

ALSTON + BIRD LLP

Securities Law Advisory

November 21, 2003

Final NYSE and Nasdaq Corporate Governance Listing Standards Approved; Comparison Chart Updated

On November 4, 2003, the Securities and Exchange Commission (Commission) approved significant changes to the listing standards of the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) that are intended to enhance corporate governance and bolster investor confidence following a number of well-publicized corporate failures among U.S. public companies.¹ These listing standard changes are the culmination of nearly two years of deliberations among the Commission, NYSE and Nasdaq (including a public comment period) that resulted in at least six separate rulemaking proposals and 16 amendments.²

These listing standards supplement, rather than replace, the corporate governance reforms adopted by the Commission pursuant to the Sarbanes-Oxley Act of 2002. In order to help you understand these new requirements, the following chart compares the corporate governance provisions of the Sarbanes-Oxley Act to the corresponding corporate governance listing standards that have been adopted by the NYSE and Nasdaq. Note that this Advisory updates and replaces our Securities Law Advisory of June 20, 2003, which included a similar analysis and comparison for the listing standards as proposed at that time.

A review of the attached chart reveals a remarkable consistency between the NYSE and Nasdaq listing standards, reflecting the Commission staff's efforts to harmonize, to the greatest extent possible, the two sets of listing standards. Both the NYSE and Nasdaq generally conformed

¹ Self-Regulatory Organizations; New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Changes (SR-NYSE-2002-33 and SR-NASD-2002-141) and Amendments No. 1 thereto; Order Approving Proposed Rule Changes (SR-NASD-2002-77, SR-NASD-2002-80, SR-NASD-2002-138 and SR-NASD-2002-139) and Amendments No. 1 to SR-NASD-2002-80 and SR-NASD-2002-139; and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 to SR-NYSE-2002-33, Amendment Nos. 2, 3, 4 and 5 to SR-NASD-2002-141, Amendment Nos. 2 and 3 to SR-NASD-2002-80, Amendment Nos. 1, 2, and 3 to SR-NASD-2002-138, and Amendment No. 2 to SR-NASD-2002-139, Relating to Corporate Governance, <http://www.sec.gov/rules/sro/34-48745.htm> (Nov. 4, 2003) (the "Final Rules Release").

² For a detailed discussion of the ways in which the final listing standards approved by the Commission differ from the proposed listing standards published for public comment, see the discussion in the Final Rules Release under the heading "IV. Amendments to NYSE and Nasdaq Proposals."

their listing standards to the audit committee composition requirements, compliance dates and transition periods in the Commission's Exchange Act Rule 10A-3, which was adopted pursuant to Section 301 of the Sarbanes-Oxley Act.³ In addition, the NYSE and Nasdaq each modified its rules in certain respects to conform to the standards proposed by the other.

Transition Periods and Effective Dates

Under the rules of both the NYSE and Nasdaq, listed companies (other than foreign private issuers) generally have until the earlier of their first annual meeting after January 15, 2004, or October 31, 2004, to comply with the new standards. However, if a company with a staggered board would be required (other than by virtue of an audit committee composition requirement) to change a director who would not normally stand for election at that annual meeting, that director may continue in office until the next annual meeting, but not later than December 31, 2005. Foreign private issuers generally have until July 31, 2005 to comply.

Companies listing in conjunction with their initial public offering would be permitted to phase in compliance with the board composition requirements consistent with the phase-in schedule permitted pursuant to Exchange Act Rule 10A-3 for audit committees. That is, the independent committees must have one independent member at the time of listing, a majority of independent members within 90 days of listing, and solely independent members within one year of listing. Such companies would be required to meet the majority independent board requirement within one year of listing.

Companies listing upon transfer from another market that has a substantially similar requirement would be afforded the balance of any grace period afforded by the other market. Companies listing upon transfer from another market that does not have a substantially similar requirement would be afforded a grace period of one year from the date of transfer. However, these transition provisions for companies transferring from another market would not apply to the audit committee requirements of Exchange Act Rule 10A-3, unless a transition period is available under that rule.

There are a number of noteworthy exceptions to the foregoing general transition periods. Nasdaq's requirement relating to audit committee approval of related party transactions becomes effective January 15, 2004, and Nasdaq's code of conduct requirement becomes effective May 4, 2004. In addition, the NYSE and Nasdaq requirements for shareholder approval of equity compensation plans or arrangements became effective earlier this year on June 30, 2003.

³ See Final Rule: Standards Relating to Listed Company Audit Committees, Securities Act Rel. No. 33-8220, Exchange Act Rel. No. 34-47654, Investment Co. Act Rel. No. IC-26001, <http://www.sec.gov/rules/final/33-8220.htm> (Apr. 9, 2003); Alston & Bird LLP Securities Law Advisory, "SEC Adopts Final Rules Relating to Listed Company Audit Committees," <http://www.alston.com/articles/Final%20Rules%20Relating%20Audit%20Committees.pdf> (Apr. 16, 2003).

Comparison of New Corporate Governance Listing Standards

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	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
<u>Composition of Board of Directors</u>	No requirement.	<p>Listed companies, other than controlled companies,² limited partnerships, companies in bankruptcy, mutual funds and certain other passive business organizations (§303A), must have a majority of independent directors (§303A.01).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§303A).³</p>	<p>Listed companies, other than controlled companies,⁴ must have a majority of independent directors and identify those directors determined to be independent in their annual proxy statements (or in their Forms 10-K or Forms 20-F if they do not file a proxy statement) (Rule 4350(c)(1)).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).⁵</p> <p>If a company fails to comply with this requirement due to one vacancy, or one director ceases to be independent due to circumstances beyond his reasonable control, the company must regain compliance by the earlier of its next annual meeting or one year from the occurrence of the event that caused the lapse. Companies relying on this grace period must immediately notify Nasdaq (Rule 4350(c)(1)).</p> <p>Companies must provide Nasdaq with prompt notification after any executive officer⁶ becomes aware of any material non-compliance with the board independence or independent committee requirements of Rule 4350 (Rule 4350(m)).</p>

¹ This column also describes certain SEC rules and regulations promulgated under Sarbanes-Oxley.

² A controlled company is a company of which more than 50% of the voting power is held by an individual, group or another company. Controlled companies also are relieved of the responsibility to have nominating/corporate governance and compensation committees. However, all controlled companies must have a minimum three-person audit committee composed entirely of independent directors. The NYSE requires a controlled company relying upon this exemption to disclose in its annual proxy statement (or, if the company does not file an annual proxy statement, in its annual report on Form 10-K) that it is relying on this exemption, that it is a controlled company and the basis for that determination.

³ If a listed company with a classified (i.e., staggered) board would be required to change a director who would not normally stand for election at such annual meeting (and such change is not necessitated by the requirement that audit committees comply with Rule 10A-3 of the Exchange Act), the company may continue such director in office until the second annual meeting after January 15, 2004 but no later than December 31, 2005.

⁴ Controlled companies are defined as companies of which more than 50% of the voting power is held by an individual, group or another company. Controlled companies also are relieved of the responsibility to have nominating/corporate governance and compensation committees. Nasdaq requires a controlled company relying upon the controlled company exemption to disclose in its annual proxy statement (or Form 10-K or 20-F if it does not file a proxy statement) that it is a controlled company and the basis for that determination.

⁵ In the case of an issuer with a staggered board, with the exception of the audit committee requirements, the issuer will have until its second annual meeting after January 15, 2004, but not later than December 31, 2005, to implement all new requirements relating to board composition, if the issuer would be required to change a director who would not normally stand for election at an earlier meeting. Foreign private issuers and small business issuers have until July 31, 2005 to comply.

⁶ Executive officers are those officers covered by Exchange Act Rule 16a-1(f) (IM – 4350 Executive Officers).

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
<u>Definition of Director Independence</u>	No requirement.	<p>For a director to be deemed “independent,” the board of directors must affirmatively determine that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company) (§303A.02(a)).⁷ Listed companies must disclose the basis for this determination in their annual proxy statements (Commentary to §303A.02(a)).⁸ In addition,</p> <ul style="list-style-type: none"> • A director who is an employee, or whose immediate family member⁹ is an executive officer, of the company cannot be independent until three years after the end of such employment relationship (§303A.02(b)(i))¹⁰; • A director who receives, or whose immediate family member receives, more than \$100,000 per year in direct compensation¹¹ from the listed company, cannot be independent until three years after he or she, or the family member, ceases to receive more than \$100,000 per year (§303A.02(b)(ii)); 	<p>The company’s board of directors must make an affirmative determination that a director is independent by determining that the director has no relationships that would interfere with the exercise of independent judgment (IM – 4200 Definition of Independence – Rule 4200(a)(15))¹³; <i>provided, however</i>, the following persons cannot be considered independent:</p> <ul style="list-style-type: none"> • A director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company (Rule 4200(a)(15)(A)); • A director who, or whose family member, accepted in the current or any of the past three fiscal years payments (including political contributions) in excess of \$60,000 from the company or any parent or subsidiary of the company (Rule 4200(a)(15)(B));¹⁴ • A director with any family member¹⁵ who is, or at any time during the past three years was, employed as an executive officer by the company or any parent or subsidiary of the company (Rule 4200(a)(15)(C));

⁷ Because the concern is independence from management, ownership of the company’s stock, even a significant amount of stock, is not by itself a bar to an independence finding.

⁸ This determination may be based on categorical standards that the company adopts and discloses, but a determination that a director who does not meet such standards is nevertheless independent would have to be specifically explained in the proxy statement. If a company does not file an annual proxy statement, the disclosure should be included in the annual report on Form 10-K.

⁹ An immediate family member includes a person’s spouse, parents, children, siblings, parents-in-law, children-in-law, siblings-in-law and anyone (other than domestic employees) who shares such person’s home (General Commentary to Section 303A.02(b)).

¹⁰ Employment as an interim chairman or CEO will not disqualify a director from being independent following that employment.

¹¹ Fees for service as a director or committee member, as well as pension or other deferred compensation payments for prior service (provided such payments are not contingent on continued service), are excluded from the calculation of direct compensation.

¹² Charitable organizations are not considered “companies” for purposes of this rule, provided that a listed company must disclose in its annual proxy statement (or in its annual report on Form 10-K if no annual proxy statement is filed) any charitable contributions made by a listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year exceeded the greater of \$1 million or 2% of such charitable organization’s consolidated gross revenues.

¹³ Ownership of the company’s stock does not by itself preclude a finding of independence (IM – 4200 – Definition of Independence – Rule 4200(a)(15)).

¹⁴ The following are not included in the calculation of payments received: compensation for board or committee service; payments arising solely from investments in the company’s securities; compensation paid to family members who are employees (but not executive officers) of the company, its parent or any of its subsidiaries; benefits under tax-qualified retirement plans or non-discretionary compensation; and loans permitted under Section 13(k) of the Exchange Act (Rule 4200(a)(15)(B)).

¹⁵ A family member is defined as person’s spouse, parents, children, and siblings, whether by blood, marriage or adoption, as well as anyone living in such person’s home (Rule 4200(a)(14)). The “by marriage” requirement is deemed to capture parent, child, and sibling relationships arising by marriage (i.e. “in-laws”) (IM – 4200 Definition of Independence – Rule 4200(a)(15)).

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		<ul style="list-style-type: none"> • A director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the listed company is not independent until three years after the end of the affiliation or the employment or auditing relationship (§303A.02(b)(iii)); • A director is not independent if he, she or a member of his or her immediate family is, or in the past three years has been, employed as an executive officer of another company where any of the listed company’s present executives serve on the compensation committee of the other company (§303A.02(b)(iv)); or • A director who is an executive officer or employee of, or whose immediate family member is an executive officer of, another company that makes payments to or receives payments from the listed company for property or services in an amount that in any single fiscal year exceeds the greater of \$1 million or 2% of the other company’s consolidated gross revenues, is not independent until three years after falling below such threshold (§303A.02(b)(v)).¹² <p>In order to facilitate a smooth transition, the “look-back” provisions will be phased in by applying only a one-year look-back for the first year. The three-year look-backs will begin to apply from and after November 4, 2004 (Transition Rule to §303A.02(b)).</p>	<ul style="list-style-type: none"> • A director who is, or who has a family member who is, a partner, controlling shareholder, or executive officer of any organization to which the company made, or from which the company received, payments for property or services during the current or any of the past three fiscal years, that exceeded the greater of \$200,000 or 5% of the recipient’s consolidated gross revenues for the year in which the payments were made (Rule 4200(a)(15)(D));¹⁶ or • A director who is, or who has a family member who is, employed as an executive officer of another entity where at any time during the current or past three years any of the executive officers of the listed company served on the compensation committee of such other entity (Rule 4200(a)(15)(E)); or • A director who is, or whose family member is, a current partner of the company’s outside auditor, or was a partner or employee of the company’s outside auditor, who worked on the company’s audit at any time during any of the past three years (Rule 4200(a)(15)(F)).

¹⁶ The following are not included in the calculation of payments received: payments arising solely from investments in the company’s securities and payments under non-discretionary charitable contribution programs (Rule 4200(a)(15)(D)).

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
<u>Non-Management Director Executive Sessions</u>	No requirement.	<p>Non-management directors (which may include directors who do not qualify as “independent”) must meet in regularly scheduled executive sessions without management present (§303A.03). The identity of, or process for deciding, the presiding director at each such meeting must be disclosed in the company’s annual proxy statement (or annual report on Form 10-K if no proxy statement is filed) (Commentary to §303A.03). Listed companies also must disclose a method by which the presiding director or the non-management directors as a group may be contacted by interested parties.</p> <p>If the group of non-management directors includes directors who are not independent, an executive session of only independent directors should be held at least once a year (Commentary to §303A.03).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§303A).</p>	<p>Independent directors must regularly meet in executive sessions at which only they are present (Nasdaq “contemplates” that these meetings will be held at least twice a year) (Rule 4350(c)(2)).</p> <p>Listed companies must comply by the earlier of their first annual meeting occurring after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).</p>
<u>Nominating/Corporate Governance Committee</u>	No requirement.	<p>Listed companies must have a nominating/corporate governance committee composed entirely of independent directors. The committee must have and publish a written charter (§303A.04(b)).¹⁷</p> <p>Controlled companies, limited partnerships, companies in bankruptcy, and certain other entities are exempt from this requirement (§303A).</p> <p>Listed companies must include the charter of the nominating/corporate governance committee on their Websites, and their annual reports on Form 10-K must state both that the information is available on their</p>	<p>Director nominees must be selected, or recommended for the Board’s selection, either by a nominating committee comprised solely of independent directors or by a majority of the independent directors (Rule 4350(c)(4)(A)). This requirement does not apply where a third party has a legal right to nominate a director (Rule 4350(c)(4)(D)).</p> <p>Controlled companies also are exempt from this requirement (Rule 4350(c)(5)) as are companies subject to a binding obligation that requires a director nomination structure inconsistent with the new rules that was already in place at the time the rule was approved</p>

¹⁷ The nominating/corporate governance committee charter must address, at a minimum: (i) the committee’s purpose and responsibilities – which, at minimum, must be to: identify individuals qualified to become board members, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; develop and recommend to the board a set of corporate governance principles applicable to the corporation; and oversee the evaluation of the board and management; and (ii) an annual performance evaluation of the committee.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		<p>Websites and available in print to any shareholder who requests it (Commentary to §303A.09). If a company is legally required by contract or otherwise to provide third parties with the ability to nominate directors, the selection and nomination of such directors need not be subject to the nominating committee process.</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§303A).</p>	<p>(Rule 4350(c)(4)(E)).</p> <p>Each listed company also must certify that it has adopted a formal written charter or board resolution addressing the nominations process (Rule 42350(c)(4)(B)).</p> <p>If the nominating committee has at least three members, one non-independent director (who is not an officer or employee or a family member of an officer or employee) may serve on the committee (for no more than two years) if the board, under exceptional and limited circumstances, determines it is in the company's and the shareholders' best interests. The nature of such non-independent director's relationship with the company and the reasons for the board's determination must be disclosed in the next annual proxy statement (or in its Form 10-K or Form 20-F if an annual proxy statement is not filed) (Rule 4350(c)(4)(C)).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).</p>
<u>Compensation Committee</u>	No requirement.	<p>Listed companies must have a compensation committee composed entirely of independent directors (§303A.05(a)). The committee must adopt and publish a written charter (§303A.05(b)).¹⁸ Controlled companies, limited partnerships, companies in bankruptcy and certain other entities would be exempt from this requirement (§303A).</p> <p>Listed companies must include the charter of the</p>	<p>CEO compensation must be determined, or recommended to the Board for determination, either by a compensation committee comprised solely of independent directors or a majority of the independent directors (Rule 4350(c)(3)(A)), and the CEO may not be present during voting or deliberations. Compensation of all other executive officers must be determined in the same manner, except that the CEO may be present (Rule 4350(c)(3)(B)).</p>

¹⁸ The compensation committee charter, at a minimum, must address: (i) the committee's purpose and responsibilities – which, at minimum, must be to have direct responsibility to (a) review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board) determine the CEO's compensation level based on this evaluation; (b) make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans, and equity-based plans; and (c) produce a compensation committee report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report on Form 10-K; and (ii) an annual performance evaluation of the committee. Commentary to §303A(5) states that discussions of CEO compensation with the board generally is not precluded by this rule.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		<p>compensation committee on their Websites, and their annual reports on Form 10-K must state both that the information is available on their Websites and available in print to any shareholder who requests it (Commentary to §303A.09).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§303A).</p>	<p>If the compensation committee has at least three members, one non-independent director (who is not an officer or employee or a family member of an officer or employee) may serve on the committee (for no more than two years) if the board, under exceptional and limited circumstances, determines it is in the company's and the shareholders' best interests. The nature of such non-independent director's relationship with the company and the reasons for the board's determination must be disclosed in the next annual meeting proxy statement (or in its Form 10-K or 20-F if an annual proxy statement is not filed) (Rule 4350(c)(3)(C)).</p> <p>Controlled companies are exempt from this requirement (Rule 4350(c)(5)).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).</p>
<p><u>Audit Committee Member Qualifications</u></p>	<p><u>Independence:</u></p> <p>Issuers must have an audit committee composed entirely of independent directors. In order to be independent for purposes of serving as a member of the audit committee of a non-investment company issuer, a director: (1) may not accept directly or indirectly any consulting, advisory, or other compensatory fee¹⁹ from the issuer or any of its subsidiaries, and (2) may not be an</p>	<p><u>Independence:</u></p> <p>Each listed company must have an audit committee with a minimum of three members (§303A.07(a)). Each audit committee member must satisfy the new, tightened definition of independence applicable to all directors. In addition, all audit committee members must satisfy the independence requirements of Exchange Act Rule 10A-3(b)(1) (§303A.06).²⁴ Foreign private issuers are specifically required under NYSE rules to have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act (§303A).</p>	<p><u>Independence:</u></p> <p>Each issuer must have an audit committee consisting of at least three directors who (1) meet the requirements for independence set forth in Nasdaq's definition of "independent director" as described above, (2) meet the criteria for independence set forth in Exchange Act Rule 10A-3(b)(1),²⁷ and (3) have not participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years (Rule 4350(d)(2)(A)).</p> <p>Under exceptional and limited circumstances, the audit</p>

¹⁹ Excludes: (i) fees for services as a director or committee member, or (ii) fixed amounts of compensation received as compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer, so long as such compensation is not contingent in any way on continued service.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	<p>affiliated person of the issuer or any of its subsidiaries²⁰ (SOX §301; Exchange Act Rule 10A-3(b)(1)).</p> <p>The SEC may grant exemptions to independence requirements on a case-by-case basis. Companies conducting an IPO must comply with the independence requirements over a phase-in period during the first year from effectiveness of the registration statement. Foreign private issuers are exempt from some of the requirements.</p> <p>Issuers, other than foreign private issuers and small business issuers, must comply with these requirements by the earlier of their first annual meeting after January 15, 2004 and October 31, 2004 (SEC Rel. No. 33-8220).²¹</p>	<p>If an audit committee member serves on more than three public company audit committees and the listed company does not limit such service, the board must make a determination that such simultaneous, multiple service does not impair the individual's ability to effectively serve on the listed company's audit committee and disclose such determination in the company's annual proxy statement (or annual report on Form 10-K if no proxy statement is filed) (Commentary to §303A.06).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004; provided, however, that foreign private issuers will have until July 31, 2005 to comply with this new rule (§303A).²⁵</p> <p><u>Financial Literacy:</u> Each member of the audit committee must be financially literate, as reasonably interpreted by the company's board of directors, or must become financially literate within a reasonable</p>	<p>committee may include a director who is not independent under Nasdaq listing standards but who does meet the requirements set forth in Section 10A(m)(3) of the Exchange Act and is not a current officer, employee or family member of an officer or employee. The audit committee member serving pursuant to this exception would be limited to a two-year term and may not serve as the chair of the committee. The board of directors must determine that such service is in the company's and the shareholders' best interests, and the company must disclose the nature of such director's relationship with the company and the reasons for the board's determination in its next annual meeting proxy statement (or its Form 10-K or 20-F if no annual proxy statement is filed) (Rule 4350(d)(2)(B)).</p> <p>If an issuer fails to comply with the Exchange Act rules concerning audit committee composition or with the Nasdaq requirements because an audit committee member ceases to be independent for reasons outside the member's reasonable control, the audit committee member may remain on the audit committee until the earlier of the next annual meeting or one year from the</p>

²⁰ For purposes of this rule, "affiliate" is defined in the same manner as elsewhere in the Exchange Act (*i.e.*, a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the specified person). A person will not be deemed to be in control of a specified person if the person does not beneficially own more than 10% of any class of voting securities of the specified person and is not an executive officer of the specified person. In addition, executive officers of an affiliate, directors that are also employees of an affiliate, general partners of an affiliate and managing members of an affiliate are deemed to be affiliates.

²¹ See Alston & Bird LLP *Securities Law Advisory*, "SEC Adopts Final Rules Relating to Listed Company Audit Committees," <http://www.alston.com/articles/Final%20Rules%20Relating%20Audit%20Committees.pdf> (Apr. 16, 2003).

²² See Alston & Bird LLP *Securities Law Advisory*, "SEC Adopts Final Regulations Regarding Corporate Code of Ethics and Audit Committee Financial Experts," <http://www.alston.com/articles/Codes%20of%20Ethics.pdf> (Jan. 30, 2003).

²³ The "audit committee financial expert" must have acquired these skills through (1) education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions, (2) experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions, (3) experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing, or evaluation of financial statements, or (4) other relevant experience.

²⁴ These requirements are set forth in this section under the column headed "Sarbanes-Oxley."

²⁵ Companies with classified (*i.e.*, staggered) boards are not given any additional time to comply with the independence requirements for audit committee members.

²⁶ The audit committee financial expert requirement is not applicable to foreign private issuers.

²⁷ These requirements are set forth in this section under the column headed "Sarbanes-Oxley."

²⁸ This requirement is satisfied with respect to any person with past employment experience in finance or accounting, professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer, or other senior officer with financial oversight responsibilities.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	<p><u>Financial Literacy</u>: There is no SEC requirement that all members of the audit committee be financially literate, but the issuer must disclose whether at least one member of the audit committee qualifies as an “audit committee financial expert.”²² To qualify as an audit committee financial expert, a member must have: (1) an understanding of GAAP and financial statements, (2) the ability to assess the general application of GAAP in connection with the accounting for estimates, accruals, and reversals, (3) experience preparing, auditing, analyzing, or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the company’s financial statements, or experience actively supervising one or more persons engaged in such activities, (4) understanding of internal controls and procedures for financial reporting, and (5) an understanding of audit committee functions.²³ The identity of the audit committee financial expert(s), or disclosure as to why the company does not have an audit committee financial expert serving on the audit committee, must be disclosed in the issuer’s annual report for all fiscal years ending on or after July 15,</p>	<p>period of time after his or her appointment to the committee. At least one member also must have accounting or related financial management expertise, although under the new standards, the board can presume that a person who satisfies the definition of an audit committee financial expert set out in Item 401(e) of Reg. S-K has such expertise (Commentary to §303A.07(a)).²⁶</p>	<p>occurrence of the event that caused the lapse. Similarly, if an issuer fails to comply with the audit committee composition requirement due to one vacancy on the audit committee and the cure period for audit committee non-compliance is not otherwise being relied upon for another member, the company will have a grace period until the earlier of the next annual meeting or one year from occurrence of the event that caused the lapse. Issuers relying on the grace period in either situation must immediately notify Nasdaq (Rule 4350(d)(4)).</p> <p><u>Financial Literacy</u>: Audit committee members must be able to read and understand financial statements at the time of their appointment. In addition, the company must certify that at least one audit committee member is financially sophisticated (Rule 4350(d)(2)(A)).²⁸</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).</p> <p>Companies must provide Nasdaq with prompt notification after any executive officer becomes aware of any material non-compliance with the board independence and independent committee requirements of Rule 4350 (Rule 4350(m)).</p>

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	2003, except for small business issuers who must make such disclosure on or after December 15, 2003 (SEC Rel. No. 33-8177).		
<u>Audit Committee Charter and Internal Audit Function</u>	<p>The SEC’s final rules outlining the responsibilities and duties of the audit committee include the following requirements:²⁹</p> <ul style="list-style-type: none"> • The audit committee must be directly responsible for the appointment, compensation, retention, and oversight of any registered public accounting firm engaged by the company to prepare or issue an audit report or perform other audit, review, or attest services for the issuer and such registered public accounting firm must report directly to the audit committee (SEC Rel. No. 33-8220; Exchange Act Rule 10A-3(b)(2)). • Subject to a narrow <i>de minimis</i> exception, the audit committee must pre-approve all audit services (which includes the provision of comfort letters in connection with securities 	<p>The audit committee must adopt and publish a written charter (§303A.07(c)).³³ Listed companies also are required to establish an internal audit function (§303A.07(d)). The internal audit function may be outsourced to a firm other than its independent auditor (Commentary to §303A.07(d)).</p> <p>Listed companies must include the charter of the audit committee on their Websites, and their annual reports on Form 10-K must state both that the information is available on their Websites and available in print to any shareholder who requests it (§ 303A.09).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004. (§303A).</p>	<p>The audit committee must adopt a written charter (Rule 4350(d)(1)(C)).³⁴</p> <p>Each listed company shall conduct an appropriate review of all related-party transactions (as that term is defined in Item 404 of Regulation S-K) on an on-going basis and all such transactions shall be approved by the audit committee or another independent body of the board of directors (Rule 4350(h)). This particular requirement takes effect January 15, 2004.</p> <p>Except as noted above for Rule 4350(h), listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (SR-NASD-2002-138, Amendment 3).</p>

²⁹ See Alston & Bird LLP *Securities Law Advisory*, “SEC Issues Final Auditor Independence Rules,” <http://www.alston.com/articles/Final%20Auditor%20Independence%20Rules.pdf> (Feb. 12, 2003). See also Alston & Bird LLP *Securities Law Advisory*, “SEC Adopts Final Rules Relating to Listed Companies Audit Committees,” <http://www.alston.com/articles/Final%20Rules%20Relating%20Audit%20Committees.pdf> (Apr. 16, 2003).

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	<p>offerings) and permissible non-audit services,³⁰ which must be disclosed in the company's annual report³¹ and annual proxy statement, provided by the company's auditor (SOX § 202; SEC Rel. No. 33-8183 – Rule 2-01 of Reg. S-X).³²</p> <ul style="list-style-type: none"> The audit committee must establish procedures for: (i) the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters and (ii) employees' confidential, anonymous submission of concerns regarding accounting or 		

³⁰ Auditors are absolutely prohibited from providing the following non-audit services to their audit clients: (1) bookkeeping or other services related to the accounting records or financial statements of the audit client; (2) financial information systems design and implementation; (3) appraisal or valuation services, fairness opinions, or contribution-in-kind reports; (4) actuarial services; (5) internal audit outsourcing activities; (6) management functions; (7) human resources services; (8) broker-dealer, investment adviser, or investment banking services; (9) legal services; and (10) expert services unrelated to the audit.

³¹ Because this disclosure is included in Part III of Forms 10-K and 10-KSB, the disclosure may be incorporated by reference from the company's annual proxy statement.

³² Beginning for fiscal years ending after December 15, 2003, the company will also have to disclose quantitative information regarding audit fees, audit related fees, tax fees, and all other fees paid to the principal accountant in the company's annual proxy statement (SEC Rel. No. 33-8183; Schedule 14A, Item 9).

³³ The audit committee charter must address, at a minimum: (i) the committee's purpose, (ii) the duties and responsibilities of the audit committee, and (iii) an annual performance evaluation of the audit committee. The committee's purpose, at minimum, must be to: (a) assist board oversight of (1) the integrity of the company's financial statements, (2) the company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the company's internal audit function and independent auditors; and (b) prepare the report required by the SEC's proxy rules to be included in the company's annual proxy statement. The duties and responsibilities of the audit committee must be, at a minimum, to (a) meet the requirements of Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act, (b) at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the company; (c) discuss the annual audited financial statements and quarterly financial statements with management and the independent auditor, including the company's disclosures under "Management's Discussion and Analysis of Financial Condition and Results of Operations"; (d) discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; (e) discuss policies with respect to risk assessment and risk management; (f) meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors; (g) review with the independent auditor any audit problems or difficulties and management's response; (h) set clear hiring policies for employees or former employees of the independent auditors; and (i) report regularly to the board of directors.

³⁴ The audit committee charter must address, at a minimum: (A) the scope of the committee's responsibilities, and how it carries them out, including structure, process and membership requirements; (B) the committee's responsibility for ensuring receipt from the auditors of a formal written statement delineating all relationships between the auditor and the company, consistent with ISB Standard I, and the committee's responsibility for actively engaging in a dialogue with the auditor with respect to any disclosed relationships or services that may impact the objectivity and independence of the auditor and for taking, or recommending that the full board take, appropriate action to oversee the independence of the auditor; (C) the committee's purpose of overseeing the accounting and financial reporting processes of the issuer and the audits of the financial statements of the issuer; and (D) the specific audit committee responsibilities and authority necessary to comply with Exchange Act Rule 10A-3(b)(2), (3), (4) and (5).

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	<p>auditing matters (SEC Rel. No. 33-8220; Exchange Act Rule 10A-3(b)(3)).</p> <ul style="list-style-type: none"> The audit committee must be provided the requisite authority to engage independent counsel and other advisers, as it deems necessary to carry out its duties and the company must provide appropriate funding (as determined by the audit committee) to pay compensation to the company's independent auditor for the audit review and attest services provided by the auditor to the company, as well as the compensation of independent counsel and other advisers engaged by the audit committee (SEC Rel. No. 33-8220; Exchange Act Rule 10A-3(b)(4) and (5)). 		
<u>Shareholder Approval of Equity Plans</u>	No requirement.	Shareholder approval is required for the adoption or material modification of any equity compensation plan after June 30, 2003. Inducement grants to new employees, conversion or replacement grants to reflect a corporate merger or acquisition, certain grants pursuant to pre-existing plans of a non-listed company acquired in a merger or acquisition transaction, and certain tax-qualified plans, such as employee stock ownership plans (ESOPs), are exempt	Shareholder approval is required for the adoption or material amendment of any equity compensation arrangement (including stock option and purchase plans) after June 30, 2003 (Rule 4350(i)(1)(A)). ³⁶ Inducement grants to new employees are exempt if the grants were approved by an independent compensation committee or a majority of the company's independent directors (Rule 4350(i)(1)(A)(iv)). Promptly following an issuance of any employment inducement grant in reliance on this

³⁵ Limited transition rules apply for plans that are "discretionary" (regardless of term) or "formula plans" without a term of 10 years or less.

