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SEC Approves NYSE and NASDAQ Revised Listing Rules Regarding the Independence of Compensation Committees and Their Advisers

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Amendments to the stock exchange listing rules governing compensation committee independence were finalized recently, as the U.S. Securities and Exchange Commission (SEC), the New York Stock Exchange (NYSE) and the NASDAQ Stock Market (Nasdaq, and together with NYSE, the Exchanges) completed a self-regulatory process which began when the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) was passed in 2010.

The Dodd-Frank Act added Section 10C to the Securities Exchange Act of 1934 (the Exchange Act), which directed the SEC to promulgate rules for the national exchanges to address the independence of compensation committees of issuers, and the retention, compensation and oversight of consultants, outside legal counsel and other advisers to compensation committees.

Under the self-regulatory rulemaking process, the SEC issued proposed and then final rules directing the exchanges to take action (the Final Rules), and in September 2012, each of NYSE and Nasdaq submitted initial proposals to amend their respective corporate governance listing standards and subsequently modified their initial proposals. The Exchanges submitted final proposals to modify their respective listed company rules in early January 2013 (the Listed Company Rules). On January 11, 2013, the SEC released orders approving, without revision, the proposals (as amended) submitted by NYSE and Nasdaq. For a detailed discussion of the Listed Company Rules as initially proposed and the Final Rules issued by the SEC, please refer to our Client Alert, *NYSE and Nasdaq Propose Amendments to Listing Rules To Implement SEC Requirements for Independence of Compensation Committees and Their Advisers* dated October 5, 2012.

The revised Listed Company Rules, as approved by the SEC, are substantially similar in form and substance to the Listed Company Rules as initially proposed by the Exchanges in the fall of 2012; however, both of the Exchanges amended their initial proposals subsequent to their original submissions to the SEC. This Special Report summarizes the material differences between the Listed Company Rules as initially proposed by the Exchanges and as revised and approved by the SEC. This Special Report also provides general guidance on the Listed Company Rules. Annex A attached to this Special Report sets forth a chart comparing the key aspects of the compensation committee independence rules of NYSE and Nasdaq under the revised Listed Company Rules.

The primary changes reflected in the final amended Listed Company Rules addressed the following:

- *Exempting Certain Outside Consultant Activity from Independence Review*: The final Listed Company Rules clarify that a compensation committee need not consider the independence criteria with respect to consultants and other advisers who provide counsel on broad-based compensation plans or who provide general survey data or customized data without any substantive input from the issuer.

- *Smaller Reporting Company Effective Dates*: The amendments extend the transition period for compliance when a "smaller reporting company" (an issuer with a "public float" under $75 million) loses that status.

Apart from being aware of these changes, the key focus for issuers should be the first major compliance date under the Listed Company Rules: July 1, 2013. By that date, issuers must ensure that their compensation committees have the authority to retain and pay outside consultants and other advisers and the responsibility to consider certain independence factors before selecting such advisers.[1] The next key date will require that issuers comply with the independence standards and charter requirements with respect to compensation committees and their advisers by the earlier of (i) the first annual meeting after January 15, 2014 or (ii) October 31, 2014.

Compensation Committees Generally

Under the final Nasdaq Listed Company Rules, a Nasdaq-listed company must have a formal standing compensation committee of at least two independent members, and must certify that it has a formal written compensation committee charter. The compensation committee charter must specify:

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

- 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;

- that the CEO may not be present during voting or deliberations on his or her own compensation; and

- the specific responsibilities and authorities of the compensation committee to retain or obtain the advice of compensation consultants, outside legal counsel or other advisers.

Likewise, the NYSE Listed Company Rules require a listed company to have a compensation committee composed entirely of independent directors and to adopt a written compensation committee charter (although there is no certification requirement). [2] NYSE requires that the charter address:

- the compensation committee's responsibility to review, approve and evaluate chief executive officer compensation, and to make recommendations with respect to non-CEO compensation and incentive compensation and equity-based plans, subject to board approval;

- the compensation committee's responsibility to prepare the Compensation Committee Report required under Regulation S-K;

- an annual performance evaluation of the compensation committee; and

- the specific responsibilities and authorities of the compensation committee to retain or obtain the advice of compensation consultants, outside legal counsel or other advisers.

