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Alert

SEC Disclosure and Corporate Governance

New NYSE and Nasdaq Listing Standards on Independence of Compensation Committees and Their Advisers: It's Time to Prepare

New corporate governance listing standards of the New York Stock Exchange and the Nasdaq Stock Market were approved by the Securities and Exchange Commission on January 11, 2013.¹ The new standards apply to any company with listed equity securities, other than controlled companies and certain other listed companies specifically exempted by the exchanges. In approving the listing standards, the SEC did not take the opportunity to align the NYSE and Nasdaq standards where they differ.

Companies should start to prepare for the following:

- **Independence assessment of advisers.** Beginning July 1, 2013, a compensation committee may select or receive advice from a compensation consultant, legal counsel or other adviser only after conducting an independence assessment. A committee is not precluded from using a non-independent adviser, but it must first conduct the requisite assessment.
- **Compensation committee independence.** New, enhanced independence criteria for compensation committee members must be satisfied by the earlier of the first annual shareholders meeting after January 15, 2014, or October 31, 2014.
- **Compensation committee responsibility and authority over advisers and charter amendments.** Compensation committee charters must be revised by July 1, 2013, to reflect certain responsibilities and authority over advisers specified in the new listing standards.
- **Nasdaq formal compensation committee and charter requirements.** Nasdaq companies that do not have a compensation committee or formal written charter will need to have them in place by the earlier of the first annual shareholders meeting after January 15, 2014, or October 31, 2014. The charter is now required to include certain enumerated responsibilities of the compensation committee, so even Nasdaq companies that already have a formal written charter will need to review the charter for compliance with the new requirements. For a Nasdaq-listed company that has not yet established a formal committee by July 1, 2013, the independent directors must undertake the new responsibilities and authority by that date.

Reminder for upcoming proxy season: Disclosure of conflicts of interests of compensation consultants: New Item 407(e)(3)(iv) of Regulation S-K requires all companies subject to the proxy rules to disclose conflicts of interest of any compensation consultant in any proxy statement for an annual or special shareholders meeting at which directors are to be elected occurring on or after January 1, 2013.

The new listing standards implement Rule 10C-1 of the Securities Exchange Act of 1934.² For more details on the SEC's rules implementing new Item 407(e)(3)(iv) of Regulation S-K and adopting Exchange Act Rule 10C-1, see our Alert available at <http://www.weil.com/news/pubdetail.aspx?pub=10918>.

Compensation Committee Independence

Supplementing the existing listing requirements that members of the compensation committee be independent, the NYSE and Nasdaq listing standards now also require that the board of directors take into account two factors enumerated in Exchange Act Section 10C-1(b)(1) in determining whether a director is eligible for service on the compensation committee.³ It is here that the stock exchanges' standards differ.

NYSE	NASDAQ
<ul style="list-style-type: none"> ■ No bright-line tests for compensation committee member independence. ■ In affirmatively determining the independence of any director who will serve on the compensation committee, the board of directors must <i>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 but not limited to:</i> (1) the source of compensation of the director, including any consulting, advisory, or other compensatory fees⁴ paid by the listed company to the director and (2) whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. ■ No look-back period. 	<ul style="list-style-type: none"> ■ Bright-line test: A director serving on the compensation committee must not accept "directly or indirectly, any consulting, advisory or other compensatory fee"⁵ from the company or any subsidiary. This test mirrors the bright-line audit committee independence test for receipt of compensation under Exchange Act Rule 10A-3(b)(1)(ii)(A). ■ In determining whether a director is eligible to serve on the compensation committee, the board must also <i>consider</i> 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 <i>such affiliation would impair the director's judgment as a member of the compensation committee.</i> ■ No look-back period.

