Cross-Border Listings Guide - Nasdaq

Corporate governance

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# Corporate governance

[Last updated: 1 January 2024, unless otherwise noted]

As mentioned above, a company listed on Nasdaq must comply with a broad set of corporate governance requirements set forth in the Nasdaq rules. Rather than being required to follow all of the corporate governance requirements that apply to domestic companies, a foreign private issuer may follow the corporate governance practice in its home country, except that it must:

Disclose publicly each requirement that it does not follow and describe the home country practice that it does follow.

Refrain from a disparate reduction or restriction of voting rights of common stockholders, subject to certain exceptions if not prohibited by home country law.

Provide a prompt notification if an executive officer of the company becomes aware of any noncompliance by the company of Nasdaq rules.

Have an audit committee that meets certain requirements, as discussed below.

Meet certain diversity requirements for the board of directors, or explain reasons for not doing so, and make certain annual disclosures under the Nasdaq Board Diversity Rule (see [Nasdaq Summary](https://listingcenter.nasdaq.com/assets/Foreign%20Issuers%20Listing%20on%20Nasdaq.pdf)).

A foreign private issuer seeking to follow home country practices in lieu of corporate governance practices ordinarily required by Nasdaq must submit to Nasdaq a written statement from independent counsel in the issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws.

While the US has now added new requirements effectively mandating the use of compensation committees of independent directors for most listed issuers, foreign private issuers listed on Nasdaq may continue to follow home country practices in relation to executive compensation decisions as long as they describe how their practices diverge from US practices in their Form 20-F disclosures.

*Audit committee*

Under Nasdaq rules, a foreign private issuer must have an audit committee composed of at least three members who satisfy the independence requirements of SEC Rule 10A-3. This rule generally requires each member of the audit committee to be a member of the board of directors of the company, but otherwise independent of the company. With respect to non-investment company issuers, an audit committee member is considered independent if he or she does not accept directly or indirectly any consulting, advisory or other compensatory fee from the issuer or a subsidiary of the issuer (other than in the capacity of a member of an audit committee, the board of directors or any other board committee). Additionally, in order to be independent, the audit committee member may not be an affiliated person of the company or any subsidiary. In certain situations, exemptions from these requirements are available to foreign private issuers.

In the context of an IPO, at least one member of the audit committee must meet the independence requirement, and the others are exempt from the audit committee independence requirements for 90 days from the date of the effectiveness of the registration statement filed with the SEC. Additionally, less than half of the audit committee members are exempt from the independence requirements for a year from the date of effectiveness of the IPO registration statement.

Rule 10A-3 and the related Nasdaq rules also set out responsibilities of the audit committee relating to registered public accounting firms, procedures regarding complaints, engaging advisers and funding.

However, a foreign private issuer that already has a board of auditors (or similar body or statutory auditors) would be exempt from all or a portion of the audit committee requirements if certain conditions are met.

*Other SEC-imposed corporate governance requirements*

In addition to the corporate governance requirements outlined above, the SEC imposes a number of corporate governance requirements on all public companies (domestic and foreign). These include:

CEO/CFO certifications in the company's Form 20-F filed with the SEC.

Prohibitions on loans to executive officers.

Requirements that issuers review their relationships with their auditors to ensure continued independence.

Stringent rules requiring attorneys to report evidence of material violations.

Protection of whistleblowers.

Adoption and maintenance of a code of ethics for senior and financial officers.

Potential forfeiture of CEO and CFO bonuses or certain other types of compensation in the event of an accounting restatement, as well as additional new compensation clawback rules implemented in 2023 requiring the recovery of incentive-based compensation that is erroneously "received" by current and former executive officers for fiscal periods preceding the date of an accounting restatement (see our Client Alert:[SEC Releases Final Rule on Clawback of Incentive Compensation](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAUuQVQjpl3o%2BQzUxecjEbFL&amp;nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&amp;attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAeiCIukYeOcBk%3D&amp;fromContentView=1)).

*Other implications for corporate governance*

In addition to complying with its express obligations under the <st2:country-region>US</st2:country-region> securities laws, a foreign private issuer should also consider the following practical implications of becoming a public company in the US:

The company will be required to provide public disclosure about annual compensation (including non-cash compensation, such as stock options and other equity-based compensation) paid to executive officers and directors. This disclosure may generally be furnished on an aggregate, rather than an individual, basis.

Transactions with the company's stockholders, officers, directors and other affiliates must be carefully scrutinized for fairness and appropriately approved. Public disclosure of these transactions may be required.

The company must publicly disclose information about material on-going litigation, which may make it more difficult to conduct or settle the litigation on a favorable basis.

Material information about the company that is not yet disclosed to the public should be restricted to a small group on a "need-to-know" basis.

Clear lines of communication must be established for dealing with analysts and others interested in the company's financial affairs.

Review of all public disclosures must be centralized.

Officers and directors must be fully informed with respect to their responsibilities and potential liabilities. Indemnification of officers and directors and the availability of directors' and officers' liability insurance coverage will be of concern, particularly to outside directors.

Officers, directors and other affiliates must be sensitive to the timing of sales and purchases of the company's securities. Procedures must be implemented to monitor transactions in the company's securities, including assistance to officers and directors in filing reports and effecting sales of securities.

Routine corporate actions must be subject to formal procedures and timetables, including advance schedules for director and stockholder meetings and other corporate actions.

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