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## DIRECTOR AND AUDIT COMMITTEE RESPONSIBILITIES RELATING TO PERQUISITES

CHARLES B. TOMM\*

Certain personal benefits which are not directly related to job performance of management, generally referred to as "perquisites" or "perks", have rather recently become the focus of attention by the Securities and Exchange Commission (SEC) and have been deemed to constitute remuneration. Thus, their receipt must be disclosed in proxy statements, registration statements, and various other documents filed with the SEC.<sup>1</sup> In order to ensure the accuracy of the remuneration sections of those documents, registrants must establish effective procedures for monitoring management's use of company assets and other perks.<sup>2</sup>

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<sup>1</sup> See SEC Release No. 33-5856, 34-13872, 42 Fed. Reg. 43,058, 46,047 (1977), reprinted in 2 FED. SEC. L. REP. (CCH) ¶ 23,019 [hereinafter cited as *Perquisites Release*]. The release was aimed at ensuring full disclosure of all forms of management remuneration. See generally Messmer, *Disclosure of Management Remuneration Under the Federal Securities Laws, in PLLI, Tenth Annual Institute on Securities Regulation* 145 (1978).

<sup>2</sup> See text accompanying notes 105-11 *infra*. Since the receipt of perquisites may also constitute income for purposes of § 61 of the Internal Revenue Code of 1954, as amended (the Code), corporations have become concerned in recent years as to how the deduction of a perquisites-related expense under Code § 162 as an "ordinary and necessary" business expense can be preserved. Although there has been much discussion in tax literature, the efforts of the Internal Revenue Service (Service) in the perquisites area have not received the extensive press coverage which the SEC's efforts have attracted. The Service has certainly not been oblivious to the issue, but the Fringe Benefits Act, Pub. L. No. 95-427, 92 Stat. 997 (1978), contains a provision which forbids promulgation of new regulations on perks and other fringe benefits before January 1, 1980. In the interim, it is contemplated that Congress will make a detailed study of the issue.

Sections 162, 262 and 274 of the Code provide the basic statutory framework for the deduction of perks. Under § 274(d), no deduction is allowed for any travel or entertainment expenses unless the taxpayer substantiates the amount of the expenses, the time and place of travel or entertainment, the business purpose, and the business relationship to the taxpayer of the individual's entertainment. Section 274(d) was intended to override the rule enunciated in *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930), which permitted a court to approximate expenses where evidence indicated that expenses deductible under § 162 were actually incurred. Section 1.274-5(c) of the Treasury Regulations establishes the rules for substantiating a deduction under § 274.

A Discussion Draft of Proposed Regulations on Employee Fringe Benefits (Discussion Draft) issued by the Treasury Department in September 1975, and since withdrawn, took an incremental cost approach to valuing perquisites which is similar to the approach taken by the SEC in a release issued in December 1978. See text accompanying notes 13-14 *infra*. For example, the Discussion Draft took the position that due to the minimal incremental cost to the corporation, "hitchhiking" a ride on a company plane would not constitute income to an employee. In the present regulatory and administrative climate, however, it does not seem unlikely that the Service's position on perquisites would differ in many respects from the position set forth in the Discussion Draft; e.g., if an executive "hitches" a ride on an airplane, it would not be too surprising if the Service adopted the position that he receives income in the amount of commercial airline fare for an equivalent trip, either first class or coach, depending upon the type of airplane.

In August 1977, the SEC issued a release addressing the perquisites problem (Perquisites Release)<sup>3</sup> which stated that disclosure of perquisites was required in documents filed with the SEC under the Securities Act of 1933, as amended ('33 Act),<sup>4</sup> and the Securities Exchange Act of 1934, as amended ('34 Act).<sup>5</sup> An additional release was issued in February 1978 (Interpretive Release)<sup>6</sup> which answered a number of questions which had arisen regarding the Perquisites Release. Although the Perquisites Release stated that the method of valuation should be that which management deems most reasonable,<sup>7</sup> neither release provided a uniform standard for valuing non-cash perquisites. The examples provided in the Interpretive Release suggested that if a cost to the employer standard would result in no disclosable value, a benefit to the employee standard should be utilized, and vice versa.<sup>8</sup> In short, the SEC seemed to want it both ways.<sup>9</sup>

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On the other hand, if a plane is used solely for personal purposes, relying upon President Nixon's settlement on family use of government airplanes and the resultant imputation of income in the amount of comparable first class commercial fare may be hazardous. The Nixon family required extensive security which could only be obtained by flying on government airplanes. Thus, it would have seemed unfair to impute income in the amount of a comparable charter flight. In contrast, few executives and their families need such privacy and security. Thus, the Service may assert that income has been received in an amount equivalent to the charter value.

If the Service disallows a perk's deduction, a corporation may be able to reclassify the expense as additional compensation to the individual concerned, but reclassification can raise several problems. First, compensation must meet the test of reasonableness under § 162(a)(1). Furthermore, if an expense is disallowed under § 274(a), which disallows deductions for entertainment expenses not directly related to, or directly preceding or following a bona fide business discussion, the expense cannot be reclassified as compensation. Section 274(e)(3) of the Code and Treas. Reg. § 1.274-2(f)(2) (iii)(a) indicate that a taxpayer must treat expenses related to goods, services and facilities as compensation on its income tax return as originally filed, and that no reclassification will be permitted. Thus, it is quite likely that if a corporation treats the use of an airplane as a nonremunerative expense and the deduction is disallowed under § 274(a) as not being business related, the corporation would not be permitted to reclassify the deduction as compensation and would therefore lose the deduction.

For a more thorough discussion of the tax treatment of perquisites, see *Executive "Perks": the Emerging Tax, SEC and Withholding Principles*, 2 J. OF CORP. COUNSEL SECTION, STATE BAR OF TEXAS 1 (1979).

<sup>3</sup> *Perquisites Release*, *supra* note 1.

<sup>4</sup> 15 U.S.C. §§ 77a-77bbb (1976).

<sup>5</sup> 15 U.S.C. §§ 78a-78kk (1976).

<sup>6</sup> SEC Release No. 33-5904, 34-14445, 43 Fed. Reg. 6,060 (1978), *reprinted in* 2 FED. SEC. L. REP. (CCH) ¶ 23,019A [hereinafter cited as *Interpretive Release*].

<sup>7</sup> *Perquisites Release*, *supra* note 1, ¶ 23,019 at 17,059-6 to 17,059-7.

<sup>8</sup> *Interpretive Release*, *supra* note 6, ¶ 23,019A at 17,059-10. The response to Question 7 regarding the valuation of nonmonetary remuneration also recognized as reasonable valuation methods appraisals, the value assigned by the registrant or executive for tax purposes, or some other standard considered reasonable by management. *Id.* If the remuneration entailed personal use of company assets, such as planes, apartments, and lodges, the SEC required valuation by one of two methods: (1) the recipient's cost if he had obtained the use of equivalent assets independent of the corporation; or (2) allocation to the individual of a portion of the corporation's cost of owning and maintaining the facility on the basis of the amount of personal usage, unless such amount was disproportionate to the amount the recipient would have paid if he had obtained the use of equivalent assets himself. *Id.* at 17,059-12 (Question 21).

A release published in late July 1978 proposed amendments<sup>10</sup> to the management remuneration section of Regulation S-K,<sup>11</sup> but was similarly equivocal as to the valuation of non-cash perquisites.<sup>12</sup> However, the release which finally adopted the amendments to the remuneration section of Regulation S-K (Remuneration Release)<sup>13</sup> provides significant guidance and specifies a qualified incremental cost approach to valuing perquisites.<sup>14</sup>

## I. BACKGROUND OF THE PERKS PROBLEM

The SEC's relatively recent attention to the perquisites issue appears to have been generated in part by concern arising out of the revelations relating to corporate payoffs and kickbacks, such as those involving Gulf Oil Corporation.<sup>15</sup> In addition, the SEC has intensified its scrutiny of perquisites in response to the discovery of the receipt by corporate officers of substantial amounts of corporate funds for personal use without disclosure in SEC filings.<sup>16</sup> Except in cases of exceptional abuse of perquisites alleg-

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<sup>9</sup> See text accompanying notes 7-8 *supra*. For example, Question 15 in the Interpretive Release concerned the valuation of personal use of a company car. The Interpretive Release stated that the cost to the company should be used when an employee utilized a company car to commute, despite the fact that the monetary benefit to the employee may only have been the cost of public transportation. See *Interpretive Release, supra* note 6, ¶ 23,019A at 17,059-11. On the other hand, the response to a subsequent question stated that the cost to the employee of a commercial airplane ticket should be utilized if an employee "hitched" a ride on a company aircraft which had available seats, even though the incremental cost to the company was minimal. See *id.* (Question 19).

<sup>10</sup> SEC Release No. 33-5950, 34-15007, 43 Fed. Reg. 34,415 (1978), reprinted in [Current] FED. SEC. L. REP. (CCH) ¶ 81,650 [hereinafter cited as *Proposed Amendments Release*].

<sup>11</sup> 17 C.F.R. Part 229 (1978), amended at 43 Fed. Reg. 34,402 & 58,181 (1978), reprinted in 4 FED. SEC. L. REP. (CCH) ¶¶ 70,950-64.

