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NYSE and NASDAQ Propose Amendments to Listing Rules to Implement SEC Requirements for Independence of Compensation Committees and Their Advisers

October 5, 2012

On September 25, 2012, each of the New York Stock Exchange ("NYSE") and the NASDAQ Stock Market ("Nasdaq") submitted to the U.S. Securities and Exchange Commission (the "SEC") proposals to modify their respective listed company rules (the "Proposed Listed Company Rules") in order to comply with the SEC's final rules (the "Final Rules") regarding the independence of compensation committees and the retention, compensation and oversight of consultants, independent legal counsel and other advisers to the compensation committees as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1]

EXECUTIVE SUMMARY

Key features of the Proposed Listed Company Rules include:

- *Compensation Committee Establishment and Adoption of Formal Charter for Nasdaq-listed Companies*. Under the Proposed Listed Company Rules, Nasdaq-listed companies must have a standing compensation committee comprised of two or more directors, each of whom must be independent (subject to a narrow exception under limited and exceptional circumstances), and the compensation committee must have a written charter that includes certain minimum duties and authorities and that is reviewed and reassessed on an annual basis. (Unlike companies subject to Nasdaq's existing rules, NYSE-listed companies currently are required to have a standing compensation committee composed entirely of independent directors operating under a written compensation committee charter.)

Independence of Compensation Committee Members. In determining a director's independence for purposes of compensation committee membership, both NYSE and Nasdaq add to their existing director independence rules a requirement that the board of directors consider the source of the director's compensation and any affiliations of the director with the listed company or its subsidiaries and their affiliates, with focus on whether or not any such compensation or affiliation would impair the director's judgment. In addition, Nasdaq's Proposed Listed Company Rules would affirmatively prohibit a compensation committee member from taking consulting, advisory or compensatory fee – directly or indirectly – from the listed company or its subsidiaries other than director fees and certain retirement (including deferred) compensation; however, NYSE Proposed Listed Company Rules only require that the board consider the source of compensation of such director, including any compensation paid to the director by the listed company, rather than impose an absolute prohibition.

???*Independence of Advisers*. Each of NYSE and Nasdaq's proposals require compensation committees to have the right and responsibility to retain or obtain the advice of a compensation consultant, independent legal counsel and other adviser in its sole discretion only after considering six independence factors set forth in the Final Rules; neither Exchange elected to expand on those factors. Further, both Exchanges require the compensation committee charter to specify these rights and responsibilities as to compensation advisers.[2]

???*Exemptions, Cure Periods and Phase-in Periods*. Both NYSE and Nasdaq include certain categorical exemptions from the foregoing compensation committee independence rules, as well as cure periods to correct noncompliance and phase-in periods for newly listed companies and for companies which lose their exemption from such rules.

Annex A attached to this client alert sets forth a chart comparing the key aspects of the Proposed Listed Company Rules of NYSE and Nasdaq.

INDEPENDENCE OF COMPENSATION COMMITTEES

Compensation Committees Generally

Under Exchange Act Rule 10C-1(a), the Exchanges are directed to adopt listing standards that apply to a listed company's compensation committee or, in the absence of a designated compensation committee, to any other committee of the listed company's board of directors that performs the functions of a compensation committee (i.e., oversight of executive compensation), regardless of its formal title and even if such other board committee performs other functions as well or, to the extent applicable, those members of the listed company's board of directors who oversee executive compensation in the absence of a committee.

While existing Nasdaq rules generally permit listed companies to have either a formal compensation committee or a committee of independent directors oversee executive compensation, the Nasdaq Proposed Listed Company Rules eliminate the alternative of having a committee of independent directors serve in lieu of a designated compensation committee. Under the proposed rules, Nasdaq-listed companies will be required to have a formal standing compensation committee with responsibility for determining (or making recommendations to the full board for determining) executive officer compensation. Such a compensation committee must be comprised of at least two members, each of whom meets certain independence requirements, and must adopt, review and reassess a compensation committee charter (as described below). Notably, the Nasdaq Proposed Listed Company Rules continue to include the "Exceptional and Limited Circumstances" exception to the general rule that a listed company have a compensation committee comprised solely of independent directors. [3]

By contrast, the existing NYSE rules presently require, and continue under the Proposed Listed Company Rules to require, that listed companies have a compensation committee composed entirely of independent directors and adopt a written compensation committee charter. However, the NYSE Proposed Listed Company Rules do not affect the existing ability of listed company boards to allocate the responsibilities of a compensation committee to other board committees composed entirely of independent directors, so long as any such "other" board committees operate under their own committee charters.

