Corporate Governance Standards: Overview

by Practical Law Corporate & Securities

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*This Note provides an overview of the corporate governance standards established by the NYSE, Nasdaq and the SEC. In particular, this Note explains which entities and regulators set corporate governance standards and to whom these standards apply. This Note describes some of the corporate governance requirements relating to the **board** of **directors** and its key committees, some policies and procedures to be implemented by public companies (such as corporate governance guidelines and a code of ethics or conduct) and when transactions must be approved by stockholders. In particular, this Note reviews and compares NYSE and Nasdaq standards and applicable SEC requirements.*

To Whom Do Corporate Governance Standards Apply?

Who Sets Corporate Governance Standards?

State Law

Federal Law

Securities Exchanges

Institutional Investors

Corporate Governance Standards

Board of Directors

Audit Committee

Compensation Committee

Nominating/Corporate Governance Committee

Exemption from Board and Board Committee Standards for Controlled Companies

Code of Conduct/Code of Ethics

Corporate Governance Guidelines

Required Stockholder Approval

Officer Certifications

Other Provisions

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To Whom Do Corporate Governance Standards Apply?

Corporate governance standards can apply to all companies, whether public or private, depending on the source of the standards. This Note will primarily focus on corporate governance standards that apply to public companies, as established by two of the major securities exchanges and the **Securities and Exchange Commission** (SEC).

Who Sets Corporate Governance Standards?

Public companies must comply with a large number of corporate governance and other corporate requirements arising from different regulatory and other interested parties, including the following:

State Law

Every company, whether public or private, is governed by the laws of the state in which it is incorporated. State corporate regulations are found in the general corporation law or business corporation law statutes of the state code as well as in the state court decisions that apply or interpret the corporate statutes. State corporate law governs the basic aspects of a company's existence and a company's actions, including meeting notice to stockholders, voting and quorum requirements and, most importantly, the fiduciary duties of **directors**. Some of this information may also be included in a company's charter documents (its certificate or articles of incorporation and its bylaws), the contents of which are governed by state corporate regulations. For more information on **director** fiduciary duties, see Practice Note, Fiduciary Duties of the **Board** of **Directors**. For more information on certain state corporate laws, see Corporation Law: State Q&A Tool.

Federal Law

Public companies are also governed by federal law. Congress has enacted legislation, and the SEC has interpreted legislation and adopted its own rules and regulations, that monitor different aspects of the governance of public companies. For example, in 2002, Congress passed the **Sarbanes-Oxley Act of 2002** (Sarbanes-Oxley), and the SEC adopted new rules and regulations reflecting Sarbanes-Oxley initiatives. These rules address issues such as the composition of the audit committee of the **board** of **directors**, the adoption of company codes of ethics and disclosure of information about the **board** of **directors** and its committees. In 2010, Congress passed the **Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** (the Dodd-Frank Act), which includes provisions relating to executive compensation and corporate governance matters. The SEC and the national securities exchanges have adopted new rules and listing standards implementing these provisions, but several of these provisions require further effort by the SEC and/or the national securities exchanges (see Practice Notes, Summary of the Dodd-Frank Act: Executive Compensation and Summary of the Dodd-Frank Act: Corporate Governance).

Securities Exchanges

Companies with securities listed on a national securities exchange, such as **Nasdaq Stock Market** (Nasdaq) or the **New York Stock Exchange** (NYSE), must comply with continued listing standards of the exchange to maintain their listings. Nasdaq and the NYSE have adopted qualitative listing standards that include certain corporate governance requirements such as actions by independent audit, compensation and nominating and corporate governance committees and the

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adoption of company codes of conduct. Companies that do not comply with these corporate governance requirements may lose their listing status. For more information, see Comparative Corporate Governance Standards Chart: NYSE vs. Nasdaq, Qualitative Listing Requirements Chart: New York Stock Exchange and Qualitative Listing Requirements Chart: Nasdaq Stock Market.