<sup>12</sup> See *Proposed Amendments Release, supra* note 10, ¶ 81,650 at 80,627.

<sup>13</sup> SEC Release No. 33-6003, 34-15,380, 43 Fed. Reg. 58,181 (1978), reprinted in [Current] FED. SEC. L. REP. (CCH) ¶ 81,765 [hereinafter cited as *Remuneration Release*].

<sup>14</sup> The SEC's incremental cost approach to the valuation of perquisites is not unlike the approach taken by the Treasury Department in the Discussion Draft. See note 2 *supra*.

<sup>15</sup> See *SEC v. Gulf Oil Corp.* Report of the Special Review Comm. of the Bd. of Directors of Gulf Oil Corp., No. 75-0324 (D.D.C. 1975); *Proposed Amendments to the Securities Exchange Act of 1934: Hearings on S.3133 Before the Senate Comm. on Banking Housing & Urban Affairs*, 94th Cong., 2d Sess. 4-7 (1976) (statement of John J. McCloy); SECURITIES AND EXCHANGE COMMISSION, REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, 94th Cong., 2d Sess., Exhibit B at B-7 to B-9 (Senate Banking, Housing & Urban Affairs Comm. Print 1976) [hereinafter cited as SEC CORPORATE PAYMENTS REPORT].

<sup>16</sup> See, e.g., *SEC v. Five Star Coal Co.*, No. C-2-77-832 (S.D. Ohio, filed Nov. 3, 1977), 13 S.E.C. Docket No. 9, at 633 (misappropriation of corporate assets by directors to create shell corporation); *SEC v. Sharon Steel Corp.*, No. 77-1631 (D.D.C., filed Sept. 20, 1977), 13 S.E.C. Docket No. 3, at 178; *SEC v. Basic Food Indus.*, No. 77-1587 (D.D.C., filed Sept. 15, 1977), 13 S.E.C. Docket No. 2, at 105 (undisclosed advance of \$217,000 in corporate funds to former chief executive for personal use); *SEC v. Ormand Indus., Inc.*, No. 77-0790 (D.D.C., filed May 10, 1977), 12 S.E.C. Docket No. 4, at 415 (undisclosed appropriation of \$250,000 by chief executive officer for personal use); *SEC v. Kneapler*, No. 77-969-JLK (S.D. Fla., filed April 4, 1977), 11 S.E.C. Docket No. 19, at 2224 (undisclosed use of corporate funds to renovate officer's residence); *SEC v. Potter Instrument Co.*, No. 77-0394 (D.D.C., filed March

edly involving violations of fiduciary duties,<sup>17</sup> however, it has not been suggested that there is anything improper about the personal use by management of corporate assets, provided such use is properly accounted for and disclosed.<sup>18</sup> Moreover, the SEC has indicated that certain perquisites which are directly related to job performance, such as free parking, meals at company facilities, and office furnishings, do not constitute remuneration and need not be disclosed in SEC filings.<sup>19</sup> But the SEC does seem to suggest that the receipt by management of perquisites which are unrelated to job performance may reflect upon the "quality" of management, a factor the SEC validly deems material to shareholders.

The SEC's concern with the quality of management quite properly comprehends the views and attitudes of management on matters such as questionable business practices, including suspect corporate payments and the willingness of management to utilize corporate property for personal benefit.<sup>20</sup> To the SEC, however, the qualitative factor does not seem to include the amount of time management devotes to conducting the business of a publicly held corporation, or the personal sacrifices officers must make such as the willingness to travel on short notice, to work long hours, or to forego vacations or other personal plans in the face of business emergencies.<sup>21</sup> Thus, while "quality" of management is material to investors, and the receipt of perquisites bears upon this qualitative factor, the SEC deems material only those factors which reflect unfavorably on management and ignores many positive indicators of management quality. Such one-sidedness distorts the use of perquisites as a form of management remuneration.

Another factor contributing to the increasing emphasis upon perquisites is the expanding conception of what is material to the "average prudent investor."<sup>22</sup> Traditionally, the average prudent investor has been viewed by the SEC solely in economic terms as being interested in information which related to the current and future economic performance of a corporation, including information which might affect his vote on a mat-

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9, 1977), 11 S.E.C. Docket No. 15, at 1984 (undisclosed use of \$100,000 of corporate funds by chairman of the board to maintain yacht and home, and pay domestic servants); SEC v. Emersons Ltd., No. 77-0808 (D.D.C., filed May 11, 1976), 9 S.E.C. Docket No. 12 at 667 (failure of director to disclose receipt of \$9,000 of corporate funds to make home improvements).

<sup>17</sup> See, e.g., SEC v. Five Star Coal Co., No. C-2-77-832 (S.D. Ohio, filed Nov. 3, 1977), 13 S.E.C. Docket No. 9, at 633 (officers of Five Star looted tangible assets of Five Star's corporate predecessor for personal benefit creating a shell corporation while fraudulently engaging to sell unregistered and worthless Five Star stock through use of a materially false and misleading balance sheet and inflated quotations).

<sup>18</sup> See *Perquisites Release*, supra note 1, ¶ 23,019 at 17,059-3 to 17,059-7.

<sup>19</sup> *Id.*; see text accompanying notes 120-33 *infra*.

<sup>20</sup> See SEC CORPORATE PAYMENTS REPORT, supra note 15, at 15, 30.

<sup>21</sup> Mann, *The Application of Federal Securities Laws to Corporate Perquisites*, reprinted in MANAGEMENT REMUNERATION: SEC AND TAX ASPECTS OF CORPORATE PERQUISITES (PLI 1978).

<sup>22</sup> See Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 892-99 (1977) [hereinafter cited as Hewitt].

ter placed before shareholders.<sup>23</sup> The courts, as indicated by the Supreme Court's decision in *TSC Industries, Inc. v. Northway, Inc.*,<sup>24</sup> have not subscribed to such an expansive view of what information the average prudent investor is interested in obtaining and what information he considers material to his decision-making. In *TSC*, the Supreme Court established a standard of materiality under section 14(a) of the '34 Act,<sup>25</sup> and Rule 14a-9<sup>26</sup> promulgated thereunder, directed to the economic interests of the average investor. The Court held that for information to be material to an investor, there must be "a showing of a *substantial likelihood* that, under all the circumstances, the omitted fact *would* have assumed actual significance in the deliberations of the *reasonable shareholder*."<sup>27</sup> The *TSC* circuit court's definition of a material fact as one that "a reasonable shareholder *might* consider important,"<sup>28</sup> while responsive to the SEC's traditional economic view of the shareholder,<sup>29</sup> was rejected by the Supreme Court "as setting too low a threshold for the imposition of liability under Rule 14a-9."<sup>30</sup> Although the judicial standard of materiality is narrower than that preferred by the SEC, materiality still requires evaluation of management's judgment within the total context of the corporation's business and financial circumstances.<sup>31</sup>

Rule 12b-2,<sup>32</sup> promulgated under section 12 of the '34 Act,<sup>33</sup> defines

<sup>23</sup> SEC ADVISORY COMM., 95th Cong., 1st Sess., REPORT ON CORP. DISCLOSURE 326-27 (House Interstate and Foreign Commerce Comm. Print 1977), *digested at* [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,357 [hereinafter cited as ADVISORY COMMITTEE REPORT].

<sup>24</sup> 426 U.S. 438 (1976).

<sup>25</sup> 15 U.S.C. § 78n(a) (1976).

<sup>26</sup> 17 C.F.R. § 240.14a-9 (1978).

<sup>27</sup> 426 U.S. at 449 (emphasis added). One commentator has suggested that judicial impetus towards expanded disclosure was provided by decisions such as *Natural Resources Defense Council, Inc. v. SEC*, 389 F. Supp. 689 (D.D.C. 1974), which referred to the "ethical investor" as being the focus of disclosure requirements. *Id.* at 700; *see* Hewitt, *supra* note 22, at 897. This represents an expansion of the materiality concept to include special "ethical" concerns such as the environment or civil rights, and is well beyond the informational requirements of the traditional average prudent investor who is interested primarily, if not solely, in the return on his investment. Although decisions of this type may have influenced the SEC's approach, the Supreme Court's *TSC* decision indicates that the more traditional and less subjective materiality concept will continue to be applied by the courts absent a contrary statutory mandate. Indeed, the *TSC* Court spoke of the "reasonable shareholder" and placed no gloss upon this construction which indicated any change in the traditional concept. *See* 426 U.S. at 449-50.

<sup>28</sup> *Northway, Inc. v. TSC Indus., Inc.*, 512 F.2d 324, 330 (7th Cir. 1975) (emphasis added).

<sup>29</sup> *See* text accompanying note 23 *supra*.

<sup>30</sup> 426 U.S. at 445, 449. The SEC filed a brief as *amicus curiae* urging affirmance of the circuit court's "might consider important" standard of materiality for the average investor *Id.* at 440.

