

A low-angle, upward-looking photograph of a modern skyscraper with a glass facade. The building's structural elements, including dark metal beams and glass panels, create a strong geometric pattern that converges towards the top of the frame. The sky is filled with soft, white clouds, and the overall lighting is bright, suggesting a clear day. The image is split horizontally, with the top half showing the building and the bottom half containing a grey banner with text.

## Resources for Directors of New Public Companies

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# EVERYONE ON BOARD?

## WHAT COMPANIES AND DIRECTORS CAN EXPECT OF EACH OTHER

Stockholders own corporate entities, but elect a board of directors to govern the company. The board is responsible for overseeing the general management of the company's business (for the benefit of the stockholders) and — except for certain matters reserved for stockholders — has decision-making authority over the company's affairs. Directors in turn delegate much of the day-to-day operational matters of running the business to officers of the company, who hire employees and engage other third-party consultants and advisors. Boards must approve most major corporate actions that involve significant financial, legal, or tax consequences, including, for example: distributions, hiring and firing of senior officers, operating budgets, amending the company's organizational documents, borrowing or lending money, changes to employee benefit plans, and any major sale or merger transaction.

### COMPANY EXPECTATIONS

Companies require directors to attend board meetings on a regular basis (often monthly or quarterly). In advance of a board meeting, directors typically receive a package of information regarding the matters to be discussed at the upcoming meeting. Companies should expect directors to spend time reviewing and analyzing the meeting materials. Directors also need to be generally available to the company's management should issues come up that require impromptu board calls or special board meetings.

Legally, directors have certain duties and responsibilities owed to the corporate entity and, therefore, to the corporate stockholders:

- *Duty of Loyalty.* The duty of loyalty requires a director to act in the best interests of the company, which means putting stockholder interests above their own personal interests when making decisions on behalf of the company. To uphold their duty of loyalty, directors should not engage in self-dealing, usurp corporate opportunities or make use of company confidential information for personal interest or gain. The duty of loyalty requires that when the board takes action, it must be acting independently and absent any conflict of interest. The duty of loyalty also encompasses a duty of good faith, which requires directors to act with the intent to further stockholder interests and to act in what directors honestly believe to be the best interest of the company. Legally, directors have certain duties and responsibilities owed to the corporate entity and, therefore, to the corporate stockholders.
- *Duty of Care.* The duty of care requires that directors exercise the same degree of care that an ordinarily reasonable person would use when faced with similar circumstances. This proactive duty requires that directors obtain all material information available to them before making a decision. While directors must stay informed about the company and its decisions, they are permitted to reasonably rely on the company's records, management and advisors.

### DIRECTOR EXPECTATIONS

Directors should understand the importance of upholding their fiduciary duties to the company, as stockholders can bring direct lawsuits, or derivative lawsuits on the company's behalf, against directors for violating these fiduciary duties. Board decisions are usually protected by the deferential business judgment rule. The business judgment rule provides that as long as the decisions of the board were made on an informed basis and the board has a reasonable business purpose, a court will not question such decisions even if those decisions turn out to be wrong in hindsight. The business judgment rule rests on a presumption that board decisions were made by directors who were disinterested and independent, acted in good faith and used a reasonable decision-making process. Courts generally recognize that judges and stockholders are often not in the best position to second guess business decisions of a company's board, so courts will focus on the board's process rather than the substance of the decision when evaluating the merits of a case.

Directors should proactively take certain steps to fulfill their role and satisfy their duties:

- *Stay Informed* – Directors should be educated about the business — including results of operations — and should understand the company's strategies and corporate plans. Directors should ask questions and inquire into any areas of concern.
- *Conduct Diligence* – Directors should perform diligence as necessary when making board decisions, including engaging experts and advisors, and insisting upon adequate information from management. Directors should make sure to fully understand the terms and consequences of any proposed action.
- *Be Involved* – The board should hold regular meetings and be involved in and approve all major corporate decisions, such as deciding whether to enter into a significant transaction. Directors should spend time considering and deliberating on all important issues involved in any major decision. See [How to Run an Effective Board Meeting](#) for more information on board meetings.

- *Maintain Board Minutes* – Directors should ensure that the board maintains full and complete minutes. Minutes are necessary to record and demonstrate the scope of the board's analysis in making important decisions, which a court may rely on to evaluate whether directors have satisfied their fiduciary duties in making business decisions. See **What to Know About Board Meeting Minutes** for more information on board minutes. Notably however, in certain circumstances, such as a merger or sale of the company, courts may apply a stricter standard of review.

For a company to be successful, it needs a board that is comprised of engaged directors who have a clear understanding of both their legal and business responsibilities. The expectations set forth above are a critical step in fulfilling a director's responsibilities to the company.



## WHEN IS BOARD APPROVAL REQUIRED?

Delaware law generally provides that a board of directors will manage or direct the business and affairs of a company. While the board typically delegates day-to-day management to the company's officers, failure to secure necessary board approval for certain corporate actions introduces risk. For example, potential investors will typically request company records as part of their due diligence prior to investing. A company that does not follow the proper protocol with regard to board approvals may seriously impede its ability to secure funding.

### DETERMINING WHAT DECISIONS REQUIRE BOARD APPROVAL

A single, comprehensive list of decisions or transactions that require board approval does not exist, so some companies use signing authority schedules to help provide guidelines for when contracts or other actions require board approval. In addition, a number of actions will always require board approval. The following list includes several common actions and transactions contemplated by companies that generally require board approval, either under Delaware law, the company's governing documents and/or by market practice. In certain cases, some of these actions and transactions may also require stockholder approval.

- Amending the certificate of incorporation or bylaws
- Granting or transferring equity (this includes all issuances of securities, including stock, stock options, convertible promissory notes and warrants)
- Adopting or amending employee equity and benefit plans
- Hiring or firing senior officers
- Entering into employment agreements, or amending the terms of employment, for senior officers
- Borrowing or lending money
- Adopting an annual budget
- Entering into agreements of material importance to the company (e.g., financing agreements, material license agreements and leases)

### BEST PRACTICES FOR BOARD APPROVAL

What are the next steps after a company has established that it is planning to engage in an activity that requires board approval?

Board approvals may be accomplished in one of two ways:

- At a duly called meeting in person or by phone/videoconference. The process for calling a meeting is typically included in the company's bylaws, which describe who is allowed to call a meeting, the allowable methods for providing notice (e.g., in person or by email) and how far in advance of the meeting notice of the meeting must be delivered.
- By unanimous written consent (approved and delivered by all directors).

It is important to maintain a written record of the approval. Minutes from a board meeting should document the actions that were approved by the board and be approved by the board at a subsequent meeting and then signed by the secretary and filed in the company's minute books. All directors must sign and date written consents (or approve them by email if allowed under the company's bylaws). A copy of the written consent (including any email approvals received) should be filed in the company's minute books. The written consent filed in the company's minute books must also include any attachments that were included with the resolutions approved (i.e., copies of agreements approved).

