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Boards and Committees

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Board Independence Requirements: Building Compliance

CORE STANDARDS

- Majority of board must be independent
- Audit, compensation, and nominating/corporate governance committees must be fully independent.

IPO TRANSITION RULES

- Newly listed companies receive transition periods to meet board and committee independence requirements, but timing and triggers differ (especially for the audit committee under Rule 10A-3 and exchange rules). Plan early based on NYSE vs. Nasdaq and company facts.
- Generally, one independent director per committee at initial listing, majority independence for each committee within 90 days of listing, and full committee independence and board majority within one year of listing.

SPECIAL CONSIDERATIONS

- Private equity designees may qualify as independent, with specific audit committee rules applying.

Controlled Company Boards: Tailored Governance

DEFINITION

A “Controlled Company” exists when an individual, group, or entity (e.g., voting agreements designating directors or directing votes) holds >50% voting power for director elections.

EXEMPTIONS

- No majority independent board required.
- Independent compensation and nominating/governance committees not mandated.

REQUIREMENT

Must maintain an independent audit committee.

DISCLOSURE

Must report Controlled Company status and basis in the annual proxy statement and/or periodic reports.

Board Composition

SKILLS MATRIX	Evaluate specific experience, qualifications, and skills.
ALIGNMENT	Match attributes to the company's unique business context.
EMERGING FOCUS	Prioritize expertise in AI, technology, cybersecurity, digital assets, human capital, and climate, as appropriate. Certain industries will have specific expertise requirements (e.g., biotech).
BROADER PERSPECTIVE AND CAPACITY	Consider directors' service on other boards.

Committees

- **NYSE Requirement**: Mandatory audit, compensation, and nominating/corporate governance committees.
- **Nasdaq Requirement**: Audit committee plus independent executive compensation oversight.
- **Industry/Risk-Specific Committees**: Disclosure, executive, finance, compliance, risk, AI, technology, ESG (as needed).
- **Documentation**: Each committee must have a governing charter.

Committee Charters / Governance Policies

- Develop and adopt detailed charters for each Board committee
- Develop and adopt general corporate governance policies, such as:
  - Governance Guidelines
  - Code of Conduct
  - Financial Code of Ethics
  - Audit Committee Pre-Approval Policy
  - Whistleblower Policy
  - Related Persons Transactions Policy
  - Stock Ownership & Retention Guidelines
  - Insider Trading Policy
  - Short-Swing Trading and Reporting Policy
  - Regulation FD Policy
  - Document Retention Policy

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Fiduciary Duties

Fiduciary Duties: Guiding Your Leadership

DUTY OF CARE	DUTY OF LOYALTY	DUTY OF GOOD FAITH
Act on an informed basis and with appropriate diligence.	Act in the best interests of the corporation and stockholders; avoid conflicts.	Violated by intentionally disregarding known risks or a knowing failure to apply minimum levels of diligence *DGCL 102(b)(7) exculpation: May limit monetary liability for certain care claims (subject to important exceptions; loyalty/bad faith not exculpable).*

DUTY OF DISCLOSURE In the context of a public transaction, there is also a duty of disclosure

- Duty to disclose fully and fairly all material information within the board's control when it seeks shareholder approval
- The court may also apply a heightened standard of review due to conflicts of interest

Business Judgment Rule: Your Directors' Shield

EMPOWER INFORMED DECISIONS

- **Core Presumption**: Courts assume directors act on an informed basis, in good faith, and in the company's best interests.
- **Key Protections**: Shields from liability unless there's evidence of conflict, fraud, or gross negligence—no second-guessing by courts.
- **Tie to Fiduciary Duties**: Reinforces care, loyalty, and good faith; can reduced litigation risk (D&O coverage depends on policy terms and facts).

THE BUSINESS JUDGMENT RULE PROTECTS DIRECTORS & OFFICERS AGAINST HONEST ERRORS OF JUDGMENT

Periodic Reporting Requirements

Periodic Reporting Requirements

Public companies must file reports with the SEC under the Securities Exchange Act of 1934.

REQUIRED FILINGS

- Annual Reports on Form 10-K, including executive compensation and governance disclosures.
- Quarterly Reports on Form 10-Q.
- Current Reports on Form 8-K.

Form 10-K and Form 10-Q: Deadlines and Details

- Filing deadlines vary by filer status: non-accelerated, accelerated, or large accelerated.
- Newly public companies, typically non-accelerated filers, must file Form 10-K within 90 days and Form 10-Q within 45 days of the fiscal period end.
- EGCs and SRCs benefit from scaled disclosure requirements.

EGC Exemptions: Streamlining Compliance

EXEMPTIONS

- No stockholder advisory votes on executive compensation or golden parachutes (Section 14A(a) and (b)).
- No CEO pay ratio disclosure (Dodd-Frank Section 953(b)(1)).
- Reduced executive compensation disclosure (Item 402 of Regulation S-K), excluding CD&A.
- No auditor attestation of internal controls (Sarbanes-Oxley Section 404(b)); management still assesses effectiveness.

