

CODE OF ETHICS UNDER SARBANES-OXLEY

Earlier this year, the Securities and Exchange Commission released its final rule to implement the “code of ethics” provisions of Section 406 of the Sarbanes-Oxley Act. The rule is set forth under Item 406 of Regulation S-K and Item 406 of Regulation S-B. As discussed in more detail below, the rule imposes on public companies new obligations relating to codes of ethics.

Companies subject to the new rule

The rule applies to all companies that are obligated to file reports with the SEC under Section 13 or 15(d) of the Securities Exchange Act of 1934, including foreign private issuers.

“Code of ethics”

The SEC describes a “code of ethics” as written standards that are reasonably

designed to deter wrongdoing and to promote:

- honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships,
- full, fair, accurate, timely, and understandable disclosure in reports and documents filed with the SEC and in other public communications,
- compliance with applicable governmental laws, rules and regulations,
- prompt internal reporting of code violations to appropriate persons identified in the code, and
- accountability for adherence to the code.

A code of ethics is intended to vary from company to company depending on the particular needs and structure of each company. A company may have separate codes of ethics for different types of officers, or, as an alternative, a company may adopt a code of ethics as part of a broader code of ethics for all of a company’s officers, directors and employees.

Persons subject to a code of ethics

The rule requires a public company to disclose whether it has adopted a code of ethics for the following persons:

- principal executive officer,
- principal financial officer,
- principal accounting officer or controller, or
- persons performing similar functions.

Requirement to adopt a code of ethics

The rule does not require a company adopt a code of ethics. The rule does, however, require that if a company has not adopted a code of ethics, it must disclose that and the reasons why. Also, if a company has a code of ethics that does not meet the requirements of the rule, the company must explain why. As described below, the national stock exchanges and Nasdaq have proposed rules requiring that each listed company adopt a code of ethics.

Disclosing the code of ethics

The rule requires that a company that has adopted a code of ethics must make such code of ethics publicly available in one of the following manners:

- filing a copy of its code of ethics as an exhibit to its annual report on Form 10-K or Form 10-KSB (or Form 20-F for foreign private issuers),
- posting and maintaining the text of its code of ethics, or the relevant portions, on its website and disclose its website address and intention to provide disclosure in this manner in its annual report, or
- undertaking in its annual report to provide a copy of its code of ethics to any person without charge upon request.

Disclosure of changes to, or waivers from, a code of ethics

A company may amend its code of ethics. A company may also waive compliance with its code of ethics should

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circumstances warrant such a waiver. A waiver is the approval by the company of a material departure from a provision of its code of ethics. A waiver is also the company's failure to take action within a reasonable period of time regarding a violation of a material provision of its code of ethics that has been made known to at least one of its executive officers.

The rule requires a company to immediately disclose on Form 8-K or its website any change to, or waiver from, its code of ethics. Although the rule requires that only amendments or waivers relating to the rule's required elements and the rule's specific officers must be disclosed, disclosure may be necessary under Nasdaq or stock exchange rules or to comply with the anti-fraud provisions of Rule 10b-5 of the Exchange Act.

A company electing to provide this disclosure on Form 8-K must do so within five business days after the change or waiver. As an alternative to disclosure on Form 8-K, a company may disclose changes or waivers on its website, but only if the company has previously disclosed in its annual report its intention to disclose these events in this manner. A company electing the website alternative must make the disclosure on its website within five business days after the change or waiver, make the disclosure available on its website for twelve months, retain the information for at least five years thereafter, and make the information available to the SEC upon request.

A foreign private issuer is required to disclose any change to, or waiver from, its code of ethics made during the foreign private issuer's past fiscal year on Form 20-F. A foreign private issuer may also voluntarily report changes or waivers on a more frequent basis on Form 6-K or its website.

Effective date of compliance

A company must comply with the code of ethics disclosure requirements in its annual report for its fiscal year ending on or after July 15, 2003. A company also must comply with the requirements regarding disclosure of changes to, and waivers from, its code of ethics on or after the date on which it is

required to file its first annual report in which the code of ethics disclosure is required.

Proposed Stock Exchange and Nasdaq requirements

The New York Stock Exchange, the American Stock Exchange and the Nasdaq Stock Market have proposed changes to their rules which would require listed companies to adopt codes of conduct for all directors, officers and employees. The SEC has not yet approved these proposed rules.

New York Stock Exchange

Proposed NYSE Rule 303A(10) would require that NYSE-listed companies adopt a code of business conduct and ethics for its directors, officers and employees. The proposed rule would require that any waivers of the code be approved by the company's board of directors or a board committee and promptly disclosed to the company's shareholders. The proposed rule would allow each listed company to create its own code, but specifically identified certain categories that each code should address:

- conflicts of interest,
- corporate opportunities,
- confidentiality,
- fair dealing,
- protection and proper use of company assets,
- compliance with laws, rules and regulations, including insider trading laws, and
- encouraging the reporting of any illegal or unethical behavior.

American Stock Exchange

Proposed AMEX Section 807 would require that AMEX-listed companies adopt a code of conduct and ethics for its directors, officers and employees which also complies with the SEC's definition of code of ethics discussed above. Like

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the NYSE's proposed rule, each AMEX-listed company would be allowed to create its own code.

Nasdaq Stock Market

Proposed Nasdaq Rule 4350(m) would require that Nasdaq-listed companies adopt a code of conduct for its directors, officers and employees which also complies with the SEC's definition of code of ethics. Nasdaq's proposed rule would require that any waivers of the code for directors or executive officers must be approved by the company's board of directors and disclosed in the company's public filings, not later than the company's next periodic report.