping or other services related to the accounting records or financial statements of the Company^{*}
- 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
- Human resources
- Broker-dealer, investment adviser or investment banking services
- Legal services
- Expert services unrelated to the audit
- Any services entailing a contingent fee or commission (not including fees awarded by a bankruptcy court when the audit client is in bankruptcy)[†]
- Tax services to an officer of the audit client whose role is in a financial reporting oversight capacity (regardless of whether the audit client or the officer pays the fee for the services)[†]
- Planning or opining on the tax consequences of a “listed,” *i.e.*, tax avoidance, transaction[†]

^{*} Provision of these non-audit services is permitted if it is reasonable to conclude that the results of these services will not be subject to audit procedures. Materiality is not an appropriate basis upon which to overcome the rebuttable presumption that prohibited services will be subject to audit procedures because determining materiality is itself a matter of audit judgment.

[†] The prohibitions on tax shelter advice, aggressive tax planning advice and tax services for certain corporate officers flow from the PCAOB’s adoption of certain auditor independence and ethics rules in July 2005. *See* PCAOB Release No. 2005-014 (July 26, 2005).

- Planning or opining on the tax consequences of a “confidential” transaction, *i.e.*, where tax advice is given under restriction of confidentiality (regardless of the fee to be paid)[†]

Planning or opining on a transaction that is based on an “aggressive interpretation” of tax laws and regulations, if the transaction was recommended by the audit firm and a significant purpose of which is tax avoidance unless the proposed tax treatment is at least more likely than not to be allowed under current tax laws[†]

[†] The prohibitions on tax shelter advice, aggressive tax planning advice and tax services for certain corporate officers flow from the PCAOB’s adoption of certain auditor independence and ethics rules in July 2005. *See* PCAOB Release No. 2005-014 (July 26, 2005).

Exhibit F

MODEL POLICIES AND PROCEDURES WITH RESPECT TO RELATED PERSON TRANSACTIONS²⁰⁵

Introduction

The Board of Directors of the Company (the “Board”) has adopted this Policy and the related procedures for the evaluation and approval, disapproval or ratification of Related Person Transactions (as defined below). This Policy is intended to establish a framework whereby such Related Person Transactions will be reviewed and approved or ratified by the Company’s Audit Committee.²⁰⁶

Under this Policy, a Related Person Transaction shall be consummated or continued only if the Company’s Audit Committee shall approve or ratify such transaction as in, or not inconsistent with, the best interests of the Company and its stockholders. This Policy is intended to augment and work in conjunction with other Company policies having code of conduct and/or conflict of interest provisions.

The Company’s Audit Committee periodically shall review this Policy and may recommend to the Board amendments to this Policy from time to time as it deems appropriate.

²⁰⁵ Item 404(b) of Regulation S-K requires a Company to disclose its policies and procedures for the review, approval or ratification of any related person transaction required to be reported under Item 404(a) of Regulation S-K. Item 404(b) further provides that, while the material features of such policies and procedures will vary depending on the particular circumstances, examples of such features may include, in given cases, among other things: (1) the types of transactions covered; (2) the standards to be applied; and (3) the persons or groups of persons on the board or otherwise responsible for its application. The rule also provides that companies should disclose whether such policies and procedures are in writing and, if not, how such policies and procedures are evidenced.

²⁰⁶ The NASDAQ marketplace rules require, and the New York Stock Exchange (NYSE) rules recommend, that the audit committee or another independent body of the board approve all related person transactions. See NYSE Listed Company Manual Section 314 and NASDAQ Rule 5630(a). As such, a company may allocate such authority to a body of independent directors other than the audit committee.

Definitions

For purposes of this Policy, a “Related Person” is:

1. Any Director or Executive Officer (as such terms are defined below) of the Company, and any individual who was a Director or Executive Officer of the Company at any time since the beginning of the last fiscal year.²⁰⁷
2. Any nominee for election as a Director of the Company.²⁰⁸
3. Any individual or entity known to the Company to be the beneficial owner of more than five percent (5%) of any class of the Company’s voting securities.²⁰⁹
4. Any immediate family member of an individual identified in Items 1 through 3 above. An immediate family member would be any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law of such individual, and any individual (other than a tenant or employee) sharing the household of such individual.²¹⁰

For purposes of this Policy, a “Director” is a member of the Board, and an “Executive Officer” means an employee of the Company that is covered by Section 16a-1(f) of the Securities Exchange Act of 1934, as amended and in effect from time to time.