Compensation Committee Independence Requirements

Under Rule 10C-1(b)(1) of the Exchange Act, the compensation committee must be comprised solely of independent members of the listed company's board of directors. In determining "independence" requirements for members of the compensation committee, the Exchanges must consider "relevant factors," including, specifically:

- the source of the director's compensation, including any consulting, advisory or other compensatory fees paid to the director by the listed company; and
- whether the director is affiliated with the listed company, a subsidiary or an affiliate of a subsidiary.

Exchange Act Rule 10C-1(b) does not specify any other factors that the Exchanges must consider and does not specify any particular level or type of compensation or any particular affiliations or other business or personal relationships that would automatically rule out a director's independence.[4]

In this regard, NYSE proposes to adopt additional director independence standards specific to compensation committee membership that substantially incorporate the language of Exchange Act 10C-1(b) and supplement its existing director independence rules. Under the existing NYSE rules, a director may qualify as "independent" only if the board of directors affirmatively determines that the director has no material relationship with the listed company and if the director is not specifically disqualified by certain bright-line rules.[5] While continuing to require that the listed company's board determine that no material relationship exists, NYSE's Proposed Listed Company Rules further require the board of directors to consider "all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member," including, without limitation, the two "relevant factors" specified under Rule 10C-1(b) described above. In considering all of these factors, the board is directed to consider whether the director's ability to make independent judgments would be impaired by the applicable compensation or affiliation.

Similarly, the Nasdaq Proposed Listed Company Rules maintain the existing definitions of "independent director" generally with respect to compensation committee members,[6] but further require that compensation committee members not accept – directly or indirectly – any consulting, advisory or other compensatory fees from the listed company or its subsidiaries from and after their commencement of service on the compensation committee, other than committee or board fees or fixed amounts payable under a retirement plan (including deferred compensation) for prior service with the company which are not contingent on continued service.[7] In addition, Nasdaq's Proposed Listed Company Rules add a requirement that the board of directors consider whether a director is affiliated with the listed company (or any subsidiary or affiliate of a subsidiary) to determine whether such affiliation would impair the director's judgment as a member of the compensation committee.

Thus, both NYSE and Nasdaq incorporated the SEC factors relevant to compensation committee independence without significant departure from either the Final Rules or from their existing director independence standards. Notably, both NYSE and Nasdaq affirmatively declined to require that a board of directors consider whether and to what extent a director owns stock of the listed company in determining the independence of such director for purposes of compensation committee membership (as is the case for audit committee membership), as each Exchange noted in its respective proposal that stock ownership aligns the interests of the compensation committee members with those of stockholders of the listed company.

Compensation Committee Charter

While the SEC's Final Rules do not expressly mandate that a compensation committee have a formal written charter, existing SEC disclosure rules with respect to compensation committees generally require a listed company to disclose whether or not its compensation committee has a charter and to provide stockholders with a copy of the charter (whether as an exhibit to or by incorporation in the proxy or by reference to a company Web site on which the charter is available).

Under existing NYSE rules, compensation committees are required to have a written charter that addresses the committee's purpose and responsibilities (which, at a minimum, must generally include responsibility to review, approve and evaluate chief executive officer compensation, to make recommendations with respect to non-CEO compensation and incentive compensation and equity-based plans subject to board approval, and to prepare the Compensation Committee Report required under Regulation S-K) as well as an annual performance evaluation of the compensation committee. Under NYSE's Proposed Listed Company Rules, the compensation committee charter also must address the rights and responsibilities of the compensation committee to retain or obtain the advice of a compensation consultant, independent legal counsel or other advisers as set out in the NYSE Proposed Listed Company Rules (as described below).

By contrast to the existing NYSE rules, the existing Nasdaq rules do not require that listed companies have a formal written compensation committee charter.[8] However, under the Nasdaq Proposed Listed Company Rules, listed companies must certify that they have a formal written compensation committee charter, and their compensation committees will be required to review and reassess (though not recertify) the adequacy of their charters on an annual basis. Under these proposed rules, the compensation committee charter must specify:

(i) the scope of the compensation committee's responsibilities and how it carries out such responsibilities (including structure, processes and membership requirements);

(ii) the compensation committee's responsibility for determining, or recommending to the board of directors for determination, the compensation of the CEO and other executive officers;

(iii) that the CEO may not be present during voting or deliberations on his or her own compensation;[9] and

(iv) the specific responsibilities and authorities of the compensation committee to retain or obtain the advice of a compensation consultant, independent legal counsel or other advisers (as described below).