³⁶ Material amendments would include, but not be limited to: (i) any increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spin-off, or similar transaction); (ii) any material increase in benefits to participants; (iii) any material expansion of the class of participants eligible to participate in the plan; and (iv) any expansion in the types of awards provided under the plan.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		<p>from the requirements. Any exempt adoption or amendment must be approved by the company's compensation committee or a majority of the independent directors, and the company must notify the SEC in writing when it relies on an exemption (§303A.08 and Commentary).</p> <p>Existing equity compensation plans are not required to be retroactively approved by the shareholders, but any material modifications to existing option plans require shareholder approval (Commentary to §303A.08).³⁵</p> <p>Listed companies may not give a proxy to vote on equity compensation plans unless the beneficial owner of the shares has given voting instructions (§452).</p> <p>This rule became effective for listed companies on June 30, 2003.</p>	<p>exemption, a company must disclose in a press release the material terms of the grant, including the recipient(s) and the number of shares involved (Rule 4350(i)(1)(A)(iv)). Certain tax-qualified plans, such as 401(k) plans and certain parallel nonqualified plans, also are exempt provided they are approved by the company's independent compensation committee or a majority of the company's independent directors, as</p>

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		31, 2004 (§303A).	
<u>Codes of Business Conduct and Ethics</u>	<p>A company must disclose in its annual reports filed with the SEC whether or not, and if not, why not, it has adopted a code of ethics³⁹ applying to the principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. The code must be publicly available by inclusion as an exhibit to the annual report, posting on the company's Website with a cross-reference in the annual report, or by undertaking in the annual report to send a copy free of charge to any person that requests it (and including instructions on how to request it).</p> <p>Amendments to and waivers of the code of ethics that relate to the specified officers must be disclosed either on Form 8-K or on the company's Website (if the prior annual report provides the Website address and notes that such information will be available there).</p> <p>Disclosure of the code of ethics must be made in all annual reports for fiscal years ending on or after</p>	<p>Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees.⁴¹ Only the board of directors or a board committee may waive provisions of the code for executive officers or directors, and waivers for executive officers and directors must be promptly disclosed to the company's shareholders (§303A.10 and Commentary).</p> <p>Listed companies must include the code of business conduct and ethics on their Websites, and their annual reports must state both that the information is available on the Website and available in print to any shareholder who requests it (Commentary to §303A.10).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§ 303A).</p>	<p>Issuers must have a publicly available code of conduct that complies with the definition of a Code of Ethics under the Sarbanes-Oxley Act and which is applicable to all directors, executive officers and employees. Only the board of directors may grant waivers of compliance with the code for executive officers and directors, and all waivers granted to executive officers and directors, as well as the reason for the waiver, must be disclosed on a Form 8-K within five days. The code must also include an enforcement mechanism that ensures prompt and consistent enforcement of the code, protection for persons reporting questionable behavior, clear and objective standards for compliance, and a fair process by which to determine violations (Rule 4350(n)).</p> <p>Listed companies must comply by May 4, 2004.</p>

³⁹ To qualify, a code of ethics must be written standards that are reasonably designed to deter wrongdoing and to promote: (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships, (2) full, fair, accurate, timely, and understandable disclosure in the company's SEC filings and public communications, (3) compliance with applicable governmental rules and regulations, (4) prompt internal reporting of violations of the code to an appropriate person or persons identified in the code, and (5) accountability for adherence to the code.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
	July 15, 2003 (SEC Rel. No. 33-8177). ⁴⁰		
<u>Corporate Governance Standards for Foreign Private Issuers</u>	The Act applies to all foreign companies reporting under the Exchange Act, although exemptions are available under some of the provisions to avoid conflicts with the foreign private issuer's home country standards.	<p>Foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies⁴². (§303A.11 and Commentary).</p> <p>Foreign private issuers may provide the disclosure on their Websites (in English) and/or in their annual reports as distributed to shareholders in the United States. If the disclosure is only made available on their Websites, the annual report must so state and provide the Web address (Commentary to §303A.11).</p> <p>In addition to these requirements, foreign private issuers are specifically required to have an audit committee that satisfies the requirements of Rule 10A-3 under the Exchange Act and to comply with notification rules requiring CEOs of listed companies to promptly notify the NYSE in writing after any executive officer becomes aware of any material non-compliance with any applicable provision of Section 303A. Otherwise, foreign private issuers are</p>	<p>Foreign private issuers must disclose in their annual reports filed with the SEC any exemptions from Nasdaq's corporate governance requirements, as well as any alternative home country practices followed in lieu of the requirements from which it has been exempted. Such exemptions are available to foreign private issuers when Nasdaq's rules are contrary to the laws, rules, regulations or generally accepted business practices of the home country. (Rule 4350(a)).</p> <p>Previously the exemption based on home country law or practice was available to all non-U.S. issuers, but the rule change, effective July 31, 2005, limits it to foreign private issuers. Foreign private issuers must make the required disclosure regarding exemptions beginning January 1, 2004.</p>

⁴⁰ See Alston & Bird LLP *Securities Law Advisory*, "SEC Adopts Final Regulations Regarding Corporate Codes of Ethics and Audit Committee Financial Experts," <http://www.alston.com/articles/Codes%20of%20Ethics.pdf> (Jan. 30, 2003).