For purposes of this Policy, a “Related Person Transaction” is any transaction, arrangement or relationship (or series of similar transactions, arrangements or relationships) in which the Company (or any of its subsidiaries)²¹¹ is, was or will be a participant and the amount involved exceeds \$120,000, and in which the Related Person had, has or will have a direct or indirect material interest,²¹² other than:

²⁰⁷ Instruction 1.a(i) to Item 404(a) of Regulation S-K.

²⁰⁸ Instruction 1.a(ii) to Item 404(a) of Regulation S-K.

²⁰⁹ Instruction 1.b(i) to Item 404(a) and Item 403(a) of Regulation S-K.

²¹⁰ Instructions 1.a(iii) and 1.b(ii) of Item 404(a) of Regulation S-K.

²¹¹ SEC Release No. 33-8732A, Section V.A.1, text accompanying footnote 425.

²¹² Item 404(a) of Regulation S-K.

- (a) Employment relationships or transactions involving an Executive Officer and any related compensation solely resulting from such employment if (i) the compensation is required to be reported in the Company's annual proxy or (ii) the Executive Officer is not an immediate family member specified in subparagraph 4 in the definitions above and such compensation was approved, or recommended to the Board for approval, by the Compensation Committee of the Company.²¹³
- (b) Compensation for serving as a Director of the Company.²¹⁴
- (c) Payments arising solely from the ownership of the Company's equity securities in which all holders of that class of equity securities received the same benefit on a *pro rata* basis.²¹⁵
- (d) Indebtedness arising from ordinary-course transactions such as the purchases of goods and services at market prices, and indebtedness transactions with any individual or entity that is a Related Person only by virtue of subparagraph 3 in the Definitions above.²¹⁶
- (e) Transactions where the rates or charges are determined by competitive bids.²¹⁷
- (f) Transactions where the rates or charges are fixed in conformity with law or governmental authority in connection with the provision of services as a common or contract carrier or public utility.²¹⁸
- (g) Ordinary course transactions involving the provision of certain financial services (*e.g.*, by a bank depository, transfer agent, registrar, trustee under a trust indenture or similar services).²¹⁹

²¹³ Instruction 5 of Item 404(a) of Regulation S-K.

²¹⁴ Instruction 5 of Item 404(a) of Regulation S-K.

²¹⁵ Instruction 7.c of Item 404(a) of Regulation S-K.

²¹⁶ Instruction 4 of Item 404(a) of Regulation S-K.

²¹⁷ Instruction 7.a of Item 404(a) of Regulation S-K.

²¹⁸ Instruction 7.a of Item 404(a) of Regulation S-K.

²¹⁹ Instruction 7.b of Item 404(a) of Regulation S-K.

Review and Approval of Related Person Transactions

Management shall present to the Audit Committee of the Company the following information, to the extent relevant, with respect to actual or potential Related Person Transactions:

1. *A general description of the transaction(s), including the material terms and conditions.*
2. *The name of the Related Person and the basis on which such individual or entity is a Related Person.*²²⁰
3. *The Related Person's interest in the transaction(s), including the Related Person's position or relationship with, or ownership of, any entity that is a party to or has an interest in the transaction(s).*²²¹
4. *The approximate dollar value of the transaction(s), and the approximate dollar value of the Related Person's interest in the transaction(s) without regard to amount of profit or loss.*²²²
5. *In the case of a lease or other transaction providing for periodic payments or installments, the aggregate amount of all periodic payments or installments expected to be made.*²²³
6. *In the case of indebtedness, the aggregate amount of principal to be outstanding and the rate or amount of interest to be payable on such indebtedness.*²²⁴
7. *Any other material information regarding the transaction(s) or the Related Person's interest in the transaction(s).*²²⁵

After reviewing such information, the disinterested members of the Audit Committee of the Company shall approve or disapprove such transaction. No

²²⁰ Item 404(a)(1) of Regulation S-K.

²²¹ Item 404(a)(2) of Regulation S-K.

²²² Item 404(a)(3)-(4) of Regulation S-K.

²²³ Instruction 3.b of Item 404(a) of Regulation S-K.

²²⁴ Item 404(a)(5) and Instruction 3.a of Item 404(a) of Regulation S-K.