Compensation Committee Member 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.

NYSE generally incorporated these additional compensation committee independence factors within its pre-existing Listed Company Rules regarding director independence. In doing so, NYSE rules do not prohibit a compensation committee member from receiving compensatory fees, but instead require the listed company's board of directors to consider whether that compensation "is material to that director's ability to be independent from management in connection with the duties of a compensation committee member." By contrast, the Nasdaq rules affirmatively prohibit compensation committee members from accepting – 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.

Retention, Compensation and Oversight of Compensation Committee Advisers

Exchange Act Rule 10C-1(b)(4) directed the Exchanges to require consideration of the following six independence factors, in addition to any other factors which may be imposed by rule of the Exchanges, before a listed company's compensation committee may retain or obtain advice from a compensation consultant, legal counsel (other than in-house legal counsel) or other adviser:

- ???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.

Nasdaq's final Listed Company Rules require compensation committees to consider only the foregoing six factors prior to selecting any compensation consultant, outside legal counsel or other adviser. In contrast, the NYSE rules require that compensation committees take into consideration not only the six enumerated factors, but also "all factors relevant to that person's independence from management."

In the final, SEC-approved Listed Company Rules, both Exchanges have clarified that the compensation committee adviser independence assessment need not be conducted in order for the compensation committee to receive advice from:

- in-house legal counsel; or

- compensation consultants, legal counsel or other advisers whose role is limited to consulting on "any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice."

These clarifications generally mirror the exceptions under Item 407(e)(3)(iii) of Regulation S-K from the requirement that listed companies disclose any role that compensation consultants had in determining or recommending executive and director compensation for advice with respect to broad-based, nondiscriminatory plans and noncustomized information.

In addition, the final Listed Company Rules with respect to compensation committee adviser independence of both NYSE and Nasdaq clarify that compensation consultants, outside legal counsel and other advisers are not required to satisfy the "independence" criteria for a compensation committee to retain or receive advice from these advisers; instead, these Listed Company Rules only require that the compensation committee consider the independence factors before selecting these advisers or receiving advice from them.

Changes to Special Rules for Smaller Reporting Companies

Both NYSE and Nasdaq Listed Company Rules with respect to the independence of compensation committee members and their advisers contain special rules for a "smaller reporting company."[3]

In their final Listed Company Rules, both NYSE and Nasdaq exempt smaller reporting companies from the general requirement that, in determining whether a compensation committee member is "independent," the board of directors must consider the additional independence factors for compensation committee members, i.e., the member's source of compensation, and whether the member is affiliated with the listed company, a subsidiary of the listed company, or an affiliate of a subsidiary of the listed company. However, both Exchanges generally require that the compensation committee members of smaller reporting companies be "independent" under the general independence standards applicable to independent directors other than compensation committee members.[4] In addition, while neither Exchange requires a smaller reporting company compensation committee to consider the enumerated adviser independence factors described above in selecting their advisers, a smaller reporting company listed on NYSE must have a formal written charter that specifies the compensation committee's authority to retain and oversee compensation consultants, legal counsel or other advisers to the compensation committee. A smaller reporting company listed on Nasdaq generally must have, and must certify that it has and will continue to have, a compensation committee comprised of at least two independent directors and a formal written compensation committee charter or, alternatively, a board resolution, setting forth the responsibilities of the smaller reporting company's compensation committee; however, this charter or resolution need not specify the compensation committee's authorities to retain and oversee compensation consultants, legal counsel or other advisers to the compensation committee.