POST-EGC TRANSITION

- EGCs are exempt from say-on-pay / say-on-frequency / say-on-golden-parachute votes while they remain EGCs. After losing EGC status, the company must hold its first say-on-pay vote within one year.

SRCs: More Streamlining

- New issuers often qualify as SRCs with: (i) public float < $250 million, or (ii) annual revenue < $100 million and float < $700 million.
- SRCs benefit from scaled disclosure, overlapping with EGC rules, but have some extra exemptions:
  - No pay ratio (Item 402(u))
  - No pay v. performance (Item 402(v))
  - No quantitative/qualitative market risk disclosures (Item 305)
  - Omit ratio of earnings to fixed charges exhibit (Item 601(b)(12))
- Many EGCs also classified as SRCs typically adopt EGC disclosure standards.

Form 8-K: Timely Event Reporting

REQUIRED SEC FILINGS FOR KEY EVENTS, INCLUDING:

- Change in accountants.
- Director/executive officer departures or elections.
- Material executive compensation plans or contracts.
- Stockholder vote submissions.
- Regulation FD disclosures.
- Cybersecurity Incident disclosures

MOST MUST BE FILED **WITHIN FOUR BUSINESS DAYS** OF THE EVENT –
BUT TIMING MAY VARY AS SOME ITEMS HAVE SPECIFIC TRIGGERS/REQUIREMENTS.

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Reporting Ownership: Section 16 and Schedules 13G/13D

Section 16: Insider Compliance Essentials

INSIDER OBLIGATIONS

(DIRECTORS, OFFICERS, 10% STOCKHOLDERS):

- Report equity ownership via Forms 3, 4, and 5 with the SEC.
- File Form 4 within two business days of any transaction (Form 3 filed at IPO; subsequent trades on Form 4).

COMPANY RESPONSIBILITIES

- Post Forms 3, 4, and 5 on website by end of business day after filing (or provide hyperlink to EDGAR).
- Maintain postings for 12 months, either directly or via hyperlink.

TRADING RULES

- Disgorge short-swing profits from share trades.
- Prohibit short sales of shares.

Beneficial Ownership

- SEC rules determine beneficial ownership, potentially exceeding record ownership for Section 16 insiders.
- Voting or investment power over securities is a primary factor in ownership assessment.
- Beneficial ownership, for reporting and short-swing profit liability, hinges on the insider's direct or indirect financial interest and ability to profit from trades.

Short Swing Profits

SECTION 16(B)

- Insiders must return short-swing profits from buying and selling (or selling and buying) company shares within six months.

LIABILITY

- Strict, requiring no proof of insider information use.

ENFORCEMENT

- Typically pursued by stockholders, though the company may act.

EXEMPTION

- Transactions under employee benefit plans are exempt if approved by the board or a committee.

Schedules 13G and 13D

SCHEDULE 13D (ACTIVIST)

- **Initial filing deadline** – within **5 business days** of acquiring beneficial ownership of > 5%
- **Amendment trigger** – a "material change", including a 1% or greater change in holdings or a change in intent
- **Amendment deadline** – within **2 business days** after a material change

SCHEDULE 13G (PASSIVE/QII/EXEMPT)

- **Initial filing deadline**
  - **QII/Exempt**: within **45 days after the quarter-end** in which beneficial ownership > 5%
  - **Passive**: within **5 business days after the month end** in which beneficial ownership > 5%
- **Amendment trigger** - Any material change in information previously reported
- **Amendment deadline** - 45 days after the quarter-end; **accelerated deadlines** for > 10% ownership or 5% + change (accelerated amendment generally due within 2 business days after month-end)

General Disclosure Requirements

Materiality: Defining Investor Relevance

DEFINITION (RULE 405, SECURITIES ACT)	Information a reasonable investor would likely deem significant when deciding to buy a registered security.
STANDARD	Requires a substantial likelihood of altering the "total mix" of available information (but does not require an investor making a change in investment or voting decisions).
GUIDANCE	Some disclosures include built-in materiality thresholds, but companies should avoid rigid, formulaic assessments.

No General Duty to Disclose

Public companies have no continuous, general duty to disclose material information beyond required filings (Forms 10-K, 10-Q, 8-K) absent insider trading or prior inaccuracies.

SPECIFIC OBLIGATIONS ARISE WHEN:

- Insiders selectively share material nonpublic information.
- The company trades its own stock.
- Previously disclosed information becomes inaccurate or outdated.

Duty to Correct: Ensuring Accuracy

- Companies must correct prior statements proven false or misleading when made.
- No duty applies if the original statement was vague, indefinite, or new information is unreliable.
- Courts rarely enforce correction for forward-looking statements unless based on inaccurate historical data.

Duty to Update: Dealing with Evolving Facts

- **Trigger**: Arises when a clear, factual, forward-looking statement with ongoing investor relevance becomes misleading due to subsequent events.
- **Key Factors**: Statement remains "alive" (relied upon by reasonable investors) and involves a fundamental issuer change.
- **Exceptions**: No duty for ordinary financial projections, vague statements/puffery, or historical facts.

