



## 307 Private Companies Living in a Public Company World

**Ginny Coles**

*Assistant General Counsel*

Good Technology

**Marty Collins**

*Vice President, Associate General Counsel & Assistant Secretary*

Oracle Corporation

**Thomas W. Kellerman**

*Partner*

Morgan Lewis & Bockius LLP

**Richard A. Parr II**

*General Counsel*

Manor Care, Inc.

**Miriam Rivera**

*Vice President & Deputy General Counsel*

Google, Inc.

## Faculty Biographies

### Ginny Coles

Assistant General Counsel  
Good Technology

### Marty Collins

Vice President, Associate General Counsel & Assistant Secretary  
Oracle Corporation

### Thomas W. Kellerman

Thomas Kellerman is the managing partner of the Palo Alto office and is co-chair of the emerging business & technology practice. He concentrates his practice on advising companies, venture capitalists and investment banks focused on corporate finance, mergers and acquisitions and corporate governance matters within the technology industry.

Mr. Kellerman has extensive experience in venture capital and other private equity transactions and equity public offerings. He practiced for four years in London and has a particular expertise in cross-border transactions for technology companies.

He also frequently speaks and writes on topics related to his practice expertise.

### Richard A. Parr II

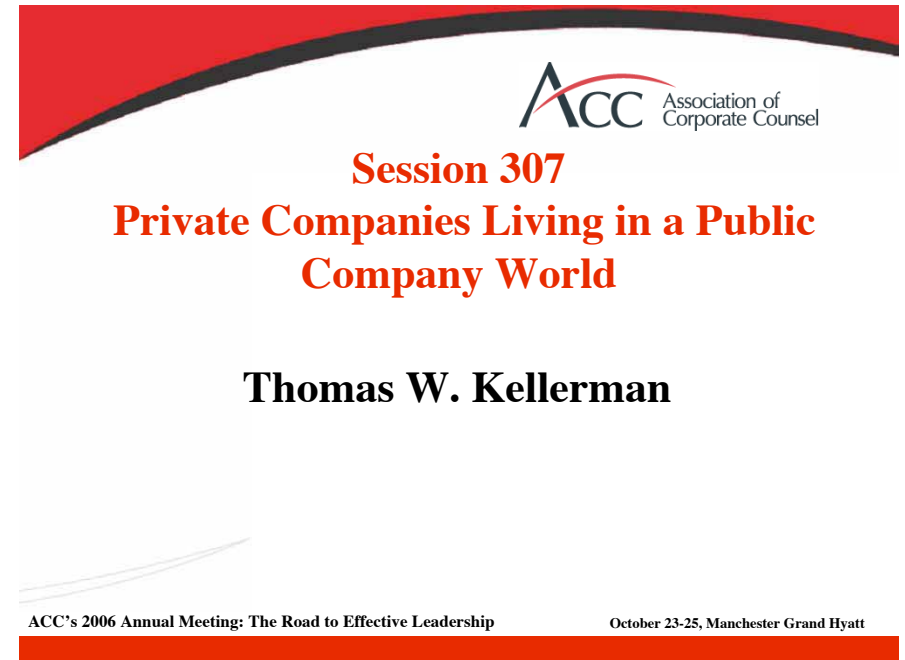
General Counsel  
Manor Care, Inc.

### Miriam Rivera

Miriam Rivera leads the legal teams for Google's corporate, commercial, Asia Pacific/ Latin America, employment, real estate and technical operations. Previously, she served as associate general counsel, managing the commercial and strategic alliance practice for the company. Ms. Rivera has also closed a number of strategic partnerships for Google, including AOL and AOL Europe, as well as earlier partnerships for Yahoo! and Yahoo Japan, while overseeing the completion of thousands of revenue and strategic alliances.

Prior to joining Google, Ms. Rivera served as in-house counsel for Ariba Inc. in Sunnyvale, California. Previously, she co-founded On Your Mind (later known as Outcome Software), a venture-backed enterprise software company. Earlier roles included strategy consultant for Andersen Consulting (now Accenture) and associate in the business and technology practice at the law firm of Brobeck, Phleger & Harrison.

Ms. Rivera received an A.B. and an A.M. from Stanford University, as well as a M.B.A. and a J.D. from Stanford Graduate School of Business and Stanford Law School.



ACC Association of Corporate Counsel

**Session 307**  
**Private Companies Living in a Public Company World**

**Thomas W. Kellerman**

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## Benefits of Adopting Public Company Governance Practices



## Private companies should formalize governance practices because:

- Many requirements become effective upon *filing* for an IPO;
- Potential public acquirers need to rely on historic practices of the target; and
- Increased focus on governance has created a new standard of “best practices”



## Additional requirements placed on public companies

- Sarbanes-Oxley
- SEC Reporting Obligations
- Stock Exchange Listing Requirements (NYSE, Nasdaq)
- Corporate Common Law

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## Major considerations for private companies moving toward a public model

- Independence of Directors
- Committees
  - Compensation
  - Audit
  - Nominating and Corporate Governance
- Code of Ethics – Post-Enron Environment
- Certifications of CEO and CFO
- Focus on Executive Compensation
- Whistle Blowing Policy

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## Governance: Board of Directors

- Independence of directors
  - Both the NYSE and Nasdaq require a majority of independent directors on board unless one entity controls greater than 50% of the company's voting power
  - Independent director defined:
    - Directors that have no material relationship with company



## Audit Committee: Major duties

- Oversight of:
  - Financial statements
  - Compliance with legal and regulatory requirements
  - Independent auditors
- Prepare audit committee report
- Report regularly to the board
- Discuss risk management and internal controls with management and auditors
- Approve and supervise disclosure control procedures



## Audit Committee: Composition of members

- All must be financially literate independent directors
- At least 3 members
- One member with accounting expertise



## Compensation Committee: Major duties

- Determine and approve executive salaries in light of corporate goals
- Make recommendations to board on non-executive compensation and stock plans (stock options)
- Produce report to be included in required SEC reports
- Prohibition of loans to executive officers
- Stockholder approval of stock plans



## Nominating and Corporate Governance Committee

- Nominates board members
- Reviews board on annual basis
- Oversees Code of Ethics



## Certifications of CEO and CFO

- Greater emphasis on process
- Disclosure Controls and Procedures



## Executive compensation

- Focus of Media and Regulators
- Option Granting Procedures
- New SEC Disclosure Obligations



## Whistle-blowing

- Sarbanes Oxley requires a policy
- Double-edged sword
- Requires an administrator





## Best Governance Practices

- Move to a more “Process-Oriented” environment
- Need for independence in approval processes
- Need for full disclosure to Board and Shareholders
- Need for good documentation of actions



## Recap

- In preparation for a change from a private company environment to a public company environment, consider:
  - Directors:
    - Independence
    - Governance Policy
  - Committees
    - Audit
    - Compensation
    - Nominating and Corporate Governance
  - Code of Ethics
  - Executive compensation procedures
  - Whistle-blowing procedures
  - Process-Oriented Environment



February 2004

**ANNOTATED CHARTER OF THE AUDIT COMMITTEE  
OF THE BOARD OF DIRECTORS**  
OF \_\_\_\_\_<sup>1</sup>

**I. Purpose**

The Audit Committee (the "Committee") of the Board of Directors (the "Board") of \_\_\_\_\_ (the "Company") is appointed by, and generally acts on behalf of, the Board. The Committee's purposes shall be:

- A. To assist the Board in its oversight of (1) the integrity of the Company's financial statements; (2) the Company's compliance with legal and regulatory requirements; and (3) the performance of the Company's internal audit function;<sup>2</sup>
- B. To interact directly with and evaluate the performance of the independent auditors, including to determine whether to engage or dismiss the independent auditors and to monitor the independent auditors' qualifications and independence;<sup>3</sup> and
- C. To prepare the report required by the rules of the Securities and Exchange Commission (the "SEC") to be included in the Company's proxy statement.<sup>4</sup>

Although the Committee has the powers and responsibilities set forth in this Charter, the role of the Committee is oversight. The members of the Committee are not full-time employees of the Company and may or may not be accountants or auditors by profession or experts in the fields of accounting or auditing and, in any event, do not serve in such capacity. Consequently, it is not the duty of the Committee to conduct audits, to independently verify management's representations, or to determine that the Company's financial statements are

<sup>1</sup> A written charter of the Audit Committee of the Board must be adopted by the Board pursuant to NYSE §303A.07 and Nasdaq Rule 4350(d)(1). The charter is required to be published on the Company's website pursuant to NYSE §303A.09; see also Item 7(d)(3)(iii) of Schedule 14A under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which requires the Company to file the charter as an appendix to the Company's proxy statement at least every three years.

<sup>2</sup> See NYSE § 303A.07(c)(i)(A).