In addition to the foregoing rules, the Listed Company Rules of each Exchange include phase-in periods for smaller reporting companies that cease to qualify as smaller reporting companies. Under Securities 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 their second quarter of each fiscal year (the SRC Determination Date). Listed companies which do not so qualify as of the SRC Determination Date will cease to be smaller reporting companies on the first day of the fiscal year immediately following the SRC Determination Date (the SRC End Date). Under the final Listed Company Rules of both Nasdaq and NYSE, listed companies that cease to be smaller reporting companies generally must:

- within 6 months of the SRC End Date, comply with the applicable compensation committee adviser requirements, and have at least one compensation committee member who satisfies the applicable compensation committee member independence requirements;

- within 9 months of the SRC End Date, have a majority of compensation committee members satisfy the applicable independence requirements; and

- within 12 months of the SRC End Date, have all of their compensation committee members satisfy the applicable independence requirements.[5]

Effectiveness and Transition

Nasdaq's Listed Company Rules become effective generally upon the earlier of a listed company's first annual meeting after January 15, 2014, and October 31, 2014; however, the rules with respect to the compensation committee's authority to retain compensation consultants, advisers and outside legal counsel are effective on July 1, 2013 (in the case of a listed company without a formal compensation committee as of that date, the authority to retain compensation consultants, advisers and outside legal counsel must be granted to the independent directors who determine, or recommend to the board for determination, executive compensation by July 1, 2013).[6] A Nasdaq-listed company will be required to certify, on a form to be provided by Nasdaq, within thirty days after the applicable compliance deadline, that it has complied with the Listed Company Rules as revised.

NYSE Listed Company Rules become effective on July 1, 2013; however, 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 new independence requirements for compensation committee members. Accordingly, like the corresponding Nasdaq rules, compliance with the NYSE rules regarding a compensation committee's rights and responsibilities with respect to compensation consultants, outside legal counsel or other advisers is required July 1, 2013. However, by contrast to the Nasdaq rules, the revised NYSE Listed Company Rules do not include any formal certification requirement with respect to the compensation committee member and adviser independence requirements.

Implementation and Impact

Notwithstanding the delayed effective dates, NYSE- and Nasdaq-listed companies should, in the absence of a transition period or an exemption, already be moving 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 final, SEC-approved Listed Company Rules. While most publicly traded companies already are subject to a variety of existing compensation committee independence requirements,[7] listed companies should review and, to the extent necessary or appropriate, update their compensation committee's charter, size and membership criteria, and policies and practices with respect to retention of outside 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 lawyer or any member of our Employee Benefits, Executive Compensation & ERISA Litigation Practice Center.

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.	Listed companies must have a formal, stand-alone compensation committee comprised of at least two directors, all of whom must be independent. (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 has been 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 must be independent (subject to the "exceptional and limited circumstances" exception).[8]

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: ??? 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 ??? 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	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.

Director Independence Factors Generally – Bright-line Exclusions	In general,[9] a director is not independent if he or she: ??? 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; ??? 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; ??? 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	In general,[10] a director is not considered independent if he or she: ??? is, or at any time during the past three years was, employed by the company; ??? 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 nondiscretionary compensation; ??? 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; ??? is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any

Compensation Committee Charter	Compensation committee must have a written charter that addresses: ??? the compensation committee's purpose and responsibilities; ??? an annual performance evaluation of the compensation committee; and ??? the rights and responsibilities of the compensation committee as to compensation consultants, outside counsel and other advisers.	Compensation committee charter must specify: ??? scope of the compensation committee's responsibilities and how it carries out such responsibilities (including structure, process and membership requirements); ??? the compensation committee's responsibility for determining (or recommending) CEO and other executive officer compensation; ??? that the CEO may not be present during voting or deliberations over his or her own compensation; and ??? 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

Compensation Committee Consultants, Outside Legal Counsel and Other Advisers	???NYSE 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. ???Compensation committee may retain or obtain the advice of a compensation consultant, outside legal counsel or other adviser. ???Compensation committee is directly responsible for the appointment, compensation and oversight of the work of any such adviser retained by the compensation committee. ???Listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such advisers. ???Compensation committee may select such an adviser only after taking into consideration all	???Nasdaq 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. ???Compensation committee may retain or obtain the advice of a compensation consultant, outside legal counsel or other adviser. ???Compensation committee is directly responsible for the appointment, compensation and oversight of the work of any such adviser retained by the compensation committee. ???Listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such advisers. ???Compensation committee may select such an adviser only after taking into consideration the specific independence factors from

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.	If a listed company fails to comply with the compensation committee composition requirements because of one vacancy, or if one member ceases to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of its next annual meeting or one year from the occurrence of the event causing compliance failure (or if the next annual meeting is within 180 days, then within 180 days from event of failure). The company must provide notice to Nasdaq immediately upon learning of the event or circumstance causing noncompliance.