Companies should work closely with legal counsel to identify which actions require board approval if uncertainties arise. In addition, companies should maintain comprehensive documentation of all approvals, whether in minutes of board meetings or actions taken by unanimous written consent. By following these best practices, companies can help establish good corporate record keeping.

# HOW TO RUN AN EFFECTIVE BOARD MEETING

An effective board meeting is a highly organized team effort potentially involving every department in a company, its management and the directors themselves. These meetings are critical to the company's operation, and care must be taken to ensure they are as effective — and efficient — as possible.

## 1. UNDERSTAND THE ROLE OF THE BOARD OF DIRECTORS AND THE MEETINGS

Both public and private company boards of directors provide oversight and advise company management on strategy and operations.

Directors owe fiduciary duties to the company and its stockholders. Breaching these duties can result in personal liability to directors. To satisfy these duties, boards must follow a decision-making process that allows for considered deliberation and discussion of all matters before the board. Directors also must avoid conflicts of interest and act in the best interest of the company and its stockholders.

Directors may have a hard time carrying out their fiduciary duties and providing effective advice and oversight if their board meetings are poorly run.

## 2. CONSIDER THE COMPOSITION OF THE BOARD

For most companies, the board of directors established at the time of incorporation is composed of just the founders or a subset of the founders. During this early stage, the directors handle most acts that require board approval by signing a written consent. Though complicated matters, and in particular matters that may implicate a director's fiduciary duty of loyalty to the company (e.g., a transaction between the company and another entity a director controls) are better served with a live or tele-meeting to allow for careful deliberation and discussion.

For a mature company, the board composition is typically revised to include a mix of founders and investors, if applicable, and majority of independent directors. At this point, the board adopts a more formal board meeting schedule and process, and running effective board meetings becomes more critical to the company's success and the directors' protection.

## 3. PLAN YOUR MEETINGS

Time, organization and information are the three key ingredients to an effective meeting. As a best practice, instituting a board meeting process well in advance of a board meeting will help avoid last-minute scrambles and prevent incomplete or incorrect information from going to the board.

- *Time.* The board needs time to review and discuss the matters before it. Allow at least a week for the board to review materials before the board meeting. Not only does this help directors satisfy their fiduciary duties, this also allows for informed follow-up questions or material requests to be made ahead of the meeting. This can help avoid last-minute delays if the board is unable to act on the information initially provided, which could be critical in a time-sensitive transaction or litigation matter.
- *Organization.* The best board meetings are highly organized — both in the weeks leading up to the meeting and in the conduct of the meeting itself.
  - Identify a leader in management that will work with the board's chairperson or a lead director to agree upon a clear agenda ahead of time. See the [Sample Board and Committee Calendars](#) below for a checklist of items to be covered at board and committee meetings throughout the fiscal year.
  - Build a timeline that facilitates the provision of information and materials to the board at least a week ahead of the meeting.
  - Present and organize the information for the board using bound books or binders of hard copy materials indexed to the matters on the agenda. Companies are increasingly using iPads or other means of electronic access in lieu of, or to supplement, the paper versions of such materials. There are several board material management software vendors that can provide secure and seamless electronic access to, and organization of, the volumes of information that are sometimes necessary to send to the board.
  - Keep on schedule while also building in adequate time for discussion. Consider including time for an executive session and/or an outside directors' session as well.
  - Be careful to avoid preventable surprises or confusion on the day of a board meeting.
  - Be mindful of time zones — if directors or management are attending via conference call or video conference from multiple time zones, strive for a time to maximize convenience.

- *Information.* The information sent to the board for their consideration and deliberation should be clearly presented and comprehensive.
  - Executives and employees across the company should ensure all necessary information and materials are prepared and available for the board meeting.
  - Management or relevant non-management employees should be on hand to answer any of the board's questions before, during and after the meeting.
- A specific person should be pre-appointed to take the meeting minutes, to record the process that ensued and decisions made. Failure to properly document the board's deliberation and decisions can impede the board's ability to demonstrate how the board satisfied its fiduciary duties, derailing what otherwise might be the best of processes. See **What to Know About Board Meeting Minutes** for board meeting minutes best practices.

#### **4. UTILIZE COUNSEL**

The company's outside lawyers may also be able to help direct the meeting or advise on the process leading up to and during a meeting. Latham is available to advise on any questions you may have as you prepare for your board meetings.

## SAMPLE BOARD AND COMMITTEE CALENDARS

Federal law, state law and rules issued by the New York Stock Exchange (“**NYSE**”) and the Nasdaq Stock Market (“**Nasdaq**”) impose a variety of substantive requirements on boards of directors and their committees. This sample board calendar summarizes the legal requirements for a U.S. publicly traded company listed on the NYSE or Nasdaq. Please note that where NYSE and Nasdaq rules are the same, only NYSE rules are provided; where there is a significant disparity between NYSE and Nasdaq rules, it is noted. Further, certain board practices, not required by the Nasdaq but generally recommended as a best practice, are also included in this sample calendar. Also provided are sample calendars for the Audit Committee ([Exhibit A](#)), Compensation Committee ([Exhibit B](#)) and Nominating and Corporate Governance Committee ([Exhibit C](#)). Please note that this calendar is only a summary, and you should consult with legal counsel for further and specific guidance on any of the requirements listed below.



GENERAL BOARD MATTERS		Annually	Quarterly	As Necessary
<b><u>Disclosure and Compliance</u></b>				
1.	Review and approve Annual Report on Form 10-K and proxy statement for filing with the Securities and Exchange Commission (“SEC”) and review procedures supporting CEO and CFO certifications regarding Exchange Act reports and internal control over financial reporting.	✓	<input type="checkbox"/>	<input type="checkbox"/>
2.	Review certification of compliance with listing standards.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Review and approve Quarterly Report on Form 10-Q for filing with the SEC, after the Audit Committee reviews the financial statements for such 10-Q.	<input type="checkbox"/>	✓	<input type="checkbox"/>
4.	Adopt resolutions for annual shareholders’ meeting, including setting the record date and meeting date and making board recommendations with regard to ballot items.	✓	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>Board and Committee Composition</u></b>				
1.	Approve nomination of directors for election or re-election at annual meeting of stockholders based upon recommendation of the Nominating and Corporate Governance Committee. <sup>1</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
2.	Review board committee composition and appoint directors as members and chairs of board committees, with input from the Nominating and Corporate Governance Committee.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Receive Nominating and Corporate Governance Committee report and act upon any recommendations relating to director independence standards, criteria and qualifications for board membership, and board and committee calendar for coming year.	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Review completed director and officer questionnaires relating to: <ul style="list-style-type: none"> <li><input type="checkbox"/> director independence</li> <li><input type="checkbox"/> qualification and independence of Audit Committee members, including financial expertise of Audit Committee members and</li> <li><input type="checkbox"/> independence of Compensation Committee and Nominating and Corporate Governance Committee members.</li> </ul>	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>1</sup> NYSE § 303A.04 requires the Nominating and Corporate Governance Committee to either select director nominees, or recommend the board select director nominees. Nasdaq Rule 5605(e)(1) requires a separate nominations committee or nominations to be approved by majority of the board’s independent directors.