<sup>3</sup> See Exchange Act Rule 10A-3(b)(1), NYSE §§ 303A.07(c)(i)(A) and (iii) and Nasdaq Rule 4350(d)(3).

<sup>4</sup> See Regulation S-K Item 306 and Item 7(d)(3)(i) of Exchange Act Schedule 14A; see also NYSE § 303A.07(c)(i)(B).

complete and accurate, are prepared in accordance with generally accepted accounting principles ("GAAP"), or fairly present the financial condition, results of operations, and cash flows of the Company in accordance with GAAP. These are the responsibilities of management and the independent auditors.<sup>5</sup> The Committee's considerations and discussions with management and the independent auditors do not ensure that the Company's financial statements are presented in accordance with GAAP, that the audit of the Company's financial statements has been carried out in accordance with generally accepted auditing standards, or that the Company's independent auditors are in fact "independent."

**II. Membership**

- A. The Committee shall be composed of at least three directors,<sup>6</sup> each of whom must be independent.<sup>7</sup> A director shall qualify as independent if the Board has affirmatively determined that the member has met the basic independence criteria set forth in the Company's Corporate Governance Guidelines. In addition, members of the Committee must also satisfy the following additional requirements in order to be independent:
  1. No Committee member or immediate family member of such Committee member may be an affiliated person of the Company or any of its subsidiaries, as that term is defined by the SEC;<sup>8</sup> and
  2. No Committee member shall accept, directly or indirectly, any consulting, advisory, or other compensatory fees from the Company or any of its subsidiaries, except for fees for services as a director and member of the Audit Committee and any other Board committee.<sup>9</sup>
- B. All members of the Committee must be financially literate.<sup>10</sup> At least one member shall have accounting or related financial management

<sup>5</sup> See NYSE § 303A.07 (general commentary to § 303A.07(c)).

<sup>6</sup> See NYSE § 303A.07(a) and Nasdaq Rule 4350(d)(2).

<sup>7</sup> See NYSE § 303A.07(b) and Nasdaq Rule 4350(d)(2); see also Exchange Act § 10A(m)(3) (added by Section 301 of Sarbanes-Oxley); Exchange Act Rule 10A-3(b); and NYSE § 303A.02.

<sup>8</sup> See Exchange Act § 10A(m)(3) (added by Section 301 of Sarbanes-Oxley); and Exchange Act Rule 10A-3(b)(1).

<sup>9</sup> See id.

<sup>10</sup> See NYSE § 303A.07(a) (commentary), providing that a member of the audit committee may become financially literate within a reasonable time after appointment to the Committee, and Nasdaq Rule 4350(d)(2)(A)(iii), providing that each member of the audit committee must be able to read and understand fundamental financial statements, including a company's balance sheet, income statement, and cash flow statement.

expertise.<sup>11</sup> To the extent possible, at least one member of the Committee shall be a "audit committee financial expert" as that term is defined by the SEC.<sup>12</sup>

- C. The members of the Committee shall be nominated by the Nominating and Corporate Governance Committee and appointed by a majority of the Board for one-year terms.<sup>13</sup> The Nominating and Corporate Governance Committee shall recommend, and the Board shall designate, one member of the Committee to serve as Chairperson. The members of the Committee shall serve until their resignation, retirement, or removal by the Board and until their successors shall be appointed. No member of the Committee shall be removed except by majority vote of the independent directors of the full Board then in office.
- D. Generally, no member of the Committee may serve simultaneously on the audit committees of more than three public companies without a specific Board determination that such simultaneous service will not impair the ability of such Committee member to serve on the Committee.<sup>14</sup>

### III. Meetings and Procedures

- A. The Committee shall meet as often as it may deem necessary and appropriate in its judgment, but in no event less than [four] times per year. A majority of the members of the Committee shall constitute a quorum.
- B. The Committee shall meet with the independent auditors, the senior personnel performing the Company's internal audit function, and management in separate meetings, as often as it deems necessary and appropriate in its judgment.<sup>15</sup>
- C. The Chairperson of the Committee or a majority of the members of the Committee may call a special meeting of the Committee.

<sup>11</sup> See *id.* Nasdaq Rule 4350(d)(2) requires that at least one member of the audit committee have past employment experience in finance or accounting, or any comparable experience or background which results in the individual's financial sophistication, including having been a chief executive officer, chief financial officer, or other senior officer with financial oversight responsibilities. Each of the NYSE and the Nasdaq states that a person who meets the SEC's definition of audit committee financial expert will be considered to have accounting or related financial management expertise. See NYSE § 303A.07(a) (commentary) and Nasdaq interpretation IM-4350-4 "Audit Committee Composition."

<sup>12</sup> See Sarbanes-Oxley Section 407 and Regulation S-K Item 401(h).

<sup>13</sup> See NYSE § 303A.04 (commentary).

<sup>14</sup> See NYSE § 303A.07(a) (commentary).

<sup>15</sup> See NYSE § 303A.07(c)(iii)(E).

- D. The Committee may request that any directors, officers, or employees of the Company, or other persons whose advice and counsel are sought by the Committee, attend any meeting to provide such information as the Committee requests.
- E. The Committee shall fix its own rules of procedure,<sup>16</sup> which shall be consistent with the Bylaws of the Company and this Charter.
- F. The Committee shall report to the Board on the matters discussed at each meeting of the Committee, including describing all actions taken by the Committee at the meeting.<sup>17</sup>
- G. The Committee shall keep written minutes of its meetings, which minutes shall be maintained with the books and records of the Company.
- H. The Committee may delegate authority to one or more members of the Committee where appropriate, but no such delegation shall be permitted if the authority is required by law, regulation, or listing standard to be exercised by the Committee as a whole.<sup>18</sup>
- I. The Committee shall have the authority to obtain advice and assistance from internal and external legal, accounting, and other advisors,<sup>19</sup> and the Company shall provide appropriate funding for the Committee to retain any such advisors without requiring the Committee to seek Board approval.<sup>20</sup>

### IV. Duties and Responsibilities

#### A. Financial Reporting Process

- 1. The Committee shall review and discuss with management and the independent auditors the annual audited financial statements to be included in the Company's annual report on Form 10-K, the quarterly financial statements to be included in the Company's quarterly reports on Form 10-Q, the Company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations," and any other financial disclosures to

<sup>16</sup> See Nasdaq Rule 4350(d)(1)(A).

<sup>17</sup> See NYSE § 303A.07(c)(iii)(H).

<sup>18</sup> See Exchange Act § 10A(i)(3) (with respect to pre-approvals of audit and non-audit services) (added by Section 202 of Sarbanes-Oxley); and Rule 2-01(c)(7) of Regulation S-X.

<sup>19</sup> See Exchange Act § 10A(m)(5) (added by Section 301 of Sarbanes-Oxley) and Exchange Act Rule 10A-3(b)(4); see also NYSE § 303A.07(c)(iii) and Nasdaq Rule 4350(a)(3)(iii).

<sup>20</sup> See Exchange Act § 10A(m)(6) (added by Section 301 of Sarbanes-Oxley) and Exchange Act Rule 10A-3(b)(5); see also NYSE § 303A.07(c)(iii) and Nasdaq Rule 4350(d)(3)(iii).

be included in SEC filings prior to their release.<sup>21</sup> The Committee shall review major issues regarding accounting principles and financial statement presentations, including any significant changes in the Company's selection or application of accounting principles, and major issues as to the adequacy of internal controls and any special audit steps adopted in light of material control deficiencies; analyses prepared by management and/or the independent auditors setting forth significant financial reporting issues and judgments made in connection with the preparation of financial statements, including analysis of the effects of alternative GAAP methods on the financial statements; the effect of regulatory and accounting initiatives, as well as off-balance sheet arrangements, on the financial statements; the use of pro forma or non-GAAP financial information; and any correspondence with regulators or published reports that raise material issues with respect to, or that could have a significant effect on, the Company's financial statements.<sup>22</sup>

2. The Committee shall recommend to the Board whether the audited financial statements should be included in the Company's annual report on Form 10-K.<sup>23</sup>
3. The Committee shall review earnings press releases prior to their release, as well as the type of financial information and earnings guidance and the type of presentation to be provided to analysts and rating agencies.<sup>24</sup>
4. The Committee shall prepare the Committee report required by the rules of the SEC to be included in the Company's annual proxy statement.<sup>25</sup>

B. Risks and Control Environment

1. The Committee shall discuss periodically with management the Company's policies and guidelines regarding risk assessment and risk management, as well as the Company's major financial risk exposures and the steps that management has taken to monitor and control such exposures.<sup>26</sup> In addition, the Committee shall obtain

