



NYSE and NASDAQ Propose New Standards for Compensation Committees and Their Advisers

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The NYSE and NASDAQ have proposed new listing standards for public companies (other than smaller reporting companies) that will require:

- compensation committee consideration of new independence and conflicts of interest factors prior to engaging a compensation consultant or adviser; and
- heightened independence standards for compensation committee members.

In addition, the NASDAQ proposal contains new listing requirements for NASDAQ companies relating to the composition and governance of compensation committees.

Consultant/Adviser Independence. The new proposals require compensation committees to consider the six independence factors set out in SEC Rule 10C-1 before hiring a consultant or adviser. The six factors are (i) the provision of other services to the listed company by the person that employs the adviser, (ii) the amount of fees received from the listed company by the adviser's employer, as a percentage of the total revenue of the employer, (iii) the policies and procedures of the adviser's employer that are designed to prevent conflicts of interest, (iv) any business or personal relationship of the adviser with a member of the compensation committee, (v) any stock of the listed company owned by the adviser and (vi) any business or personal relationship of the adviser or the adviser's employer with an executive officer of the listed company. These proposals are scheduled to become effective for NASDAQ listed companies immediately upon adoption by the SEC and for NYSE listed companies on July 1, 2013.

Director Independence. Both proposals also will add two new independence factors that must be considered in addition to the independence factors currently required by the applicable exchange. The two new factors are: (i) the source of compensation paid to a director, including any consulting, advisory

or other compensatory fee paid by the listed company to the director, and (ii) any affiliation of the director with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of a listed company. For NYSE listed companies these proposals are scheduled to become effective on the earlier of (i) the listed company's first annual meeting after January 15, 2014 or (ii) October 31, 2014. The changes are scheduled to become effective for NASDAQ listed companies on the earlier of (i) the second annual meeting of the listed company following the SEC's approval of the new listing standards or (ii) December 31, 2014.

New NASDAQ Compensation Committee Requirements. For the first time, NASDAQ will require listed companies to have an entirely independent compensation committee composed of at least two directors. In addition, the compensation committee will be required to have a written charter. Except for smaller reporting companies, the charter must contain, among other things, the authority to retain and fund consultants and advisers and the responsibility to consider the independence of consultants and advisers. Compliance is expected to be required along with the new director independence factors on the earlier of (i) the second annual meeting of the listed company following the SEC's approval of the new listing standards or (ii) December 31, 2014.

Preparing for the New Rules. In anticipation of the revised listing standards, companies should:

- consider any changes that may be necessary to their board processes for making determinations of independence for compensation committee members;
- NYSE listed companies should review their existing compensation committee charters to determine if any revisions should be made to conform to the new requirements;
- adopt new procedures for the consideration of consultant and adviser independence prior to engagement by the compensation committee;
- NASDAQ listed companies will need to consider promptly either board resolutions or a written compensation committee charter to provide the compensation committee (or the board's independent directors if no committee currently exists) with the necessary authority to retain and fund, and the responsibility to consider the independence of, consultants and advisers until the remainder of the new NASDAQ listing requirements become effective; and
- plan for any potential proxy statement disclosure of compensation consultant conflicts of interest under revised Item 407 of Regulation S-K that will be required for annual meetings held after January 1, 2013.

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