NYSE and Nasdaq have not specifically defined terms such as "affiliate" or "indirect" acceptance of compensation, for the purposes of assessing the enhanced independence standards for compensation committee members. Absent further guidance from the stock exchanges, listed companies will likely look to Exchange Act Rule 10A-3, which sets forth the independence criteria for members of the audit committee. Indeed, Nasdaq fully embraced one of the audit committee criteria for its new bright line test.⁶

Under the new listing standards, the board must *consider* whether a director is affiliated with⁷ the company (other than by reason of serving as a director) in order to determine whether such director is eligible to serve on the compensation committee. In contrast, Exchange Act Rule 10A-3 automatically disqualifies an affiliated director from service on the audit committee. The stock exchanges have noted that significant share ownership or affiliation with a significant stockholder will not be a bar to a finding of independence for compensation committee members.⁸ Therefore, a designee of a significant stockholder, who may not qualify for service on the audit committee, may still qualify for service on the compensation committee.⁹

Cure Period for Compensation Committee Independence. The listing standards provide for a new cure period for noncompliance with the compensation committee independence standards.

NYSE	NASDAQ
<ul style="list-style-type: none"> ■ If a company fails to comply with the new independence standards for compensation committee members because a member of the compensation committee ceases to be independent for reasons outside of the member's reasonable control, that member may remain on the compensation committee until the <i>earlier</i> of (1) the next annual shareholders meeting or (2) one year from the occurrence of the event that caused the member to no longer be independent; provided that a majority of the members on the compensation committee continue to be independent. ■ The NYSE does not provide for a cure period in the case of a vacancy. ■ The NYSE requires <i>prompt</i> notice of noncompliance with the listing standards 	<ul style="list-style-type: none"> ■ If a company fails to comply with the new independence standards for compensation committee members due to one vacancy, or one compensation committee member ceasing to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the <i>earlier</i> of (1) the next annual shareholders meeting or (2) one year from the occurrence of the event that caused the failure to comply; provided, however, that it will have at least 180 days to cure noncompliance (even if the annual meeting occurs sooner). ■ Nasdaq requires <i>immediate</i> notice of noncompliance with the listing standards. ■ Nasdaq's existing rule that permits one non-independent director on a compensation committee composed of at least three members in limited and exceptional circumstances remains substantially unchanged and applies for a director who fails to meet the enhanced standards.¹⁰

Assessing Compensation Adviser Independence

Perhaps the most challenging of the new listing standards is the requirement, implementing Exchange Act Rule 10C-1(b)(4), that the compensation committee of a listed company may *select or obtain advice* from a compensation consultant, legal counsel or other adviser (collectively, **Advisers**) *only after taking into consideration six enumerated factors*. Advisers are not required to be independent, and both stock exchanges' standards expressly provide that the compensation committee may select or receive advice from an Adviser that is *not* independent, *but only after* taking into consideration the six factors. The new listing standards do not require disclosure of the result of the independence analysis.

The compensation committee must consider the following six independence factors in their totality (no single factor is determinative):

1. the provision of other services to the company by the firm that employs the adviser;
2. the amount of fees received from the company by the firm that employs the adviser, as a percentage of the total revenue of the firm that employs the adviser;
3. the policies and procedures of the firm that employs the adviser that are designed to prevent conflicts of interest;
4. any business or personal relationship of the adviser with a member of the compensation committee;
5. any stock of the company owned by the adviser; and
6. any business or personal relationship of the adviser or the firm employing the adviser with an executive officer of the company.

As examples of relationships that would fall under the sixth factor, the SEC cited situations where the CEO and the Adviser have a familial relationship or where the CEO and the Adviser (or the Adviser's employer) are business partners.¹¹ While not made explicit, presumably the same examples would apply to the fourth factor concerning relationships between the Adviser and a member of the compensation committee.

The NYSE requires that the compensation committee consider *all factors relevant to the Adviser's independence from management, including the six factors*. Nasdaq has determined that consideration of only the six factors is adequate to elicit broad and sufficient information to enable the committee to make the appropriate determination. None of the six factors have materiality qualifiers or quantitative thresholds, and therefore a committee will need to exercise judgment and may want to develop its own guidelines.