<sup>31</sup> *TSC* has been followed in subsequent lower court decisions. *E.g.*, *Goldberg v. Meridor*, 567 F.2d 209, 218-19 (2d Cir. 1977); *Sunstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1040 (7th Cir. 1977); *Woolf v. S.D. Cohn & Co.*, 546 F.2d 1252, 1253 (5th Cir. 1977); *Walsh v. Butcher & Sherrerd*, 452 F. Supp. 80, 83 (E.D. Pa. 1978); *see Proxy Solicitation, 1977-1978 Securities Law Developments*, 35 WASH. & LEE. L. REV. 867, 871-83 (1978).

<sup>32</sup> 17 C.F.R. § 240.12b-2 (1978).

“material” in language similar to that of the TSC Court as limiting “the information [to be disclosed] to those matters as to which an average prudent investor ought reasonably to be informed before buying or selling the security registered.”<sup>34</sup> Rule 12b-2 notwithstanding, the SEC’s current concept of what is material appears to be significantly broader than what many average prudent investors consider material.<sup>35</sup> Thus, information formerly thought to be disclosable at management’s discretion and immaterial to shareholders now is subject to disclosure under the new perquisites guidelines.<sup>36</sup>

Certainly, cases of exceptional abuse of perquisites which were uncovered under existing antifraud and disclosure provisions were material in the traditional sense.<sup>37</sup> In all likelihood, those abuses also constituted a waste of corporate assets under the pertinent state corporation laws. Under the SEC’s current concept of materiality, however, perquisites disclosure will be more wide-ranging than traditional concepts of materiality would require.<sup>38</sup>

The SEC Advisory Committee on Corporate Disclosure stated in its report that “[i]f the [SEC] sees the need to directly regulate corporate conduct, it should request Congress to authorize it to do so and should not do so through requiring disclosure of immaterial information.”<sup>39</sup> Such authorization is provided in the perquisites area by the Foreign Corrupt Practices Act of 1977 (FCPA),<sup>40</sup> which was enacted a little more than a

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<sup>34</sup> 15 U.S.C. § 78l (1976).

<sup>35</sup> 17 C.F.R. § 240.12b-2(j) (1978). Rule 405, 17 C.F.R. § 230.405(1) (1978), promulgated under § 8 of the ‘33 Act, 15 U.S.C. § 77h (1976), defines “material” in language essentially the same as Rule 12b-2. One commentator asks whether disclosure of information of which an average prudent investor ought reasonably to be informed as Rules 12b-2 and 405 require, is the same standard of materiality as the TSC Court’s required disclosure of information where there is a substantial likelihood that the omitted fact would be significant in the deliberations of the reasonable shareholder. See Hewitt, *supra* note 22, at 911. The question is not answered.

<sup>36</sup> Hewitt, *supra* note 22, at 911-47. Indeed, comments were even requested on the advisability of requiring disclosure of the cost of maintaining the office of the chief executive, including staff and such items as special furnishings. See *Proposed Amendments Release*, *supra* note 10, ¶ 81,650 at 80,629.

<sup>37</sup> See *Remuneration Release*, *supra* note 13; *Proposed Amendments Release*, *supra* note 10; *Interpretive Release*, *supra* note 6; *Perquisites Release*, *supra* note 1.

<sup>38</sup> See Kripke, *Where Are We on Securities Disclosure After the Advisory Committee Report?*, 6 SEC. REG. L.J. 99, 122 n.61 (1978) [hereinafter cited as Kripke].

<sup>39</sup> See ADVISORY COMMITTEE REPORT, *supra* note 23, at 322-27.

<sup>40</sup> *Id.* at 319 (footnote omitted).

<sup>41</sup> Pub. L. No. 95-213, 91 Stat. 1494, Title I (1977) (to be codified in 15 U.S.C. §§ 78m(b)(2), (3)(A), (B), 78dd-1 & -2). The Foreign Corrupt Practices Act (FCPA) was enacted to proscribe corrupt corporate foreign practices, but it nevertheless applies to personal benefits received by management. See *Proposed Amendments Release*, *supra* note 10, ¶ 81,650 at 80,627 n.8 (“A registrant’s inability to identify large amounts of benefits may raise questions under [the FCPA.]”); cf. von Mehren, *Introduction to Foreign Corrupt Practices Act: Law, Procedures and Practices*, reprinted in PLI, TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 81, 87, 90 (1978) [hereinafter cited as von Mehren] (“deplorable” that legislation considered largely as dealing with foreign payments may have its most critical impact on internal corporate governance). For a discussion of the FCPA, see text

month after issuance of the Advisory Committee Report. Section 102 of the FCPA<sup>41</sup> amended section 13(b) of the '34 Act<sup>42</sup> on reporting requirements. Section 102 applies to all issuers within the SEC's jurisdiction and not just those issuers with foreign sales or operations.<sup>43</sup> The amendment requires issuers to maintain books, records, and accounts which "in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."<sup>44</sup> Each issuer is also required to maintain internal accounting controls which provide "reasonable assurances" that transactions are executed and access to assets is permitted only in accordance with management procedures. Such transactions must be recorded in a manner which will maintain accountability, and inventories and reconciliations must be undertaken at reasonable intervals.<sup>45</sup> Thus, corporate assets used to provide non-job related perquisites must be recorded since the disposition of those assets is material, if only for purposes of the FCPA.<sup>46</sup>

Even prior to enactment of the FCPA, however, the SEC issued the Perquisites Release, perhaps on the theory, as stated in a speech by Commissioner Roberta S. Karmel, that

[c]orporate social responsibility may be an index to the quality of management and viability of the enterprise . . . . Additional information about management's perquisites may be material to an evaluation of the quality and integrity of management . . . . The fact that this is an issue at all, however, reflects on the evolution of the concept of materiality away from an objective standard towards a more qualitative but, I hope, relevant standard.<sup>47</sup>

The SEC Division of Enforcement has thus far concentrated on significant failures to disclose perquisites which have been so egregious as to constitute a breach of fiduciary duty to shareholders.<sup>48</sup> One can expect, however, that as the more serious cases in the perquisites area are dealt with and because of the sweeping nature of the amendments to Item 4 of Regulation S-K regarding management remuneration,<sup>49</sup> the Enforcement Division will look toward less serious offenders.

Private rights of action also exist under section 11 of the '33 Act<sup>50</sup> and

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accompanying notes 113-19 *infra*. The SEC has issued very broad final regulations concerning the FCPA. See note 149 *infra*.

<sup>41</sup> Foreign Corrupt Practices Act, Pub. L. No. 95-213, § 102; 91 Stat. 1494, Title I (1977) (to be codified in 15 U.S.C. § 78m(b)(2), (3)(A), (B)).

<sup>42</sup> 15 U.S.C. § 78m(b) (1976).

<sup>43</sup> Pub. L. No. 95-213, § 102, 91 Stat. 1494, Title I (1977) (to be codified in 15 U.S.C. § 78m(b)(2), (3)(A), (B)).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See text accompanying notes 113-19 *infra*.

<sup>47</sup> "Changing Concepts of Materiality," Speech by SEC Commissioner Roberta S. Karmel to the New York Chapter of the National Investor Relations Institute (April 12, 1978).

<sup>48</sup> See cases cited in note 16 *supra*.

<sup>49</sup> See text accompanying notes 120-43 *infra*.

<sup>50</sup> 15 U.S.C. § 77k (1976).



section 14 of the '34 Act<sup>51</sup> for failure to include information required to be disclosed by the SEC's forms. In addition, it has been argued that since the remuneration table in a proxy statement is a material fact, any error in the table may cause a proxy statement to be false and misleading, thereby resulting in a violation of Rule 14a-9.<sup>52</sup> Absent a situation of serious abuse, however, failure to disclose the amount and nature of perquisites would be of little or no materiality in the more traditional sense. Thus, a private action or an administrative or injunctive proceeding by the SEC for failure to include required information in the relevant forms probably would result in only minimal monetary damages, coupled with the public embarrassment of a settlement or consent decree requiring amendment of the form in question and the establishment of perquisites monitoring procedures.

## II. PERQUISITES MONITORING AND CONTROL

The SEC's efforts in the perquisites area thus far have not met with universal acclaim, in part because of the departure from the more traditional materiality concept. The amount of time, both corporate and governmental, that has been devoted to perquisites which traditionally would have been considered nonabusive in nature and immaterial has been strongly criticized. One well-known commentator has stated that "[s]tretching these [materiality] requirements by interpretation provided a sensation for a while, but left behind a detritus of useless 'disclosures' containing no meaningful information."<sup>53</sup> He further contends that the SEC's powers to institute fraud actions are sufficient to provide a remedy when abuse of perquisites occurs.<sup>54</sup> Nevertheless, it is clear that the SEC expects registrants to establish effective perquisites monitoring programs.

### A. Role of the Board of Directors

The board of directors traditionally has been viewed as being responsible for the management of the corporation.<sup>55</sup> This view is reflected in most state corporation laws, which generally speak in terms of an active management role for directors.<sup>56</sup> At least two factors, however, prevent a board

<sup>51</sup> 15 U.S.C. § 78n (1976); see *General Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 161 (2d Cir.), *cert. denied*, 393 U.S. 1026 (1968).