5.	Make determinations as to the independence of directors (including for purposes of Audit Committee and Compensation Committee service) and qualification and financial expertise of Audit Committee members. <sup>2</sup>	✓	<input type="checkbox"/>	✓
<b><u>Corporate Governance</u></b>				
1.	Hold an “executive session,” where either (a) the non-management directors or (b) the independent directors of the board regularly meet, without any members of management present. <sup>3</sup>	<input type="checkbox"/>	✓	✓
2.	For independent directors: elect a lead director, if the Chairperson of the Board is not independent.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Approve operating and capital budgets and financing program for coming year.	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Act upon any recommendations of board committees, including those relating to the Company's certificate of incorporation, bylaws, board committee charters, corporate governance guidelines, criteria for selecting directors, code of business conduct and ethics, <sup>4</sup> insider trading policy, related person transaction policy, and form and amount of board and committee compensation.	<input type="checkbox"/>	<input type="checkbox"/>	✓
5.	Receive Audit Committee report on risk management review. <sup>5</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>Other</u></b>				
1.	Review information reporting systems and disclosure controls and procedures, including a report on the operations of the Disclosure Committee, if the Company has established one.	✓	<input type="checkbox"/>	✓
2.	Complete orientation session for newly elected directors.	<input type="checkbox"/>	<input type="checkbox"/>	✓
3.	Discuss plans for director continuing education sessions.	✓	<input type="checkbox"/>	✓

<sup>2</sup> NYSE §§ 303A.01 and 303A.02 require that the full board have a majority of independent directors. Dodd-Frank § 952 and NYSE § 303A.05(a) require that the Compensation Committee be composed entirely of independent directors; NYSE §§ 303A.04(a) requires that the Nominating and Corporate Governance Committee be composed entirely of independent directors, and NYSE §§ 303A.07(a) requires the same of the Audit Committee. Nasdaq rules do not require that a Company have a separate nominations committee, but require that certain nominating decisions be made by a majority of independent directors if no nominations committee exists.

<sup>3</sup> NYSE § 303A.03 requires that either the non-management directors or the independent directors regularly hold executive sessions. Nasdaq Rule 5605(b)(2) requires that independent directors hold at least two executive sessions per year.

<sup>4</sup> NYSE § 303A.10 requires companies to adopt and disclose a code of business conduct and ethics for directors, officers, and employees. Nasdaq Rule 5610 requires a similar code of conduct that complies with SOX § 406.

<sup>5</sup> NYSE § 303A.07 requires the Audit Committee to discuss policies with respect to risk assessment and risk management and report to the board on such activities. Nasdaq rules do not require such specific discussion but do require general audit committee oversight over auditing concerns.

4.	Succession planning: <ul style="list-style-type: none"><li><input type="checkbox"/> Evaluate the company's succession plans upon the Chief Executive Officer's retirement and in the event of an unexpected occurrence; and</li><li><input type="checkbox"/> Review the performance of the Chief Executive Officer.</li></ul>	✓	<input type="checkbox"/>	<input type="checkbox"/>
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## EXHIBIT A

## SAMPLE AUDIT COMMITTEE CALENDAR

AUDIT COMMITTEE		Annually	Quarterly	As Necessary
<u>Disclosure and Corporate Governance</u>				
1.	Meet to review Annual Report on Form 10-K and Quarterly Reports on Form 10-Q, including management's certifications of annual reports as well as Management's Discussion and Analysis <sup>6</sup> and how reported results compare to projected plan. Determine whether to recommend to the board that the audited financial statements be included in the Company's Annual Report on Form 10-K. Meet separately with management, with the internal auditor (or other personnel responsible for the internal audit function) and with the independent auditor.	✓	✓	<input type="checkbox"/>
2.	Discuss earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies. <sup>7</sup>	<input type="checkbox"/>	✓	✓
3.	Review significant new or changed accounting principles (or significant changes in the application thereof) and financial reporting requirements. <sup>8</sup>	<input type="checkbox"/>	<input type="checkbox"/>	✓
4.	Discuss proposed significant, complex, and/or unusual transactions, the business rationale, approval, and monitoring of such transactions, and their potential effect on the financial statements.	<input type="checkbox"/>	<input type="checkbox"/>	✓
5.	Review and approve each related party transaction. <sup>9</sup>	<input type="checkbox"/>	<input type="checkbox"/>	✓
6.	Review and discuss any significant deficiencies and material weaknesses in internal controls and the adequacy of management's plans for remediation and any special audit steps adopted in light of any material control deficiencies. Review disclosures related to material weaknesses, if any are noted. <sup>10</sup>	<input type="checkbox"/>	✓	<input type="checkbox"/>

<sup>6</sup> NYSE § 303A.07(b)(iii)(B) requires the Audit Committee to meet to review and discuss the Company's annual and quarterly financial statements with management and the independent auditor, including reviewing the "Management's Discussion and Analysis" section. Nasdaq rules do not specifically require this, but generally require oversight of the accounting and financial reporting processes, as well as audits of the financial statements, of the Company.

<sup>7</sup> NYSE § 303A.07(b)(iii)(C) requires that the Audit Committee discuss this information. Nasdaq rules do not specifically require this discussion.

<sup>8</sup> General Commentary to NYSE § 303A.07(b) requires the Audit Committee to monitor such accounting and financial reporting principles. Nasdaq rules do not specifically require this discussion.

<sup>9</sup> Nasdaq Rule 5630 requires that the Audit Committee or another independent body of the board review and approve related party transactions. NYSE § 314.00 recommends that the Audit Committee or "another comparable body" do so.

<sup>10</sup> NYSE § 303A.07(b)(iii)(H) requires that the AC review such deficiencies. Nasdaq rules do not specifically require this review.

7.	Prepare and deliver the Audit Committee Report with respect to the audited financial statements for inclusion in the Company's proxy statement.	✓	<input type="checkbox"/>	<input type="checkbox"/>
8.	Review antifraud programs and controls at the Company.	✓	<input type="checkbox"/>	<input type="checkbox"/>
9.	Assess the risk of material misstatement due to fraud and how management has responded to those risks.	✓	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>Relationship with Independent Auditors and/or Management</u></b>				
1.	Discuss critical accounting policies and all material alternative accounting methods that management has discussed with the independent registered public accountants and review the critical accounting policy report concerning such accounting policies and methods.	✓	<input type="checkbox"/>	✓
2.	Review and discuss significant accounting estimates and material issues from quality reviews, inquiries, and inspections and any steps taken to deal with such issues.	✓	<input type="checkbox"/>	✓
3.	Discuss with management the Company's policies with respect to risk assessment and risk management, the Company's risk exposures, and the actions management has taken to limit, monitor or control such exposures. <sup>11</sup>	✓	<input type="checkbox"/>	✓
4.	Hold separate executive sessions with each of (a) independent registered public accountants, (b) management, and (c) internal auditors. <sup>12</sup>	<input type="checkbox"/>	✓	<input type="checkbox"/>
5.	Review the audit engagement letter and discuss any significant issues that the auditor discussed with management in connection with the audit firm's appointment or retention. Evaluate qualifications, performance, and independence of auditors and select independent auditor for current year, and approve audit fees.	✓	<input type="checkbox"/>	✓
6.	Obtain and review the internal auditor's report(s) on the auditing firm's internal quality control procedures and material issues from the reviews, inquiries, and inspections and any steps taken to deal with such issues, and all relationships and services between the auditing firm and the Company. <sup>13</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
7.	Review and discuss with the auditor the matters required to be discussed by the Statement on Auditing Standards No. 1301 including the auditor's responsibilities under generally accepted auditing standards, an overview of the planned scope and timing of the audit, and significant findings from the audit.	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>11</sup> NYSE § 303A.07(b)(iii)(D) requires these discussions. Nasdaq rules do not specifically require this discussion.