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[1] In the case of a Nasdaq-listed company which does not have a formal compensation committee by July 1, 2013, the authority to retain and pay outside consultants and other advisers must be granted to the independent directors who determine, or recommend to the board for determination, executive compensation. In any case, all Nasdaq-listed companies generally must have a formal, stand-alone compensation committee composed entirely of independent directors and operating under a formal written charter by the earlier of (i) the first annual meeting after January 15, 2014 or (ii) October 31, 2014. However, under exceptional and limited circumstances, a Nasdaq-listed company whose compensation committee has at least three members may appoint one director to the compensation committee who is not an "Independent Director" under the general director independence definition. For this exception to apply, the director may not be an executive officer or an employee of the listed company, or a family member of an executive officer of the listed company, and may not serve for more than two years. In addition, the board must determine that the director's membership on the compensation committee is required by the best interests of the listed company and its stockholders, and the listed company must make certain proxy disclosure as to the director's relationship and the board's rationale for appointing the director to the compensation committee.

[2] The requirement to have a compensation committee charter existed for NYSE-listed companies prior to the approval of NYSE's revised Listed Company Rules. However, the NYSE Listed Company Rules continue to permit listed company boards to allocate the responsibilities of a compensation committee to other board committees composed entirely of independent directors, so long as any of these "other" board committees operate under their own committee charters.

[3] Under Regulation S-K, Item 10(f)(1), a "smaller reporting company" generally refers to an issuer with a public float of less than $75 million as of the last business day of its most recently completed second fiscal quarter, or in the case of an initial registration statement, as of a date within 30 days of the date of the filing of the registration statement. In the case of an issuer whose public float was zero as of the applicable date, such issuer will be considered a smaller reporting company if its annual revenues were less than $50 million during the most recently completed fiscal year.

[4] See Annex A for a summary of the general director independence factors applicable for both NYSE- and Nasdaq-listed companies.

[5] Under the proposed NYSE Listed Company Rules, listed companies that cease to be smaller reporting companies would have been required to comply with the compensation committee member independence requirements within six months of the SRC Determination Date and with the compensation committee adviser requirements as of the SRC Determination Date. Under the proposed Nasdaq Listed Company Rules, listed companies that cease to be smaller reporting companies would have been required to meet the compensation committee charter requirements (including with respect to the authority and responsibilities to retain advisers), and to begin phasing in the additional independence requirements for compensation committee members, within 30 days of the SRC End Date.

[6] Nasdaq originally proposed that its Listed Company Rules would become effective generally at a listed company's second annual meeting held after the date of SEC approval, but no later than December 31, 2014, and that the rules with respect to the compensation committee's authority to retain compensation consultants, advisers and outside legal counsel would be effective immediately upon SEC approval.

[7] 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 by a compensation committee comprised solely of two or more "outside directors" as defined under Section 162(m) of the Code.

[8] See Footnote 1, *supra*, for a summary of the "exceptional and limited circumstances" exception under the Nasdaq rules.

[9] Under the NYSE Listed Company Rules, closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940 are not required to comply with the director independence requirements. Business development companies that are not registered under the Investment Company Act are required to have independent directors for their compensation committees; however, a director of a business development company is considered independent if he or she is not an "interested person" of the company, as defined in Section 2(a)(19) of the Investment Company Act.

[10] Under the Nasdaq Listed Company Rules, in the case of an investment company, a director is not considered independent if he or she 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).

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