Institutional Investors

Large institutional investors in public companies may apply pressure on those companies to adopt practices that may not be required by law or by applicable listing standards but that operate in the best interests of the stockholders. Examples of practices encouraged by **institutional investors** include requiring companies to adopt a majority vote standard for electing **directors**, separate the positions of chairman of the **board** and chief executive officer (CEO) and eliminate staggered **boards** of **directors**. For example, many large companies, such as Pfizer Inc, General Electric Company and Hewlett-Packard Company, adopted majority vote policies for the election of **directors** following pressure from stockholders. In addition, based on extensive discussions with several of its largest institutional stockholders, the **board** of Chesapeake Energy Corporation agreed to appoint a new independent non-executive chairman and strip the chairman title from its CEO, after certain conflicts of interest between the CEO and the company were disclosed. Institutional investors attempt to achieve these results by speaking directly with company management and members of the company's **board** and by submitting proposals to be included in the companies' proxy statements for a stockholder vote.

In July 2016, a group of CEOs of prominent companies and institutional investors released a set of corporate governance principles on the roles and responsibilities of **boards**, companies, and shareholders. These governance principles are meant to be used by company **directors**, executives, institutional shareholders, and in-house and outside counsel to start a discussion on what constitutes good corporate governance. In October 2018, the group (now including additional CEOs) issued an updated set of corporate governance principles (Commonsense Governance Principles 2.0). For more information on these corporate governance principles, see Practice Note, Corporate Governance Practices: Commentary: Commonsense Governance Principles.

This Note summarizes key corporate governance standards for public companies adopted by the NYSE, Nasdaq and the SEC. For more detailed information, see the following:

- Practice Note, Corporate Governance Standards: Audit Committee.
- Practice Note, Corporate Governance Standards: **Board** of **Directors**.
- Practice Note, Corporate Governance Standards: Code of Ethics or Conduct.
- Practice Note, Corporate Governance Standards: Compensation Committee.
- Practice Note, Corporate Governance Standards: Nominating and Corporate Governance Committee.
- Comparative Corporate Governance Standards Chart: NYSE vs. Nasdaq.
- Qualitative Listing Requirements Chart: New York Stock Exchange.
- Qualitative Listing Requirements Chart: Nasdaq Stock Market.

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- **Director** Independence Standards Chart.

For more information on corporate governance generally, see Practice Note, Corporate Governance Practices: Commentary.

Corporate Governance Standards

Board of Directors

Independence

The NYSE and Nasdaq require that a majority of the **directors** on a listed company's **board** of **directors** must be independent, subject to exemptions for certain companies, such as "controlled companies" (see below). Each of the NYSE and Nasdaq have their own definitions of "independence" that must be satisfied, although their standards are similar. For more information on **director** independence tests, see **Director** Independence Standards Chart. In addition, each listed company must disclose information about the independence of its **directors** in compliance with Item 407(a) of **Regulation S-K**.

The SEC requires each company to disclose the following:

- The names of the **directors** that the **board** determined are independent under the rules of the relevant securities exchange (and under any additional independence standards of the company, if applicable).
- If the company has any additional independence standards, a description of those standards.
- A description of the transactions, relationships and other arrangements that the **board** considered in making its determination of the independence of each **director**.

(*Item 407(a), Regulation S-K.*)

If a company is relying on the exchanges' controlled company exemptions, (see Exemption from **Board** and **Board** Committee Standards for Controlled Companies), the company must disclose this information, including the basis for the exemption and with which corporate governance standards the company does not comply. All of the **director** independence information is disclosed in the company's **Form 10-K** and **proxy statement**. For more information, see Practice Notes, Form 10-K and Proxy Statements.

Meetings of Certain Directors

Nasdaq requires the independent **directors** to hold regularly scheduled meetings, or "executive sessions," without management or other members of the **board** at least twice a year. The NYSE requires either one of the following:

- Non-management **directors** must hold regularly scheduled executive sessions. If the company elects this option, since non-management **directors** include **directors** that are not considered independent, then the NYSE recommends that the company's independent **directors** also schedule an executive session at least once a year.

- Only the independent **directors** must hold regularly scheduled executive sessions.