<sup>21</sup> See NYSE § 303A.07(c)(iii)(B).  
<sup>22</sup> See NYSE § 303A.07(c) (general commentary).  
<sup>23</sup> See Regulation S-K Item 306(a)(4).  
<sup>24</sup> See NYSE § 303A.07(c)(iii)(C).  
<sup>25</sup> See NYSE § 303A.07(c)(i)(B); see also Regulation S-K Item 306 and Item 7(d)(3)(i) of Schedule 14A.  
<sup>26</sup> See NYSE § 303A.07(c)(iii)(D) (including commentary).

periodically from the personnel performing the Company's internal audit function their assessments of the Company's risk management process and system of internal control.<sup>27</sup>

2. The Committee shall review periodically the Company's [Code of Business Conduct and Ethics], and shall have the sole authority to grant waivers of the Company's [Code of Business Conduct and Ethics] to the Company's directors and executive officers.<sup>28</sup>
3. The Committee shall meet periodically with the senior personnel performing the internal audit function, the general counsel's office, and the independent auditors to review the Company's policies and procedures regarding disclosures that may impact the financial statements and compliance with applicable laws and regulations and the Company's [Code of Business Conduct and Ethics].<sup>29</sup>
4. The Committee shall oversee the Company's disclosure controls and procedures, including internal control over financial reporting, and, where applicable, shall oversee changes in internal control over financial reporting intended to address any significant deficiencies or material weaknesses in the design or operation of internal control and any fraud involving management or other employees that is reported to the Committee.<sup>30</sup> In addition, the Committee shall review and discuss the annual report of management on the effectiveness of the Company's internal control over financial reporting and the independent auditors' report on, and attestation of, such management report, to the extent those reports are required by SEC rules.<sup>31</sup>

C. Independent Auditors

1. The Committee shall have the sole authority to retain, set compensation and retention terms for, terminate, oversee, and evaluate the activities of the Company's independent auditors.<sup>32</sup>

<sup>27</sup> See NYSE § 303A.07(d).  
<sup>28</sup> See NYSE § 303A.10 (commentary), stating that the board or a committee of the board must grant any waivers for executive officers and directors; see also Regulation S-K Item 406, requiring disclosure of any such waivers.  
<sup>29</sup> See NYSE § 303A.07(d), stating that companies must have an internal audit function.  
<sup>30</sup> See Exchange Act Rule 13a-14(a) (implementing Section 302 of Sarbanes-Oxley).  
<sup>31</sup> See Exchange Act Rule 13a-15(c), Regulation S-K Items 308(a) and (b), and Rule 2-02(f) Regulation S-X.  
<sup>32</sup> See Exchange Act § 10A(m)(2) (added by Section 301 of Sarbanes-Oxley) and Exchange Act Rule 10A-3(b)(2); see also NYSE § 303A.07(c)(iii) (including commentary) and Nasdaq Rule 4350(d)(3).

The independent auditors shall report directly to the Committee.<sup>33</sup> The Company shall provide for appropriate funding, as determined by the Committee, for payment of compensation to the independent auditors.<sup>34</sup>

2. The Committee shall review and approve in advance the retention of the independent auditors for the performance of all audit and non-audit services that are not prohibited and the fees for such services.<sup>35</sup> Pre-approval of audit and non-audit services that are not prohibited may be pursuant to appropriate policies and procedures established by the Committee for the pre-approval of such services, including through delegation of authority to a member of the Committee. Any service that is approved pursuant to a delegation of authority to a member of the Committee must be reported to the full Committee at its next scheduled meeting.<sup>36</sup>
3. Prior to initiation of the audit, the Committee shall meet with the independent auditors to discuss the planning and staffing of the audit, including the impact of applicable rotation requirements and other independence rules on the staffing.<sup>37</sup>
4. The Committee shall, at least annually, obtain and review a report by the independent auditors describing: (i) the independent auditors' internal quality-control procedures; (ii) any material issues raised by the most recent internal quality-control review, or peer review, of the auditing firm, or by any inquiry or investigation by governmental or professional authorities or a private sector regulatory board, within the preceding five years, respecting one or more independent audits performed by the auditing firm, and any steps taken to deal with any such issues; and (iii) in order to assess the firm's independence, all relationships between the auditing firm and the Company, consistent with Independent Standards Board No. 1.<sup>38</sup>

<sup>33</sup> See *id.*

<sup>34</sup> See Exchange Act § 10A(m)(6) (added by Section 301 of Sarbanes-Oxley); see also Exchange Act Rule 10A-3(b)(5).

<sup>35</sup> See Exchange Act § 10A(h)-(i) (added by Sections 201 and 202 of Sarbanes-Oxley); and Rule 2-01(c)(7) of Regulation S-X.

<sup>36</sup> See Exchange Act § 10A(i)(3) (added by Section 202 of Sarbanes-Oxley); and Rule 2-01(c)(7) of Regulation S-X.

<sup>37</sup> See Exchange Act § 10A(j) (added by Section 203 of Sarbanes-Oxley); and Rule 2-01(c)(6) of Regulation S-X.

<sup>38</sup> See NYSE § 303A.07(c)(iii)(A) (including commentary); see also Nasdaq Rule 4350(d)(1)(B).

5. The Committee shall review periodically any reports prepared by the independent auditors and provided to the Committee relating to, among other things, the Company's critical accounting policies and practices; alternative treatments within generally accepted accounting principles for policies and practices relating to material items that have been discussed with management, including the ramifications of the use of such alternative disclosures and treatments and the treatment preferred by the independent auditors; and any other material written communications between the independent auditors and management, such as any management letter or schedule of unadjusted differences.<sup>39</sup>
6. The Committee shall discuss with the independent auditors any audit problems or difficulties, including any restrictions on the scope of the independent auditors' activities or on access to requested information, management's response to same, and any other matters required to be brought to its attention under auditing standards (e.g., SAS 61), and shall resolve any disagreements between the independent auditors and management.<sup>40</sup>
7. After reviewing the reports from the independent auditors and the independent auditors' work throughout the audit period, the Committee will conduct an annual evaluation of the independent auditors' performance and their independence, including considering whether the independent auditors' quality controls are adequate. This evaluation also shall include the review and evaluation of the audit engagement team, including the lead audit partner. In making its evaluation, the Committee shall take into account the opinions of management and the senior personnel performing the Company's internal audit function. The Committee shall present its conclusions with respect to the evaluation of the independent auditors to the Board.<sup>41</sup>
8. The Committee shall set clear policies for the hiring by the Company of employees or former employees of the independent auditors.<sup>42</sup> Specifically, the Company shall not hire as its Chief Executive Officer, Chief Financial Officer, Controller, Chief

<sup>39</sup> See Exchange Act § 10A(k) (added by Section 204 of Sarbanes-Oxley); see also NYSE § 303A.07(c)(iii)(F) (general commentary) and Rule 2-07(a) of Regulation S-X.

<sup>40</sup> See Exchange Act Rule 10A-3(b)(2).

<sup>41</sup> See NYSE § 303A.07(c)(iii)(A) (including commentary) and Nasdaq Rule 4350(d)(1)(B), requiring the Committee to take, or recommend that the board take, action as needed to oversee the independence of the independent auditors.

<sup>42</sup> See NYSE § 303A.07(c)(iii)(G); see also Exchange Act § 10A(l) (added by Section 206 of Sarbanes-Oxley); and Rule 2-01(c)(2) of Regulation S-X.

Accounting Officer, or any person serving in an equivalent position, any partner, employee, or former employee of the Company's independent auditors who participated in any capacity in an audit of the Company during the one-year period preceding the date of initiation of the then-current audit.

D. Internal Audit Function<sup>43</sup>

1. The Committee shall oversee the activities, organizational structure, and qualifications of the persons performing the internal audit function.
2. The Committee shall review and approve the appointment and replacement of the senior personnel performing the internal audit function.
3. The Committee shall review and approve the annual internal audit plan of, and any special projects undertaken by, the personnel performing the internal audit function.
4. The Committee shall discuss with the personnel performing the internal audit function any changes to, and the implementation of, the internal audit plan and any special projects, and discuss the results of the internal audits and special projects.
5. The Committee shall review any significant reports to management prepared by the internal audit department and management's responses.

E. Evaluations and Reports

1. The Committee shall annually review and assess the performance of the Committee and each Committee member and deliver a report to the Board setting forth the results of its evaluation.<sup>44</sup> In conducting this review and assessment, the Committee shall address matters that it considers relevant to its performance, including, at a minimum, the adequacy, appropriateness, and quality of the information and recommendations that the Committee presented to the Board, the manner in which they were discussed or debated, and whether the number and length of meetings of the Committee were adequate for the Committee to complete its work in a thorough and thoughtful manner.

<sup>43</sup> See NYSE § 303A.07(d).

<sup>44</sup> See NYSE § 303A.07(c)(ii).