<sup>12</sup> NYSE § 303A.07(b)(iii)(E) requires these periodical executive sessions. Nasdaq rules do not require these specific executive sessions.

<sup>13</sup> Together, NYSE § 303A.07(c) and NYSE § 303A.07(b)(iii)(E)-(F) require that a Company have an internal audit function, and that the Audit Committee review and discuss its responsibilities, budget and staffing. Nasdaq rules do not require such specific review, but do require general oversight over internal accounting controls.

8.	Review a summary of unadjusted audit differences and adjustments resulting from the quarterly review, and any other material written communications that the independent registered public accountants discussed with management.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
9.	Review and discuss with the auditor any difficulties encountered during the audit (including any restrictions on the scope of the work or on access to required information or any significant disagreements with management and management's responses to such matters). <sup>14</sup>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10.	Consider plan for audit partner rotation to comply with SEC independence rules and confirm compliance by independent auditor with partner rotation requirements.	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
11.	Pre-approve all audit and non-audit services (subject to limited exceptions such as delegation to the Audit Committee Chair) and, if applicable, consider whether the independent auditor's provision of any non-audit services to the Company is compatible with maintaining the independence of the independent auditor.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
12.	Obtain assurances that the independent auditor has provided all notices of illegal acts.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13.	Obtain and review a report prepared by the independent auditor describing (i) the auditing firm's internal quality-control procedures and (ii) any material issues raised by the most recent internal quality-control review, or peer review, of the auditing firm, or by any inquiry or investigation by governmental or professional authorities within the preceding five years relating to any independent audit conducted by the auditing firm, and any steps taken to deal with any such issues and (iii) all relationships and services between the independent auditor and the Company in order to assess the independent auditors. <sup>15</sup>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14.	Obtain, review and discuss a written statement from the independent auditor delineating all relationships between the independent auditor and the Company.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15.	Report to the board (i) any material issues that arise with respect to the Audit Committee's performance of its responsibilities, (ii) any issues that arise with respect to the quality or integrity of the Company's financial statements, (iii) the Company's compliance with legal or regulatory requirements, (iv) the performance and independence of the Company's independent auditor, (v) the performance of the Company's internal audit function, or any other matter the Audit Committee determines is necessary or advisable to report to the board.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
16.	Review and investigate any complaints received regarding accounting, internal accounting controls or auditing matters, including whistleblower information, and periodically report to the board regarding such investigations and establish and updated procedures for the anonymous receipt, retention and treatment of such information. Establish and update	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

<sup>14</sup> NYSE § 303A.07(b)(iii)(F) requires this review and suggests that the Audit Committee additionally review any accounting adjustments that were noted or proposed by the auditor but were "passed" (as immaterial or otherwise); any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement; and any "management" or "internal control" letter issued, or proposed to be issued, by the audit firm to the Company. Nasdaq rules do not specifically require this review.

<sup>15</sup> NYSE § 303A.07(b)(iii)(A) requires the Audit Committee to review this report. Nasdaq rules do not specifically require this report, but require general and direct oversight of the Company's independent auditor.



	procedures for the confidential and anonymous submission by employees regarding questionable accounting or auditing matters.			
17.	Set forth clear hiring policies for employees or former employees of the Company's independent auditor.	✓	<input type="checkbox"/>	<input type="checkbox"/>
18.	Discuss with management and the independent auditor any correspondence from or with regulators or governmental agencies, any employee complaints or any published reports that raise material issues regarding the Company's financial statements, financial reporting process, accounting policies or internal audit function.	<input type="checkbox"/>	<input type="checkbox"/>	✓
<b><u>Other</u></b>				
1.	Report regularly to the board regarding the activities of the Audit Committee. <sup>16</sup>	<input type="checkbox"/>	✓	✓
2.	Review Audit Committee Charter and recommend any proposed changes to the board.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Hold executive session of Audit Committee members.	<input type="checkbox"/>	✓	<input type="checkbox"/>
4.	Evaluate effectiveness of Audit Committee and its members (i.e., self-evaluation) and provide written material from evaluation to board. <sup>17</sup> Evaluate business relationships and independence of members in relation to the Company.	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>16</sup> NYSE § 303A.07(b) and Nasdaq Rule 5605(c)(1) set forth requirements regarding the Audit Committee charter.

<sup>17</sup> NYSE § 303A.07(b)(ii) requires this annual self-evaluation. Nasdaq rules do not specifically require this self-evaluation.

## EXHIBIT B

## SAMPLE COMPENSATION COMMITTEE CALENDAR

COMPENSATION COMMITTEE		Annually	Quarterly	As Necessary
<b><u>Compensation Decisions</u></b>				
1.	Review the Company's executive compensation programs and determine whether they remain effective to attract, motivate and retain executive officers and other key personnel.	✓	<input type="checkbox"/>	✓
2.	Meet with senior risk officers to discuss the Company's compensation policies and practices for employees as they relate to risk management and risk-taking incentives.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Review and make recommendations to the board regarding the corporate goals and objectives relevant to the Executive Chairman and the CEO. Evaluate the Executive Chairman's and CEO's performance in light of goals and objectives, determine and approve the compensation of the Executive Chairman and the CEO. If not all members of the Committee are non-employee directors, the equity or equity-based portion of the compensation shall be approved by the full board. <sup>18</sup> The Section 16 Subcommittee, if created, shall review and set the compensation of the executive officers other than the CEO.	✓	<input type="checkbox"/>	✓
4.	Establish performance goals, approve any grant or award to the named executive officers that is intended to qualify for the performance-based compensation exemption from the limitations on deductibility of executive compensation imposed by Section 162(m) of the Internal Revenue Code (the "IRC").	✓	<input type="checkbox"/>	<input type="checkbox"/>
5.	Review and approve the following with respect to the executive officers of the Company: (a) the annual base salary amount, (b) special bonus arrangements, if any, (c) any long-term incentive compensation (including cash-based and equity-based awards and opportunities), (d) any employment agreements, severance arrangements, and change in control and similar agreements or provisions, and any amendments thereto, and (e) any perquisites or other supplemental benefits, provided to such persons during and after employment with the Company.	✓	<input type="checkbox"/>	<input type="checkbox"/>
6.	Implement the Company's incentive compensation and equity-based plans in which the CEO, executive officers and other employees of the Company and its subsidiaries participate, including: (a) approving option grants and restricted stock or other awards, (b) interpreting the plans, (c) determining rules and regulations relating to the plans, (d) modifying or canceling existing grants or awards, and (e) imposing limitations, restrictions and conditions upon any grant or award as the Compensation Committee deems necessary or advisable.	✓	<input type="checkbox"/>	✓
<b><u>Compliance and Disclosure</u></b>				

<sup>18</sup> NYSE § 303A.05(b)(i)(A) requires the Compensation Committee to perform these functions. Nasdaq rules do not specify these functions, but generally make the Compensation Committee responsible for executive compensation.