The NYSE also requires the company to establish a method for any interested party (which includes stockholders and employees) to communicate with non-management or independent **directors**, depending on the option chosen by the company, or a presiding non-management or independent **director**, as applicable.

Other Board Requirements

The SEC requires each company to disclose information about the stockholders' ability to communicate with **directors**, including:

- Whether the company has a process for stockholder communication with **directors** and if not, why not.

- A description of this process.

The SEC also requires each company to disclose information about **director** attendance at meetings, including:

- Whether the company has a policy on **director** attendance at the annual meeting and if so, a description of the policy.

- The **directors** that attended the last annual meeting.

- A list of **directors** who attended less than 75% of **board** meetings and committee meetings.

In addition, the company must discuss its **board** leadership structure and the **board's** role in risk oversight of the company.

All of this information is disclosed in the company's proxy statement. For information on preparing the proxy statement, see Practice Note, Proxy Statements.

Nasdaq has adopted a new requirement that listed companies, subject to certain exceptions, must have, or explain why they do not have, at least two diverse **directors**, one of whom is female and the other of whom is an underrepresented minority or LGBTQ+. Companies will have to disclose this information in their proxy statements or on their websites. Companies will be able to transition into full compliance with this requirement over several years, depending on a company's listing tier, but generally all listed companies will have to have one diverse **director** by August 7, 2023. For more information on Nasdaq's new diversity requirements, see Legal Update, SEC Approves Nasdaq's **Board** Diversity Rules.

For more information on the corporate governance standards applicable to the **board** of **directors** of a public company, see Practice Note, Corporate Governance Standards: **Board** of **Directors**.

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Audit Committee

The SEC, the NYSE and Nasdaq require that each company must have an audit committee comprised entirely of independent **directors**. The NYSE and Nasdaq require that the audit committee be comprised of at least three independent **directors**, each of whom:

- Meets the exchange's general independence requirements for all **directors**.
- Meets the SEC's enhanced independence standards for audit committee members under Rule 10A-3 under the Exchange Act (see Practice Note, Corporate Governance Standards: Audit Committee: SEC Rules and Requirements: Independence).
- Is financially literate (NYSE) or can read and understand **fundamental** financial statements (Nasdaq).
- For Nasdaq companies only, did not participate in preparing the company's financial statements at any time in the past three years.

In addition, at least one member of the audit committee must have accounting or related financial management expertise (NYSE) or past experience or a background that makes him or her financially sophisticated (Nasdaq). The SEC requires that each company disclose in its Form 10-K or proxy statement whether it has at least one audit committee financial expert, and if not, why not. Generally, a **director** that satisfies the specific exchange requirement regarding experience is also considered to satisfy the requirements for an audit committee financial expert.

Under certain exceptional and limited circumstances that are disclosed on its website or in its proxy statement or Form 10-K, a Nasdaq-listed company may have one member on its audit committee that does not meet all of Nasdaq's independence requirements.

The NYSE and Nasdaq also require the audit committee to have a written charter that establishes the committee's purpose, duties and responsibilities, including:

- Appointment, retention, compensation and oversight of the company's auditors.
- Review of the company's financial statements with management and the company's auditors.
- Establishing procedures for the receipt, retention and treatment of complaints to the company regarding accounting, internal accounting controls or auditing matters and for the confidential, anonymous submission by employees of accounting or auditing issues.
- Establishing policies and procedures for the pre-approval by the committee of all audit, non-audit and other services provided by the company's auditors. The SEC requires the company to describe its pre-approval policies and related audit services procedures in its proxy statement.
- Preparation of the audit committee report required by the SEC to be included in the proxy statement.
- The authority and appropriate funding to retain independent counsel and outside advisors.

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In addition, Nasdaq requires the audit committee, or another independent **board** committee, to review all transactions between the company and any **related party** (any **director**, executive officer, 5% stockholder or any of their family members). Nasdaq has indicated this rule requires only a review, not approval, and this review can even take place after the fact. However, in practice, when reviewing related party transactions for potential conflicts of interest, many Nasdaq companies have their audit committees approve the related party transactions that do not present any such conflict. The NYSE also requires the audit committee or another independent **board** committee to listed companies to review and evaluate related party transactions. The committee must conduct a reasonable prior review and prohibit any related party transaction if they determine it to be inconsistent with the interests of the company and its stockholders. For a form of related party transaction approval policy, see Standard Document, Related Party Transactions Policy.