2. The Committee shall make regular reports to the Board on its activities, including reviewing any issues that arise respecting the quality and integrity of the Company's public reporting, the Company's compliance with legal and regulatory requirements, the performance and independence of the Company's independent auditors, the performance of the Company's internal audit function, and the effectiveness of the Company's disclosure controls and procedures.<sup>45</sup>

F. Other Matters

1. The Committee shall establish procedures for the approval of all related-party transactions involving executive officers and directors.<sup>46</sup>
2. The Committee shall establish procedures for (i) the receipt, retention, and treatment of complaints received by the Company regarding accounting, internal accounting controls, or auditing matters, and (ii) the confidential, anonymous submission by Company employees of concerns regarding questionable accounting or auditing matters.<sup>47</sup>
3. The Committee shall review and assess the adequacy of this Charter annually and recommend any proposed changes to the Board for its approval.<sup>48</sup>
4. The Committee shall maintain free and open communication with the Board, management, the internal auditors, and the independent auditors.
5. The Committee shall perform any other activities consistent with this Charter, the Company's Certificate of Incorporation, the Company's Bylaws, and governing law, as the Committee or the Board may deem necessary or appropriate.

<sup>45</sup> See NYSE § 303A.07(c)(iii)(H).

<sup>46</sup> See Nasdaq Rule 4350(h).

<sup>47</sup> See Exchange Act § 10A(m)(4) (added by Section 301 of Sarbanes-Oxley) and Exchange Act Rule 10A-3(b)(3); see also NYSE § 303A.07(c)(iii) and Nasdaq Rule 4350(d)(3).

<sup>48</sup> See Nasdaq Rule 4350(d)(1). Former NYSE § 303.01(B)(1) required such annual review of the charter by the audit committee.



February 2004

**CORPORATE GOVERNANCE GUIDELINES<sup>1</sup>  
OF**

\_\_\_\_\_  
**(ANNOTATED VERSION FOR NYSE-LISTED COMPANIES)**

**Mission Statement**

The objective of these corporate governance guidelines is to provide appropriate checks and balances on the Board of Directors (the “Board”) and management of the Company to ensure that those to whom the stockholders entrust the direction and success of the Company act in the best interests of the stockholders. The mission of the Board of \_\_\_\_\_ (the “Company”) is to oversee the corporate governance of the Company and to facilitate the Company’s principal mission to create long-term economic value for its stockholders at a rate and with a consistency that are among the best companies [among its peers in the industry] [and competitive with [its] industry as a whole]. In fulfilling this mission, the Board also will consider the interests of its other stakeholders and interested parties, including its employees, customers, suppliers, creditors, local communities, and the public at large.

**I. Board Composition and Structure**

- A. Size of Board. The Board periodically reviews its size to determine the size that is appropriate for its effective operation. In general, the Board believes that its appropriate size is [\_\_\_\_\_] members, recognizing that retirements, resignations, and recruiting delays may result, periodically, in the Board consisting, for some transitional period, of a slightly greater or lesser number of directors than the Board may have targeted.
- B. Mix of Directors; “Independent” Directors.<sup>2</sup> A [majority]<sup>3</sup> [substantial majority] of the Board will be independent. No

<sup>1</sup> See NYSE § 303A.09, requiring listed companies to adopt corporate governance guidelines and include on the listed company’s website its corporate governance guidelines, as well as the audit, compensation, and nominating, and corporate governance committee charters.

<sup>2</sup> See NYSE § 303A.09, requiring listed companies to include in their corporate governance guidelines director qualification standards, including independence standards.

director will be independent unless the Board affirmatively determines that the director has no material relationship with the Company (either directly or as a partner, stockholder, or officer of an organization that has a relationship with the Company). The following standards apply to the determination of director independence:

1. *Per Se Exclusions.* A director will not be deemed independent until three years after the end of any of the following relationships or situations: (i) the director is employed by the Company or her/his immediate family member<sup>4</sup> is an executive officer of the Company; (ii) the director or her/his immediate family member who is an executive officer of the Company receives more than \$100,000 in direct compensation from the Company (other than director and committee fees and pension or other forms of deferred compensation for prior service, provided such compensation is not contingent on continued service), (iii) the director is employed by or affiliated with, or someone in the director’s immediate family is employed by or affiliated with, the Company’s present or former internal auditors or outside independent auditors; (iv) the director or someone in her/his immediate family is employed as an executive officer with another entity where any of the Company’s then-current executives serves on that other entity’s compensation committee; or (v) the director is an executive officer or an employee, or someone in her/his immediate family is an executive officer, of another company that makes payments to or receives payments from the Company for property or services in an amount which, in any single fiscal year, exceeds the greater of \$1 million or 2% of such other company’s consolidated gross revenues.<sup>5</sup>

<sup>3</sup> See NYSE § 303A.01, requiring listed companies to have a majority of independent directors.

<sup>4</sup> See NYSE § 303A.02(b) (general commentary), defining an “immediate family member” to include a person’s spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person’s home. When applying the look-back provisions in NYSE § 303A.02(b), the company need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become incapacitated.

<sup>5</sup> The commentary to NYSE § 313A.02(b) states that charitable organizations are not to be considered “companies” for the purposes of NYSE § 303A.02(b)(v); however, a

2. *Categorical Standards.* The following commercial or charitable relationships will not be considered to be material relationships that would impair a director's independence (other than as a member of the Audit Committee, whose independence is subject to additional restrictions set forth in the Audit Committee Charter): **[Discuss]**<sup>6</sup>
- C. **Selection of Directors.** Each year at the Company's annual stockholders meeting, the Board recommends a slate of nominees for election by stockholders. In addition, the Board fills vacancies on the Board when necessary or appropriate. The Board's recommendations or determinations are based on the recommendations of, and information supplied by, the Nominating and Corporate Governance Committee as to the suitability of each individual and, where applicable, the slate as a whole to serve as directors, taking into account the criteria described below and other factors, including the requirements for Board committee membership. In recommending nominees, the Committee shall consider nominees recommended by the Company's stockholders [provided any such stockholder submits the following information to the Chairman of the Nominating and Corporate Governance Committee c/o [the Company's address] by 120 days prior to the one-year anniversary of the date of the mailing of the Company's proxy statement for its most recent annual meeting of stockholders:
1. the name of the candidate and the information about the individual that would be required to be included in a proxy statement under the rules of the SEC;
  2. information about the relationship between the candidate and the nominating stockholder;
3. the consent of the candidate to serve as a director; and
4. proof of the number of shares of the Company's common stock that the nominating stockholder owns and the length of time the shares have been owned.<sup>7</sup> **[Note: The bracketed language should not be confused with an advanced notice bylaw provision for a stockholder who intends to nominate a director at the upcoming annual meeting.]**
- D. **Board Membership Criteria.**<sup>8</sup> The Nominating and Corporate Governance Committee is responsible for reviewing with the Board, on an annual basis, the size, function, and needs of the Board and, in doing so, takes into account that the Board as a whole will have competency in the following areas: [(i) industry knowledge; (ii) accounting and finance; (iii) business judgment; (iv) management; (v) leadership; (vi) international markets; (vii) business strategy; (viii) crisis management; (ix) corporate governance; and (x) risk management. The Board also seeks members from diverse backgrounds so that the Board consists of members with a broad spectrum of experience and expertise and with a reputation for integrity. Directors should have experience in positions with a high degree of responsibility, be leaders in the companies or institutions with which they are affiliated, and be selected based upon contributions that they can make to the Company. In determining whether to recommend a director for re-election, the Nominating and Corporate Governance Committee also considers the director's past attendance at meetings and participation in and contributions to the activities of the Board and committees of the Board on which he/she served.]
- E. **[Selection of the Chairperson of the Board.** The Board's policy is that the positions of Chairman and Chief Executive Officer be held by the same person, except in unusual circumstances such as transition in leadership. The Board believes that this combination has served the Company well over many years by providing unified leadership and direction. The Board may separate these positions in the future should circumstances change.]

---

company must disclose in its annual proxy statement (or, if it does not file an annual proxy statement, in its annual report on Form 10-K) any charitable contributions made by the company to a charitable organization in which a director serves as an executive officer, if, within the preceding three years, contributions in any fiscal year exceeded the greater of \$1 million or 2% of such charitable organization's consolidated gross revenues.

<sup>6</sup> See NYSE § 303A.02(a), requiring disclosure in a listed company's annual proxy statement, or if it does not file an annual proxy statement, its annual report on Form 10-K, of any board determination that a relationship is not material. A board may adopt and disclose categorical standards to assist it in making determinations of independence. The board may then make a general disclosure if a director meets those standards. Any determination of independence for a director who does not meet the categorical standards must be specifically explained.

---

<sup>7</sup> See SEC Exchange Act Schedule 14A, Item 7(d)(2), requiring disclosure in the proxy statement of whether the Company's nominating committee will consider nominees recommended by stockholders and, if so, the procedures stockholders must follow to make such recommendations.

