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Some Random Thoughts About
Corporate Governance After the Bubble

While Alan Greenspan argues that the FRB could not (and should not) have prevented the Bubble and Arthur Levitt argues that the SEC could not have prevented the securities market excesses that contributed to the Bubble because the SEC was underfunded and understaffed, corporate governance has been seized upon to:

- assure transparency;
- monitor management performance;
- monitor legal and regulatory compliance; and
- restore credibility to the financial markets.

To accomplish this we have the Sarbanes-Oxley Act of 2002, new rules from the SEC, new rules from the NYSE and a plethora of recommendations from the Business Roundtable, the Conference Board, the Council of Institutional Investors and countless others. The following are the more significant initiatives or revitalizations of prior recommendations (the order is not an indication of importance):

1. CEO and CFO certification of financial statements as fairly presenting financial condition and results of operations and adequacy of internal controls. CEO certification of compliance with NYSE corporate governance rules.

2. Formation of a senior executive disclosure committee and use of certifications by division officers to further assure the accuracy of the financial statements and other disclosures.

3. The "fairly presents" standard mandated by Sarbanes-Oxley overrides GAAP so that compliance with GAAP does not necessarily constitute the requisite full disclosure.

4. Discussion between the FASB and IASB of convergence of rules-based accounting and principles-based accounting has begun.

5. A trend toward expensing stock options has begun.

6. Structured finance is unmasked.

7. Pro forma earnings must be reconciled to GAAP earnings and not given prominence over GAAP earnings.

8. Audit committee, not management, control of hiring and compensating the auditor.

9. MD&A enhanced and expanded; discussion of critical accounting policies.

10. A "financial expert" (yet to be defined by the SEC) on the audit committee.

11. Auditor barred from consulting and advising.

12. New oversight of auditors through PCAOB; crime to attempt to improperly influence the audit.

13. Majority of directors must be independent.

14. An independent director is one with no family or material relationship.

15. Audit, compensation and nominating committees to consist of only independent directors.

16. Corporate governance guidelines, committee charters and codes of ethics must be published. Special code of ethics for senior accounting officers.

17. More frequent and longer board and committee meetings.

18. Annual board retreat for strategic review and facilities visits.

19. Executive sessions of the non-management directors, with a designated director presiding.

20. Board and committee access, without management approval, to outside experts.

21. Board and committees to do annual self-evaluation.

22. Director's compensation increased in light of increased time commitment and responsibility and simplified to cash, or half cash, half restricted stock.

23. Loans to directors and executive officers prohibited (query cashless exercise of stock options).

24. Compensation committee, not management, hires compensation consultant. Nominating committee, not management, hires search firm.

25. Pressure to reduce executive compensation.

26. Director and officer stock transactions reportable in two days.

27. Shareholder approval of all equity compensation plans; brokers to vote only with instructions.

28. Whistle blowers encouraged and protected, including requirement for lawyers to "go up the ladder" (query requirement to take the last step and do a "noisy withdrawal").

29. Increased use of proxy proposals to push corporate governance agendas of activist investors.

Now the issue is whether the new corporate governance requirements go too far and will result in discouraging competent people from serving as directors and deter management from taking appropriate entrepreneurial risks.

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