Typically, the committee charter is prepared by the company (by the legal department), subject to review by, and any other requested assistance from, the company's outside counsel and/or counsel retained by the audit committee. However, depending on the size of the company's legal department and any department budgetary constraints, the company may request that its outside counsel prepare the charter with company assistance. For a form of audit committee charter, see Standard Document, Audit Committee Charter.

The SEC requires each company to disclose information about its audit committee in its Form 10-K and proxy statement. For more detailed information on what must be disclosed in each document, see Practice Notes, Form 10-K and Proxy Statements.

For more information on the corporate governance standards applicable to the audit committee of a public company, see Practice Note, Corporate Governance Standards: Audit Committee.

Compensation Committee

Each of the NYSE and Nasdaq requires listed companies, subject to exemptions for certain companies, such as "controlled companies" (see below), to have a compensation committee comprised entirely of independent **directors**, each of whom:

- Meets the exchange's general independence requirements for all **directors**.
- Is evaluated under an enhanced independence review for compensation committee members, including the sources of his or her compensation and any affiliations between the **director** and the company.

In addition, Nasdaq requires the compensation committee to be composed of at least two members. Under certain exceptional and limited circumstances that are disclosed on its website or in its proxy statement or Form 10-K, a Nasdaq-listed company may have one member on its compensation committee that does not meet all of the independence requirements.

The compensation committee must have a written charter that establishes the committee's purpose, goals, rights, responsibilities and authority, including:

- Determination (or for Nasdaq only a recommendation to the **board** for its determination) of the compensation of the CEO.

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- Review and approval of corporate goals and objectives for compensation of the CEO and evaluation of the CEO's performance in light of those goals and objectives.
- Determination, or recommendation to the **board** for its determination, of compensation for all other executive officers and (for NYSE only) of incentive compensation and equity-based plans that are subject to **board** approval.
- A provision that the CEO may not be present during voting or deliberations on his compensation (for Nasdaq only).
- Authority to retain, in its sole discretion, compensation consultants, independent legal counsel and other advisors and be directly responsible for hiring, overseeing and compensating the consultants, counsel and other advisors.
- Provision by the company of adequate funding to the compensation committee to pay the fees of its consultants, counsel and other advisors.
- Evaluation of the independence of any compensation consultant, legal counsel (other than in-house counsel) or other advisor, including consideration of six factors (itemized in Rule 10C-1 and adopted into applicable exchange rules ((for the specific list of factors, see Practice Note, Corporate Governance Standards: Compensation Committee: NYSE Standards: Compensation Committee Charter and Corporate Governance Standards: Compensation Committee: Nasdaq Standards: Compensation Committee Charter)), before selecting or soliciting advice from that advisor.

Typically, the committee charter is prepared by the company (by the legal department), subject to review by, and any other requested assistance from, the company's outside counsel and other advisers such as compensation consultants. However, depending on the size of the company's legal department and any department budgetary constraints, the company may request that its outside counsel prepare the charter with company assistance. For a form of compensation committee charter, see Standard Document, Compensation Committee Charter.

Smaller reporting companies do not have to comply with some of the listing standards for compensation committees. For more information, see Practice Note, Corporate Governance Standards: Compensation Committee: Compliance with the NYSE Requirements and Compliance with Nasdaq Requirements.

The SEC requires reporting companies to disclose information about the compensation committee, including:

- The members of the committee.
- A description of the committee's charter.
- A description of the executive compensation process.
- A discussion of compensation policies and practices for all employees that may cause material risks to the company.
- Disclosure of fees paid to compensation consultants for services in addition to advice or recommendations on the amount or form of executive or **director** compensation under certain circumstances.

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- Information about any conflicts of interest of compensation consultants, if applicable, including the nature of the conflict and how it is being addressed.

This information is disclosed in the company's proxy statement (see Practice Note, Proxy Statements).

