December 18, 2002

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D C. 20549-0609

Re: Comment of the Committee on Securities and Exchanges of the New York County Lawyers' Association on the Proposed Rules Relating to the Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments; the Conditions for Use of Non-GAAP Financial Measures; and Insider Trades During Pension Fund Blackout Periods, File Nos. S7-42-02, S7-43-02 and S7-44-02

Dear Mr. Katz:

The Committee on Securities and Exchanges of the New York County Lawyers' Association submits the following comments in response to the above-referenced United States Securities and Exchange Commission's ("SEC" or "Commission") rule proposal regarding the implementation of the provisions of Sarbanes-Oxley Act of 2002 ("SOA"). The Committee on Securities and Exchanges of the New York County Lawyers' Association has over 100 members who are attorneys in private practice, in-house counsel for corporations and financial services companies and self-regulatory organizations. Many of our members are former SEC attorneys as well as attorneys from federal and state law enforcement agencies.[1]

[1]. Members of the Committee employed by Self-Regulatory Organizations, federal and state government agencies, other regulatory agencies or private law firms express no opinion regarding any of the proposed rules. Individual members of the Committee may have views that differ from those presented. Moreover, this comment is solely that of the Committee on Securities and Exchanges, has not been approved by the Board of Directors of the New York County Lawyers' Association, and does not necessarily represent the views of the Board.

Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements, Contractual Obligations and Contingent Liabilities and Commitments

In response to SOA Section 401(a), the SEC has proposed new rules that would "require disclosure of off-balance sheet transactions, arrangements, obligations (including contingent obligations), and other relationships of an issuer with unconsolidated entities or other persons. . . ."[2]

The SEC proposed these rules to address certain fraudulent activities relating to the previous practices of issuers to remove various items from their balance sheets thereby creating misleading filings with the SEC. The new disclosure would be placed in a new Management Discussion and Analysis of Financial Condition and Results of Operation section of the issuer's filings.

The Committee members were unanimous in expressing their belief that these new rule proposals are being rushed through to satisfy Congress's expectations. The Committee suggested that this new rule, to be called Section 13(j) of the Securities Exchange Act of 1934, would seemingly be helpful in ensuring full and fair disclosure to the investing public. However, certain Committee members believed that the disclosure now required was generally required in the past, but suggested that issuers had not been making this disclosure. A Committee member even suggested that the SEC did not need to propose a new rule, but could have issued an interpretive release. Another member of the Committee, however, suggested that the SEC has broadened the reach of the SOA. The Committee member believed that the new rule would require any issuer to make many new disclosures regarding contractual arrangements, thereby necessitating a decision as to the "potential materiality" of these arrangements. Another opinion was that the SEC should conform its current proposed rule pursuant to SOA with its previous interpretive release in January 2002 regarding the definition of off-balance sheet transactions. Additionally, the disclosure threshold definition would now include a more remote calculation changing the historical approach.

The Committee came to no clear consensus as to the disposition of this proposed new rule.

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[2] See Securities Act of 1933 Release Number 33-8144; Securities Exchange Act of 1934 Release Number 34-46767.

Conditions for Use of Non-GAAP Financial Measures

The SOA required the SEC to propose new rules and regulations relating to public companies' use of non-GAAP accounting methods. In response, the SEC proposed a new Regulation G requiring "public companies that disclose or release these non-GAAP financial measures to include, in that disclosure or release, a presentation of the most comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most comparable GAAP financial measure."[3]

Several members of the Committee expressed concern about longstanding habits of non-GAAP accounting and the use of pro forma accounting methods. The costs associated with full audits can be considerable for many corporations. Members also expressed concerns that in the era of many high-tech concerns, traditional accounting methods do not address revenue, asset and expense issues. One Committee member reported a discussion with a certified public accountant, who had enjoyed a tenure on the Commission staff. The former SEC staff member expressed disillusionment with pro forma accounting methods because pro forma accountings are "what ifs" and the problem is that management will almost never do a "what if"' as to possible negative events. However, this Committee member expressed the belief that corporate management would be inclined to paint an optimistic "what if picture. Further, this Committee member also suggested that the SEC should consider abolishing the right to use pro forma accountings given the accounting industry's lost credibility over the events of the last year. All Committee members expressed the same concerns that the prevention of fraud and full disclosure had not always occurred under the current regulatory regime.

The Committee came to no clear consensus on these new rules.

Insider Trades During Pension Fund Blackout Periods

The SEC is proposing new rules to clarify SOA Section 306(a), which prohibits directors and other corporate executive officers "from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period" when other pension plan participants could not engage in such transactions. [4]

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[3] See Securities Act of 1933 Release Number 33-8145; Securities Exchange Act of 1934 Release Number 34-46788.

[4] See Securities Exchange Act of 1934 Release Number 34-46778; Investment Company Act Release IC-25795.

At least one Committee member voiced the view that employee shares should be more freely tradeable; that is, there should be no distinctions between management's and other employees' shares. Further, there should be a prohibition for trading restricted share awards during the restrictions, and employees should have options to diversify away from the issuer's stock at an earlier time. One Committee member also expressed concern about the transfer agents and brokerage firms being awarded employee stock holding contracts.

The Committee came to no clear consensus on these new rules.

Conclusion

We thank the SEC for the opportunity to respond to these proposals. If the Commission or you should have any questions, please do not hesitate to contact Ernest E. Badway at (973) 622-3333 or any of the other Committee members listed below who responded to the SEC on behalf of the whole Committee.

Respectfully submitted,

Ernest E. Badway, Co-Chair
Suzanne E. Auletta, Co-Chair
Robert Evans
Ronit V. Fischer
Helen Mangano
Lance Myers
Marc Powers