<sup>52</sup> 17 C.F.R. § 240.14a-9 (1978). Rule 14a-9 prohibits solicitation by a proxy which contains "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact. . . ." *Id.*

<sup>53</sup> Kripke, *supra* note 37, at 122 n.61. Instead of dabbling with moralistic concepts of materiality and crusading to uncover "perks," Kripke would have the SEC "encourage research that might help to determine the relationship between changes in macroeconomic factors and security prices." *Id.* at 122.

<sup>54</sup> *Id.* at 122 n.61; see text accompanying note 37 *supra*.

<sup>55</sup> See generally Bayne, *A Philosophy of Corporate Control*, 112 U. PA. L. REV. 22 (1963); Berle, *Control in Corporate Law*, 58 COLUM. L. REV. 1212 (1958).

<sup>56</sup> See, e.g., DEL. CODE tit. 8, § 141(a) (Supp. 1978); ILL. REV. STAT. ch. 32, § 157.33 (Supp.

of directors, which includes outside directors, from managing a large corporation on a day-to-day basis. The first factor is time constraints. The second is the practical inability of outside directors to obtain and review necessary information.<sup>57</sup> Since directors know that it is impossible to maintain the active role suggested by the legal model because of time and information constraints, the role directors are expected to assume in monitoring perquisites is uncertain.<sup>58</sup>

Prior to 1975, most commentators advocated providing a mechanism whereby directors would actually "manage" the corporation, thus bringing actual director conduct into line with the statutory requirements. Proposals were made to have professional directors serve on several boards,<sup>59</sup> to have full-time directors,<sup>60</sup> and to have corporate boards with their own staffs.<sup>61</sup> However, each of these proposals had significant drawbacks.<sup>62</sup> More recently, commentators have concentrated on the functions which a board can meaningfully perform given the time, information, and other constraints which exist.<sup>63</sup> One commentator has even stated that in reality corporate boards function best not as policy makers but as monitors, and that the monitoring function should be considered the primary function of the board of directors.<sup>64</sup>

1978); N.Y. Bus. Corp. Law § 701 (McKinney Supp. 1978).

<sup>57</sup> Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors and Accountants*, 63 CAL. L. REV. 375, 378-84 (1975) [hereinafter cited as Eisenberg].

<sup>58</sup> See generally Soderquist, *Toward A More Effective Corporate Board: Reexamining Roles of Outside Directors*, 52 N.Y.U.L. REV. 1341, 1357-63 (1977) [hereinafter cited as Soderquist].

<sup>59</sup> See, e.g., W. DOUGLAS, *DEMOCRACY AND FINANCE* 52-55 (1940); P. Holden, L. Fish and H. Smith, *TOP MANAGEMENT ORGANIZATION AND CONTROL* 225 (enlarged ed. 1948); J. JURAN & J. LOUDEN, *THE CORPORATE DIRECTOR* 331-33 (1966).

<sup>60</sup> See generally C. BROWN & E. SMITH, *THE DIRECTOR LOOKS AT HIS JOB* 57-93 (1957).

<sup>61</sup> See, e.g., H. KOONTZ, *THE BOARD OF DIRECTORS AND EFFECTIVE MANAGEMENT* 169-70 (1967); Goldberg, *Debate on Outside Directors*, N.Y. Times, Oct. 29, 1972, § 3, at 1, col. 3.

<sup>62</sup> See Eisenberg, *supra* note 57, at 385-90. Professional directors were not desired by a large majority of corporations surveyed on the matter. *Id.* at 385. It is also doubtful whether there is a sufficient number of qualified individuals to serve as professional directors. *Id.* at 386. Moreover, because directors' fees are relatively low, a professional director would need to hold around a dozen seats in order to earn a living. This would generate enormous conflict of interest problems as well as linking many major corporations together. *Id.* at 386-87.

A full-time director is an individual who is in a corporation's employ on a full-time basis, but who has no operating responsibilities. *Id.* at 387. The distinction between operating and nonoperating responsibilities is blurred, and most corporations could not easily develop or afford a complete set of full-time managers with no operating responsibilities. *Id.* at 388. In addition, many nonoperating functions cannot be isolated from operating decisions. *Id.*

Equipping the board with a substantial staff to advise it in reviewing management output and proposals is equally flawed. Essentially a shadow staff would be created with an obligation to second-guess management, but with limited responsibility for results. *Id.* at 390. Adding a staff to the board would create a further and unnecessary level of decision-making and would increase the already burgeoning corporate bureaucracy. Responsibility would be diffused and, correspondingly, decision-making would be made increasingly difficult. *Id.*

<sup>63</sup> See, e.g., Eisenberg, *supra* note 57, at 391-403; Soderquist, *supra* note 58, at 1357-63.

<sup>64</sup> Eisenberg, *supra* note 57, at 396-403, 438; see M. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 162-70 (1976).

The 1974 amendments to section 141 of the Delaware General Corporation Law<sup>65</sup> explicitly recognize that directors have been constrained from actively managing the corporation as dictated by the legal model. Section 141(a) states in pertinent part that the "business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."<sup>66</sup> The words "or under the direction of" were added to eliminate any implication that directors must become involved in the day-to-day management of a corporation and were intended to indicate that a board can function as a monitor instead of a managing body.<sup>67</sup> Nevertheless, the additional language does little to aid a director in ascertaining what his duties are.<sup>68</sup>

Partly as a result of the uncertainty concerning the duties of directors and because damages can be extremely large, state courts have been reluctant to impose liability when a director's conduct has been merely negligent.<sup>69</sup> Directors of banks and other financial institutions, however, have generally been held to higher standards of care than directors of industrial corporations.<sup>70</sup> In determining the liability of directors of industrial corporations, state courts have applied the business judgment rule when ordinary negligence absent wrongdoing existed,<sup>71</sup> and self-dealing has usually been present when liability has been imposed.<sup>72</sup> Reluctance to impose liability also appears to stem from a belief that if excessive demands are placed upon outside directors, securing the services of able and experienced corporate directors would be extremely difficult.<sup>73</sup>

Whether state courts will continue to be reluctant to impose liability remains to be seen, but it seems unlikely that directors would be held liable

<sup>65</sup> DEL. CODE tit. 8, § 141(a) (Supp. 1978).

<sup>66</sup> *Id.*

<sup>67</sup> See Soderquist, *supra* note 58, at 1361 n.122; ABA-ALI MODEL BUS. CORP. ACT § 35 (rev. ed. 1974).

<sup>68</sup> Vagts, *Directors: Myth and Reality*, 31 BUS. LAW. 1227, 1230 (1976); see Soderquist, *supra* note 58, at 1361.

<sup>69</sup> Cohen, *Philosophy of Board Activity and Responsibility*, reprinted in *PLI, DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS* 233, 239 (A. Cohen & R. Loeb eds. 1978).

<sup>70</sup> *E.g.*, Litwin v. Allen, 25 N.Y.S.2d 667, 678 (Sup. Ct. 1940).

<sup>71</sup> See, *e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Warshaw v. Calhoun, 43 Del. Ch. 148, 221 A.2d 487, 492-93 (1966); Casey v. Woodruff, 49 N.Y.S.2d 625, 642-43 (Sup. Ct. 1944); Smith v. Brown-Borhek Co., 414 Pa. 325, 200 A.2d 398, 398-402 (1964). Under the business judgment rule:

acts of directors, within the powers of the corporation, in the furtherance of its business, made in good faith and in the exercise of an honest judgment, are valid and conclude the corporation and its shareholders. Questions of management policy, contract expediency and adequate consideration are left to their honest and unselfish decision, judgment and discretion and may not be interfered with or restrained.

Heimann v. American Express Co., 53 Misc. 2d 749, 279 N.Y.S.2d 867, 881 (Sup. Ct. 1967).

<sup>72</sup> See, *e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971); Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952); Bishop, *Sitting Ducks and Decay Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1099 (1968); Soderquist, *supra* note 58, at 1348.

<sup>73</sup> Smith v. Brown-Borhek Co., 414 Pa. 325, 333, 200 A.2d 398, 401 (1964).

under state law for failure to establish a perquisite monitoring program, except in cases of extreme abuse constituting a waste of corporate assets. There is no doubt, however, that directors are increasingly aware of their growing exposure to liability of all types.<sup>74</sup>

Liability can be imposed on directors for misconduct such as failure to exercise the functions and duties of their office. Current concepts of director functions include providing advice and counsel to the chief executive of the corporation, serving as a constraining force on the activities of management, authorizing major corporate action, representing the views of nonmanagement individuals in corporate decisionmaking, selecting senior management and evaluating its performance, and acting in crisis situations.<sup>75</sup> In short, as one commentator has stated, "the ineradicable and unavoidable responsibility of directors is to see that management is doing its job."<sup>76</sup>

The SEC recognizes that outside directors are not involved in the day-to-day affairs of the corporations they direct and are not expected to participate in the implementation of corporate policies.<sup>77</sup> Nevertheless, several recent cases clearly indicate that directors cannot assume a wholly passive role in the direction of a corporation, especially in connection with public offerings and proxy statements.<sup>78</sup> One court has stated that "[w]hen possible, the liability sections [of the '33 and '34 Acts] should be interpreted to afford incentives to directors to undertake active and rigorous scrutiny of corporate activities . . . ."<sup>79</sup>

The SEC's concept of directors' duties can be ascertained from its *Report of Investigation in the Matter of Stirling Homex Corp. Relating to*

<sup>74</sup> Cf. Hershman, *Opening Remarks*, 27 BUS. LAW 1, 2-4 (Feb. 1972 Special Issue: *Officers' and Directors' Responsibilities and Liabilities*) (outlining substantial increase in suits brought against officers and directors and in resulting liability).

