

Alert

SEC Disclosure and Corporate Governance

Two Reminders for the Compensation Committee:

Reconsider Adviser Independence

Nasdaq Companies Must Submit One-Time Certification

Since July 1, 2013, the New York Stock Exchange and the Nasdaq Stock Market have required that a compensation committee of a listed company may *select or obtain advice* from a compensation consultant, legal counsel or other adviser only after considering six enumerated factors relating to adviser independence. The compensation committee should ensure that, in addition to considering the independence of any new adviser, it reconsiders the independence of existing advisers on at least an annual basis as suggested by the SEC.

A compensation committee is not precluded from obtaining advice from a non-independent adviser, and the listing standards do not require disclosure of whether an adviser is independent. However, since January 1, 2013, SEC rules require disclosure of conflicts of interest of any compensation consultant, taking into account the same six factors.

Listed companies should consider the most appropriate time to consider and/or reconsider adviser independence for 2014 and add this to the compensation committee's annual calendar. In order to prepare, companies will need to gather information from advisers to the compensation committee, as well as directors and executive officers. Year 2 of the independence assessment may also be an appropriate time for the committee to review and refresh the procedures it has in place to ensure that the six independence factors are considered prior to retaining or receiving advice from an adviser.

For a detailed discussion of the six factors that the compensation committee must consider and an analysis of other listing rules adopted in 2013 relating to compensation committee independence, adviser independence and requirements of the compensation committee charter, see our Alert dated January 28, 2013 available at http://www.weil.com/files/upload/Weil_Alert_SEC_CG_January_2013.pdf, as updated for certain amendments made to the Nasdaq listing rules in our Alert dated December 4, 2013 available at http://www.weil.com/files/upload/11001_Nasdaq_SEC_Alert_v3.pdf.

Other Key Reminders:

- In affirmatively determining the independence of any director that serves on the compensation committee, the board of directors of NYSE and Nasdaq-listed companies must consider all factors specifically relevant to determining whether the 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. This requirement applies effective as of the 2014 annual meeting or October 14, 2014, whichever is earlier.

- The charters of NYSE and Nasdaq-listed companies must include certain enumerated responsibilities and authority articulated in the listing standards, including the compensation committee's responsibility to consider the independence of its advisers.
 - While NYSE-listed companies should have implemented any necessary changes by July 1, 2013, Nasdaq-listed companies that do not yet have a compensation committee or formal written charter will need to have them in place by their 2014 annual meeting or October 14, 2014, whichever is earlier.
- Nasdaq-listed companies must submit a one-time certification to Nasdaq within 30 days of the 2014 annual meeting or October 14, 2014, whichever is earlier, certifying that the company has complied with their requirements relating to the compensation committee charter and committee composition. The certification form is available at <https://listingcenter.nasdaqomx.com>.
- NYSE-listed companies must continue to submit an annual written affirmation and a CEO certification with 30 days of their annual meeting (or within 30 days of the filing of the Form 10-K if no annual meeting is held).

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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