Exemptions from Compensation Committee Independence Requirements

The compensation committee independence requirements described above generally apply to all listed companies, but certain categories of listed companies are specifically exempt under the SEC's Final Rules: limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act of 1940, and foreign private issuers that disclose in their annual reports why they do not have an independent compensation committee.[10] NYSE and Nasdaq each adopted these general exemptions for such types of listed companies as well as those categories of listed companies that are currently exempt from their respective compensation committee requirements, including, in the case of NYSE-listed companies, companies whose only listed security is preferred stock.

In addition, Exchange Act Rule 10C-1 exempts controlled companies and smaller reporting companies from compliance with the proposed compensation committee independence rules and, as such, the Proposed Listed Company Rules based on Rule 10C-1 are not applicable to controlled companies and smaller reporting companies. However, Nasdaq's Proposed Listed Company Rules nonetheless require a smaller reporting company to have a compensation committee comprised of at least two independent directors (subject to certain exceptions) and to have a formal written compensation committee charter; however, a board resolution setting forth the compensation committee's responsibilities and authorities may be used in lieu of a charter and there would be no requirement to review and reassess the charter (or resolution, as the case may be) annually or to specify the responsibilities and authorities of the compensation committee regarding the use of a compensation consultant, independent legal counsel or other adviser. Further, smaller reporting company compensation committee members are not subject to the additional independence factors relating to compensatory fees from and affiliation with the listed company and its subsidiaries and their affiliates.

Cure Periods for Failure to Comply with Compensation Committee Independence Requirements

The failure of a listed company that is subject to the compensation committee independence requirements to have a compensation committee comprised only of independent directors will result in the prohibition of the listing of the company's stock on both NYSE and Nasdaq. Nonetheless, consistent with the Final Rules, both NYSE and Nasdaq have included a cure period for listed companies to correct defects in the composition of their compensation committees for reasons outside of a committee member's reasonable control, as well as, in the case of Nasdaq, due to a vacancy. In each case, the listed company must regain compliance by the earlier of the next annual stockholders meeting or one year from the event that caused the noncompliance; however, the Nasdaq Proposed Listed Company Rules extend the cure period to 180 days from the event causing noncompliance in the case where the listed company's next annual meeting occurs within 180 days of the noncompliance event. In the case of NYSE, the Proposed Listed Company Rules also limit the opportunity to cure to circumstances where the compensation committee continues to have a majority of independent directors.[11] Both the NYSE and Nasdaq Proposed Listed Company Rules require the listed company to provide prompt notice to the applicable exchange of the failure.

Phase-In Periods for Newly Listed Companies to Comply with Compensation Committee Independence Requirements

For companies that become listed companies for the first time (such as companies that become listed in connection with an initial public offering, companies emerging from bankruptcy, companies which cease to qualify as a controlled company, and companies transferring from other stock exchanges or markets), both NYSE and Nasdaq continue to have their existing phase-in rules with respect to director independence standards apply with respect to compliance with the new compensation committee independence requirements. Under these phase-in rules, newly listed companies will be required to have fully independent compensation committees operating in compliance with the applicable rules generally within one year of the applicable listing or status change date, with certain interim requirements.[12] Under the NYSE Proposed Listed Company Rules, foreign private issuers who cease to qualify as such would be required to have fully independent compensation committees within six months of losing their foreign private issuer status; however, Nasdaq's Proposed Listed Company Rules do not appear to provide such foreign private issuers with a compliance phase-in opportunity (except to the extent the foreign private issuer also ceases to be a controlled company).

In addition, each of NYSE and Nasdaq's Proposed Listed Company Rules include phase-in rules with respect to the compensation committee independence requirements for smaller reporting companies which cease to qualify as such. Under Exchange Act Rule 12b-2, smaller reporting companies are required to test whether they continue to qualify as smaller reporting companies as of the last business day of its second quarter of each fiscal year (the "SRC Determination Date"). Under the NYSE Proposed Listed Company Rules, a listed company that ceases to be a smaller reporting company will be required to have a compensation committee satisfying the independence requirements within six months of the SRC Determination Date and to have the authority and responsibilities for the retention, compensation and oversight of compensation committee advisers as of the SRC Determination Date. Under the Nasdaq Proposed Listed Company Rules, such a listed company will be required to comply with the additional eligibility requirements relating to compensatory fees and affiliation with the listed company as if it had become a newly listed company in connection with an initial public offering (i.e., full compliance within one year following interim compliance requirements); however, as smaller reporting companies will be required to have at least two independent directors, there is no phase-in for the independence or committee size rules for listed companies that cease to be smaller reporting companies under the proposed Nasdaq Listing Standards.