1.	Monitor the Company's compliance with applicable laws and regulations affecting compensation and benefits matters, including overseeing compliance with Sarbanes-Oxley Act requirements relating to 401(k) plans and loans to directors and officers and overseeing compliance with NYSE rules regarding shareholder approval of equity-based compensation plans. <sup>19</sup>	✓	<input type="checkbox"/>	✓
2.	Review and approve retention of compensation consultants and other outside advisors, including fees for such consultants, and draft proxy statement disclosure regarding such consultants if necessary.	✓	<input type="checkbox"/>	✓
3.	Review and approve policies regarding the independence of compensation consultants.	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Review and discuss the Compensation Discussion and Analysis (the "CD&A") with the Company's management and determine whether to recommend to the board that the CD&A be included in the Company's appropriate filing.	✓	<input type="checkbox"/>	<input type="checkbox"/>
5.	Prepare an annual Compensation Committee Report, as required by the Securities and Exchange Commission, for inclusion in the Company's annual proxy statement.	✓	<input type="checkbox"/>	<input type="checkbox"/>
<b><u>Other</u></b>				
1.	Report regularly to the board regarding the activities of the Compensation Committee.	<input type="checkbox"/>	✓	✓
2.	Review the Compensation Committee charter and recommend any proposed changes to the board.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Conduct annual Compensation Committee self-evaluation. <sup>20</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>19</sup> NYSE 303A.08 requires a shareholder vote approving all equity-based compensation plans, except for certain employment inducement awards, grants, and plans, which must be approved by either the Compensation Committee or a majority of the Company's independent directors. Nasdaq rules do not require this vote.

<sup>20</sup> NYSE §303A.05(b)(ii) requires this annual self-evaluation. Nasdaq rules do not.

## EXHIBIT C

## SAMPLE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE CALENDAR

NOMINATING AND CORPORATE GOVERNANCE COMMITTEE		Annually	Quarterly	As Necessary
<b><u>Board Membership</u></b>				
1.	Review the performance, qualifications, and independence of incumbent directors and other director candidates, and consider the results of such evaluation when identifying and recommending to the full board candidates for election or re-election to the board.	✓	<input type="checkbox"/>	<input type="checkbox"/>
2.	Recommend the nominees for election to the board at the annual meeting of the shareholders.	✓	<input type="checkbox"/>	<input type="checkbox"/>
3.	Review with the board, on an annual basis, the appropriate characteristics, skills and experience required for the board as a whole and its individual members and update "Director Qualification Standards and Additional Selection Criteria" in the Corporate Governance Guidelines as needed.	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Review policy (if any) regarding diversity in the identification of nominees for directors and assess the effectiveness of such policy.	✓	<input type="checkbox"/>	<input type="checkbox"/>
5.	Develop an orientation program for new directors, including background material on the Company and its business, and a continuing education program for all directors. <sup>21</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
6.	Recommend candidate committee members and chairs to the board. <sup>22</sup>			
<b><u>Corporate Governance</u></b>				
1.	Review draft of governance-related disclosures for proxy statement including disclosure related to (a) the experience, qualifications, skills and attributes that led to the conclusion that the nominees or directors should serve or continue serving as directors, (b) the consideration of diversity in the process by which director candidates are identified, and (c) the board's administration of its risk oversight function.	✓	<input type="checkbox"/>	<input type="checkbox"/>
2.	Review board leadership structure and draft proxy statement disclosure regarding why such structure is appropriate, including the reasons why the Company has the same or different persons serving as Chairman of the Board and CEO, and the role of the lead independent director, if any.	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>21</sup> NYSE § 303A.09 requires director orientation and continuing education. Nasdaq rules do not require such orientation or continuing education.

<sup>22</sup> NYSE §303A.04(b) generally imposes this responsibility on the Nominating and Corporate Governance Committee. Nasdaq rules do not place this responsibility on any nominations committee or the independent directors generally.

3.	Review policies and procedures for receipt of shareholder recommendations of candidates for nomination by the board.	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Review the board committee structure and recommend to the board for its approval directors to serve as members of each committee.	✓	<input type="checkbox"/>	<input type="checkbox"/>
5.	Review and reassess the adequacy of the Corporate Governance Guidelines and recommend any proposed changes to the board for approval. <sup>23</sup>	<input type="checkbox"/>	<input type="checkbox"/>	✓
6.	Review shareholder proposals, nominations and/or recommendations.	<input type="checkbox"/>	<input type="checkbox"/>	✓
7.	Consider shareholder proposals and voting results from prior proxy season and anticipate any shareholder engagement needed on governance matters.	✓	<input type="checkbox"/>	<input type="checkbox"/>
8.	Consider other corporate governance matters, including, but not limited to, the Company's certificate of incorporation, bylaws, and the charters of the other board committees and make recommendations to the board.	✓	<input type="checkbox"/>	<input type="checkbox"/>
9.	Set performance goals for the board and committees. <sup>24</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
10.	Evaluate and approve or reject requests for waiver of the code of business conduct and ethics. <sup>25</sup>	<input type="checkbox"/>	<input type="checkbox"/>	✓
11.	Review Director and Officer ("D&O") insurance coverage, indemnification provisions and policies relating to advancement of expenses; review developments in law regarding D&O insurance, exculpatory charter provisions and indemnification or advancement of expenses, and make recommendations to the board.			
<b><u>Other</u></b>				
1.	Report regularly to the board regarding the activities of the Nominating and Corporate Governance Committee.	<input type="checkbox"/>	✓	✓
2.	Review Nominating and Corporate Governance Committee charter and recommend any proposed changes to the full board. <sup>26</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>

<sup>23</sup> NYSE § 303A.09 requires Companies to adopt and disclose corporate governance guidelines. Nasdaq rules do not require such guidelines.

<sup>24</sup> NYSE § 303A.09 requires an annual performance evaluation of the full board; the Nominating and Corporate Governance Committee would be a logical committee to coordinate this evaluation. Nasdaq rules require no such performance evaluation.

<sup>25</sup> NYSE § 303A.10 provides that any waiver of the code for executive officers or directors may be made only by the board or a board committee; the Nominating and Corporate Governance Committee is a logical committee to have this authority. Nasdaq Rule 5610 provides that such waivers must be approved by the board.

<sup>26</sup> NYSE § 303A.04(b) requires that the Nominating and Corporate Governance Committee have a written charter. Nasdaq Rule 5605(e) requires a Company to have a formal written charter or board resolution addressing the director nominations process and related matters under federal securities laws.