For more information on the corporate governance standards applicable to the compensation committee of a public company, see Practice Note, Corporate Governance Standards: Compensation Committee.

Nominating/Corporate Governance Committee

The NYSE requires listed companies, subject to exemptions for certain companies, such as "controlled companies" (see below), to have a nominating/corporate governance committee comprised entirely of independent **directors** that are responsible for **director** nominations as well as developing and overseeing the corporate governance policies of the company. The NYSE also requires the nominating/corporate governance committee to have a written charter that establishes the committee's purpose, duties and responsibilities, including:

- Identification of people qualified to become company **directors**.
- Selection of **director** nominees.
- Development of the company's corporate governance guidelines.

Nasdaq requires **director** nominees to be selected or recommended by either a nominating committee comprised entirely of independent **directors** or a majority of the independent **directors** of the **board**, subject to exemptions for certain companies, such as "controlled companies" (see below) or under certain exceptional and limited circumstances that are disclosed on its website or in its proxy statement or Form 10-K. Nasdaq requires the company to adopt a written charter, if it has an independent nominating committee, or formal **board** resolutions, if decisions are made by a majority of the independent **directors**, relating to the company's nominating process.

For more information, see Practice Note, Corporate Governance Standards: Nominating and Corporate Governance Committee.

Typically, the committee charter is prepared by the company (by the legal department), subject to review by, and any other requested assistance from, the company's outside counsel. However, depending on the size of the company's legal department and any department budgetary constraints, the company may request that its outside counsel prepare the charter with company assistance. For a form of committee charter, see Standard Document, Nominating and Corporate Governance Committee Charter.

The SEC requires a reporting company to disclose its process for nominating **directors**, including:

- Whether the company has a nominating committee, if not, why not, and whether the committee has a charter.
- The committee's process to identify and select **director** nominees and any minimum qualifications for **directors**.

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- Whether the company will consider **director** candidates recommended by stockholders, and if so, how stockholders can recommend candidates.
- Whether and how the company considers diversity as a factor in identifying nominees for **director**.
- A description of the specific skills, qualifications and skills of each **director** and **director** nominee that caused the committee and/or the **board** to determine that each such person should be a **director**.

This information is disclosed in the company's proxy statement (see Practice Note, Proxy Statements).

Exemption from Board and Board Committee Standards for Controlled Companies

The NYSE and Nasdaq define a "controlled company" as a company of which more than 50% of the voting power for the election of its **directors** is held by a single person, entity or group. Under NYSE and Nasdaq rules, a controlled company can choose not to comply with some or all of the corporate governance rules requiring:

- A majority of independent **directors** on the **board**.
- An independent compensation committee.
- An independent nominating and corporate governance committee or a group of independent **directors** making nominating decisions.

However, controlled companies must continue to comply with the exchanges' other corporate governance standards, including those relating to the audit committee and the special meetings of independent or non-management **directors**.

To use the controlled company exemption, the NYSE and Nasdaq require a company to comply with the disclosure requirements of Item 407(a) of Regulation S-K (Corporate Governance). Instruction 1 to Item 407(a) provides that if a company is listed on a national securities exchange, which requires a majority of the **board** of **directors** to be independent but provides exemptions from that requirement, a company relying on an exemption must disclose in its proxy statement or Form 10-K:

- The exemption being relied on.
- Its basis for concluding that the exemption is applicable.

This means that the company would disclose that:

- It is a controlled company.
- It is exempt from complying with certain exchange requirements.

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- It is not complying with any or all of those requirements.

For example, a controlled company taking advantage of all of the exemptions permitted would disclose that it is a controlled company as defined by the exchange, explain how it meets that definition, and state that as a result it does not have a majority of independent **directors** on its **board**, an independent compensation committee and/or an independent nominating and corporate governance committee. Because controlled companies are not required to take advantage of these exemptions, a company could disclose that it is a controlled company as defined by the exchange but, despite meeting that definition, it has a majority of independent **directors** as well as independent **board** committees (or whichever of the requirements it chooses to follow).