²²⁵ Item 404(a)(6) of Regulation S-K.

member of the Audit Committee of the Company shall participate in the review, consideration or approval of any Related Person Transaction with respect to which such member or any member of his or her immediate family is a Related Person. Approval of such transaction shall be given only if it is determined by the Audit Committee of the Company that such transaction is in, or not inconsistent with, the best interests of the Company and its shareholders.

If any material information with respect to such transactions shall change subsequent to the Audit Committee of the Company's review of such transactions, management shall provide the Audit Committee of the Company with updated information at its next scheduled meeting.

In the event management becomes aware of a Related Person Transaction that has not been previously approved or ratified under this Policy, it shall be submitted to the Audit Committee of the Company promptly, and the Audit Committee of the Company shall review the Related Person Transaction in accordance with the criteria set forth in this Policy, taking into account all of the relevant facts and circumstances available to the Audit Committee of the Company. Based on the conclusions reached, the Audit Committee of the Company shall evaluate all options, including, without limitation, approval, ratification, amendment or termination of the Related Person Transaction or, with respect to any Related Person Transaction that is no longer pending or ongoing, rescission and/or disciplinary action. Any such determination by the Audit Committee of the Company shall be reported to the full Board.

In the event management determines it is impractical or undesirable to wait until the next meeting of the Audit Committee of the Company to approve a Related Person Transaction, the Chair of the Audit Committee of the Company may review and approve the Related Person Transaction in accordance with the criteria set forth herein. The Chair of the Audit Committee of the Company will report any such approval to the Audit Committee of the Company at its next regularly scheduled meeting.

The Audit Committee of the Company shall report all material Related Person Transactions it has reviewed to the full Board.

Exhibit G

MODEL EMPLOYEE COMPLAINT PROCEDURES FOR ACCOUNTING AND AUDITING MATTERS

Any employee of the Company may submit a good faith complaint regarding accounting or auditing matters to the management of the Company without fear of dismissal or retaliation of any kind. The Company is committed to achieving compliance with all applicable securities laws and regulations, accounting standards, accounting controls, and audit practices. The Company's Audit Committee will oversee treatment of employee concerns in this area.

In order to facilitate the reporting of employee complaints, the Company's Audit Committee has established the following procedures for (1) the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters ("Accounting Matters"), and (2) the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.

Receipt of Employee Complaints

- Employees with concerns regarding Accounting Matters may report their concerns to the General Counsel of the Company.
- Employees may forward complaints on a confidential or anonymous basis to the General Counsel of the Company through a hotline, e-mail or regular mail to:

[CONTACT INFORMATION]

Scope of Matters Covered by These Procedures

These procedures relate to employee complaints relating to any questionable accounting or auditing matters, including, without limitation, the following:

- fraud or deliberate error in the preparation, evaluation, review or audit of any financial statement of the Company;
- fraud or deliberate error in the recording and maintaining of financial records of the Company;

- deficiencies in, or noncompliance with, the Company's internal accounting controls;
- misrepresentation or false statement to or by a senior officer or accountant regarding a matter contained in the financial records, financial reports or audit reports of the Company; or
- deviation from full and fair reporting of the Company's financial condition.

Treatment of Complaints

- Upon receipt of a complaint, the General Counsel of the Company will (1) determine whether the complaint actually pertains to Accounting Matters, and (2) when possible, acknowledge receipt of the complaint to the sender.
- Complaints relating to Accounting Matters will be reviewed under the Company's Audit Committee direction and oversight by the General Counsel of the Company, internal audit or such other persons as the Company's Audit Committee determines to be appropriate. Confidentiality will be maintained to the fullest extent possible, consistent with the need to conduct an adequate review.
- Prompt and appropriate corrective action will be taken when and as warranted in the judgment of the Company's Audit Committee.
- The Company will not discharge, demote, suspend, threaten, harass or in any manner discriminate against any employee in the terms and conditions of employment based upon any lawful actions of such employee with respect to good faith reporting of complaints regarding Accounting Matters or otherwise as specified in Section 806 of the Sarbanes-Oxley Act of 2002.

Reporting and Retention of Complaints and Investigations

- The General Counsel of the Company will maintain a log of all complaints, tracking their receipt, investigation and resolution, and shall prepare a periodic summary report thereof for the Company's Audit Committee. Copies of complaints and such log will be maintained in accordance with the Company's document retention policy.

