

CLIENT UPDATE

Proposed NYSE and NASDAQ Listing Standards For Compensation Committees

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The New York Stock Exchange (the “NYSE”) and the NASDAQ Stock Market LLC (“NASDAQ”) recently proposed modifications to their listing standards for compensation committees of equity issuers. The proposed modifications are intended to comply with the final rules adopted by the SEC in June implementing provisions of Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.¹

Proposed Rules Look Like the Current Rules.

As we anticipated, the proposed revisions do not dramatically change the requirements currently being used by the NYSE and NASDAQ, with a few notable exceptions. NASDAQ has proposed to prohibit members of the compensation committee from accepting *any* fees or other compensation from the issuer other than fees for service on the board or a committee. NASDAQ has also proposed requirements that all listed companies have an independent compensation committee, which must operate under a formal written charter.

For your convenience, we have attached two simple charts, one showing the rules proposed by the NYSE and the other showing the rules proposed by NASDAQ.

¹ Please see our Client Update, dated June 26, 2012, “SEC Issues Final Rules Regarding Listing Standards for Compensation Committees,” at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=93eb6ac6-6b9b-4524-b35f-bd03dac90878>.

Effective Dates.

If approved by the SEC, the NYSE rules would be effective by the earlier of:

- the first annual meeting after January 15, 2014 or
- October 31, 2014.

The NASDAQ rules would generally be effective by the earlier of:

- the issuer's second annual meeting held after the date of approval of the amended rules or
- December 31, 2014. (However, the NASDAQ's new rule requiring all issuers to have a compensation committee charter will be effective immediately, upon approval by the SEC).

Note that, in addition to meeting the independence requirements of the NYSE and NASDAQ, compensation committee members should also continue to be independent within the meaning of Section 16 of the Exchange Act and Section 162(m) of the Internal Revenue Code of 1984, as amended.

Reminder to Disclose Conflicts of Interest in Upcoming Proxy.

In addition to the NYSE and NASDAQ proposed rules, we would also like to remind you that, beginning with proxy statements for annual meetings that occur on or after January 1, 2013, SEC rules will now require additional disclosure regarding an issuer's use of compensation consultants and any related conflicts of interest, whether or not the issuer is listed on the NYSE or NASDAQ. An issuer will be required to disclose if the consultant played any role in determining or recommending the amount or form of executive or director compensation, regardless of whether the consultant was retained by management or the compensation committee or any other board committee. The issuer will also be required to disclose whether the work of the consultant raised any conflict of interest and, if so, a description of the specific conflict and how the conflict was addressed. When determining whether a conflict of interest exists, the issuer must consider all relevant factors, including, but not limited to, six SEC-mandated factors.²

Please do not hesitate to contact us if you have any questions.

October 31, 2012

² See footnote 4 below under the NYSE proposed modifications or footnote 8 under the NASDAQ proposed modifications for the list of the six factors.

NYSE PROPOSED MODIFICATIONS

Topic	Current NYSE Listing Rules	Proposed Amendments to the NYSE Listing Rules
Independence Standards for Compensation Committee (“Committee”) Directors	<p>Board must:</p> <ul style="list-style-type: none"> ■ affirmatively determine that Committee director has no material relationship with the company (directly or as a partner, shareholder or officer of an organization that has a relationship with the company) and ■ the member may not fall within the five enumerated classifications under the NYSE’s bright-line test for independence.³ 	<p>Current rules continue to apply. In addition, board must consider all relevant factors to determine whether a director has a relationship with the company which is material to the director’s ability to be independent from management as a Committee member and must consider the director’s:</p> <ul style="list-style-type: none"> ■ source of compensation and ■ affiliation with the issuer or any affiliate. (Share ownership will not adversely affect a director’s qualification as independent.)
Cure Period	Not applicable.	<p>If a Committee member ceases to be independent for reasons outside of the member’s control, she/he may remain a Committee member until the earlier of the next annual meeting or one year from when she/he ceased to be independent. But this cure period is limited to circumstances where the Committee continues to have a majority of independent directors.</p>

³ The director falls within the five classifications if the director: (1) is, or has been within the last three years, an employee of the issuer, or an immediate family member is, or has been within the last three years, an executive officer of the issuer; (2) has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the issuer, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); (3) (A) is a current partner or employee of a firm that is the issuer’s internal or external auditor; (B) has an immediate family member who is a current partner of such a firm; (C) has an immediate family member who is a current employee of such a firm and personally works on the issuer’s audit; or (D) she/he or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the issuer’s audit within that time; (4) she/he or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any of the issuer’s present executive officers at the same time serves or served on that company’s compensation committee; (5) is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the issuer for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company’s consolidated gross revenues.