3.	Oversee the annual self-evaluations of the board and management. <sup>27</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>
4.	Conduct annual Nominating and Corporate Governance Committee self-evaluation. <sup>28</sup>	✓	<input type="checkbox"/>	<input type="checkbox"/>

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<sup>27</sup> NYSE §§ 303A.09, 303A.04(b)(ii), §303A.05(b)(ii), and NYSE § 303A.07(b)(ii) require self-evaluations by the full board and the three required committees. **Nasdaq** rules do not require such self-evaluations.

<sup>28</sup> NYSE § 303A.04(b)(ii) requires annual self-evaluation by the Nominating and Corporate Governance Committee. **Nasdaq** rules require no such evaluation



## WHAT TO KNOW ABOUT BOARD MEETING MINUTES

Minutes serve as the permanent record of a meeting of the board or one of its committees. Rather than providing multiple records of what occurred at a given meeting, the minutes, once approved by the board, serve as the official record. They record what topics were discussed and what decisions were reached and give management the authority to act. When drafted properly, minutes can serve as a shield against liability. Below are some matters companies should keep in mind when drafting and reviewing meeting minutes.

### WHAT SHOULD MEETING MINUTES COVER?

The basic features of meeting minutes are the date, time, location and attendees, followed by a record of the board's actions, including brief descriptions of any presentations or topics discussed, specific resolutions adopted, and finally, general resolutions.

In the opening paragraph, state what time the meeting began, and which attendees were present in person versus those present via telephone conference. Make note of the presence of a quorum and the titles of any people attending the meeting at the board's request (for example, a lawyer, an officer or an auditor).

Often, a board's first action at a meeting is to approve the previous meeting's minutes, which should be distributed in advance of the meeting to the board members. This gives each board member an opportunity to review the minutes and discuss any corrections prior to approval.

See the [Minutes Drafting Checklist](#) below for a detailed list of items that are often addressed in minutes.

### ASSUME MINUTES WILL BE SEEN BY THIRD PARTIES

Minutes are official records, so they should reflect an assumption that they may receive external scrutiny. Stockholders, regulators, litigants and others may get to see the minutes under some circumstances. Minutes should anticipate each of the different audiences that might review them.

### STRIKE THE BALANCE BETWEEN TOO MUCH AND TOO LITTLE

Minutes should provide a basic record of what happened at a meeting, but should not read like a transcript. For example: (i) who gave a presentation, (ii) did a "discussion ensue" and (iii) were "questions asked and answered?" Be careful of recording everything that happened at a meeting in great detail. Minutes are not supposed to be verbatim and including too much detail may put the board and the company at risk. However, care should be taken to include enough detail so that it is clear that the board adequately considered one or more matters.

The amount of detail included will typically depend on the importance of the action taken. For major decisions, like significant transactions, the minutes should provide enough description of the process by which a decision was reached to show that directors met their fiduciary duties. This type of procedural record should focus on procedural steps rather than substantive information. For example, they should note the topics raised and confirm that discussion occurred, but not necessarily summarize the content of the discussion itself.

See the [Before and After for Drafting Minutes](#) chart below for an illustration of how much detail minutes should include.

### AVOID EMOTIONAL STATEMENTS

Avoid non-factual statements such as "heated discussion" or that someone "seemed upset." Minutes are, first and foremost, a factual record of the events of a meeting.

### ADOPTING RESOLUTIONS

If a board member calls for a vote or the board otherwise needs to formally approve a particular matter, the board should adopt a resolution or "resolve" to act. For example, after discussing the new budget, one board member might call for a vote to approve the budget. Once approved, the decision is called a "resolution." Thus, the minutes would say "Resolved, that the budget provided to the board in advance of the meeting is unanimously approved." (Of course, if board members vote against the resolution, be sure to include a description of the votes received for and against any action.)

In most cases, the board knows the list of actions it is going to consider at a board meeting. As a result, as a best practice, prepare, or ask the company's lawyers to help prepare a set of resolutions for the board's consideration in advance of the meeting. By preparing, the board can have these resolutions in front of them as they make their decision. Following board discussion and consideration of draft resolutions, appropriate changes (if any) can be made prior to their adoption. If one or more board members have a conflict of interest with respect to any resolutions being considered, the minutes should specifically reflect that this conflict was disclosed to the other directors and that the resolution was approved by a majority of

the disinterested directors.

One of the final acts a board should take at a meeting is to adopt general resolutions. These resolutions give management the authority to act on the matters decided at the meeting, just in case the other specific resolutions end up being insufficient. General resolutions can also ratify actions that management has already taken in advance of the meeting, such as starting negotiations with a new key employee.

## **SAMPLE MINUTES FORMAT**

### **FASHION, INC.**

#### ***Meeting of the Board of Directors***

A meeting of the Board of Directors (the “**Board**”) of Fashion, Inc. (the “**Company**”) was held via telephone conference on January 1, 2016, beginning at 9:00 a.m., Eastern Time. The following directors, representing a quorum of the members of the Board, participated: Oscar De LaRenta, Carolina Herrera, and Donatella Versace. Also present, at the invitation of the Board, were: Anna Wintour, the Company’s Chief Executive Officer, Nina Garcia, the Company’s Chief Financial Officer, and Annie Associate of Latham & Watkins LLP, counsel to the Company. Board member Ralph Lauren did not participate in the meeting. Ms. Herrera, the Chairman of the Board, presided and Ms. Associate kept the minutes of the meeting.

Ms. Wintour reviewed the agenda of the meeting.

#### ***Approval of Minutes***

Ms. Wintour referred the directors to the minutes of the meeting of the Board that had been provided to the directors in advance of the meeting. After discussion, upon motion duly made and seconded, it was unanimously

***RESOLVED, that the minutes of the meeting of the Board held on December 1, 2015, in the form provided to the directors in advance of this meeting, are hereby approved.***

#### ***Financial Presentation***

Ms. Garcia then directed the Board to the financial presentation that had been provided to the directors in advance of the meeting. Ms. Garcia described the financial results of the last month. Questions were asked and answered.

#### ***Proposal to replace Black with Orange***

Ms. Wintour then described a proposal that the color black be removed from the Company’s clothing lines and replaced with the color orange. A discussion ensued. Upon motion duly made and seconded, a vote was taken. Mr. DeLaRenta and Ms. Herrera voted in favor of the proposal. Ms. Versace voted against the proposal. It is hereby

***RESOLVED, that orange is the new black.***

#### ***Proposal to enter into Commercial Transaction with DLR Corporation***

Ms. Wintour then described a proposal for the Company to enter into a commercial agreement with DLR Corporation.

Ms. Wintour advised the Board that she believed the transaction was in the best interests of the Company and that it would.