EXAMPLE

SEC v. Walgreens (September 2018)

- Company and management learned that projections were 20% off, but CEO and CFO repeatedly re-affirmed guidance without disclosing heightened risks of achieving such results.
- SEC fined Walgreens $34.5 million and CEO and CFO were fined $160,000 each.

Risk Factors: Investor Caution

PURPOSE	PRESENTATION	IMPACT
Cautionary statements addressing risks that could materially impact business, financial condition, or operations, marking investments as speculative.	Featured under a distinct heading in periodic reports or prospectuses, reflecting management's view on potential effects.	Details how materialized risks may influence company performance and the value of investor-held securities.

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Insider Trading

Insider Trading – Rule 10b-5

- **Prohibition**: Insiders cannot trade on company securities with material nonpublic information.
- **Liability Standard**: Rule 10b5-1 holds “possession,” not “use,” of such information as sufficient for liability.
- **Family/Associates**: Presumed to share insider knowledge; insiders should deter their trading during possession periods.
- **Tipping**: Unlawful for insiders to share material nonpublic information with outsiders for trading, or for outsiders to trade on it; avoid external discussions.
- **Misappropriation**: Unlawful for employees to trade another company’s securities using material nonpublic information obtained in breach of duty.

Rule 10b-5 Trading Plans: Safeguarding Insider Trades

- **Purpose**: Mitigates insider trading liability by allowing pre-planned trades during possession of material nonpublic information.
- **Format and Terms**:
  - Written plan established in good faith before possessing material nonpublic information.
  - Specifies timing, price, or volume of trades, executed by a broker or agent.
  - Limitations on multiple overlapping plans (for persons other than issuers).
  - Modifications only under specific conditions.
  - Effective for a set duration, cancellable only per plan terms.
- **Benefits**: Provides affirmative defense against Rule 10b-5 claims if followed strictly.

Rule 10b-5 Trading Plan Conditions: Recent Updates

- **Cooling-Off Period**: Trading may begin only after the later of 90 days after adoption/modification or two business days after disclosure of financial results for the relevant quarter, subject to a maximum of 120 days.
- **Certification**: Insiders must certify good faith and no material nonpublic information at plan inception.
- **Overlapping plans**: Generally restricted, subject to specific rule exceptions; single-trade plans are limited.

Disclosure Obligations: Insider Trading Oversight

QUARTERLY	Disclose directors'/officers' adoption, termination, or modification of Rule 10b5-1 plans, including material terms.
ANNUALLY	Report company insider trading policies and procedures in Form 10-K or proxy statements.
OPTION AWARDS	Disclose timing and awards near material nonpublic information releases.
SECTION 16 FILERS	Report 10b5-1 plan transactions and gift dispositions on Form 4 within two business days.
EXHIBIT REQUIREMENT	File insider trading policies as an exhibit under Item 601 of Regulation S-K.

Company Involvement in 10b5-1 Plans: Key Recommendations

- **Oversight**: Implement robust insider trading policies requiring preclearance and review by legal/compliance teams for good faith and compliance.
- **Plan Review**: Ensure plans adhere to SEC rules (e.g., cooling-off periods, no overlapping plans); verify written terms specify trade details without insider influence.
- **Broker Interaction**: Coordinate with brokers to confirm automated execution; provide clear instructions and monitor adherence.
- **Documentation & Monitoring**: Maintain records of plan adoption/modifications; conduct periodic reviews to prevent misuse.
- **Disclosure Alignment**: Align with quarterly/annual reporting obligations for transparency.

Insider Trading Policies: Essential Safeguards

BLACKOUT PERIODS

Restrict trading for designated personnel.

- **Earnings**: Often starts first business day of last full week before fiscal period end; often ends two trading days post-financial results release. Applies to directors, Section 16 officers, and CFO-designated individuals.
- **Event-Specific**: Imposed as needed (e.g., material transactions like business combinations).

COMPANY BENEFIT PLANS

- Outline permissible transactions.

RULE 10B5-1 PLANS

- Enable pre-planned trades.

PRE-CLEARANCE PROCEDURES

- Require approval for trades.

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Regulation FD

Regulation FD: Ensuring Fair Disclosure

- **Purpose**: Prohibits selective disclosure of material nonpublic information by public companies before public release.
- **Background**: Addresses past favoritism toward analysts and select investors with early information.
- **Requirement**:
  - If CEO, CFO, IR, or spokespersons share material data with brokers, analysts, or shareholders, it must be publicly announced to ensure equity.
  - For unintentional selective disclosure, the issuer must make public disclosure promptly—as soon as reasonably practicable, but no later than 24 hours or the start of the next trading day, whichever is later.
- **Exception**: Disclosure permitted if recipients agree to confidentiality or owe a duty of trust (e.g., attorneys, bankers, auditors).

Material Nonpublic Information

DEFINITION

- Regulation FD lacks a specific “material” definition; deemed significant if a reasonable investor would find it important or it alters the information mix.

NONPUBLIC STATUS

- Applies if information is not broadly available to investors.

BEST PRACTICE

- Implement a robust Regulation FD Policy to guide conduct and ensure compliance.