The independence assessment must be conducted for any Adviser that *provides advice to the compensation committee*. Consequently, for example, an assessment is required for an Adviser that is retained by *management* but provides advice to the compensation committee and for an Adviser that provides advice to the compensation committee on *director* compensation.¹² The listing standards only specifically exclude from the independence assessment (1) in-house legal counsel and (2) Advisers that act in a role limited to (a) consulting on broad-based plans that are generally applicable to all salaried employees or (b) providing information that is either not customized for the company or that is customized based on parameters that are not developed by the Adviser, and about which the Adviser does not provide advice.¹³

The new listing standards do not specify what it means to *obtain advice* from an Adviser. The NYSE stated that the independence of any outside legal counsel, including the company's regular securities and tax counsel, must be evaluated prior to their being selected by or providing advice to the compensation committee.¹⁴ However, it is not clear whether an independence assessment of the company's outside legal counsel is required if such outside legal counsel only provides advice to the company's legal department and has no direct contact with the compensation committee regarding the advice. Absent further guidance from the stock exchanges, committees and Advisers are left to use their reasonable judgment.

In addition, transitional issues exist regarding the timing of an assessment for Advisers already engaged by or providing advice to the compensation committee. We recommend that the compensation committee conduct, by July 1, 2013, an independence assessment of any Adviser retained by the committee or from whom it has received (or expects to receive) advice for the 2013 fiscal year. We also recommend that minutes reflect that the appropriate assessment has been conducted by the compensation committee. The SEC indicates that it anticipates that compensation committees will conduct the independence assessment at least annually.¹⁵

Reminder: New Proxy Disclosure Required of Conflicts of Interests with Compensation Consultants. While listed companies are not required to disclose the results of the compensation committee's evaluation of Adviser independence, new Item 407(e)(3)(iv) of Regulation S-K requires all companies subject to the proxy rules (whether or not listed on an exchange) to disclose *conflicts of interest* of any compensation consultant (but not legal counsel or other advisers) who had *any role in determining or recommending the amount or form of executive or director compensation during the last completed fiscal year*. In evaluating whether a conflict of interests exists, the compensation committee must consider the same six factors identified above concerning the independence of all Advisers. The disclosure, if needed, must be included in any proxy statement for an annual or special meeting at which directors are to be elected occurring *on or after January 1, 2013*. For more details about new Item 407(e)(3)(iv) of Regulation S-K, see our Alert available at <http://www.weil.com/news/pubdetail.aspx?pub=10918>.

Compensation Committee Responsibility and Authority Over Advisers: New Charter Requirements

The new listing standards require that the compensation committee have certain responsibilities and authority over Advisers. Both stock exchanges require that the compensation committee charter include the following responsibilities and authority:

- the sole discretion to retain or obtain the advice of any Adviser;
- the direct responsibility for the appointment, compensation and oversight of the work of any Adviser retained by the compensation committee;
- a requirement that the company provide appropriate funding, as determined by the compensation committee, for the payment of reasonable compensation to any Adviser retained by the compensation committee; and
- the responsibility, prior to selecting or receiving advice from any Adviser, to evaluate the independence of such Adviser as discussed above.

Nasdaq Compensation Committee and Charter Requirements

Nasdaq will now require that all equity-listed companies have a compensation committee consisting of at least two directors that are independent under the current listing standards and that also qualify to serve on the compensation committee under the new enhanced standards summarized above.¹⁶ In addition, the compensation committee will be required to adopt a formal written charter which must specify:

- the scope of the committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
- the committee's responsibility for determining, or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company;
- that the CEO may not be present during voting or deliberations on his or her compensation; and
- the specific committee responsibilities and authority over Advisers (see above).

The compensation committee will need to review and reassess its charter annually.¹⁷ While many Nasdaq companies already have formal compensation committees and written charters, they will need to revise the charter to reflect the responsibilities and authority now specifically required to be enumerated in the charter.

Effective Dates

The effective dates for the new listing standards are as follows:

By July 1, 2013:

- Assess Adviser independence.
- Revise compensation committee charter to include compensation committee responsibility and authority over Advisers.

By the earlier of the first annual meeting after January 15, 2014, or October 31, 2014:

- Compensation committee members must meet the enhanced independence standards.
- Nasdaq companies that do not have a compensation committee or formal written charter must have them in place (but note the committee or independent directors acting in lieu thereof must possess the expanded responsibility and authority over advisers by July 1, 2013).

