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Alert
SEC Disclosure and Corporate Governance

Heads Up for 2014 Proxy Season:

Nasdaq Amends Compensation Committee Independence Requirements – Again

Last week, Nasdaq amended its listing rules governing the independence of compensation committee members. Earlier this year, Nasdaq amended its listing rules relating to compensation committee independence, responsibilities and authority. The earlier amendments to Nasdaq Rule 5605(d)(2) provided that a director who accepts directly or indirectly any compensatory fee from the company (including any parent or subsidiary) may not be considered independent for purposes of service on the compensation committee, subject to limited exceptions for certain types of fees. The current amendments eliminate this bright-line test, and require that the board instead only *consider* the receipt of all types of compensatory fees when determining eligibility for compensation committee membership. The current rule amendments are available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2013/SR-NASDAQ-2013-147.pdf. Compensation committee members at Nasdaq-listed companies must meet the revised independence standards by the earlier of the first annual shareholders meeting after January 15, 2014, or October 31, 2014.

The current rule amendments provide that in addition to satisfying the general independent director requirements under Nasdaq Rule 5605(a)(2), in affirmatively determining the independence of any director who will serve on the compensation committee, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the 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 but not limited to (1) sources of compensation and (2) affiliate status. The current rule amendments conform closely to the NYSE listing standards.

The chart below compares the earlier and current rule amendments governing compensation committee independence.

Compensation Committee Independence	Earlier Rule Amendment	Current Rule Amendment
Receipt of Compensation	▪ Bright-line test: Compensation committee member must not accept directly or indirectly, any consulting, advisory or other compensatory fee from the company or any subsidiary; mirrors audit committee independence bright-line test for receipt of compensation under Exchange Act Rule 10A-3(b)(1)(ii)(A). Compensatory fees do not include: (1) fees received as a member of the compensation committee, the board of directors or any other board committee; or (2) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company (provided that such compensation is not contingent in any way on continued service).	▪ Bright-line test eliminated: Board must *consider* the source of compensation of the director, including any consulting, advisory, or other compensatory fees paid by the company to the director. Exceptions to compensatory fees eliminated; director fees and amounts received for prior service must now be considered when determining independence. ▪ When considering the sources of a director's compensation, the board should consider whether the director receives compensation from any person or entity that would impair the director's ability to make independent judgments about the company's executive compensation.
Affiliate Status	▪ The board must consider whether the director is affiliated with the 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.	▪ No substantive changes: The board must consider whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. ▪ When considering any affiliate relationship, the board should consider whether the affiliate relationship places the director under the direct or indirect control of the company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair the director's ability to make independent judgments about the company's executive compensation.
Look-Back Period	▪ None	▪ No change

How to Prepare

Companies with equity securities listed on Nasdaq are advised to take the following steps:

- *As soon as possible*:
  - Revise, if necessary, D&O questionnaires to reflect the listing rule amendments
  - Review compensation committee composition to determine whether all members meet the enhanced independence tests as revised
- *By the earlier of the company's first annual meeting after January 15, 2014, or October 31, 2014*:
  - Establish a formal compensation committee of at least two members with a written charter
  - Ensure that all compensation committee members meet the enhanced independence tests as revised
  - Revise, if necessary, the compensation committee charter and other documents (e.g., corporate governance guidelines, director independence standards) to reflect compensation committee independence requirements as amended
- *No later than 30 days after the earlier of the company's first annual meeting after January 15, 2014, or October 31, 2014*:
  - Submit a one-time certification to Nasdaq that the company has complied with the requirements relating to compensation committee charter and composition
    - Nasdaq has advised that the certification form will be available at https://listingcenter.nasdaqomx.com no later than January 15, 2014; a draft form of the certification is available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109_Amendment_1.pdf
    - Note that smaller reporting companies, foreign private issuers, controlled companies and companies relying on a phase-in schedule are required to file the certification even if they are exempt from some or all of Nasdaq's compensation committee requirements; however, asset-backed and other passive issuers, cooperatives, limited partnerships and management investment companies registered under the Investment Company Act of 1940 are *not* required to file the certification

If you have any questions on these matters, please do not hesitate to speak to your regular contact at Weil, Gotshal & Manges LLP or to any member of Weil's Public Company Advisory Group:

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