<sup>75</sup> See J. BACON, *CORPORATE DIRECTORSHIP PRACTICES* 93-107 (1967); M. MACE, *DIRECTORS: MYTH AND REALITY* 14, 23, 27 (1971).

<sup>76</sup> Gibson, *Functions of Directors Under the Existing System*, 27 BUS. LAW 23, 45 (Feb. 1972 Special Issue: *Officers' and Directors' Responsibilities and Liabilities*).

<sup>77</sup> See *Lanza v. Drexell & Co.*, 479 F.2d 1277, 1306 (2d Cir. 1973) (en banc) (quoting brief for SEC as amicus curiae at 5).

<sup>78</sup> In *Lanza v. Drexell & Co.*, 479 F.2d 1277 (2d Cir. 1973), the court noted that although proof of a willful or reckless disregard for the truth is necessary to establish director liability under Rule 10b-5, a director may have an obligation to maintain an awareness of significant corporate developments and to consider any material, adverse developments which come to his attention. *Id.* at 1306; cf. *Gould v. American Hawaiian S.S. Co.*, 351 F. Supp. 853, 858-65 (D. Del. 1972) (under negligence standard which governs liability with respect to proxy solicitation under the '34 Act, a director who participates in a proxy solicitation which utilizes materially false or misleading statements violates § 14a of the Act if he knew or should have known of the improper disclosure); *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643, 687-89 (S.D.N.Y. 1968) (outside director has duty to investigate accuracy of prospectus, must use reasonable care to investigate facts which a prudent man would employ in the management of his own property). *But see Barnes v. Andrews*, 298 F. 614, 620 (S.D.N.Y. 1924) (Hand, J.) (unreasonable to require directors to read materials circulated to shareholders for factual accuracy since such a requirement is the duty of management).

<sup>79</sup> *Gould v. American Hawaiian S.S. Co.*, 351 F. Supp. 853, 859 (D. Del. 1972).

*Activities of the Board of Directors of Stirling Homex Corp.*<sup>80</sup> (*Stirling Homex Report*), and from the complaint filed in *SEC v. Shiell*.<sup>81</sup> The SEC stated in the *Stirling Homex Report* that it was not promulgating any guidelines relating to the duties of outside directors.<sup>82</sup> Despite this disclaimer, the report is highly instructive. The report arose out of a situation in which outside directors assumed no "significant role in the direction of a company's affairs even though they possessed considerable business experience and sophistication."<sup>83</sup>

The SEC indicated that major corporate decisions should not be left solely to the executive committee of the board of directors.<sup>84</sup> This appears to contradict the law of Delaware and other states which permit reliance upon committees of the board.<sup>85</sup> However, the Stirling Homex board placed virtually absolute, unquestioning reliance upon the executive committee, which was comprised solely of management directors.<sup>86</sup> Indeed, the SEC criticized the lack of other committees to aid the board and the absence of written agenda and memoranda to assist the board in its deliberations:

The Board of Directors did not create any other committees to assist in the performance of its responsibilities or to receive, solicit or evaluate information from Stirling Homex management. There was no presentation of a written agenda containing items for discussion at any Board meetings, or memoranda which would have

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<sup>80</sup> [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,219 [hereinafter cited as *Stirling Homex Report*]; see Cohen, *The Outside Director—Selection, Responsibilities, and Contribution to the Public Corporation*, 34 WASH. & LEE L. REV. 837, 843 (1977) [hereinafter cited as Cohen].

<sup>81</sup> [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,190; see 383 SEC. REG. & L. REP. (BNA) A-8 (Dec. 22, 1976) (background and summary of complaint) [hereinafter cited as *Shiell*]; Cohen, *supra* note 80, at 843-47.

<sup>82</sup> *Stirling Homex Report*, *supra* note 80, ¶ 80,219 at 85,462.

<sup>83</sup> *Id.* Stirling Homex was engaged in the manufacture and installation of modular homes. *Id.* at 85,460. In 1970, after completion of an initial public offering of \$20 million of common stock, the Stirling Homex management began a fraudulent course of conduct designed to show continually increasing sales and earnings through the recordation of fictitious sales, earnings, and assets. *Id.* As part of this fraudulent conduct, materially false and misleading registration statements, press releases, annual and periodic reports, and other materials were filed with the SEC and released to the public and stockholders of Stirling Homex. *Id.* In early 1971, Stirling Homex again decided to publicly offer \$20 million of securities because the corporation was encountering cash flow problems. *Id.* Subsequent to this offering, the financial condition of Stirling Homex deteriorated and the corporation ultimately filed a Chapter X petition for reorganization in 1972. *Id.* The outside directors of Stirling Homex were intentionally deceived by corporate officers and inside directors as to the fraudulent course of conduct pursued by management through misrepresentations, falsified contracts, and false and misleading financial information. *Id.* at 85,459. Nevertheless, the SEC criticized the outside directors because they relied primarily on management for information and accepted information without question, failed to obtain a sufficient understanding of the company's accounting practices in order to make informed decisions, and essentially did little more than fill chairs at board meetings. *Id.* at 85,462-63.

<sup>84</sup> See *Stirling Homex Report*, *supra* note 80, ¶ 80,219 at 85,460.

<sup>85</sup> See, e.g., DEL. CODE tit. 8, § 141(c) (1974); N.Y. BUS. CORP. LAW § 712(a) (McKinney Supp. 1978); TEX. BUS. CORP. ACT. ANN. art. 2.36 (Vernon Supp. 1978).

<sup>86</sup> *Stirling Homex Report*, *supra* note 80, ¶ 80,219 at 85,460, 85,462-63.

assisted the Board in considering various proposals and operational problems in an orderly and businesslike manner.<sup>87</sup>

The Commission was also critical of the outside directors' failure to familiarize themselves with accounting practices.<sup>88</sup> As a result, the outside directors were unable to discover abuses which might arise. Their failure to ask probing questions and their willingness to be satisfied with superficial answers to those questions which were asked were also noted.<sup>89</sup>

In *Shiell*, the SEC again objected to a lack of director control over corporate management. The complaint alleged the failure of board members to supervise sufficiently the officers and operations of the company and failure to inquire into business activities when "they knew or should have known" of the company's deteriorating financial position.<sup>90</sup> The directors were charged with "unwarranted reliance" upon the representations of the company's president as the sole source of information regarding the company's operations, failure to meet with other officers, failure to establish reporting requirements, failure to inquire adequately into the affairs of the company and failure to review the unconsolidated audited and unaudited statements of the company and its subsidiaries, which would have revealed a number of problems.<sup>91</sup>

The *Stirling Homex Report* and *Shiell* clearly indicate that the Commission expects outside directors to question management and outside auditors in a thorough and probing manner.<sup>92</sup> Indeed, the *Stirling Homex*

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<sup>87</sup> *Id.* at 85,460.

<sup>88</sup> *Id.* at 85,462-63.

<sup>89</sup> *Id.* at 85,460-61, 85,463.

<sup>90</sup> *Shiell*, *supra* note 81, at A-9; see Cohen, *supra* note 80, at 846-47. TCC business activities, until 1971, consisted of originating and funding VA and FHA residential and commercial mortgage loans for later sale to institutional investors, and servicing the loans. *Shiell*, *supra* note 81, at A-8. With the coming of the building boom in the early 1970's, TCC shifted its activities to land acquisition, development and construction loans, which it also sold to institutional investors. *Id.* High demand by institutional investors for these mortgages led the company to do business with marginal developers and to finance ill-conceived projects. *Id.* In 1974, the energy crisis, inflation and recession made it increasingly difficult for many builders to meet their commitments. *Id.* Much of TCC's expansion into construction and development was financed through the sale of short term investment certificates. *Id.* In 1974 TCC's officers, in need of money to pay off certificates as they became due and to finance company operations, made a public offering of more certificates and common stock after engaging in several questionable transactions to make the company appear healthy. *Id.* The prospectus issued in connection with the public offering failed to disclose that TCC utilized questionable business practices to obtain additional cash to enable builders to complete their projects and avoid default. *Id.* at A-9. The prospectus also did not disclose that material amounts of the company's outstanding loans were in default and that TCC engaged in sham transactions to enhance artificially its financial condition. *Id.* There were misrepresentations in the prospectus as well, such as statements that the company's loan experience was highly successful, that no losses had been realized on construction loans, and that the directors were exercising proper control over management. *Id.* The SEC brought suit against TCC seeking an injunction against various officers, directors, and its accountant. Cohen, *supra* note 80, at 843. All defendants except two consented to the entry of a permanent injunction against them. [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,190 at 92,384.