A Nasdaq-listed company is required to certify, within 30 days after the applicable implementation deadline, that it has complied with the new listing standards related to compensation committees.¹⁸ There is no new NYSE certification requirement, but NYSE companies continue to be required to provide annual, and sometimes interim, written affirmations certifying compliance with the NYSE corporate governance listing standards.

Exemptions and Phase-in Periods

The new listing standards do not apply to companies that only have debt securities listed on an exchange. In addition, the following exemption and phase-in periods apply:

Controlled Companies and Others. Existing stock exchange exemptions that apply to controlled companies, asset-backed issuers, cooperatives, limited partnerships, companies in bankruptcy and registered investment companies will continue under the NYSE and Nasdaq listing rules relating to the new compensation committee requirements.¹⁹

Foreign Private Issuers. As is currently the case, a foreign private issuer may follow its home country practices regarding compensation committee matters. Existing listing standards already require disclosure of any significant ways in which the corporate governance standards differ from those required of US companies, but Nasdaq will now also require a foreign private issuer to disclose why it does not have an independent compensation committee. Phase-in periods continue to be available under the NYSE listing standards for a foreign private issuer that ceases to qualify as such.

Smaller Reporting Companies. Smaller reporting companies are exempt from the enhanced independence standards for compensation committee members and from the committee responsibility to assess Adviser independence. However, smaller reporting companies will be subject to new listing rules relating to the responsibilities and authority of the compensation committee (other than evaluating Adviser independence). Phase-in periods are available under the NYSE and Nasdaq for a smaller reporting company that ceases to qualify as such.

- Nasdaq-listed smaller reporting companies may adopt a board resolution that specifies the compensation committee's responsibilities in lieu of adopting a formal written compensation committee charter. Such companies are also exempt from the requirement to review the compensation committee charter (or board resolutions) on an annual basis.

IPO Companies. A company that lists equity in conjunction with its initial public offering is subject to all of the new listing standards, but it may take advantage of existing phase-in rules.²⁰

Emerging Growth Companies. No specific exemptions are available for emerging growth companies.²¹

How To Prepare

- **Determine whether any disclosure for compensation consultant conflicts of interests is required.** Companies should already be working with their compensation consultants to collect the necessary information to determine whether the consultant's work raises any *conflicts of interests* based on the six factors enumerated in new Item 407(e)(3)(iv) of Regulation S-K (the same factors to be used to assess Adviser independence). Disclosure of any conflicts of interests is required in any proxy statement for an annual or special meeting of shareholders at which directors are to be elected. Also see below regarding D&O Questionnaire update.
- **Conduct an independence assessment of Advisers.**
 - **Determine which advisers need an independence assessment.** Companies should work with compensation consultants, outside legal counsel and other advisers to determine whether an independence assessment will be required.
 - **Gather Information.** Companies should be gathering necessary information from compensation consultants, outside legal counsel and other advisers, as well as directors and executive officers to enable the compensation committee to assess the independence of Advisers. Also see below regarding D&O Questionnaire update.

