

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 34-47890; IC-26050; FR-71; File No. S7-39-02]

RIN 3235-AI67

Improper Influence on Conduct of Audits

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: As directed by section 303 of the Sarbanes-Oxley Act of 2002, we are adopting rules to prohibit officers and directors of an issuer, and persons acting under the direction of an officer or director, from taking any action to coerce, manipulate, mislead, or fraudulently influence the auditor of the issuer's financial statements if that person knew or should have known that such action, if successful, could result in rendering the financial statements materially misleading.

EFFECTIVE DATE: June 27, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: We are redesignating rule 13b2-2 of Regulation 13B-2¹ as rule 13b2-2(a) and adding new rules 13b2-2(b) and (c).

I. Executive Summary

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the "Act")² was enacted. Section 303(a) of the Act states:

It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

As mandated by the Act, the Commission is adopting rules to implement section 303(a).³ The rules, in

combination with the existing rules under Regulation 13B-2, are designed to ensure that management makes open and full disclosures to, and has honest discussions with, the auditor of the issuer's financial statements. These rules prohibit officers or directors of an issuer, or persons acting under their direction, from subverting the auditor's responsibilities to investors to conduct a diligent audit of the financial statements and to provide a true report of the auditor's findings.

II. Discussion of Final Rules

A. Introduction

The new rules supplement the rules currently in Regulation 13B-2, which address the falsification of books, records and accounts⁴ and false or misleading statements, or omissions to make certain statements, to accountants.⁵ New rule 13b2-2(b)(1)

(a) RULES TO PROHIBIT. It shall be unlawful, in contravention of such rules or regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors, for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of that issuer for the purpose of rendering such financial statements materially misleading.

(b) ENFORCEMENT.—In any civil proceeding, the Commission shall have exclusive authority to enforce this section and any rule or regulation issued under this section.

(c) NO PREEMPTION OF OTHER LAW.—The provisions of subsection (a) shall be in addition to, and shall not supersede or preempt, any other provision of law or any rule or regulation issued thereunder.

(d) DEADLINE FOR RULEMAKING.—The Commission shall—

(1) propose the rules or regulations required by this section, not later than 90 days after the date of enactment of this Act; and

(2) issue final rules or regulations required by this section, not later than 270 days after that date of enactment.

⁴ 17 CFR 240.13b2-1 states that no person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act"). Section 13(b)(2) of the Exchange Act states:

Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall (A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. * * *

⁵ 17 CFR 240.13b2-2 states that no director or officer of an issuer, in connection with an audit or examination of the issuer's financial statements or the preparation of any document or report to be filed with the Commission, directly or indirectly shall (a) make or cause to be made a materially false or misleading statement to an accountant or (b) omit to state, or cause another person to omit to state, any material fact necessary to make statements made, in light of the circumstances under which

specifically prohibits officers and directors, and persons acting under their direction, from coercing, manipulating, misleading, or fraudulently influencing (collectively referred to herein as "improperly influencing") the auditor of the issuer's financial statements when the officer, director or other person knew or should have known that the action, if successful, could result in rendering the issuer's financial statements materially misleading.⁶ New rule 13b2-2(b)(2) provides examples of actions that improperly influence an auditor that could result in "rendering the issuer's financial statements materially misleading." This paragraph also clarifies that such actions should not occur at any time that the auditor is called upon to exercise professional judgment related to the issuer's financial statements. New rule 13b2-2(c) applies similar provisions to audits of investment companies' financial statements.

B. Discussion

Definition of "issuer." In the proposing release, we noted that the definition of the term "issuer" in section 3 of the Securities Exchange Act of 1934 ("Exchange Act") would apply to the term as used in the rule. This definition includes, with certain exceptions, any person who issues or proposes to issue securities.⁷ One commenter noted that this definition would include all private issuers of securities and suggested that we use the definition of "issuer" in the Sarbanes-Oxley Act.⁸ The definition in that Act

such statements were made, not misleading to an accountant. In redesignating Rule 13b2-2 as Rule 13b2-2(a), technical changes have been made to clarify that the rule addresses false or misleading statements made "to an accountant in connection with" an audit, review or preparation of any document or report required to be filed with the Commission.

⁶ The rules were proposed in Release Nos. 34-46685; IC-25773; File No. S7-39-02 (October 18, 2002) [67 FR 65325] ("proposing release").

⁷ The new rules are included in Regulation 13B-2 under the Securities Exchange Act of 1934 ("Exchange Act"). Section 3(a)(8) of the Exchange Act, 15 U.S.C. 78c(a)(8), defines "issuer" as follows:

The term "issuer" means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

⁸ Letter from Paul B. Uhlenhop, dated November 8, 2002.

¹ 17 CFR 240.13b2-1 *et seq.*

² Pub. L. 107-204, 116 Stat. 745 (2002).

³ Section 303 of the Act states: