



# **NOMINATING AND GOVERNANCE COMMITTEE CHARTER**

## GUIDANCE AND EXAMPLES

Nominating and governance committees operate more effectively with charters that explicitly outline their purpose and procedures. This brief, a part of the *NACD Governance Toolkit Series*, offers guidance and sample language to help committee members formulate, approve, and update their charters. Examples are drawn not only from New York Stock Exchange (NYSE) companies required to have committee charters but also from Nasdaq companies, plus one example from a company that trades in an over-the-counter (OTC) market.

## **General Guidance**

### **What is the purpose of a nominating and governance committee charter?**

The purpose of any committee's charter is to describe the committee's role, structure, responsibilities, and membership requirements, as well as the scope of the committee's authority. For committees involved in director nominations and/or corporate governance—e.g., a “nominating and governance committee”—this is particularly important, as there are a variety of ways to accomplish such functions.

As detailed later in this brief, the NYSE requires listed companies to have one or more entirely independent committees that oversee director nominations and corporate governance through

### **This Document Contains**

#### **General Guidance**

The purpose of the nominating and governance committee charter

#### **Key Items—Mandatory**

Items that NYSE listed companies are required to include in their nominating and governance charters

#### **Key Items—Discretionary**

Optional items for inclusion in nominating and governance committee charters

#### **Process for Updating**

Practices to refresh nominating and governance committee charters

#### **Appendix A**

Sample Tables of Contents: Typical nominating and governance committee section heads

#### **Appendix B**

Sample Language: Discretionary item excerpts from newly revised nominating and governance committee charters, with a focus on discretionary items

the setting of governance guidelines. (For help in constructing those, see the NACD tool, *Governance Guidelines*). Significantly, the NYSE does not require that boards have only one committee to oversee these key areas, nor does it require that any single committee handling such duties be called the “nominating and governance committee.” However, as most companies listed with the NYSE-listed companies do have a “nominating and governance committee” (in conformity to the NYSE listing rule language) this will be our nomenclature in this brief. We will also include examples of NYSE-listed companies that have given this committee different names and structures.

Among Nasdaq-listed companies, there is even greater flexibility provided to boards in accomplishing director nominations. These companies may have a formal standing committee and a committee charter for director nominations, but are not strictly required to do so. As an alternative, Nasdaq-listed companies may ask independent members of the board to appoint new directors or recommend candidates to fill board seats. In such cases, boards will have a board policy on director nominations but not a chartered committee.

## New York Stock Exchange Requirements

New York Stock Exchange (NYSE) listing rules, covered under Section 303A.04 of the *NYSE Listed Company Manual*,<sup>1</sup> state that new board and committee nominations are “among a board’s most important functions” and that “placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees.” The NYSE also states that this committee is responsible for taking a “leadership role in shaping the corporate governance of a corporation.”

*Flexibility of name and structure.* The rules state that NYSE-listed companies “must have a nominating/corporate governance committee composed entirely of independent directors.” However, the rules also note that boards may allocate the responsibilities of the nominating/corporate governance committee “to committees of their own denomination, provided that the committees are composed entirely of independent directors.” The manual also states that “any such committee must have a committee charter.”

<sup>1</sup> See “Section 303A.04 Nominating/Corporate Governance Committee” of the *NYSE Listed Company Manual*.

*Independence.* NYSE states that no director qualifies as “independent” unless the board of directors “affirmatively determines 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).”<sup>2</sup> Conditions disqualifying directors from independence include (but are not limited to) past employment (or an immediate family member’s past employment) in the company within the past three years (other than service as an interim CEO or chair or other executive officer); family ties<sup>3</sup> to a past executive officer of the company; receipt of more than \$120,000 in a 12-month period during the past three years; past service as the company’s auditor; and employment by a major vendor or nonprofit recipient (re payments of more than \$1 million or more than 2 percent of that organization’s revenues, whichever is greater).<sup>4</sup>

Whether there is only one committee for the nominating/governance function or more than one, as mentioned above, each must have a charter with certain mandated provisions (listed in the Key Items section later in this guide). As an exception, the NYSE listing rules state that if a listed company is legally required “by contract or otherwise” to let third parties nominate directors, “the selection and nomination of such directors need not be subject to the nominating committee process.”<sup>5</sup> As an example of such contracts, the NYSE lists preferred stock rights, shareholder agreements, and management agreements.

The NYSE listing rules state that a listed company must make its nominating/corporate governance committee charter available on or through its website. If any function of the nominating/corporate governance committee has been delegated to another committee, the charter of that committee must also be made available on or through the listed company’s website. Furthermore, a listed company must provide the committee charter website in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K. (For a list of items mandated for the committee, see section [Key Items – Mandatory](#).)

<sup>2</sup> See “Section 303A.02 Independence Tests” of the *NYSE Listed Company Manual*.

<sup>3</sup> As described in the “General Commentary to Section 303A.02(b)” in the *NYSE Listed Company Manual*, “An ‘immediate family member’ includes a person’s spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person’s home. When applying the look-back provisions in Section 303A.02(b), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become incapacitated.”

<sup>4</sup> For more information, see “Section 303A.02 Independence Tests” in the *NYSE Listed Company Manual*.

<sup>5</sup> See “Section 303A.04 Nominating/Corporate Governance Committee” of the *NYSE Listed Company Manual*.

## Nasdaq Stock Exchange Requirements

Like the NYSE, Nasdaq has requirements for independent oversight of director nominations. The requirements are listed in Section 5605 of Nasdaq's Listing Rules.<sup>6</sup> As summarized earlier, director nominees of Nasdaq-listed companies must be either selected or recommended for the board's selection either by a nominating committee comprising only independent directors or a group of independent directors—with some exceptions regarding independence. In explaining the purpose of this general requirement and its exceptions, Nasdaq states that "independent director oversight of nominations enhances investor confidence in the selection of well-qualified director nominees." The rule is also "intended to provide flexibility for a Company to choose an appropriate board structure and reduce resource burdens."<sup>7</sup>

**Independence.** Nasdaq defines an independent director as a person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. For purposes of this rule, "family member" means the director's spouse, parents, children, and siblings (whether by blood, marriage, or adoption) or anyone living in the director's home. The definition of independence also disqualifies some past employees and some individuals who have received compensation in excess of \$120,000 from the company for a 12-month period within the three years preceding the determination of independence.<sup>8</sup>

**Exceptions.** "This rule does not apply in cases where the right to nominate a director legally belongs to a third party. For example, investors may negotiate the right to nominate directors in connection with an investment in the Company, holders of preferred stock may be permitted to nominate or appoint directors upon certain defaults, or the Company may be a party to a shareholder's agreement that allocates the right to nominate some directors."<sup>9</sup> Another general exception under Nasdaq rules is that the board may nominate a director who does not meet the independence definition, as long as the director is not an executive officer or a family member of an executive officer. This appointment, which can only last two years per individual nominated, can only

<sup>6</sup> *Nasdaq Equity Rules*, amended July 22, 2010 (SR-NASDAQ-2008-014); amended Jan. 11, 2013 (SR-NASDAQ-2012-109).

<sup>7</sup> See "Section IM-5605-7. Independent Director Oversight of Director Nominations" in the *NASDAQ Equity Rules*.

<sup>8</sup> The rule says that in addition, the following persons shall not be considered independent: "a director who is, or at any time during the past three years was, employed by the Company;" and a director who received or who has a family member who received any compensation from the company "in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, with certain exclusions. . . ." Family member means a person's "spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home." Excluded from the monetary definition are the following: compensation for board or board committee service, compensation for work as a non-officer employee, and/or benefits under a tax-qualified retirement plan or other non-discretionary compensation. See Section IM-5605(a)(2) of the *NASDAQ Equity Rules* for more information.

<sup>9</sup> *The Nasdaq Stock Market LLC Listing Rules*, "Nasdaq Stock Market Rules, Regulation, IM-5605-7., Nasdaq, Independent Director Oversight of Director Nominations," p. 84.

be made under “exceptional and limited circumstances” and be “required by the best interests of the Company and its Shareholders.”<sup>10</sup> Reasons for the appointment must be disclosed on the company’s website, in its proxy statement, or in the company’s Form 10-K annual filing with the SEC (or Form 20-F for foreign companies) if the company doesn’t file a proxy statement.<sup>11</sup>

## Key Items – Mandatory

### Mandated Items

Under NYSE listing rules, the nominating/corporate governance committee (or any committee or committees charged with nominations and/or governance) must have a written charter that addresses the committee’s “purpose and responsibilities,” which at a minimum must include

- identifying individuals qualified to become board members, consistent with criteria approved by the board,
- selecting (or recommending to the board to select) the director nominees for the next annual meeting of shareholders,
- developing and recommending to the board a set of corporate governance guidelines applicable to the corporation (see the NACD tool on [Governance Guidelines](#)), and
- overseeing the evaluation of the board and management.

The NYSE listing rules say that the nominating/corporate governance committee charter should also address the following items:

- annual evaluation of the committee
- committee-member qualifications
- committee-member appointment and removal
- committee structure and operations (including authority to delegate to subcommittees)
- committee reporting to the board

In addition, the charter should give the nominating/corporate governance committee sole authority to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm’s fees and other retention terms.

<sup>10</sup> Ibid., p. 79.

<sup>11</sup> Ibid.

The section title "Key Items – Discretionary" is written in a large, bold, blue sans-serif font.The sub-section title "Discretionary items" is written in a bold, blue sans-serif font.

In addition to the mandated areas of oversight, some nominating and/or governance committees opt to add language addressing issues that go beyond the requirements:

**Director Compensation**

**Diversity**

**Ethics and Compliance Oversight**

**Risk Oversight**

**Stakeholder Relations**

**Sustainability**

At the end of this brief, sample language is provided for discussing these additional topics.

## Process for Updating

Each committee responsible for nominations and/or governance should regularly review its charter to ensure that it properly reflects the roles and responsibilities of the committee's members. If the work performed by the committee is no longer aligned with the responsibilities stated in the charter, committee members can initiate a review and make necessary adjustments.

Once a year, during their annual self-evaluation, committee members can take a new look at the committee charter. They can compare their current operations to charter language to ensure alignment. In some areas, the committee may need to change its operations to fit the charter, while conversely, in other areas the committee may need to amend the charter to reflect changes in operations. Meanwhile, the committee should be prepared to amend its charter promptly in response to a significant new regulatory development affecting director nominations and/or governance guidelines. The committee chair should ask legal counsel to give updates accordingly. The frequency of such changes depends on the regulatory climate.

When updating the charter, it's important to describe all areas of oversight that the board has assigned to the committee. This allows the committee to allocate an adequate amount of time to each matter. For example, if a committee oversees director compensation (which sometimes falls within the duties of the compensation committee and sometimes within the purview of the committee overseeing director nominations), the charter can discuss how it will work with an independent compensation consultant.<sup>12</sup>

It is important to write the charter carefully so that while it provides guidance on how to fulfill an area of responsibility, it does not suggest that the nominating and/or governance committee has unlimited and exclusive power to control it. Any shared powers should be noted.

<sup>12</sup> For details on the settlement of a 2016 lawsuit that included charter language along these lines, see Michael S. Melbinger, "Settlement of Lawsuit over Director Compensation Offers Useful Guidance," posted on Winston & Strawn LLP's *Executive Compensation Blog*, September 14, 2016.

## APPENDIX A

# Sample Tables of Contents

### Chevron Corp. (NYSE)

#### Board Nominating and Governance Committee Charter

(September 25, 2019)

Purpose

Membership and Procedures

Membership and Appointment

Removal

Chairperson

Meetings

Secretary

Independence

Delegation

Authority to Retain Advisers

Evaluation; Charter Review

Duties and Responsibilities

Amendment

### Harleysville Financial Corp. (OTC)

#### Corporate Governance and Nominating Committee Charter

(May 17, 2017)

Purpose

Organization and Meetings

Goals, Responsibilities and Duties

Recommend Qualified Individuals for Board  
Membership

Shareholder-Proposed Nominations

Expectations of Directors

Reliance In Good Faith

Board Committee Membership and Quali-  
fications

Develop and Oversee Corporate Governance  
Principles

Other

## Navient Corp. (Nasdaq)

### Nominations and Governance Committee Charter

(August 2019)

Purpose

Membership

Meetings

Authority and Responsibilities

- Governance

- Board Matters

- Management Succession Planning

- Risk Oversight

Resources, Reporting and Review

## ScanSource Inc. (Nasdaq)

### Governance Committee Charter

(Accessed January 3, 2020)

Purpose and Responsibility

Composition of the Committee

Operations of the Committee

- Corporate Governance Functions

- Annual Evaluation Functions

Other Activities

Committee Meetings

## ScanSource Inc. (Nasdaq)

### Nominating Committee Charter

(Accessed January 3, 2020)

Purpose and Responsibility

Composition of the Committee

Operations of the Committee

Other Activities

Committee Meetings

## APPENDIX B

# Sample Language for Discretionary Areas

For the mandated areas described earlier, examples of charter language abound. Less commonly available are examples of language for discretionary areas, such as those below.

### Director Compensation

“Each year, the Committee will review director compensation and make a recommendation to the Board regarding the form and amount of director compensation. The Committee will consider that a director’s independence may be jeopardized if (a) his or her compensation and perquisites exceed customary levels, (b) the Company makes substantial charitable contributions to organizations with which the director is affiliated or (c) the Company enters into consulting contracts with (or provides other indirect forms of compensation to) the director or an organization with which the director is affiliated. Directors who are employees of the Company may not receive any additional compensation for service on the Board.”

*StoneMor Inc.* (NYSE) Charter of the Compensation, Nominating and Governance Committee (December 31, 2019)

### Diversity

“The Committee shall advise the Board on matters of diversity, including gender, ethnic background, country of citizenship and professional experience; and recommend, as necessary, measures contributing to a Board that, as a whole, reflects a range of viewpoints, backgrounds, skills, experience and expertise.”

*Alexion Pharmaceuticals* (Nasdaq) Nominating and Corporate Governance Committee Charter (May 14, 2019)

### Ethics and Compliance Oversight

“Assisting the Board in overseeing the Company’s ethics and compliance program, including the Company’s compliance with legal and regulatory requirements other than those related to account-

ing or financial reporting (which are the responsibility of the Audit Committee).”

The Clorox Co. (NYSE) Nominating, Governance and Corporate Responsibility Charter (May 20, 2019)

## Risk Oversight

“Periodically review the Company’s compliance and performance against the risk measures contained in the Company’s Board approved risk appetite framework relating to political and regulatory risks; reputational risks, including environmental and social risks; and governance risks, such as risks related to compliance with Nasdaq listing standards and applicable rules and regulations relating to Board of Directors and management composition, governance, and independence.”

Navient Solutions LLC (Nasdaq) Nominations and Governance Committee (August 2019)

## Stakeholder Relations

“Assisting the Board in overseeing the Company’s engagement efforts with stockholders and other key stakeholders, including non-governmental organizations and key environmental, social and governance (ESG) ratings agencies.”

The Clorox Co. (NYSE) Nominating, Governance, and Corporate Responsibility Charter (May 20, 2019)

## Sustainability

“Assisting the Board in overseeing the Company’s corporate responsibility and sustainability program.”

The Clorox Co. (NYSE) Nominating, Governance, and Corporate Responsibility Charter (May 20, 2019)

“(a) Provide oversight and guidance with regard to environmental, social and governance (“ESG”) matters, (b) receive updates from management regarding the Company’s ESG activities and (c) review the annual Sustainability Report published by the Company.”

Valaris PLC (NYSE) Charter: Nominating, Governance and Sustainability Committee (August 20, 2019)

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