- **Assess Independence.** The compensation committee should make an independence assessment with respect to existing Advisers by July 1, 2013. This assessment should be conducted at least annually thereafter and with respect to any new Adviser retained by the compensation committee or from whom the committee obtains advice.
- **Consider Adopting Adviser Retention Procedures.** Compensation committees should consider establishing specific procedures for compensation committees to follow prior to retaining or receiving advice from Advisers so as to ensure that the six independence factors are considered. Compensation committees may also consider obtaining representations and agreements from Advisers addressing the six factors, as applicable, in engagement letters.
- **Revise Compensation Committee Charter.** NYSE and Nasdaq-listed companies will need to revise their charters (or, in the case of some Nasdaq companies, establish one) to include certain enumerated responsibilities and authority specified in the new listing standards (to the extent not already included in the charter), including the compensation committee's responsibility to evaluate the independence of its Advisers. NYSE-listed companies should implement any necessary changes by July 1, 2013. Nasdaq-listed companies must provide the compensation committee with the required responsibilities and authority by July 1, 2013, but need not establish a formal compensation committee with a written charter until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014. Although not technically required by the listing standards to be included in the charter, companies may wish to expressly provide in the charter that the compensation committee conduct the adviser independence analysis at least annually. In revising the charter, companies may wish to also address the enhanced standards for compensation committee members. Companies should take the opportunity to conduct an overall review of the compensation committee charter and the committee's responsibilities set forth in the charter.
- **Revisit Compensation Committee Composition.** Compensation committee members are already subject to general independence requirements under the listing standards. However, it is possible that some directors who may have been considered independent for compensation committee purposes under the general independence requirements will no longer qualify under the enhanced listing standards. Listed companies should review the composition of their compensation committees and consider whether the nominating committee and board of directors need to evaluate any additional relationships. All compensation committee members must meet the enhanced independence test by the earlier of the first annual meeting after January 15, 2014, or October 31, 2014. Also see below regarding D&O Questionnaire update.
- **Update D&O Questionnaires for 2013 and beyond.**
 - D&O questionnaires should be updated to capture information about business or personal relationships with compensation consultants to assess whether disclosure of conflicts of interests under new Item 407(e)(3)(iv) of Regulation S-K is required. For example, the questionnaire should elicit responses regarding (1) business or personal relationships of the compensation consultant with a member of the compensation committee and (2) business or personal relationships of the compensation consultant or the firm employing the consultant with any executive officer of the company.
 - Companies may wish to revise their D&O questionnaires now to capture information about business or personal relationships with any Adviser to the compensation committee so as to identify any problematic relationships in advance of the July 1, 2013 effective date of the Adviser independence assessment standard.
 - Companies may wish to revise their D&O questionnaires to include, for compensation committee members, questions similar to those asked of audit committee members relating to the source of the compensation committee member's compensation and affiliate status so as to identify any problematic relationships in advance of the effective date of the compensation committee independence standard, which will apply on the earlier of the first annual meeting after January 15, 2014, or October 31, 2014.

- 11 See Adopting Release at 39-40.
- 12 The rule does not apply to a committee that addresses director independence, but not employee compensation, so it appears that the typical governance committee would not be subject to the enhanced compensation committee independence standards.
- 13 These exceptions parallel the existing exception to Item 407(e)(3)(iii) of Regulation S-K, which requires disclosure of compensation consultants with any role in determining or recommending the amount and form of a company's executive or director compensation.
- 14 See NYSE SEC Order at 31.
- 15 See NYSE SEC Order at 49.
- 16 Accordingly, Nasdaq will become more aligned with the NYSE, which currently requires companies to have a standing compensation committee and a written committee charter.
- 17 The NYSE does not require an annual assessment of the compensation committee charter.
- 18 See Exhibit 3 to Nasdaq's Amendment No. 1 for Form of Certification (available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2012/SR-NASDAQ-2012-109_Amendment_1.pdf).
- 19 See NYSE Section 303A.00; Nasdaq Rule 5615(a). A controlled company is a listed company in which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.
- 20 The NYSE's existing transition periods continue to be available to: (1) companies listing in connection with an initial public offering or that did not have a class of common stock registered under the Exchange Act prior to the listing date; (2) companies listing in connection with a spin-off or carve-out transactions; (3) companies listing upon emergence from bankruptcy; (4) companies that cease to qualify as a controlled company; (5) companies ceasing to qualify as a foreign private issuer; and (6) companies transferring from other markets. See NYSE Section 303A.00. Nasdaq's existing transition periods continue to be available to: (1) companies listing in connection with an initial public offering; (2) companies listing upon emergence from bankruptcy; (3) companies that cease to qualify as a controlled company; and (4) companies transferring from other markets. See Nasdaq Rule 5616(b).
- 21 An emerging growth company is defined as an issuer that had total annual gross revenues of less than \$1 billion during its most recently completed fiscal year. See Section 2(a)(19) of the Securities Act; Section 3(a)(80) of the Exchange Act.

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 the firm's Public Company Advisory Group:

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