## MINUTES DRAFTING CHECKLIST

- Meeting date, location, type of meeting (regular or special)
- Recital of notice having been given or waived
- Start time and adjournment time
- For telephonic meetings, confirmation that all participants could hear each other
- Presence of a quorum
- Presiding officer, list of participants (directors, officers, advisors, guests) and attendance times if some participants attended only a portion of the meeting
- Topics discussed in order of discussion and, as applicable:
  - Names of all presenters
  - Reference materials distributed at or before the meeting, information and reports that directors used or relied upon, and any significant discussions that occurred before the meeting or at prior meetings
  - Directors' reliance on reports, advice or opinions of advisors
  - Description of types of issues discussed, including transaction terms
  - General summary of the substance of lengthy discussions or notation that discussion occurred for shorter discussions tracking the meeting agenda
  - Any recusal or abstention from discussion, due to potential conflict
- Actions taken and the scope of approval or authorization, including any resolutions adopted
- For each vote, how each director voted, noting abstentions, or that vote was unanimous, as applicable
- Whether an executive session was held

## BEFORE AND AFTER FOR DRAFTING MINUTES

Before	After
[NAME] reported on the current status of certain legal matters to which the Company is a party, including the shareholder litigation; and the US Securities and Exchange Commission's (SEC) investigation into possible insider trading violations involving a cybersecurity breach at the company. He noted recent discussions with the SEC at which the SEC encouraged the Company to settle the matter, but he said the SEC has yet to provide additional information regarding its claims against the Company to induce the Company to agree to such a settlement. After responding to questions, [NAME] concluded his remarks.	[NAME] reported on the status of certain legal matters previously reviewed with the members of the Board at the request of legal counsel as summarized in a confidential report drafted at the direction of counsel and provided in a limited distribution to members of the Board. The Board reviewed the materials and discussed these matters with [NAME] and counsel. In response to questions from members of the Board, [NAME] outlined and discussed steps that have been taken and would be taken in the future in response to these matters. Further discussion ensued. The Board directed [NAME] to continue to apprise the Board of significant updates on these matters and related issues.
Using computer slides and written materials, [NAME] provided a financial update, including estimates for the second quarter results and forecasted ranges for the full year. She began by describing the Company's preliminary financial results for the second quarter based on current estimates. She remarked that the Company's second quarter forecast is above the guidance provided at the October Board meeting due to the successful launch of a new drug and better-than-expected clinical trial results. Concerning the fourth quarter results, she noted that, year-over-year, net sales were flat, net income was up 15%, and earnings per share (EPS) were up \$0.15 or 7%. She noted various factors . . . . She reviewed net sales, operating margin and percent, gross and net income, EPS, and shares outstanding, each as compared to the second quarter of 2017, discussed trends at each of the businesses and analysts' expectations for the Company's second quarter results . . . .	Based upon materials previously provided to members of the Board, [NAME] provided the Board with the preliminary financial results for the second quarter 2019 based on the Company's current estimates.
He said the committee also received a presentation from [NAME] and [NAME] on the Company's property acquisition pipeline. He recommended that the presentation document be made available to the entire Board, and suggested that [NAME] make the presentation to the entire Board in the future. He noted that management continues to refine its efforts regarding the best method to identify/evaluate the Company's acquisition opportunities . . . .	Based upon materials previously provided to members of the Committee, [NAME] and [NAME] presented a report on the current status of the Company's acquisition pipeline.

# 8 THINGS TO THINK ABOUT FOR AUDIT, COMPENSATION AND NOMINATING AND CORPORATE GOVERNANCE COMMITTEES

Committees are critical in helping a board of directors meet the many obligations that come with overseeing a public company. Federal law and stock exchange rules set standards and qualifications with which public company board committees must comply. Here are 8 things companies should keep in mind when thinking about audit, compensation, and nominating and corporate governance committees:

## 1. WHAT ARE THE PRIMARY RESPONSIBILITIES OF THE AUDIT COMMITTEE?

- Approve the auditor engagement letter, services and fees.
- Review quarterly auditor and accounting complaint reports.
- Review and approve related party transactions.
- Review and approve periodic disclosures (Forms 10-K, 10-Q), quarterly earnings releases and proxy materials.
- Review legal issues with management.
- Review company code of business conduct and ethics.

## 2. WHAT ARE THE PRIMARY RESPONSIBILITIES OF THE COMPENSATION COMMITTEE?

- Approve compensation discussion and analysis disclosure for inclusion in proxy materials.
- Review board stock ownership requirements.
- Perform compensation risk assessments.
- Perform independence assessments of compensation consultants and legal counsel (including conflict of interest assessments).
- Approve the annual engagement of compensation consultants.
- Approve executive compensation and bonuses.
- Review board/committee compensation.
- Review annual equity grants.
- Discuss stockholder advisory say-on-pay votes.

## 3. WHAT ARE THE PRIMARY RESPONSIBILITIES OF THE NOMINATING AND CORPORATE GOVERNANCE COMMITTEE?

- Identify qualified candidates for board vacancies, develop procedures for the board's consideration of them and recommend to the Board director nominees to be considered at annual shareholder meetings.
- Approve director search firm engagement, services and fees.
- Develop corporate governance guidelines and reassess them periodically.
- Assess the expertise and diversity of board membership.
- Oversee self-evaluation processes for directors and officers.
- Perform independence assessments of director candidates and directors.
- Develop and oversee director orientation and training.

Note that while Nasdaq rules generally require independent director oversight of the director nomination process to the extent the company is not a controlled public company, it does not require its listed companies to have a separate nominating committee. Listed company boards may instead select nominees, or recommend nominees for selection by the full board, by a majority vote of independent directors. Boards choosing to follow this approach have adopted a written resolution setting out the director nomination process.

#### 4. WHO CAN SERVE ON EACH COMMITTEES?

##### **Audit committees must meet certain minimum requirements:**

- Consist of at least three directors.
- Each member must satisfy Nasdaq and SEC independence standards for audit committee members.
- Each member must be able to read and understand basic financial statements, including a company's balance sheet, income statement and cash flow statement.
- At least one member must qualify as a "financial expert" under SEC rule.

##### **Compensation committees must meet certain minimum requirements:**

- Consist of at least two directors.
- Each member must satisfy Nasdaq independence standards for compensation committee members, unless the company is a controlled company.

##### **Nominating and corporate governance committees, if established, must meet certain minimum requirements:**

- Each member must satisfy Nasdaq independence standards, unless the company is a controlled company.

Typically, the full board is given the authority to appoint members to each committee and also to remove them, with or without cause.

#### 5. HOW IS FINANCIAL LITERACY DETERMINED FOR AUDIT COMMITTEE MEMBERS?

Nasdaq rules require that all members be able to "read and understand financial statements, including a Company's balance sheet, income statement, and cash flow statement." The breadth of this definition allows companies flexibility in how they choose to measure and assess financial literacy. While some companies choose to set additional objective standards that audit committee members must meet, many make this determination on a case-by-case basis. When assessing financial literacy, it may be helpful to ask if the director can:

- Identify based on the company's financial statements where cash is coming from and where it is going, and whether such cash flows indicate profitability.
- Understand how the balance sheet, income statement and cash flow statement interact with each other.
- Understand how management decisions are reflected in the financial statements.
- Identify "red flags" and use the financial statements to investigate their severity.
- Understand the nature of accounting judgments, how they should be made and how they can reflect the financial statements.