COMPENSATION COMMITTEE ADVISERS

Retention, Compensation and Oversight of Compensation Committee Advisers

In addition to regulating the independence of the members of the compensation committee, Exchange Act Rule 10C-1(b)(2) directs the Exchanges to adopt rules which require a listed company to permit its compensation committee to retain or obtain the advice of a compensation consultant, independent legal counsel and other adviser in its sole discretion. The Final Rules neither require a compensation committee to retain a compensation adviser, nor prohibit a compensation committee from retaining nonindependent legal counsel or from obtaining the advice of in-house counsel or outside counsel retained by the listed company or management.

However, the Exchanges are directed under the Rule 10C-1(b)(4) to consider the following six independence factors, in addition to any other factors which may be imposed by rule of the Exchanges, before retaining or obtaining advice from a compensation consultant, legal counsel (other than in-house legal counsel) or other advisers:

- whether the adviser's employer provides other services to the listed company;
- the amount of fees the adviser's employer receives from the listed company (as a percentage of such employer's total revenue);
- the conflict of interest policies and procedures of the adviser's employer;
- any business or personal relationship between the adviser and a member of the compensation committee;
- any stock of the listed company owned by the adviser; and
- any business or personal relationship between the adviser or the adviser's employer with an executive officer of the listed company.[13]

Consistent with the Dodd-Frank Act, Exchange Act Rule 10C-1(b)(2) provides that the compensation committee is directly responsible for the appointment, compensation and oversight of the work of any such consultant, counsel or adviser that it retains. Furthermore, Rule 10C-1(b)(3) requires each listed company to provide appropriate funding for the payment of reasonable compensation to a compensation consultant, independent legal counsel and other adviser retained by the compensation committee. The Final Rules make clear, however, that the compensation committee will continue to be empowered and obligated to exercise its own judgment with respect to executive compensation oversight and will not be required to follow the advice of its advisers.

Under the Proposed Listed Company Rules for both NYSE and Nasdaq, the compensation committee adviser independence requirements of Exchange Act Rule 10C-1 are incorporated in the respective listing standards by first, adding new listing rules that expressly cross-reference the applicable provisions of Exchange Act Rule 10C-1(b) regarding the rights and responsibilities of the compensation committee for the retention and independence of compensation consultants, outside counsel and advisers (in the case of Nasdaq) or that are substantially similar to such rules (in the case of NYSE), and second, by requiring that the compensation committee's charter specifically include the compensation committee's rights and responsibilities under such newly added listing rules.[14] Like the Final Rules, the Proposed Listed Company Rules neither mandate the use of a compensation adviser, nor preclude the compensation committee's retention of nonindependent legal counsel or obtaining the advice of in-house counsel or outside counsel retained by the listed company or management; however, the compensation committee must conduct the adviser independence assessment as to any consultant, counsel or advisor that provides advice to it (other than in-house legal counsel); accordingly, such independence assessment is not limited to formal retention relationships.

Exemptions from Compensation Committee Adviser Independence Rules

The Final Rules specifically exempt from the compensation committee adviser rules controlled companies[15] and smaller reporting companies.[16] Under the Final Rules, the Exchanges were empowered to exempt other categories of listed companies from the foregoing compensation committee adviser listing requirements as they determined to be appropriate, taking into consideration the impact of these requirements on smaller reporting issuers.

In accordance with this authority, both NYSE and Nasdaq's Proposed Listed Company Rules exempt foreign private issuers from the compensation committee adviser requirements. Nasdaq's Proposed Listed Company Rules also exempt smaller reporting companies. In contrast, NYSE's Proposed Listed Company Rules generally require smaller reporting companies to comply with the compensation adviser requirements, with the exception that the compensation committees of smaller reporting companies are not required to consider the six "independence factors" listed above when selecting their compensation advisers.