<sup>8</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director qualification standards, which "should" reflect, at a minimum, the independence requirements set forth in NYSE §§ 303A.01 and .02.



- F. ~~Lead Independent Director.~~ The Board endorses the informal role of a lead independent director to be appointed by the independent directors, who may serve as the focal point for independent directors.

[**ALTERNATIVE**] The Board notes that all directors are elected by the stockholders and, therefore, have an equal voice. The Board does not believe that it is necessary or appropriate for serving the best interests of the Company's stockholders to designate a lead independent director. The Chairperson of the Board, the CEO, or the Board as a whole may call upon any one or more directors to provide leadership in a given situation. The Board understands that leadership in certain subject areas falls to the committee chairpersons responsible for the subject matter giving rise to the need, and that the chairpersons function as the committee liaisons to the Chairperson of the Board and the rest of the Board. In circumstances in which the independent directors meet without the Chairperson of the Board, [a director designated by the independent directors to lead the discussion of a particular matter] [the Chairperson of the Nominating and Corporate Governance Committee] will be designated to: (i) coordinate the activities of the independent directors; (ii) provide input with respect to agenda items; and (iii) consult, as appropriate, with the [other] chairpersons of Board committees in order to avoid diluting the authority or responsibility of such committee chairpersons.<sup>9</sup>

- G. [~~Term Limits;~~ Retirement; Resignation].<sup>10</sup>

1. [~~Term Limits.~~ The Board does not believe that it should establish term limits. While term limits could help ensure that there are fresh ideas and viewpoints available to the Board, they have the disadvantage of causing the loss of the contribution of directors who have been able to develop, over a period of time, increasing insight into the Company and its operations, and therefore provide an increasing contribution to the Board as a whole.]

<sup>9</sup> NYSE § 303A.03 requires listed companies to disclose in their annual proxy statement or, if the company does not file an annual proxy statement, in its annual report on Form 10-K the name of any director chosen to preside at meetings of the non-management directors or the procedure by which a presiding director is selected for each such meeting of non-management directors.

<sup>10</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director qualification standards, which "may" address director retirement, resignation, and tenure.

2. *Retirement Policy.* No person will be nominated by the Board to serve as a director after he or she has passed his/her [70th] [72nd] birthday, unless the Nominating and Corporate Governance Committee has waived the mandatory retirement age of such person as a director in a given case.

3. *Resignation Policy.* Non-management directors who change their primary job responsibilities that they held at the time of their [initial][most recent] election to the Board will offer a letter of resignation for Board consideration. The Board will, in its sole discretion, determine whether such change in responsibilities will impair the director's ability to effectively serve on the Board, and may waive such requirement for resignation where it has determined the ability of the director to serve is not impaired. Management directors will offer to resign from the Board upon their resignation, removal, or retirement as an officer of the Company. The Board will, in its sole discretion, determine whether or not to accept such resignation, provided that, if so approved by the Board, such director shall only continue to serve as a director after his resignation, removal, or retirement for a transition period of up to one year after the date that he/she ceases to be an executive officer.

- H. ~~Additional Directorships.~~ Directors are encouraged to limit the number of other boards of directors (excluding non-profit boards of directors) on which they serve, taking into account their potential meeting attendance, participation, and effectiveness on these boards of directors. It is generally advisable for members of the audit committee to limit the number of audit committees on which they serve to [three].<sup>11</sup> The Nominating and Corporate Governance Committee and the full Board will take into account the nature of and the time involved in a director's service on other boards of directors in evaluating the suitability of individual director candidates. Every director must seek the consent of the Nominating and Corporate Governance Committee and the Chairperson of the Board to confirm the absence of any actual or

<sup>11</sup> See NYSE § 303A.07(a), requiring disclosure in a company's proxy statement or, if the company does not file an annual proxy statement, in its annual report on Form 10-K of the board's determination that an audit committee member's simultaneous service on the audit committees of more than three public companies does not impair the ability of such member to effectively serve on the listed company's audit committee unless the listed company specifically limits the number on which its audit committee members serve.

potential conflict prior to accepting any invitation to serve on another corporate or not-for-profit board of directors or with any government or advisory group.<sup>12</sup> [Note: Some boards may have different policies for non-employee directors vs. employee directors.]

- I. ~~Compensation of Non-Employee Directors.~~<sup>13</sup> Company management should report annually as to how the Company's non-employee director compensation practices compare with those of other [similarly situated][peer group] public corporations. The Board should make changes in its non-employee director compensation practices only upon the recommendation of the [Nominating and Corporate Governance Committee] [Compensation Committee] after discussion and unanimous concurrence by the full Board. In discharging this duty, the Nominating and Corporate Governance Committee and the full Board should be guided by the following principles: [compensation should fairly pay directors for the work required; compensation should align directors' interests with the long-term interests of stockholders; and the structure of the compensation should be simple, transparent, and easy for stockholders to understand. The Board believes that these goals would be served by providing [\_\_\_]% of non-employee director compensation in a cash retainer and meeting fees and [\_\_\_]% in [equity-based] awards. [Note: Consider articulating policies regarding retirement benefits or charitable contributions in the name of directors, if any.]

## II. Board Meetings and Procedures

### A. Board Meetings.

1. *Number of Meetings; Attendance and Preparation.*<sup>14</sup> The Board holds a minimum of [\_\_\_\_\_] regularly scheduled meetings per year. Directors are expected to attend all regularly scheduled meetings and to have, prior to the

<sup>12</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director qualification standards, which "may" address policies limiting the number of other boards on which a director may serve.

<sup>13</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director compensation. These guidelines should include general principles for determining the form and amount of director compensation.

<sup>14</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director responsibilities, which "should" include responsibilities with respect to attendance at board meetings.

meetings, reviewed all written meeting materials distributed to them in advance.<sup>15</sup> Directors are expected to be physically present at all regularly-scheduled meetings, and a director who is unable to attend a meeting is expected to notify the Chairperson of the Board in advance of such meeting. Attendance at a meeting by telephone, videoconference, or other means of communication generally will be discouraged unless a particular Board meeting was scheduled to be so conducted.

2. *Selection of Agenda Items.* The Chairperson of the Board and CEO should establish the agenda for Board meetings; however, directors may at any time suggest that particular items be placed on the agenda and the [lead director] [Chairman of the Nominating and Corporate Governance Committee] should be given an opportunity to review all agendas. [The Chairperson of the Board, the CEO, and the [lead director] [Chairman of the Nominating and Corporate Governance Committee] will annually prepare a "Master Agenda" that will set forth a general list of items to be considered at each of the Board's regularly scheduled meetings during the year. Thereafter, the Chairperson of the Board and CEO will adjust the agenda for each specific meeting, if necessary, to include special items that had not been contemplated during the initial preparation of the Master Agenda. The Master Agenda will be provided to the entire Board.]
3. *Distribution of Materials.* The Company will distribute written materials, including the agenda, for use at Board meetings sufficiently in advance of meetings to permit meaningful review. It is recognized, however, that under certain circumstances written materials may be unavailable to directors in advance of the meeting. On those occasions in which the subject matter is too sensitive to provide in writing, the Chairperson of the Board may elect to contact each director by telephone in advance of the meeting to discuss the subject and the principal issues the Board will need to consider. The Nominating and Corporate Governance Committee periodically reviews the information flow to Board members to ensure that directors

<sup>15</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director responsibilities, which "should" include responsibilities with respect to reviewing board meeting materials in advance of any board meeting.

receive the right kind and amount of information in sufficient time to prepare for meetings.

4. *Attendance of Non-Directors.* The Board believes that attendance of key executive officers augments the meeting process by providing certain expertise and insight into items that are open for discussion at certain meetings.
5. *Executive Sessions of Non-Employee Directors.*<sup>16</sup> The non-employee directors of the Board [will meet in executive session during each of the Board's regularly scheduled meetings] [will meet in executive session, at least \_\_\_\_\_ times per year], without any management directors and any other members of the Company's management present, to (i) evaluate the CEO; (ii) review management succession planning; and (iii) consider such other matters as they may deem appropriate. **[Alt. 1:** The non-employee directors will designate and publicly disclose the name of the director who will preside at the executive sessions.] **[Alt. 2:** The lead director][The chairperson of the Nominating and Corporate Governance Committee] will preside at the executive sessions.] **[Alt 3:** The director who presides over the executive sessions will rotate among the chairpersons or the Audit, Nominating and Corporate Governance, and Compensation Committees.]<sup>17</sup> The directors may meet in executive session at any time to consider issues that they deem important to address without management present. Following each executive session, the results of the deliberations and any recommendations should be communicated to the full Board.