<sup>91</sup> *Shiell*, *supra* note 81, at A-9 to A-10; see Cohen, *supra* note 80, at 844-47.

<sup>92</sup> See Cohen, *supra* note 80, at 847.

*Report* has been characterized as coming "dangerously close" to placing outside directors in an adversarial relationship with inside directors.<sup>93</sup> In short, it appears that the SEC may at least in part subscribe to the following position:

There is an iron paradox which governs corporate affairs, and no amount of restructuring can entirely avoid its force: Only those who are involved in an enterprise full-time have sufficient knowledge to direct an enterprise, while only those who are not involved full-time can be trusted to monitor those who direct.<sup>94</sup>

In any event, there is no doubt that the SEC expects directors to assume an active monitoring role. In the perquisites area, as well as in many other areas, the primary responsibility for monitoring could be assigned to the audit committee, or to a committee which would perform similar functions such as the compensation committee.

### B. *Role of the Audit Committee*

In contrast to the executive committee which in many respects is a substitute for the full board of directors, the audit committee's function is investigatory and advisory. The audit committee is designed to provide facts and advice to the board of directors in order to permit the board to analyze the company's operations more effectively.<sup>95</sup> An indication of the importance which the SEC attaches to audit committees is the number of consent settlements which have created or continued audit committees.<sup>96</sup> Under the Audit Committee Policy of the New York Stock Exchange<sup>97</sup> (Exchange) each domestic company listed on the Exchange was required to establish an audit committee comprised solely of directors independent of management no later than June 30, 1978. Other than the Exchange requirement that the committee be comprised solely of outside independent directors, no regulations or statutes have been adopted by the Exchange, the SEC, or Congress relating to the duties of audit committees. However, in a July 1978 release addressing corporate governance issues, the SEC proposed that all issuers be required to disclose whether or not they utilized an audit committee and, if so, what the functions and duties

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<sup>93</sup> Shipman, *Role of Outside Director Distinguished From That Of Inside Director*, reprinted in PLI, DUTIES AND RESPONSIBILITIES OF OUTSIDE DIRECTORS 54, 62 (A. Cohen & R. Loeb eds. 1978).

<sup>94</sup> Eisenberg, *supra* note 57, at 439.

<sup>95</sup> Solomon, *The Audit Committee: Its Growing Significance in the Corporate Structure*, 42 CPA J. 578, 580 (1972).

<sup>96</sup> See, e.g., SEC v. Killearn Properties, Inc. [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,256 (N.D. Fla. 1977); SEC v. Mattel, Inc. [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,807 (D.D.C. 1974); SEC v. Lum's, Inc. [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,504 (S.D.N.Y. 1974); SEC v. Coastal States Gas Corp., SEC Litigation Release No. 6054 (S.D. Tex. 1973). For duties of audit committees, see text accompanying notes 100-02 *infra*.

<sup>97</sup> 2 NYSE GUIDE (CCH) ¶ 2495H.

of the committee were.<sup>98</sup> The proposal was adopted in the final release which was issued December 4, 1978.<sup>99</sup> The SEC listed audit committee duties in the July release which included engaging and discharging the independent auditors, reviewing the audit with the auditors, and inquiring into the financial practices of the corporation.<sup>100</sup> Several commentators have suggested other duties such as review of the intended scope of the annual independent audit, determination that accounting standards are being met and review of "inside audits" conducted by management.<sup>101</sup>

In the Perquisites Release, the SEC noted "with approval" that some corporations had established procedures by which independent auditors reviewed management remuneration and reported the results of their review to the audit or a similar committee, and that in other corporations, the board of directors had assumed responsibility for approving or disapproving the aggregate remuneration of all or certain management members.<sup>102</sup> The SEC considers such procedures steps toward providing more accurate data upon which disclosures relating to remuneration are made

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<sup>98</sup> SEC Release No. 34-14970, 43 Fed. Reg. 31,945 (1978), reprinted in [Current Binder] FED. SEC. L. REP. (CCH) ¶ 81,645 at 80,579-80 [hereinafter cited as *Proposed Corporate Governance Release*].

<sup>99</sup> SEC Release No. 34-15384, 43 Fed. Reg. 58,522 (1978), reprinted in [Current Binder] FED. SEC. L. REP. (CCH) ¶ 81,766 at 81,093-95 (to be codified at 17 C.F.R. § 240.14a-101, Item 6(d)) [hereinafter cited as *Adopted Corporate Governance Release*].

<sup>100</sup> *Proposed Corporate Governance Release*, supra note 98, ¶ 81,645 at 80,580. The SEC believes that the following functions should be assumed by an effective audit committee:

- (a) engaging and discharging auditors; (b) reviewing the engagement of the auditors, including the fee, scope and timing of the audit and any other services rendered; (c) reviewing with the auditors and management a company's policies and procedures with respect to internal auditing, accounting and financial controls; (d) reviewing with the independent auditors, upon completion of their audit, their report or opinion, their perception of the company's financial and accounting personnel, the cooperation they received during the audit, the extent to which company resources were and should be used to minimize the time spent on the audit, any significant transactions which are not a normal part of the company's business, any change in accounting principles and practices, all significant proposed adjustments and any recommendations they may have for improving internal accounting controls, choice of accounting principles, or management systems; (e) inquiring concerning deviations from the issuer's code of conduct and periodically reviewing such policies; (f) meeting with the company's financial staff at least twice a year to discuss internal accounting and auditing procedures and the extent to which recommendations made by the internal staff or by the independent auditors have been implemented; and (g) reviewing significant press releases concerning financial matters.

*Id.* at 80,580 n.21. The SEC has not actually adopted requirements relating to audit committee functions, although it has stated that the foregoing list provides "a convenient initial reference for companies subject to the proxy rules . . ." *Adopted Corporate Governance Release*, supra note 99, ¶ 81,766 at 81,094-95.

<sup>101</sup> See Leech & Mundheim, *The Outside Director of the Publicly Held Corporation*, 31 BUS. LAW. 1799, 1815-16 (1976); Cohen, supra note 81, at 856-57. See generally Choka, *The New Role of the Audit Committee*, 23 PRAC. LAW. 53 (1977); Note, *Accounting—The Audit Committee—A Progressive Move Toward More Meaningful Financial Reporting*, 3 J. CORP. L. 400 (1978).

<sup>102</sup> *Perquisites Release*, supra note 1, ¶ 23,019 at 17,059-7.



and has urged registrants to analyze all procedures by which management remuneration is identified and disclosed.<sup>103</sup> A recent congressional report also focused on the role of audit committees and specifically stated that the establishment of policies regarding management perquisites and the monitoring and review of such policies are obligations of audit committees:

Corporate audit committees must become involved in reviewing the propriety of special perquisites enjoyed by senior management officials of some corporations. Audit committees should establish sound policies to prevent hidden remuneration of executives through use of corporate assets for housing, personal loans, club memberships, and personal travel or pleasure. Independent auditors should monitor compliance with such policies, and assure that the amounts and types of all management compensation are reported to shareholders and the public.<sup>104</sup>

### C. *Perquisites Monitoring and Reporting*

The method of establishing a perquisites policy and a system for monitoring that policy is largely a matter requiring an accountant's expertise, and many of the major accounting firms have made recommendations relating to the management and reporting of perquisites which might constitute remuneration. A general review of various materials<sup>105</sup> suggests the following means of formulating a perquisites policy:

1. The audit committee, with the assistance of management, should identify the various types of benefits which are provided to management for personal use but which are not directly related to job performance, such as the use of automobiles, airplanes, apartments, and recreational facilities, the receipt of loans and other categories of perquisites. Corporate policy relating to use of the items which constitute perquisites should be established and should include any specific authorization necessary for use, dollar limits upon use and valuation methods for use of corporate assets deemed to constitute remuneration for reporting purposes.
2. Control procedures should be established. Internal auditors, and perhaps outside auditors, should be utilized to develop control procedures. Their final form should be approved by the audit committee, and perhaps by the entire board. When a determination is made that record-keeping would be excessively expensive or impractical with respect to certain benefits, there should be a statement to that effect in the minutes of the audit committee.

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<sup>103</sup> *Id.*

<sup>104</sup> *Senate Governmental Affairs Subcomm. on Reports, Accounting and Management*, 95th Cong., 1st Sess., *Report on Improving Accountability of Publicly-Held Corporations and Their Auditors* 14 (1977).

<sup>105</sup> See generally *Ernst & Ernst, Reporting Executive Perquisites* (1978); *Arthur Young, A Closer Look at Executive Perquisites* (Oct. 1977); *Augenbraun, Review of Management Perquisites*, 11 *REV. SEC. REG.* 952, 953 (1978) [hereinafter cited as *Augenbraun*].

3. Policies should also be established relating to dealings between management and third parties, such as banks and suppliers with which the corporation does business.<sup>106</sup> Management would have the basic responsibility for administering the perquisites program in accordance with the policies adopted by the board and the audit committee, and should be required to report periodically to the audit committee.<sup>107</sup>

Establishing a perquisites program, however, will not provide absolute insulation against perquisites litigation:

In an egregious case, proper authorization or recording would not preclude successful legal attack grounded on corporate waste or violation of disclosure requirements, assuming that the [Perquisites] [R]elease's interpretation of those requirements is upheld by the courts. But if the registrant's independent audit committee had determined that the benefit was directly related to job performance, that determination should presumably not be subject to successful challenge.<sup>108</sup>

In addition, assuming that perquisites are maintained at the reasonable level, a perquisites program which includes monitoring by both the audit or other appropriate committee and outside auditors should provide reasonable assurances of success in defending against any legal attack.