The Proposed Listed Company Rules generally continue to exempt certain categories of listed companies from the compensation committee requirements, including those regarding compensation consultants and other advisers to the compensation committee. In the case of NYSE, this general exemption includes controlled companies, limited partnerships, companies in bankruptcy, closed-end and open-end funds registered under the 1940 Act, passive business organizations such as trusts and derivatives, and issuers whose only security is preferred stock. In the case of Nasdaq, this general exemption includes asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies and controlled companies.

PROXY DISCLOSURE REGARDING COMPENSATION COMMITTEE ADVISERS AND CONFLICTS OF INTEREST

In the Final Rules, the SEC amended Item 407 of Regulation S-K (Corporate Governance) to require that, to the extent that its compensation committee identifies compensation consultants pursuant to Item 407(e)(iii) of Regulation S-K whose work has raised any conflict of interest, the registrant must provide narrative disclosure of the nature of the conflict and how the conflict is being addressed.[17] In doing so, Item 407 requires the registrant to take into account the compensation committee adviser independence factors listed in Rule 10C-1(b)(2). The Proposed Listed Company Rules do not alter these proxy disclosure requirements.

Listed companies must comply with the new proxy disclosure requirements regarding compensation committee consultant conflicts in any proxy statement for an annual or special meeting occurring on or after January 1, 2013. Notably, controlled companies and smaller reporting companies are not exempt from compliance with these new proxy disclosure requirements. As a result, even though smaller reporting companies may be exempt from the listing standards regarding compensation committee adviser independence under the Final Rules, they may still have to conduct the adviser independence assessment in order to determine what must be disclosed in their proxy statements.

EFFECTIVENESS AND TRANSITION

NYSE's Proposed Listed Company Rules become effective on July 1, 2013, but NYSE-listed companies will have a transition period until the earlier of their first annual meeting after January 15, 2014, and October 31, 2014 to comply with the independence requirements for compensation committee members (compliance with the NYSE rules regarding a compensation committee's rights and responsibilities over retaining or obtaining the advice of compensation consultants, independent legal counsel or other advisers will be required July 1, 2013). The Nasdaq Proposed Listed Company Rules become effective at a listed company's second annual meeting held after the date of SEC approval, but no later than December 31, 2014; however, the rules with respect to the authority to retain compensation consultants, advisers and independent legal counsel become effective immediately upon SEC approval. Nasdaq-listed companies will be required to certify, on a form to be provided by Nasdaq, within thirty days after the applicable compliance deadline, that they have complied with the amended listing rules; by contrast, the NYSE Proposed Listed Company Rules do not include any formal certification requirement with respect to the compensation committee independence requirements. Of course, the Proposed Listed Company Rules remain subject to SEC approval.[18]

IMPLEMENTATION AND IMPACT

As noted above, the Proposed Listed Company Rules are subject to SEC review and, if approved, generally will provide transitional relief for listed companies to conform to the compensation committee member and adviser independence requirements. However, in anticipation of SEC approval, listed companies (especially those listed on Nasdaq) should, in the absence of a transition period or an exemption, move in the direction of having a standing compensation committee of independent directors and adopting a formal written charter, in each case, that will satisfy the requirements under the Proposed Listed Company Rules. Nonetheless, in recognition of the fact that the SEC may alter or wholly reject the proposals, listed companies should be careful to build sufficient flexibility in their charters to conform to the final size and charter requirements as eventually adopted and approved by the SEC (perhaps with express reference to the final listing rules).

As was the case when the Dodd-Frank Act was enacted nearly two years ago, most publicly traded companies already are subject to a variety of existing compensation committee independence requirements.[19] Nonetheless, listed companies should review and, to the extent necessary or appropriate, update their compensation committee size and membership, their compensation committee charters and their selection and use of compensation advisers.

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If you have any questions as to how these new rules may impact your business, please do not hesitate to contact your Proskauer attorney or any member of our Employee Benefits, Executive Compensation & ERISA Litigation Practice Center.

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ANNEX A

Comparison of Key Aspects of NYSE and Nasdaq Requirements for Compensation Committees and Their Advisers

PROVISION	**NYSE**	**NASDAQ**

Compensation Committee Establishment	Listed companies must have a compensation committee composed entirely of independent directors. However, the board may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors and have a committee charter.	Proposed rules require listed companies to have a formal, stand-alone compensation committee comprised of at least two directors, all of whom must be independent. Existing alternative of having an informal committee of independent directors who constitute a majority of the board's independent directors approve or recommend executive compensation decisions is eliminated.
Compensation Committee Size and Composition	Compensation committee must be composed entirely of independent directors, but no express requirements as to the number of committee members.	Compensation committee must have at least two members, all of whom are independent (subject to the "Limited and Exceptional Circumstances" exception).
Director Independence Factors Generally	No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (directly or as a partner, shareholder or officer of an organization that has a relationship with the company). In addition, certain bright-line exclusions from "independence" apply (see below).	"Independent Director" means 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 listed company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, certain bright-line exclusions from "independence" apply (see below).