⁴¹ Each company may determine its own policies, but all listed companies should address: (i) Conflicts of Interest. A "conflict of interest" occurs when an individual's private interest interferes in any way - or even appears to interfere - with the interests of the corporation as a whole. The company should have a policy prohibiting such conflicts of interest, and providing a means for employees, officers and directors to communicate potential conflicts to the company; (ii) Corporate opportunities. Employees, officers and directors should be prohibited from (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information of position; (b) using corporate property, information or position for personal gain; and (c) competing with the company; (iii) Confidentiality. Employees, officers and directors should maintain the confidentiality of information entrusted to them by the company or its customers, except when disclosure is authorized or legally mandated (confidential information includes all non-public information that might be of use to competitors or harmful to the company or its customers if disclosed); (iv) Fair dealing. Each employee, officer and director should endeavor to deal fairly with the company's customers, suppliers, competitors and employees. None should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice. Companies may write their codes in a manner that does not alter existing legal rights and obligations of companies and their employees, such as "at will" employment arrangements; (v) Protection and proper use of company assets. All employees, officers and directors should protect the company's assets and ensure their efficient use. All company assets should be used for legitimate business purposes; (vi) Compliance with laws, rules and regulations (including insider trading laws). The company should proactively promote compliance with laws, rules and regulations, including insider trading laws; (vii) Encouraging the reporting of any illegal or unethical behavior. The company should proactively promote ethical behavior. The company should encourage employees to talk to supervisors, managers or other appropriate personnel when in doubt about the best course of action in a particular situation. Additionally, employees should report violations of laws, rules, regulations or the code of business conduct to appropriate personnel. To encourage employees to report such violations, the company must ensure that employees know that the company will not allow retaliation for reports made in good faith.

⁴² This does not need to be a detailed, line-by-line comparison but only a brief, general summary of the significant differences.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
		<p>permitted to follow their home country practices in lieu of the provisions of Section 303A (§303A).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§ 303A).</p>	
<u>Certifications</u>	CEOs and CFOs must file both Section 302 and Section 906 certifications as exhibits to periodic reports filed under the Exchange Act. ⁴³	<p>CEOs of listed companies must certify to the NYSE each year that, as of the date of the certification, he or she is not aware of any violation by the listed company of the NYSE corporate governance listing standards, and such certification must be disclosed in the company's annual report to shareholders (or annual report on Form 10-K if no annual report to shareholders is prepared) (§303A(12)(a) and Commentary). Additionally, each CEO must promptly notify the NYSE after any executive officer of the listed company becomes aware of any material non-compliance with any applicable corporate governance listing standards (§303A.12(b)). CEOs of foreign private issuers are specifically required to comply with this notification rule (§303A).</p> <p>Listed companies must comply by the earlier of their first annual meeting after January 15, 2004 or October 31, 2004 (§303A).</p>	No requirement.
<u>Penalties</u>	In addition to the range of penalties already available to the SEC and the DOJ, the Sarbanes-Oxley Act increased criminal penalties for a variety of conduct, including for violations of the Exchange Act.	The NYSE may issue public reprimand letters, suspend trading or delist a company for violations of listing standards. Because suspension of trading and delisting can be harmful to shareholders, the NYSE will use this sanction sparingly (§303A.13 and Commentary).	Nasdaq clarified that it may deny re-listing to a company based upon a corporate governance violation that occurred while that company's appeal of the delisting was pending (Rule 4810(e)) and, as is currently in effect, that a material misrepresentation or omission by an issuer to Nasdaq may form the basis for delisting. ⁴⁴

⁴³ See Alston & Bird LLP *Securities Law Advisory*, "SEC Adopts Certification Regulations under Section 302 of Sarbanes-Oxley and Accelerates Deadlines for 10-K and 10-Q Filings by Large Issuers," <http://www.alston.com/articles/SEC%20Adopts%20Certification%20Regulations.pdf> (Aug. 30, 2002); Alston & Bird *Securities Law Advisory*, "SEC Adopts Final Rules Regarding Reports on Internal Controls and Filing Requirements for Section 302 and 906 Certifications," <http://www.alston.com/articles/Final%20Rules%20Section%20302%20and%20906.pdf> (June 12, 2003).

⁴⁴ Summary of NASDAQ Corporate Governance Proposals, February 26, 2003, p. 5, http://www.nasdaq.com/about/Web_Corp_Gov_Summary%20Feb-revised.pdf.

Comparison of New Corporate Governance Listing Standards *(continued)*

	Sarbanes-Oxley ¹	NYSE Standards	Nasdaq Standards
<u>Director Education</u>	No requirement.	No requirement, although listed companies are required to adopt corporate governance guidelines that address director education.	No requirement.
<u>Disclosure of Insider Stock Transactions</u>	The Act amended Section 16 of the Exchange Act to require two-business day, electronic reporting of almost all insider transactions in company equity securities and availability of such reports on the company's Website. ⁴⁵	No requirement.	No requirement.
<u>Loans to Officers and Directors</u>	Public companies are prohibited from extending credit or arranging for the extension of credit in the form of a personal loan to directors and executive officers, with certain exceptions. ⁴⁶	No requirement.	No requirement.

⁴⁵ See Alston & Bird LLP *Securities Law Advisory*, "SEC Amends Section 16 Rules in Response to Sarbanes-Oxley," <http://www.alston.com/articles/SEC%20Amends%20Section%2016.pdf> (Aug. 29, 2002); Alston & Bird LLP *Securities Law Advisory*, "SEC Requires Electronic Filing and Website Posting of Section 16 Reports," <http://www.alston.com/articles/SEC%20Requires%20Electronic%20Filing.pdf> (May 23, 2003).

⁴⁶ See Alston & Bird LLP *Client Memorandum*, "Interpretive Issues under §402 – Prohibition of Certain Insider Loans," <http://www.alston.com/articles/ACFA8.pdf> (Oct. 15, 2002).

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