SEC rules require that companies disclose, typically in their annual reports on Form 10-K, whether or not one or more of their audit committee members meet the criteria for an "audit committee financial expert," or "ACFE." If the company does have an ACFE, it must disclose their name and whether or not they are independent. If the Company does not have an ACFE, it must disclose why not. In order to qualify as an ACFE, a board member must:

- Understand accounting principles and financial statements.
- Be able to assess the application of such principles when accounting for estimates, accruals and reserves.
- Have experience with preparing, auditing, analyzing or evaluating financial statements that are of reasonably similar complexity as those of the company.
- Understand internal control over financial reporting.
- Understand audit committee functions.
- Have developed the above abilities and understanding through experience (i) serving as, or supervising, a principal financial officer, principal accounting officer, controller, or other position involving similar functions, (ii) overseeing or assessing the performance of companies or public accountants with respect to financial statements, or (iii) other relevant experience.

Nasdaq requires that listed companies have a financial expert, though their definition is somewhat less stringent than that of an ACFE. Nasdaq requires that at least one member of the audit committee have at least one of:

- Past employment experience in finance or accounting.



- Requisite professional certification in accounting.
- Comparable experience or background resulting in financial sophistication, including service as a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

## 6. BE SURE TO CHECK AND FOLLOW YOUR COMMITTEE CHARTERS

As part of the IPO process, a company puts in place charters for each of its committees which establish such committee's (i) purpose, (ii) composition and membership requirements, (iii) authority, (iv) procedures and meeting conduct, (v) duties and responsibilities, and (vi) power to delegate to subcommittees. Nasdaq rules require that listed companies have charters for their audit and compensation committees, but does not require that a separate nominating committee be established. However, many Nasdaq-listed companies often choose to have a separate nominating and corporate governance committee, which requires the adoption of a charter. Each committee of your board should review its charter at least annually and submit any recommendations for changes they have to the full board for consideration.

## 7. PLAN AND DOCUMENT YOUR COMMITTEE MEETINGS

Committees are often only as effective as their meetings, so it is crucial to plan meetings carefully to maximize productivity and efficiency. Many of the same principles discussed above in [How to Run an Effective Board Meeting](#) are applicable to committee meetings:

- The committee chair should plan and circulate in advance an agenda for the committee meeting so that members can properly prepare for the meeting. See the Sample Audit Committee Agenda below for an example of what such an agenda might look like.
- Any materials to be reviewed or acted on in the committee meeting should be gathered and provided to committee members at least a week in advance.
- Build in time for discussion and try to keep on schedule.
- Invite management members and other participants to the meetings if they are needed to address committee member questions.
- Consult with legal counsel, who may be able to help plan or direct committee meetings.

Similar to board meetings, minutes should be prepared for each committee meeting. The principles discussed above in [What to Know About Board Meeting Minutes](#) apply to committee meeting minutes as well:

- Prepare committee meeting minutes with the assumption that third parties will have access to them.
- Committee meeting minutes should be a summary of what happened at the meeting rather than a transcript of the discussion.
- The level of detail in committee meeting minutes is a balancing act, as too little detail could undermine the minutes' usefulness and too much detail could expose the board to excessive risk. More significant actions should typically have more detail, with the additional detail focused on the procedural steps taken to reach decisions rather than the substance of the discussion.

Committee meeting minutes should be reviewed and approved at each subsequent meeting of the committee.

## 8. THE BOARD MAY SET UP OTHER COMMITTEES AS WELL

In addition to audit, compensation and nominating and corporate governance committees, boards may wish to establish other board committees to help with other aspects of board responsibilities. These committees are not typically required by law or exchange rules, so there is greater flexibility in their authorities and responsibilities. However, the same organizational approaches of developing charters, planning for meetings and preparing minutes should be applied to any additional committees as well.

Other kinds of committees that companies often establish include:

- **Executive Committee:** An executive committee is typically delegated powers from the board to approve actions and make decisions in between board meetings.
- **Disclosure Committee:** Disclosure committees are tasked with establishing procedures for the preparation and review of the public disclosure materials and managing those procedures.
- **Risk Committee:** Risk committees are responsible for establishing and maintaining policies related to the company's risk management processes.

## REFRESHING THE BOARD

As highlighted in recent press coverage and updated proxy voting guidelines, board refreshment is a hot topic. It's a subject that inspires strong feelings and competing perspectives on director tenure and board diversity. Yet these incendiary dialogues scarcely help a board in considering what is best for the company and shareholders. We suggest boards step back and review their composition in light of the company's goals and needs in three areas.

### 1. BOARD SELF-ASSESSMENTS

As part of their regular self-assessment process, public company boards should consider their composition and the unique contributions of each current or prospective director. For example, boards may try to recruit directors with specialized experience, such as in technology or international operations, as well as directors whose experience is not represented or is underrepresented on the board. Indeed, Securities and Exchange Commission regulations require companies to disclose diversity considerations in the director nomination process. Mixing new and longer-tenured directors with different skill sets may add valuable perspectives and knowledge to a board.

### 2. SUCCESSION PLANNING

Increases in director turnover have made succession planning a vitally important board matter. The average age of independent directors has risen over the last decade, and retirement and resignation have become key drivers of recent or pending changes in board composition. Tenure limits, voluntary retirements, and the inability to effectively manage multiple board commitments—i.e., over-boarding—are the most common causes of turnover. Turnover also results when companies implement mandatory retirement policies. Strategically focusing on board composition in advance can aid in weathering turnover situations, which provide an opportunity to refresh the board with much-needed—and desired—experience.

### 3. SHAREHOLDER ENGAGEMENT

Maintaining dialogues with large institutional investors, activist investors, and proxy advisory firms has become imperative for many companies. Activist and institutional shareholders often focus on introducing new perspectives and experiences in the boardroom, with the corresponding view that tenure beyond a certain number of years leads to entrenchment, compromised independence, and insufficient growth. On the other hand, tenure can create valuable institutional knowledge as well as a higher likelihood that these directors will challenge management should the need arise. When communicating with investors on these issues, boards may find it productive to emphasize the value of the company's directors and their process for reviewing both long-standing and prospective directors.

Large institutional investors and proxy advisory firms are also very focused on corporate governance and board issues. They tend to disfavor rigid tenure or age limits while often opposing longer-tenured directors, particularly as they examine independence and succession planning issues. These investors also tend to focus more on diversity and gender. A recent study reports a steadily increasing number of boards with at least one female director, with companies primarily increasing board size to add a female director. Individual states are also getting more involved, either legislatively or through their large pension funds. For example, California recently passed a resolution to encourage its public companies to include a minimum number of female directors, and its pension funds are active in this area for the companies they invest in as well. These constituents also consider the annual board self-evaluation to be critical, and often want to discuss the board's bases for composition decisions.

In all of these areas, a board should develop a carefully considered understanding of their composition and needs, reflecting the board members' unique perspectives and concerns, to facilitate engagement with a company's multiple constituencies and stakeholders, and to proceed both effectively and in the best interests of the company and its shareholders.