The audit committee also may find it beneficial to discuss audit results with the outside auditors. In this manner, information which is not important enough for inclusion in the auditors' opinion, but which should be brought to the attention of the board, can be discussed with the committee members. The audit committee then can report to the entire board on those matters of greatest importance.<sup>109</sup>

In addition, in order to measure the effectiveness of a perquisites program, it may be desirable for outside auditors to include the program in the annual audit. As a result, the audit committee may be able to ascertain the adequacy of the outside auditors' evaluation of the effectiveness of internal controls, including the performance of internal auditors and meth-

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<sup>106</sup> A personal benefit received from a third party will not constitute remuneration from a corporation if there is no incremental cost to the corporation. Eppler & Yeager, *Management Perquisites*, 10 REV. SEC. REG. 841 (1977) [hereinafter cited as Eppler & Yeager]; see text accompanying notes 134-41 *infra*. Absent an agreement by a registrant to maintain or increase its accounts or compensating balance at a bank, or to undertake to increase its borrowing or to pay a higher rate of interest as a result of loans to officers and directors, or to purchase goods at a cost in excess of market, the SEC's response to Questions 38-42 of the Interpretive Release indicates that this area should present no problem. See *Interpretive Release*, *supra* note 6, ¶ 23,019A at 17,059-14 to 17,059-15.

<sup>107</sup> Augenbraun, *supra* note 105, at 953.

<sup>108</sup> Eppler & Yeager, *supra* note 106, at 844.

<sup>109</sup> See notes 100-01 *supra*; cf. Eisenberg, *supra* note 57, at 432-33 (advocating establishment of audit committees with authority to oversee accounting matters including exclusive power to nominate and recommend dismissal of corporation's accountant on behalf of board, direct accountant's activities, and to set terms of his engagement).

ods used to test internal controls.<sup>110</sup> Since matters relating to perquisites would not be deemed "material" in the traditional sense,<sup>111</sup> outside auditors normally would not review records relating to perquisites or compliance with a perks program. Thus, if a review of perquisites records or the monitoring of compliance with a perks program is desired, such an understanding should be set forth in the audit agreement with the outside auditors.

#### D. *The Foreign Corrupt Practices Act*

As stated in one of the SEC's perquisites releases, "accurate and sufficiently detailed books and records are prerequisites to the appropriate disclosure of remuneration information."<sup>112</sup> This tautology is reinforced by section 102 of the FCPA.<sup>113</sup> Although the FCPA is generally limited to certain illegal foreign payments, section 102 amended section 13(b)(2) of the '34 Act and applies to any issuer within the SEC's jurisdiction.<sup>114</sup> The amendments have been characterized as "the most extensive application of federal law into corporate affairs since the enactment of the '33 and '34 Acts."<sup>115</sup> Under the amendments, registrants are required to do the following:

- (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; and
- (B) devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances* that

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
- (iv) the recorded accountability for assets is compared with

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<sup>110</sup> *Ernst & Ernst, Executive Perquisites* (1977); *Price Waterhouse & Co., The Audit Committee—A Working Guide For Audit Committee Members* (1976). See also *Coopers & Lybrand, Audit Committee Guide* (2d ed. 1976).

<sup>111</sup> See text accompanying notes 22-38 *supra*.

<sup>112</sup> *Interpretive Release, supra* note 6, ¶ 23,019A at 17,059-8.

<sup>113</sup> Pub. L. No. 95-213, Title I, § 102, 91 Stat. 1494 (1977) (to be codified at 15 U.S.C. § 78m(b)(2), (3)(A), (B)).

<sup>114</sup> See text accompanying notes 42-43 *supra*.

<sup>115</sup> Levenson, N.Y.L.J. Seminar, *The Foreign Corrupt Practice Act of 1977, as reported in 451 SEC. REG. L. REP. (BNA) D-1* (May 3, 1978). See generally von Mehren, *supra* note 40, at 81; Weiss, *Foreign Corrupt Practices Act of 1977*; Levenson & Gleason, *The Accounting and Record Keeping Provisions of the Foreign Corrupt Practices Act, in PLL, TENTH ANNUAL INSTITUTE ON SECURITIES REGULATION* 93, 103 (1978).

the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.<sup>116</sup>

The requirements are not stated in terms of materiality and are not limited by traditional materiality concepts. Moreover, the four objectives for internal accounting controls were drawn from professional auditing literature and were not intended by accountants to constitute legal standards. In the final analysis, the amendments may be too ambiguous to withstand legal challenge.<sup>117</sup>

The controls which are needed to provide the "reasonable assurances" mandated by the FCPA are uncertain. An AICPA advisory committee has published a tentative report concerning internal accounting controls which provides criteria to help registrants and outside accountants determine whether corporate controls provide such assurances.<sup>118</sup> The criteria include a cost-benefit analysis. Since outside auditors customarily submit an annual report on internal controls to the board of directors or to a committee of the board such as the audit committee, auditors should be requested specifically to state that the controls are adequate to provide the "reasonable assurances" required by the FCPA.

#### E. *The Releases*

A large number of items may be deemed remunerative under the various releases and therefore reportable, depending upon the circumstances under which they are provided.<sup>119</sup> The Perquisites Release states that all payments made by a company which are not directly related to job performance are forms of remuneration which should be reported.<sup>120</sup> However, certain incidental benefits which are ordinary and necessary to the conduct of company business, such as ordinary business lunches, and incidental payments made by a company for items which are directly related to the performance of management's functions, such as parking places, may not

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<sup>116</sup> Pub. L. No. 95-213, Title I, § 102, 91 Stat. 1494 (1977) (to be codified at 15 U.S.C. § 78m(b)(2), (3)(A), (B)) (emphasis added).

<sup>117</sup> Cf. Peat, Marwick, Mitchell & Co., *Executive Newsletter*, Vol. IV, No. 2 (Feb. 23, 1978).

<sup>118</sup> See AICPA, *Tentative Report of the Special Advisory Committee on Internal Accounting Control* (September 15, 1978).

<sup>119</sup> See *Perquisites Release*, *supra* note 1, ¶ 23,019 at 17,059-4 to 17,059-7. Under the SEC's policies, the following items may be deemed to constitute perquisites and therefore disclosable as remuneration, depending upon the circumstances under which they are provided: automobiles, limousines, off hours transportation costs, supper money, entertainment allowance, use of company airplane; personal travel during business trip, vacation during business trip, travel allowance (e.g., per diem), foreign conventions, cafeteria subsidy and private dining rooms, lunch clubs, country clubs, hotel suites, apartments, condominiums, hunting lodges, vacation homes, etc., tickets to social functions and sports events, physical examinations, athletic facilities (on and off premises), staff at home (permanent or temporary), home repairs; security systems, educational reimbursement, professional dues and subscriptions, financial and other professional counseling, employee discounts, low interest loans from company, and low interest loans from financial institutions. *Id.* at 17,059-5 to 17,059-6.

<sup>120</sup> *Id.* at 17,059-3.

be reportable forms of remuneration.<sup>121</sup>

The Perquisites Release recognizes that management is usually in the best position to determine whether a benefit constitutes remuneration.<sup>122</sup> In some circumstances, however, the determination should be made by the audit committee. The determination will depend upon the facts and circumstances involved. The examples set forth in the Interpretive Release<sup>123</sup> are subject to refinement depending upon the factual settings involved. However, any benefits received by management which are directly related to job performance are not required to be included in aggregate remuneration. In general, a personal benefit reportable as remuneration is something which is unrelated to the business of the company and which relieves an individual of some personal expenditure.<sup>124</sup> For example, benefits which are provided to officers' and directors' relatives and friends who do not perform any services for the corporation would be considered remuneration to the officer or director.<sup>125</sup>

If an incidental job-related benefit is ordinary and necessary to the conduct of the company's business, is generally available to management employees, does not relieve an individual of expenditures which are normally considered to be personal in nature, and is utilized "solely for the purpose of attracting and maintaining qualified personnel, facilitating their conduct of company business or improving their efficiency in job performance," the benefit normally would not be considered remuneration.<sup>126</sup> Instruction 2(d) to amended Item 4(a) of Regulation S-K<sup>127</sup> provides some further guidance, stating that those benefits which are provided to "broad categories of employees and which do not discriminate in favor of officers or directors" need not be included in remuneration.<sup>128</sup>

The SEC considers six specific categories of benefits to be reportable as remuneration:

- (1) home repairs and improvements; (2) housing and other living expenses (including domestic service) provided at principal and/or vacation residences of management personnel; (3) the personal use of company property such as automobiles, planes, yachts, apartments, hunting lodges or company vacation houses; (4) personal travel expenses; (5) personal entertainment and related expenses; and (6) legal, accounting and other professional fees for matters unrelated to the business of the registrant.<sup>129</sup>

Other forms of remuneration include the use of corporate staff for personal

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 17,059-6.