Additional Independence Factors for Compensation Committee Members	Board of directors must consider all factors specifically relevant to determining whether director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with committee duties, including: *Ø the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director (including whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation); and* *Ø whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company (including whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a*	Compensation committee members must not accept, directly or indirectly, any consulting, advisory or other compensatory fee from the listed company or any of its subsidiaries (other than (i) fees received as a member of the compensation committee, the board of directors or any other board committee; or (ii) fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed company (provided that such compensation is not contingent in any way on continued service). In determining whether a director is eligible to serve on the compensation committee, a listed company's board also must consider whether the director is affiliated with the listed company, a subsidiary of the company or an affiliate of a subsidiary of the company to determine whether such affiliation would impair the director's judgment as a member of the compensation committee.

Existing Bright-line Exclusions	In general, a director is not independent if he or she: *Ø is, or at any time during the past three years was, employed by the company, or has a family member who is or has been within the last three years an executive officer of the company;* *Ø has received, or has a family member who has received, during any 12-month period within the last three years, more than $120,000 in direct compensation from the company, other than (i) board or committee fees and (ii) pension and other deferred compensation for prior service not contingent on continued service;* *Ø is a current partner or employee of the company's internal or external auditor; has an immediate family member who is a current partner of such a firm; has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or was or has an immediate family member who was within the last three years a partner or employee of such a firm and personally*	In general,[20] a director is not considered independent if he or she: *Ø is, or at any time during the past three years was, employed by the company;* *Ø accepted or has a family member who accepted any compensation from the company in excess of $120,000 during any period of 12 consecutive months within the three years preceding the determination of independence, other than (i) compensation for board or board committee service; (ii) compensation paid to a family member who is an employee (other than an executive officer) of the company; or (iii) benefits under a tax-qualified retirement plan, or non-discretionary compensation.* *Ø is a family member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer;* *Ø is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than (i)*

Compensation Committee Charter	Compensation committee must have a written charter that addresses: *Ø the compensation committee's purpose and responsibilities;* *Ø an annual performance evaluation of the compensation committee; and* *Ø the rights and responsibilities of the compensation committee as to compensation consultants, outside counsel and other advisers.*	Compensation committee charter must specify: *Ø scope of the compensation committee's responsibilities and how it carries out such responsibilities (including structure, process and membership requirements);* *Ø the compensation committee's responsibility for determining (or recommending) CEO and other executive officer compensation;* *Ø that the CEO may not be present during voting or deliberations over his or her own compensation; and* *Ø the rights and responsibilities of the compensation committee as to compensation consultants, outside counsel and other advisers.* The listed company must certify that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the charter on an annual basis (on a form to be provided by Nasdaq).

Compensation Committee Consultants, Independent Legal Counsel and Other Advisers	*Ø NYSE-proposed rules with respect to the rights and responsibilities of the compensation committee relating to its advisers are substantially similar to those under the SEC Final Rules, and further require that the compensation committee charter include such rights and responsibilities.* *Ø Compensation committee may retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser;* *Ø Compensation committee is directly responsible for the appointment, compensation and oversight of the work of any such adviser retained by the compensation committee;* *Ø Listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such advisers; and* *Ø Compensation committee may select such an adviser only after taking into consideration all factors relevant to that person's independence from*	Compensation committee subject to SEC Final Rules with respect to (i) compensation committee authority to retain compensation consultants, independent legal counsel and other compensation advisers; (ii) authority to fund such advisers; and (iii) responsibility to consider the specified independence factors from the SEC Final Rules before selection of such advisers (other than in-house legal counsel). Such Final Rules are incorporated into Nasdaq listing standards by the addition of: *Ø an express cross-reference to applicable provisions of Exchange Act Rule 10C-1; and* *Ø a requirement that the compensation committee charter specify such responsibilities and authorities.*

Cure Periods	If a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, with prompt notice to NYSE and only so long as a majority of the members of the compensation committee continue to be independent, may remain a compensation committee member until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.	Permits listed companies to regain compliance due to one vacancy, or if one member ceases to be independent due to circumstances beyond the member's reasonable control, by earlier of their next annual meeting or one year from occurrence of event causing compliance failure (or if the next annual meeting is within 180 days, then within 180 days from event of failure).