- B. ~~Access to Senior Management/Independent Advisors.~~<sup>18</sup> Board members have complete and open access to senior members of management. The CEO will invite key employees to attend Board sessions at which the CEO believes they can meaningfully

<sup>16</sup> See NYSE § 303A.03, mandating that non-management directors of listed companies meet at regularly scheduled executive sessions without the presence of management and that the independent directors meet in executive session at least once a year.

<sup>17</sup> NYSE § 303A.03 states that the annual proxy statement, or, if the company does not file a proxy statement, its annual report on Form 10-K, must identify any director chosen to preside at these meetings or must disclose the procedures by which a presiding director is selected for each executive session.

<sup>18</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director access to management and, as necessary, access to independent advisors.

contribute to Board discussion. The Board, including the independent members of the Board, have the authority, in their discretion, to retain independent advisors.

- C. ~~Access to Stockholders and Other Interested Parties.~~ The Chairperson of the Board and the CEO are responsible for establishing effective communications with the Company's stockholders, customers, associates, communities, suppliers, creditors, and corporate partners.<sup>19</sup> Directors are not precluded from meeting with such parties, but any such meetings generally should be held with management present.
- D. ~~Confidentiality.~~ The Board believes that maintaining confidentiality of information and deliberations is an imperative.

### III. Board Duties and Responsibilities<sup>20</sup>

- A. ~~Oversight.~~ To accomplish its mission to maximize long-term stockholder value, the Board must:
  1. Ensure that the Company operates in a legal, ethical, and socially responsible manner;
  2. Select, evaluate, and offer substantive advice and counsel to the CEO and work with the CEO to develop effective measurement systems that will evaluate and determine the Company's degree of success in creating long-term economic value for its stockholders;
  3. Review, approve, and monitor fundamental financial and business strategies and major corporate actions;
  4. Oversee the Company's capital structure and financial policies and practices;
  5. Assess major risks facing the Company and review options for their mitigation; and
  6. Provide counsel and oversight on the selection, evaluation, development, and compensation of executive officers and

<sup>19</sup> Exchange Act Schedule 14A, Item 7(d)(2) requires a company to describe the process by which stockholders can send communications to the board and, if applicable, to specified directors.

<sup>20</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director responsibilities.

- provide critical and candid feedback on their successes and failures.
- B. ~~Corporate Governance.~~ The Board will review and, if it deems appropriate, approve changes to these corporate governance principles that have been recommended to the Board by the Nominating and Corporate Governance Committee.
- C. ~~Charters.~~ The Board will review and, if it deems appropriate, approve changes to the Company's Audit, Nominating and Corporate Governance, and Compensation Committee charters that have been recommended to the Board by such committees.
- D. ~~Education.~~<sup>21</sup> The Company has a full educational program for new Board members that includes extensive materials, meetings with key management, and visits to Company facilities. Additionally, all directors will periodically attend educational opportunities enabling them to better perform their duties.
- E. ~~[Company Visitation.~~ The directors are encouraged to visit the Company [and its subsidiaries] each year to familiarize himself/herself with the business of the Company and its subsidiaries. These visits should be pre-arranged with the CEO, and directors are requested to report to the full Board at the next Board meeting after any such visit their observations from such visits.]
- F. ~~Assessing Board and Committee Performance.~~<sup>22</sup> The Board will conduct an annual self-evaluation of its performance and the performance of the its individual members and an evaluation of each of the Board committees' performance and the performance of individual members of such committees to determine whether it and its committees are functioning effectively. The Board's evaluation will be based, in part, on the Nominating and Corporate Governance Committee's evaluation of the Board, and the self-evaluations conducted by each of the Committees.
- G. ~~Assessing CEO Performance.~~ The Board believes that the CEO's performance should be evaluated annually and as a regular part of any decision with respect to CEO compensation. The Board has delegated the responsibility to the Compensation Committee to

<sup>21</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines director orientation and continuing education.

<sup>22</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines annual performance evaluations of the board.

- evaluate the CEO's performance in the course of approving CEO salary, bonus, and long-term incentives such as [stock and] stock option awards. The Committee is responsible for setting annual and long-term performance goals for the CEO and for evaluating his/her performance against such goals. The Committee meets annually with the CEO to receive his/her recommendations concerning such goals and to evaluate his performance against the prior year's goals.
- H. ~~Succession Planning.~~<sup>23</sup> The Board plans for the succession to the positions of CEO and other executive officers of the Company. To assist the Board, the CEO annually provides the Compensation Committee with an assessment of the executive officers and their potential to succeed him/her. The CEO also will provide the Compensation Committee with an assessment of persons considered to be potential successors to executive officer positions and a review of any development plans recommended for such potential successors. The results of these reports will be reported to and discussed with the Board.
- I. ~~Business Conduct and Ethics.~~ The Board believes that, in order to maintain the highest ethical, legal, and socially responsible standards of conduct, the Company should maintain appropriate codes of business conduct and ethics regarding, among other things: (i) conflicts of interest, (ii) corporate opportunities, (iii) confidentiality, (iv) fair dealing, (v) protection and proper use of Company assets, (vi) compliance with laws, rules, and regulations, and (vii) such other matters as the Board deems appropriate. Such codes also will include standards of conduct reasonably applicable to designated persons, including the CEO and the senior financial officers, designed to promote: (i) honest and ethical conduct, (ii) full, fair, accurate, timely, and understandable disclosure in the periodic reports, proxy statements, and other filings under the Exchange Act that are required to be filed by the Company, and (iii) compliance with applicable governmental rules and regulations.

<sup>23</sup> See NYSE § 303A.09, mandating that listed companies address in their corporate governance guidelines management succession.

#### IV. Board Committees

- A. ~~Board Committees; Committee Charters.~~<sup>24</sup> Except where Board committees have sole authority to act as required by applicable law or a listing standard, it is the general policy of the Company that major decisions be considered by the Board as a whole. As a consequence, the Board has determined to constitute only those committees that it believes are critical to the efficient operation of the Board or are required by applicable law or a listing standard. The Board currently has [three] standing Committees: the Audit Committee; the Nominating and Corporate Governance Committee; and the Compensation Committee. The Board has the authority to establish such other committees, temporary or permanent, as the Board deems advisable [including an executive committee]. Each of the Audit Committee, the Nominating and Corporate Governance Committee, and the Compensation Committee will consist of [three] or more directors, each of whom will satisfy the independence requirements set forth herein and any additional requirements set forth in their respective charters and any other listing or regulatory requirements. The Nominating and Corporate Governance Committee will recommend, and the Board will designate, a chairperson of each committee.
1. [Each committee will meet in executive session during each of the Board's regularly scheduled meetings.]
  2. Each of the Audit Committee, the Nominating and Corporate Governance Committee, and the Compensation Committee will have appropriate written charters. The charter of each committee will be reviewed annually by the Board and the relevant committee. These committee charters will be made available on the Company's website at: \_\_\_\_\_.
- B. ~~Committee Agendas.~~ The chairperson of each committee, in consultation with the appropriate members of the committee and management, will develop his/her committee's agenda. Each committee will issue a schedule of agenda subjects to be discussed for the ensuing year at the beginning of each year. This forward agenda also will be shared with the Board.

<sup>24</sup> See NYSE §§ 303A.04, .05, and .06, requiring that listed companies have a nominating/corporate governance committee, a compensation committee, and an audit committee composed entirely of independent directors.

- C. ~~Rotation of Committee Members.~~ The Board does not believe in mandating fixed rotation of committee members and/or committee chairpersons, since there may be reasons at a given point in time for maintaining continuity. Ideally, however, the Board will seek to rotate committee members and chairs, on a staggered basis within each committee, on an average of every [five] years. The Board seeks thereby to avoid director entrenchment, while ensuring continuity and the availability of experience derived through longevity.
- D. ~~Board Oversight; Committee Reports.~~ The Board is responsible for overseeing the activities of its committees (except where such committees have sole authority to act pursuant to applicable law or listing standard) and for ensuring that the committees are fulfilling their duties and responsibilities. The Board will regularly receive reports from its committees regarding their activities and will take such actions as it deems necessary or appropriate in response to these reports.

#### V. Other Principles

- A. ~~Confidential Voting.~~ The Board has adopted a policy whereby stockholders' proxies are received by the Company's independent tabulators and the vote is certified by independent inspectors of election. Proxies and ballots that identify the vote of individual stockholders will be kept confidential from the Company's management and directors, except as necessary to meet legal requirements, in cases where stockholders request disclosure, or in a contested election.
- B. ~~Rights Plans.~~ The Board believes that rights plans, or "poison pills," have proven effective in increasing stockholder value in certain circumstances. The Company adopted a rights plan on \_\_\_\_\_, which plan expires in \_\_\_\_\_. [If the Board decides to amend its existing plan or adopt a new plan, it is the present intention of the Board to submit such an amendment or new plan to the stockholders for approval.] **ALTERNATIVE – Insert poison pill policy.**
- C. ~~Disclosure and Review of Corporate Governance Principles.~~ These corporate governance principles will be made available on the Company's website. The Nominating and Corporate Governance Committee will review these corporate governance principles from time to time, but not less frequently than annually, and will report the results of its review to the full Board.

D. ~~Disclosure Policy.~~ The Board believes that it is imperative that the Company promote full, fair, accurate, timely, and understandable disclosure in the periodic reports and other statements required to be filed by the Company.

E. ~~Share Ownership by Directors and Executive Officers.~~ The Board believes that the number of shares of the Company's stock owned by each director and executive officer is a personal decision, but encourages stock ownership and discourages sales except pursuant to a pre-arranged trading plan.

**ALTERNATIVE** The Board believes that stock ownership by directors and executive officers strengthens their commitment to the Company's future and further aligns their interests with those of the Company's stockholders. Accordingly, non-employee directors are required to own Company common stock having a value of at least [five] times their annual cash retainer, and executive officers are required to own Company common stock having a value of [\_\_\_]% of their annual cash share ownership compensation [other formulation?]. Included in this total are common stock and restricted stock, but not shares underlying stock options. Each non-employee director and executive officer is given [five] years from the date of initial election, hire, or adoption of these guidelines, as the case may be, to reach this ownership level. The Board will evaluate whether exceptions should be made in the case of any non-employee director or executive officer who, due to his or her unique financial circumstances, would incur a hardship by complying with this requirement.

F. ~~Loans; Option Re-Pricing.~~ Personal loans to directors or executive officers are not permitted. Additionally, the Company does not engage in the re-pricing of options.]

#### XYZ CORPORATION DISCLOSURE CONTROLS AND PROCEDURES

This document outlines the principal elements of XYZ's Disclosure Controls and Procedures, and is organized into four sections. The first section describes the purpose of the Company's Disclosure Controls and Procedures, including a description of the requirements compelling formal development and implementation of these controls and procedures. The second section contains an outline of the processes utilized by the Company to ensure that the information that it may need to disclose is provided to the principal executive and financial officers of the Company in a timely manner. The third section sets forth the controls and procedures for the review and recording of financial information. The final section describes the process for the evaluation and monitoring of the Company's Disclosure Controls and Procedures.

A key element of the Disclosure Controls and Procedures is the requirement that the Company periodically evaluate and monitor the effectiveness of the controls and procedures. These controls and procedures are a work in progress, and the Company intends to continue to refine and improve them over time.

#### A. PURPOSE

The purpose of these Disclosure Controls and Procedures is to ensure that the Company record, process, summarize, and report in its public disclosures, including Securities and Exchange Commission ("SEC") reports, all information: (a) required to be disclosed, (b) within the time periods specified, and (c) pursuant to processes that enable the Company's principal executive and financial officers to make timely decisions regarding disclosure.

The Company is required to disclose any information that would be expected to affect the investment decision of a reasonable investor or to alter the market price of the Company's securities. The determination that information is required to be disclosed is a complex legal and business judgment, dependent on the potential financial, operational, and overall impact of the information on the Company.

These Disclosure Controls and Procedures have been designed specifically to comply with the provisions of Sections 302, 404, and 906 of the Sarbanes-Oxley Act of 2002 (the "Act"), and the corresponding SEC rules implementing the Act. Pursuant to Section 302 of the Act, the principal executive officer(s) and the principal financial officer(s) must certify in each annual or quarterly report filed with the SEC that:

1. I have reviewed this annual/quarterly report on Form 10-K/Form 10-Q of XYZ Operating Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition,

**XYZ CORPORATION  
DISCLOSURE CONTROLS AND PROCEDURES**

results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(c) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize, and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Section 906 of the Act requires that the chief executive officer and chief financial officer of the Company accompany each periodic report containing financial statements with a statement that the periodic report fully complies with the requirements of Section 13(a) or 15(d) of the Securities and Exchange Act of 1934, and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the Company.

The Company's overall effort to ensure necessary and appropriate disclosure in its periodic reports, including development and implementation of these Disclosure Controls and Procedures, has been overseen by the Company's Chief Financial Officer and General Counsel, subject to the direction of the Chief Executive Officer.

**XYZ CORPORATION  
DISCLOSURE CONTROLS AND PROCEDURES**

**B. DISCLOSURE CONTROLS**

**1. Disclosure Guidelines**

(a) **General.** The Disclosure Guidelines set forth the key elements of the disclosure procedures applicable to all Company personnel. The Disclosure Guidelines are designed to notify all Company personnel of their disclosure obligation, and to provide a method for personnel to notify the Company of any matters potentially requiring disclosure. The Disclosure Guidelines include the following:

- (1) Company's Code of Business Conduct and Ethics, which includes a description of the disclosure obligation applicable to all personnel, the types of items requiring disclosure and the reporting process available for reporting any matters potentially requiring disclosure, which is posted on the Company's intranet and external website;
- (2) Disclosure Timeline, which identifies the responsibilities and deadlines for reviewing periodic report materials (see B.2. below);
- (3) Disclosure Committee, which includes a description of the committee members and their contact information, as well as the role and responsibilities of the Committee (see B.3. below); and
- (4) Description of the review and reporting process by business unit leaders and financial management personnel for preparation of sub-certifications (see B.5. below).

(b) **Annually.** Disclosure Guidelines to be reviewed annually, and updated as and when necessary.

**2. Disclosure Timeline**

(a) **General.** Disclosure Timeline includes assignment of responsibilities and deadlines for reviewing drafts of periodic reports for the Disclosure Committee, Audit Committee, Board of Directors, Chief Financial Officer, Chief Executive Officer, outside counsel, and outside auditor.

(b) **Monthly.** Incorporate Disclosure Timeline deadlines into Company's Corporate Calendar.

(c) **Quarterly.** Review, and revise as necessary, Disclosure Timeline to improve quality and timeliness of reporting.

**3. Disclosure Committee**

(a) **General.**

- (1) Committee serves as an independent evaluator of adequacy of corporate disclosures in periodic filings, and provides guidance to the drafter of the Company's MD&A.
- (2) Committee advises the CEO and CFO of its findings, and has access as required to the Audit Committee.

(b) **Members:**

- (1) \_ (Chairperson)

**XYZ CORPORATION  
DISCLOSURE CONTROLS AND PROCEDURES**

- (2) –
- (3) –
- (4) –
- (5) –
- (6) –

**(c) Quarterly.**

- (1) Committee meets quarterly or more frequently, as needed.
- (2) Committee reviews internal MD&A prepared by divisional operations and financial management.
- (3) Committee reviews disclosure in reports by competitors and analyst reports on the Company.
- (4) Committee reviews disclosure documentation from the legal, risk, and [regulatory affairs] departments.

**4. Internal Auditor**

- (a) General.** Internal Auditor will, as necessary and upon request, review and test the Company's Disclosure Controls and Procedures and perform functions for the Audit Committee and the Disclosure Committee.
- (b) Annually.** Internal Auditor will conduct or update a risk assessment annually, and will provide a complete written report of such assessment to senior management and the Audit Committee.

**5. Internal Sub-Certifications**

- (a) General.** Written sub-certification modeled after Section 302 requirements, but limited to the respective business unit for each individual, provided by:
  - (1) Divisional operations and financial management;
  - (2) Corporate financial, operations, and legal management; and
  - (3) Compliance Officer (see B.6. below).
- (b) Quarterly.**
  - (1) Identify for sub-certifiers the type of information required for review approximately two weeks in advance of filing periodic report.
  - (2) Obtain sub-certifications approximately one week in advance of filing periodic report.

**6. Integrity Program and Code of Business Conduct and Ethics**

- (a) General.** Advise all employees of the applicable legal and ethical standards of conduct required of them, including the Integrity Program and the Code of Business Conduct and Ethics.
- (b) Biweekly.** Train new personnel on Integrity Program during new hire orientation.
- (c) Quarterly.** Compliance Officer provides written sub-certification described in Section B.5(a) regarding Integrity Program matters.

**XYZ CORPORATION  
DISCLOSURE CONTROLS AND PROCEDURES**

**(d) Annually.**

- (1) Conduct a risk assessment of Integrity Program matters and prepare a report for the Audit Committee.
- (2) Conduct annual training of workforce on updated Integrity Program.

**7. Compliance Questionnaire and Certification**

- (a) General.** Questionnaire and certification regarding compliance with the Code of Business Conduct and Ethics completed by all officers, financial, legal, human resources, risk, regulatory, tax and purchasing personnel, and certain sales and operational supervisory personnel.
- (b) Annually.** Obtain completed questionnaire and certification by the end of January each year.