<sup>123</sup> See *Interpretive Release*, *supra* note 6, ¶ 23,019A at 17,059-11 to 17,059-16.

<sup>124</sup> *Id.* Questions 5, 17 & 18 at 17,059-10, 17,059-11.

<sup>125</sup> *Id.* Question 5 at 17,059-10.

<sup>126</sup> *Perquisites Release*, *supra* note 1, ¶ 23,019 at 17,059-6.

<sup>127</sup> 43 Fed. Reg. 58,181 (1978), reprinted in 4 FED. SEC. L. REP. (CCH) ¶ 70,962 at 61,705 (to be codified at 17 C.F.R. § 229.20 Item 4(a), Instruction 2(d)).

<sup>128</sup> *Id.*; see *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,081.

<sup>129</sup> *Perquisites Release*, *supra* note 1, ¶ 23,019 at 17,059-5 to 17,059-6; see note 119 *supra*.

purposes and management's ability to obtain favorable bank loans or other benefits because the corporation directly or indirectly compensates a bank or third parties for providing the loans or other services.<sup>130</sup> In some cases, an item may relate to the performance of business functions and also relieve an individual of some personal expenditure, thereby constituting remuneration for disclosure purposes.<sup>131</sup> If neither purpose predominates, some allocation to the extent reasonably possible may be necessary.<sup>132</sup>

The value of all forms of remuneration must be included under the appropriate disclosure item. Where cash is utilized, valuation and inclusion in the remuneration table present no problem. In this regard, it is important to note that personal benefits need not be separately described when their value is included in the remuneration table.<sup>133</sup> However, the value of perquisites and certain other items must now be disclosed in column (C2) of the remuneration table, separately from salaries, fees, commissions, and bonuses set forth in column (C1).<sup>134</sup> In addition, if a benefit is required to be disclosed under another reporting provision, such as indebtedness under Item 4(e) of Regulation S-K,<sup>135</sup> the benefit must also be described under the other reporting provision.<sup>136</sup>

The Remuneration Release states that personal benefits are to be valued on the basis of their incremental cost to the company and reported in column (C2) of the remuneration table.<sup>137</sup> When personal benefits included in the table represent 10% of a individual's remuneration or \$25,000, whichever is less, Instruction 2(d)(iii) to revised Item 4(a) requires disclosure in a footnote of the amount and a brief description of such benefits.<sup>138</sup> Instruction 2(d)(i) states that when the amount which a recipient would have paid for comparable benefits is significantly greater than the company's incremental cost of providing those benefits, a footnote describing the benefits and their value to the recipient is required.<sup>139</sup> Similarly, the portion of the Remuneration Release which describes the amendments to Item 4(a) states that if perquisites "comprise a significant component of the remuneration of a given individual, or the management group, inclusion of dollar amounts that represent a nominal incremental cost to a registrant, without further explanation, may not provide shareholders with

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<sup>130</sup> *Perquisites Release*, *supra* note 1, ¶ 23,019 at 17,059-6; see *Interpretive Release*, *supra* note 6, ¶ 23,019A, Questions 38 & 39 at 17,059-14 to 17,059-15.

<sup>131</sup> *Interpretive Release*, *supra* note 6, ¶ 23,019A at 17,059-8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* Question 8 at 17,059-10.

<sup>134</sup> *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,080-82.

<sup>135</sup> 43 Fed. Reg. 58,181 (1978), *reprinted in* 4 FED. SEC. L. REP. (CCH) ¶ 70,962 at 61,708-09 (to be codified at 17 C.F.R. § 229.20 Item 4(e)). Item 4(e) was formerly Item 7(e) of Schedule 14A and Item 18(b) of Form 10-K.

<sup>136</sup> See *Interpretive Release*, *supra* note 6, ¶ 23,019A Question 8 at 17,059-10.

<sup>137</sup> *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,081.

<sup>138</sup> 43 Fed. Reg. 58,181 (1978), *reprinted in* 4 FED. SEC. L. REP. (CCH) ¶ 70,962 at 61,705 (to be codified at 17 C.F.R. § 229.20 Item 4(a), Instruction 2(d)(iii)).

<sup>139</sup> *Id.* (to be codified at 17 C.F.R. § 220.20 Item 4(a), Instruction 2(d)(i)); see *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,081.

complete information regarding the level of management remuneration."<sup>140</sup> Thus, apparently no footnote is required when the value of benefits is not material in relation to a recipient's salary.

In addition, if the specific amount of personal benefits, or the extent to which benefits are personal rather than business, cannot be determined without unreasonable effort or expense, such benefits may be omitted from the remuneration table if after reasonable inquiry the company concludes that personal benefits do not exceed \$10,000 for each person, or for each person in a group, and the omission of the information will not render the remuneration table materially misleading.<sup>141</sup> However, a registrant's inability to identify large amounts of benefits may raise questions under the FCPA.<sup>142</sup>

### III. CONCLUSION

The SEC realizes that outside directors cannot take part in the day-to-day management of a corporation or in the implementation of corporate policies.<sup>143</sup> It is clear from the *Sterling Homex Report* and the SEC's complaint in *Shiell*,<sup>144</sup> however, that at a minimum a board is expected to participate in major corporate decisions and to keep well informed of corporate activities. The board is also expected to update existing corporate policies and to adopt such new policies as may be necessary to comply with statutory and SEC mandates, and then to monitor compliance with those policies.

The board's monitoring task can be eased significantly by the use of committees to advise it on various matters. In the perquisites area, the audit committee or a committee with comparable functions is particularly suited to establishing a perquisites control and reporting program and to monitoring its progress.<sup>145</sup> The SEC appears to expect as part of that program, procedures by which independent auditors review management remuneration, including perquisites, and report the results of their review to the audit committee.<sup>146</sup>

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<sup>140</sup> *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,081.

<sup>141</sup> 43 Fed. Reg. 58,181 (1978), *reprinted in* 4 FED. SEC. L. REP. (CCH) ¶ 70,962 at 61,705 (to be codified at 17 C.F.R. § 229.20 Item 4(a), Instruction 2(d)(ii)), *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,082. The proposed amendments to Item 4(a) set forth in the *Proposed Amendments Release* required the board of directors or an appropriate committee of the board to conclude that the applicable conditions for exclusion were satisfied and that the information set forth in the table was not materially misleading. *See Proposed Amendments Release*, *supra* note 10, ¶ 81,650 at 80,627. This requirement subsequently was deleted due to the SEC's view that officers and directors are responsible for the adequacy and accuracy of disclosures in proxy statements and other documents. *Remuneration Release*, *supra* note 13, ¶ 81,765 at 81,082.

<sup>142</sup> *Proposed Amendments Release*, *supra* note 10, ¶ 81,650 at 80,627 n.8; *see text* accompanying note 40 *supra*.

<sup>143</sup> *See text* accompanying note 77 *supra*.

<sup>144</sup> *See text* accompanying notes 80-94 *supra*.

<sup>145</sup> *See text* accompanying notes 95-111 *supra*.

<sup>146</sup> *See text* accompanying notes 102-04 *supra*.

The full board of directors cannot possibly cope with all aspects of an increasingly complex corporate structure. Moreover corporate governance will no doubt become even more complicated in coming years as Congress and the SEC require greater shareholder participation in corporate decision-making and more extensive disclosure of information once thought to be immaterial. Although a board cannot rely absolutely and unquestioningly upon committees,<sup>147</sup> it can be expected that the use of committees will greatly expand in the future. The explicit approval by the SEC of delegating to the audit committee the basic responsibility for establishing and monitoring a perquisites program<sup>148</sup> may be a harbinger of a trend in which committees will be expected to play an ever-increasing role in governing publicly held corporations.<sup>149</sup>

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<sup>147</sup> See Sterling Homex Report, *supra* note 80, ¶ 80,219 at 85,460, 85,462-63.

<sup>148</sup> See text accompanying note 102 *supra*.

<sup>149</sup> Subsequent to the completion of this article, a very useful article was published addressing the legislative history and mechanics of the FCPA. See A Report by the Comm. on Corporate Law and Accounting, *A Guide to the New Section 13(b)(2) Accounting Requirements of the Securities Exchange Act of 1934 (Section 102 of the Foreign Corrupt Practices Act of 1977)*, 34 BUS. LAW. 307 (1978). In addition, the SEC has published final rules to implement the provisions of the FCPA. SEC Release No. 34-15570, 44 Fed. Reg. 10,964 (Feb. 23, 1979), reprinted in [Current] FED. SEC. L. REP. (CCH) ¶ 81,959. The rules are extremely broad and have already elicited considerable comment. See, e.g., Queenan & Brownlee, *Section 13(b) Accounting Standards*, 12 REV. SEC. REG. 961 (1979). In the release promulgating the new rules, SEC Commissioner Karmel separately stated that she was opposed to the decision to promulgate the rules as drafted. SEC Release No. 34-15570, [Current] FED. SEC. L. REP. (CCH) ¶ 81,959 at 81,401.





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