In addition, the **controlling persons** must file a Schedule 13D with the SEC (if they have not already done so) indicating their control of the company (see Practice Notes, Section 13(d) Beneficial Ownership Reporting and Filing Schedule 13D and 13G Reports).

The NYSE and Nasdaq exempt other types of companies from many of their corporate governance listing standards. For more information on these exemptions, see Section 303A.00 of the NYSE Listed Company Manual and Rule 5615 and the related interpretative materials of the Nasdaq Listing Rules.

Code of Conduct/Code of Ethics

Under Item 406 of Regulation S-K, the SEC requires each company to disclose whether or not it has adopted a code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer and/or controller and people who perform similar functions. If a company has not adopted a code of ethics, it must publicly disclose why not. The code of ethics should provide written standards reasonably designed to deter wrongdoing.

The SEC defines a code of ethics as written standards that are reasonably designed to deter wrongdoing and promote:

- Honest and ethical conduct, including how to handle conflicts of interest between personal and professional relationships.
- Full, fair, timely, accurate and understandable disclosure in all reports and other documents filed with the SEC or otherwise released publicly.
- Compliance with applicable laws, rules and regulations.
- Prompt internal reporting of any violations of the code to the appropriate personnel specified in the code.
- Accountability for complying with the code.

The NYSE and Nasdaq require each listed company (subject to certain exemptions) to adopt a code of conduct that applies to all of its **directors**, officers and employees. The code of conduct should provide a practical set of business, compliance and ethical standards for the participants.

The NYSE code of business conduct and ethics should address the following:

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- Conflicts of interest.
- Corporate opportunities.
- Confidentiality.
- Fair dealing.
- Proper use and protection of company assets.
- Compliance with laws, rules and regulations, including insider trading laws.
- Reporting of any illegal or unethical behavior, including any violations of the code.

Nasdaq merely requires that a code of conduct must satisfy the SEC's requirements and must contain a mechanism for its enforcement.

A company may have separate codes for different types of officers and other personnel or separate codes for complying with the SEC's requirements and the exchanges' requirements. In practice, many companies combine the SEC requirements and the securities exchange requirements into one code of conduct and ethics that applies to all officers as well as **directors** and employees. Typically, the code is prepared by the company (by the legal department), subject to review by, and any other requested assistance from, the company's outside counsel. However, depending on the size of the company's legal department and any department budgetary constraints, the company may request that its outside counsel prepare the code with company assistance. For a form of code of ethics or business conduct, see Standard Document, Code of Ethics and Business Conduct for a Public Company.

For more information, see Practice Note, Corporate Governance Standards: Code of Ethics or Conduct.

Corporate Governance Guidelines

The NYSE requires each company to adopt corporate governance guidelines that describe the company's corporate governance policies and practices. Companies exempted from this requirement include controlled companies and foreign private issuers (see Section 303A.00, NYSE Listed Company Manual).

The corporate governance guidelines must address the following:

- Qualification standards for **directors**.
- Responsibilities of **directors**.
- **Director** access to management and independent advisors.
- **Director** compensation.

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- Orientation and continuing education for **directors**.
- Management succession.
- Annual **board** performance evaluations.

Neither Nasdaq nor the SEC has a similar requirement.

Required Stockholder Approval

The NYSE and Nasdaq require stockholder approval of all equity compensation plans or arrangements, whether or not **directors** and officers can participate in them, and any material revisions to those plans, other than:

- 401(k) and stock purchase plans, and similar tax-qualified plans.
- Dividend reinvestment plans.
- Awards made as an inducement to a new hire.
- Awards relating to mergers and acquisitions.

The NYSE and Nasdaq also require (subject to some exceptions) stockholder approval of:

- Any issuance of common stock that would (or could) equal or exceed 20% of the common stock outstanding before the issuance, other than in a public offering or a sale at a price greater than the stock's closing market price. For more information, see Practice Notes, Nasdaq 20% Rule: Stockholder Approval Requirements for Securities Offerings and NYSE 20% Rule: Stockholder Approval Requirements for Securities Offerings.
- Any issuance of securities that would (or could) result in a change in control of the company.