**8. Section 404 of the Sarbanes-Oxley Act**

- (a) General.** Maintain compliance with the requirements of Section 404 of the Act by establishing and maintaining adequate internal control over financial reporting and by evaluating the effectiveness of internal control over financial reporting based on the framework in Internal Control – Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission.
- (b) Annually.** Assess the effectiveness of our internal control over financial reporting, and obtain independent auditor's evaluation of assessment, each as of the end of the calendar year. Provide management's report and obtain auditor's attestation report annually in conjunction with the Company's filing of its annual report on Form 10-K.

**9. Exit Interviews**

- (a) General.** Compliance Officer oversees performance of an exit interview upon departure from the Company for all individuals in positions to receive the Compliance Questionnaire discussed in Section B.7. above.
- (b) Monthly.** Legal or Compliance Officer to report any potential disclosure matters from exit interviews to the Disclosure Committee.

**C. FINANCIAL REPORTING PROCEDURES**

**1. Internal Review**

- (a) General.** CFO and Controller conduct a balance sheet and financial review with executive operating and financial managers for each operating division and with corporate accounting staff.
- (b) Quarterly.** CFO and Controller to conduct and document balance sheet and financial reviews.



**XYZ CORPORATION  
DISCLOSURE CONTROLS AND PROCEDURES**

**2. Audit Committee Review**

- (a) **General.** Audit Committee provides periodic reports to the Board of Directors, and operates pursuant to a charter defining its role and responsibilities.
- (b) **Quarterly – Earnings Releases.** Audit Committee to meet quarterly in advance of earnings releases, or more frequently as needed, to review:
- (1) Accounting considerations and financial results;
  - (2) Drafts of periodic reports;
  - (3) Drafts of financial press releases; and
  - (4) Hotline reports regarding potential disclosure items.
- (c) **Quarterly – Board Meetings.** Audit Committee to meet on the dates of regular Board meetings, and more frequently as needed.
- (d) **Annually.** Audit Committee to conduct an annual self-assessment each calendar year.

**3. Independent Auditor Review**

- (a) **General.** Company's independent auditor to review and comment upon Company's financial statements and draft periodic reports. Auditor shall also communicate to the Audit Committee any significant accounting or financial reporting considerations for the company that it identifies.
- (b) **Quarterly.** Company's independent auditor to produce report on financial statements and draft periodic reports in advance of periodic filings.

**D. EVALUATION AND MONITORING OF EFFECTIVENESS OF DISCLOSURE CONTROLS AND PROCEDURES**

**1. Internal Evaluation and Monitoring**

- (a) **Real-Time.** Disclosure Committee to review matters identified through this process as they arise, and to notify the CEO and CFO promptly of any matters that indicate that the Disclosure Controls and Procedures should be modified.
- (b) **Quarterly Process.** GC to meet with CEO and CFO, and outside auditors as necessary, to review Company's Disclosure Controls and Procedures, and advise the Audit Committee and the Company's outside auditors of any significant deficiencies in the design or operation of internal controls which could adversely affect the Company's ability to record, process, summarize, and report financial data, identifying any material weaknesses in internal controls, and describing any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal controls.
- (c) **Periodically.** Disclosure Controls and Procedures to be revised periodically as indicated in quarterly and/or real-time evaluation process.



## 307 Private Companies Transitioning to a Public Company World

**Ginny Coles**

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt



## Your Mission

*Position your company to complete a  
“fast track” IPO or M&A deal*



## Four-Step Process

- Develop a high-level plan
- Identify resources
- Track and refine plan
- Execute



## Planning Tools

- Develop a plan: gather raw materials
  - Checklists from outside counsel
  - Checklists from financial printers
  - Checklists from colleagues
- Track and refine plan: organize inputs into a plan that you can readily update and share
  - Excel or Word
  - MS Project



## Planning Strategies: Divide & Conquer

- Divide master plan into 6-10 sub plans
- Divide each sub plan into specific deliverables and milestones
- Divide each deliverable or milestone into specific action items
  - Who, what, how and why
  - When: target dates, interdependencies and sequencing



## Planning Strategies: Prioritize Execution

- Action items that are *independent* of a particular IPO or M&A transaction
- Actions that make most sense for your company's current employee, management and Board cultures
- Action items that you can currently resource



## Example: Equity Compensation Sub Plan Deliverables and Milestones

- Hire stock administrator/corporate securities paralegal
- Conduct stock option training for all employees
- Clean up options database
- Outsource certain stock option administration functions
- Outsource transfer agent function
- Monitor ISO, Rule 701 and Section 12(g) compliance
- Develop share usage forecast; analyze dilution
- Prep public company employee option ESPP, Director Option plans
- Prep S-8 registration statements for all plans
- Facilitate high-level planning by Comp Committee so that you ease into appropriate equity comp for public company
- Learn public co law including SEC's new **Exec Comp Disclosure; Related Party Transactions** rules



### Example: Corporate Policies and Procedures Deliverables and Milestones

- Code of Conduct
- Whistleblower Policy
- External communications policies
- Records management
- Insider Trading Policy
- Section 16 compliance plan and procedures
- SOX Section 307 policy



### Miscellaneous Deliverables and Milestones

- Review D&O insurance
- Plan for due diligence
- Develop relationships with financial printers
- Think systematically about your company's risk factors
- Wrap up lingering legal disputes



## Wrap Up

- Plan, resource, track and execute
- Divide plan into sub plans, sub plans into deliverables, deliverables into specific action items
- Prioritize execution based on relevance, company culture and available resources

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt

### Law Firm XYZ IPO Responsibilities Checklist\*

\* Edited to genericize, and to eliminate certain purely IPO-related items

**PARTIES:**

LF = Law Firm  
 Company = Company  
 Auditor = Auditor

Underwriters = Underwriters  
 Underwriters' Counsel = UWC

Task	Responsible Party	Timeframe	Status
<b>I. Corporate Actions, Corporate Governance and General</b>			
1. Resolve litigation matters.	Company / LF		
2. Clean up minute books, corporate records as necessary.	LF		
3. Retain auditing firm separate from accountants to help with Sarbanes-Oxley §404.	Company		
4. Update stockholder, optionholder and warrant holder lists and cut certificates as necessary.	Company / LF		
5. Revise employment agreements as necessary.	LF / Company		
6. Obtain information and bids on director and officer insurance.	Company		
7. Discuss policies regarding external communications.	LF		
8. Qualify the company to do business where required and check on good standing status.	LF / Company		
9. Audited financials for each of the last three fiscal years (i.e., 2002 through 2004).	Company / Auditors		
10. Consider board composition in view of SEC and NASDAQ requirements, such as majority of "independent directors" and heightened standards for audit committee members; recruit new directors.	LF / Company		
11. Consider and put in place appropriate anti-takeover defenses: staggered board, etc.	Company / LF / UWC		
12. Draft committee charters and corporate policies: (a) Audit committee charter (b) Compensation committee charter (c) Nominating committee charter (d) Code of conduct (e) Insider trading policy (f) Whistleblower policy (g) Other?	LF / Company		
<b>II. Pre-Filing Action Items.</b>			
1. Due Diligence.			
(a) Prepare due diligence responses to expected request from underwriters.	LF		
(b) Obtain / organize diligence documents from Company / our files.	LF		
(c) Minute book review and necessary clean up.	LF		
(d) Stock and option issuance review (cap table).	LF		

22294/00600/DOCS/1478022.1

Task	Responsible Party	Timeframe	Status
(e) Registration Rights / Rights of First Refusal / Information Rights / Co-Sale Agreements / Voting Agreements review.	LF		
(f) Review rights of preferred stock and warrants.	LF		
(g) Subsidiaries (if any) – obtain charter, capitalization documents; determine which are “significant subsidiaries” under Regulation S-X.	LF		
(h) IP – obtain copies of patents, trademarks and licenses.	LF		
(i) Land / leases review.	LF		
(j) Customer Agreements / Licenses review.	LF		
(k) Other.	LF		
2. Determine if there are any “cheap stock,” variable accounting, back-dated options or other accounting issues	LF / Company / Auditors		
3. Prepare indemnification agreements for officers and directors of Company.	LF		
4. Identify those contracts with respect to which the Company would want to request confidential treatment and identify desired redactions	Company / F&W		
5. Select financial printer.	Company / LF		
<b>III. Stock Option Plans</b>			
1. Determine type of plans, quantities of shares and other terms.	LF		
2. Draft new plans: (a) Equity Incentive Plan. (b) Employee Stock Purchase Plan.	LF		
<b>IV. Market Standoff</b>			
1. Determine if everyone is already locked up through registration rights agreement, option grants, warrant agreements and stock purchase agreements.	LF		
<b>V. Transfer Agent / Stock Certificate Matters</b>			
1. Select transfer agent.	Company / LF		
2. Prepare Transfer Agent appointment documents.	LF		
<b>VI. NASDAQ/NYSE Matters</b>			
1. Determine eligibility for Nasdaq National Market or NYSE.	LF		