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[1] Section 952 of the Dodd-Frank Act added Section 10C (Compensation Committees) to the Securities Exchange Act of 1934 (the "Exchange Act"), which generally: (i) compelled the SEC to enact rules generally prohibiting the national securities exchanges and the national securities associations (collectively, the "Exchanges") from listing the securities of any public company (with certain exceptions) that does not have a compensation committee composed entirely of independent members of its board of directors, defining what "independence" will be based on for such purposes and permitting exemptions from those rules; (ii) authorized compensation committees to retain, compensate and oversee the services of a compensation consultant, independent legal counsel and other advisers in their sole discretion, only after taking into consideration factors to be identified by the SEC as affecting the independence of such advisers; and (iii) required public companies to provide for appropriate funding for the reasonable compensation of such advisers and to disclose whether outside compensation consultants were retained and, if so, to discuss any conflicts of interest created in connection with services provided by compensation consultants. The Final Rules added Rule 10C-1 to the regulations under the Exchange Act and directed the Exchanges to adopt listing standards addressing these issues. For a detailed discussion of the executive compensation and corporate governance provisions of the Dodd-Frank Act, please refer to our client alert, *The Impact of Financial Reform on Executive Compensation*, dated July 19, 2010.

[2] Notably, if after applying these compensation committee adviser independence factors, the compensation committee determines that the work of a compensation consultant has raised a conflict of interest, Item 407(e) of Regulation S-K, as amended by the Final Rules, requires proxy disclosure of the conflict of interest and how the conflict is being addressed, in any proxy or information statement for an annual meeting at which directors will be elected on or after January 1, 2013.

[3] Such exemption provides that if the compensation committee has at least three members, one director who is not an executive officer or an employee of the listed company, or a family member of an executive officer of the listed company, may be appointed to the compensation committee for a term not longer than two years if the board of directors, under exceptional and limited circumstances, determines that his or her membership on the compensation committee is required by the best interests of the listed company and its stockholders and makes certain proxy disclosure as to the nature of the relationship and the reasons for its determination.

[4] As explained in the Preamble to the Final Rules, the SEC deliberately chose neither to separately define the term "affiliate" for purposes of Rule 10C-1 nor to impose any mandatory look-back period for determining independence.

[5] In general, under NYSE Listed Company Manual 303A.02(b), a director is not independent if he or she (or, in certain cases, an immediate family member): is or has been an executive officer; has received more than $120,000 in direct compensation (other than director fees and pension or other retirement or deferred compensation for prior service); is or has been a partner or employee of the listed company's internal or external auditor; is or has been an employee of a company for which any of the listed company's executive officers serve or served on the company's compensation committee; or is a current employee of a company that has made or received payments to or from the listed company in excess of certain aggregate dollar or gross revenue thresholds.

[6] In general, under Nasdaq Listing Rules 5605(a), an "independent director" means 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 listed company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, certain categories of persons, substantially similar to those applicable under the NYSE rules, are expressly precluded from being considered independent.

[7] The prohibition on compensation committee members from accepting consulting, advisory or other compensatory fees from the listed company and its subsidiaries is generally identical to the existing Nasdaq rules applicable to audit committee members; however, by contrast to the audit committee rules, the proposed compensation committee rules would apply prospectively without any look-back for periods prior to service on the compensation committee.

[8] Nasdaq rules currently require each listed company to certify its adoption of a formal written audit committee charter meeting certain specifications and, further, that the audit committee has reviewed and reassessed the adequacy of the formal written charter on an annual basis. The Proposed Listed Company rules with respect to compensation committee charters are similar to the existing requirements with respect to audit committee charters, but the proposed requirement for annual review is prospective (i.e., "will review and reassess") instead of retrospective (i.e., "has reviewed and reassessed").

[9] Existing Nasdaq listing rules require that the CEO not be present during voting or deliberation over his or her own compensation. This concept would not only be retained in the Nasdaq Proposed Listed Company Rules, but also taken a step further by specifically incorporating it as a required component of the compensation committee charter.