In addition, the NYSE requires stockholder approval of any issuance of common stock in an amount greater than one percent of the outstanding common stock before the issuance to any **director**, officer or substantial stockholders or any of their affiliates. Nasdaq also requires stockholder approval of any acquisition if it would result in issuing common stock in an amount greater than 20% of the outstanding common stock before the issuance or any acquisition that would result in issuing common stock in an amount greater than 5% of the outstanding common stock before the issuance if a **director**, executive officer or 5% stockholder owns 5% of the entity being acquired.

The SEC does not have a similar requirement.

For more information, see Practice Note, Shareholder Approval of an Equity Plan by a Public Company.

Officer Certifications

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The NYSE requires the CEO of each company to certify to the NYSE annually that he or she is not aware of any violations of the NYSE's corporate governance standards. The CEO must also promptly notify the NYSE in writing if any executive officer becomes aware of any non-compliance with those standards.

Nasdaq merely requires the CEO of each company to promptly notify it if any executive officer becomes aware of any non-compliance with Nasdaq's corporate governance standards.

The SEC requires the CEO and CFO of each company to certify each of the company's Form 10-K and **Form 10-Q** reports under Sections 302 and 906 of Sarbanes-Oxley. The Section 302 certification relates to the accuracy of the report and the company's disclosure controls and procedures and internal control over financial reporting. The Section 906 certification relates to compliance with the **Securities Exchange Act of 1934**, as amended (Exchange Act) and accuracy of information. See Standard Documents, Sarbanes-Oxley Certification under Section 302 of the Act and Sarbanes-Oxley Certification under Section 906 of the Act. While the two provisions require certifications that are similar in substance, one is a criminal provision which falls under the jurisdiction of the Department of Justice and the other is a civil provision which is administered by the SEC. In practice, both certifications are attached as exhibits to a company's annual and quarterly reports and must be signed by the CEO and CFO.

Other Provisions

Sarbanes-Oxley contains several other governance provisions, including the following:

- If the company restates its financial information because it did not comply with financial reporting requirements under federal securities laws as a result of misconduct, the CEO and CFO must reimburse the company for the bonuses paid to them and any profits received by them from the sale of company securities during the 12 months after the financial information was initially reported (*Section 304, Sarbanes-Oxley*).

- **Directors** and executive officers cannot buy or sell company securities during blackout periods under company employee benefit plans (when trading in company securities is prohibited by the administrator of the plan) (*Section 306, Sarbanes-Oxley*).

- A company cannot extend loans to its **directors** and executive officers (*Section 13(k), Exchange Act*, added by *Section 402, Sarbanes-Oxley*).

For more information on Sarbanes-Oxley, see Practice Note, The Impact of Sarbanes-Oxley on Private Companies and Corporate Governance Best Practices.

The Dodd-Frank Act contains several other governance provisions, including the following:

- Each company must disclose in its proxy materials for its annual stockholders' meeting whether the same person or two separate people serve as chairman of the **board** and chief executive officer and why it adopted this structure.

- The SEC must adopt rules directing the national securities exchanges to prohibit listing any company that does not adopt a policy that provides for recoupment of executive incentive compensation if an accounting restatement is required due to material noncompliance with any financial reporting requirements. Under this clawback policy,

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a company must be able to recover from any current or former executive officer any incentive compensation paid out during the three-year period before the accounting restatement that is in excess of what would have been paid out based on the restated financial information. On July 1, 2015, the SEC issued proposed rules regarding clawback policies. For more information, see Legal Update, SEC Proposes Rules Requiring Companies to Adopt Executive Compensation Clawback Policies. In October 2021, the SEC reopened the comment period for the proposed clawback rules. For more information, see Legal Update, SEC Reopens Comment Period for Proposed Rule Requiring Companies to Adopt Clawback Policies. For a form of clawback policy that is intended to meet the Dodd-Frank requirements, see Standard Document, Clawback Policy.

For more information on the Dodd-Frank Act, see Practice Notes, Summary of the Dodd-Frank Act: Corporate Governance and Summary of the Dodd-Frank Act: Executive Compensation.

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