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SEC ISSUES FINAL RULES PROHIBITING IMPROPER INFLUENCING OF AUDITORS

By Richard P. Wolfe and Amos J. Oelking III

On May 20, 2003, the SEC adopted final rules under Section 303(a) of the Sarbanes-Oxley Act of 2002 prohibiting officers and directors of a company from taking any action to mislead or fraudulently influence the auditor of the company's financial statements. The final rules, which become effective June 27, 2003, were adopted substantially as proposed and supplement existing rules under Regulation 13B-2 of the Securities Exchange Act of 1934. ([Click here to link to the SEC's release regarding the final rules.](#))

Specifically, the final rules prohibit officers and directors, and persons acting under their direction, from taking any action to "coerce, manipulate, mislead, or fraudulently influence" an accountant engaged in an audit or review of the company's financial statements. The SEC believes the phrase "engaged in the performance of an audit" as used in Section 303(a) of the Act should be interpreted broadly. Accordingly, the final rules will apply not only throughout the term of a company's engagement of its auditors, but also:

- after the engagement has ended, when the auditor is considering whether to reissue, withdraw, or consent to the use of prior audit reports;
- prior to the commencement of the professional engagement, when the company is seeking to retain an accounting firm for the audit of its financial statements; and
- to the review of interim financial statements.

The conduct of an officer, director or person acting under the direction of an officer or director will violate the rules if such person knew or should have known that such conduct could, if successful, result in the company's financial statements being materially misleading. The SEC's release regarding the final rules makes clear that this is a negligence standard, not a fraud standard, and that "persons acting under the direction" may include customers, vendors and creditors. Moreover, consistent with the SEC's proposed rules, such conduct will violate the final rules even if the conduct is not successful in affecting the audit or review.

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Examples of prohibited conduct described in the SEC's final rules release include, but are not limited to, directly or indirectly:

- canceling or threatening to cancel existing audit or non-audit engagements if the auditor objects to the company's accounting;
- offering or paying bribes or other financial incentives, including contracts for non-audit services and offers of future employment;
- attempting to have the audit partner removed from the engagement because he or she objects to the company's accounting; and
- providing an auditor with misleading or inaccurate analysis of legal issues.

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

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