[10] In a departure from the Final Rules, NYSE's Proposed Listed Company Rules exempt a foreign private issuer from the compensation committee independence requirements only if the company follows home country practice with respect to compensation committee composition, but do not require additional disclosure as to the rationale for not having an independent compensation committee. NYSE noted that not only do current NYSE rules require foreign private issuers to disclose significant differences between home country rules and NYSE standards, but also that "the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law."

[11] Under this regime, a NYSE-listed company with a compensation committee of only two members, one of whom will not satisfy the independence rules, may not be able to use the cure period under the Proposed Listed Company Rules. Such a NYSE listed company may wish to appoint a third member to the compensation committee who would be deemed "independent" in order to preserve their ability to use the cure period by having a majority of members remain independent, notwithstanding the disqualification of the "inside" director.

[12] For example, companies that become listed in connection with an initial public offering, spin-off or emergence from bankruptcy would be required to have at least one independent director on the compensation committee on the listing date, a majority of independent directors on the compensation committee within 90 days of the listing date, and a fully independent compensation committee within one year of the listing date.

[13] As noted in the Preamble to the Final Rules, the SEC deliberately declined to impose any materiality, numerical or other thresholds that would narrow the foregoing factors or to further attempt to define "other services" or "business or personal relationship." Interestingly, the sixth and final factor regarding relationships with an executive officer was not expressly enumerated in the corresponding provisions of the Dodd-Frank Act; instead, the SEC included it under the authority given to it under the Dodd-Frank Act to identify additional factors which are "competitively neutral" among categories of consultants, legal counsel or other advisers and which preserve the ability of compensation committees to retain the services of any such advisers.

[14] Existing NYSE rules with respect to compensation committees provide that if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give it sole authority to retain and terminate the consulting firm (including sole authority to approve the firm's fees and other retention terms); however, this provision would be deleted from the NYSE rules once the Proposed Listed Company Rules take effect.

[15] Under the Final Rules, a "controlled company" is defined as a listed issuer of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.

[16] In addition, neither the listing of a security features product cleared by a clearing agency that is registered pursuant to Section 17A of the Exchange Act (or exempt from such registration) nor the listing of a standardized option issued by a clearing agency registered pursuant to Section 17A of the Exchange Act is subject to the compensation committee adviser listing requirements.

[17] Existing provisions under Item 407(e) of Regulation S-K issued by the SEC in December 2009 require that public companies make various proxy disclosures regarding the role of compensation consultants in determining executive and director compensation, including whether the compensation committee (or another board committee performing a similar function) engaged its own compensation consultant to provide advice regarding the compensation of executives or directors, the nature and scope of their work and the material instructions or directions given to the consultants. In certain cases, disclosure of the fees paid to compensation consultants is required. Under these rules, if a compensation consultant (or its affiliates) provided other services to the company for fees in excess of $120,000 in the company's last completed fiscal year, the company must disclose the fees paid to the compensation consultant for executive and director compensation consulting, as well as the aggregate fees paid to the compensation consultant and its affiliates for all other services. The company also must disclose whether the decision to engage the compensation consultant or its affiliates for these other services was made or recommended by management and whether the board or a board committee approved the engagements for these other services. Similar disclosure regarding fees is required if a compensation consultant is engaged by company management.

[18] The SEC must generally approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the Proposed Listed Company Rules within 45 days of the date of publication of the Proposed Listed Company Rules in the Federal Register. However, with respect to each of the Proposed Listed Company Rules, the SEC may extend its review period to up to 90 days after publication if it determines a longer period is appropriate and discloses its reasons for such determination, or, with the consent of the applicable Exchange, beyond the 90-day period.

[19] For example, in addition to existing independence requirements with respect to executive compensation at NYSE- or Nasdaq-listed companies, the SEC exempts certain equity grants to corporate insiders from the general prohibition on the purchase and sale of securities within a six-month period under Section 16(b) of the Exchange Act to the extent approved by a committee of two or more "nonemployee directors" (as defined in Exchange Act Rule 16b-3). In addition, in order to satisfy the requirements for the performance-based compensation exception from the $1 million annual limit on deduction of compensation payable to the covered employees of a public company pursuant to Section 162(m) of the Internal Revenue Code of 1986, as amended, performance goals must be established and certified a compensation committee comprised solely of two or more "outside directors" as defined under Section 162(m) of the Code.

[20] In the case of an investment company, in lieu of the following, a director who is an "interested person" of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee, is not considered independent.

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