Topic	Current NYSE Listing Rules	Proposed Amendments to the NYSE Listing Rules
Compensation Committee Advisers	<p>Commentary to the rules states that the Committee must be vested through the Committee charter with the sole authority to retain and terminate compensation advisers and to approve the adviser’s fees and other retention terms.</p>	<p>Companies must adopt a Committee charter that authorizes the Committee to retain compensation advisers, and the Committee must be provided with funding for such advisers. The Committee must take into account the six independence factors under SEC Rule 10C-1 when selecting compensation advisers.⁴ (But this rule does not require the Committee to implement or act consistently with the advice or recommendations of the adviser.)</p>
Transition Periods	<p>Transition periods are available to:</p> <ul style="list-style-type: none"> ■ companies listing in connection with their IPO or which did not have a class of common stock registered under the Exchange Act; a spin-off or carve-out; emergence from bankruptcy; ■ companies previously registered under Section 12(g) or 12(b) of the Exchange Act (to the extent, if applicable, the national securities exchange on which they were listed did not have the same requirement); and ■ companies that cease to qualify as a controlled company or foreign private issuer. The company must have at least one independent member on its Committee generally by the listing 	<p>These transition periods continue to apply. A transition period will also be available to companies that cease to be a smaller reporting company and become subject to the compensation committee independence requirements.</p>

⁴ The factors are: (i) the provision of other services to the issuer by the entity or person employing the adviser (the “employer”); (ii) the amount of fees received from the issuer by the employer as a percentage of the employer’s total revenue; (iii) the policies and procedures of the employer that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the adviser with a member of the Committee; (v) any issuer stock owned by the adviser; or (vi) any business or personal relationship of the adviser or the employer with an executive officer of the issuer.

Topic	Current NYSE Listing Rules	Proposed Amendments to the NYSE Listing Rules
	date (with some exceptions) and a fully independent Committee within one year of the listing date.	
Exemptions ⁵	The following types of entities are currently exempt from the listing rules requirements: controlled companies, limited partnerships and companies in bankruptcy, closed-end and open-end funds registered under the 1940 Act, passive business organizations in the form of trusts (such as royalty trusts), derivatives and special purpose securities and issuers whose only equity security is preferred stock.	These exemptions will continue to apply. Foreign private issuers will generally be exempt from the proposed rules, but must disclose how their corporate governance practices differ from domestic companies listed on the NYSE either through their website or when filing Form 20-F with the SEC. Foreign private issuers will not be required to disclose why they are not complying with the rules.

⁵ Smaller reporting companies will remain subject to the same listing standards with respect to compensation committees as they are now.

NASDAQ PROPOSED MODIFICATIONS

Topic	Current NASDAQ Listing Rules	Proposed Amendments to the NASDAQ Listing Rules
Compensation Committee (“Committee”) Profile and Size	There is no requirement to have a Committee. Compensation of an issuer’s CEO and top executives may be approved by either a majority of “independent directors” or a committee composed entirely of independent directors.	Companies must have a Committee composed of at least two “independent directors” who are responsible for determining, or recommending to the full board, the compensation of the CEO and all other executive officers of the company.
Director Independence	A director is not independent if she/he falls within the enumerated classifications under the NASDAQ’s bright-line test for independence. ⁶ In addition, the board must affirmatively determine that the director has no relationship that would interfere with his/her exercise of independent judgment in carrying out his/her board responsibilities. The definition of “independent director” does not refer to affiliation, although the definition excludes certain individuals who may be considered affiliates from being “independent.”	Board must consider whether the director is affiliated with the company or a subsidiary or an affiliate of a subsidiary and determine whether the affiliation would impair the director’s judgment as a Committee member. The board is not required to apply a “look-back” period. See also below under “Compensatory Fees.”
Exceptional and Limited Circumstances	Non-independent directors may serve on a Committee in exceptional and limited circumstances. If a Committee has at least three members, one of whom is not “independent” and is not an executive officer or employee or a family member of an executive officer, the individual may continue to serve if the board determines	This “Exceptional and Limited Circumstances” exception continues to apply.

⁶ The director falls within the classifications if the director: is an executive officer or employee of the company, was employed by the company within the prior three years; or received, or who has a family member who received, more than \$120,000 in compensation during any consecutive 12-month period during the last 3 years; has a family member that was an executive officer of the company; is or has a family member who is a partner or controlling shareholder or an executive officer to which the company made or from which the company received payments for property or services in the current or any past three fiscal years that exceed, the greater of (a) 5% of the recipient’s consolidated gross revenues for that year or (b) \$200,000; is or has a family member who was employed as an executive officer of another entity where at any time during the past three years, any of the executive officers of the company served on the compensation committee, or is or has a family member who is a current partner of the company’s outside auditor or was a partner or employee of the company’s outside auditor who worked on the company’s audit at any time during any of the past three years.

Topic	Current NASDAQ Listing Rules	Proposed Amendments to the NASDAQ Listing Rules
Exception	that the individual’s continued service is in the best interests of the company and its shareholders. ⁷ A member appointed under this exception may not serve longer than 2 years.	
Cure Period	If a company fails to comply with the Committee composition requirements due to one vacancy or one member ceases to be independent due to circumstances beyond the member’s reasonable control, the company may regain compliance by the earlier of the next annual shareholders meeting or one year from the date of noncompliance. But if the annual shareholders meeting occurs no later than 180 days following the date of noncompliance, the company instead has 180 days to regain compliance. A company relying on this provision must notify the NASDAQ.	This cure period continues to apply.
Compensatory Fees	<p>Committee members may accept:</p> <ul style="list-style-type: none"> ■ up to \$120,000 annually in consulting, advisory or other compensatory fees, for services other than board service, and ■ payment for property or services in the current or any of the past three fiscal years not in excess of the greater of (i) 5% of the individual’s gross revenues for that year or (ii) \$200,000. 	Committee members may not accept <i>any</i> consulting, advisory or other compensatory fees. But they may accept fees for board and committee service. There will not be a “look-back” period.

⁷ A company relying on this exception must disclose either on the company’s website or in the proxy statement for the next annual meeting subsequent to such determination (or if not applicable, its Form 10-K or Form 20-F) the nature of the relationship and the reasons for the determination. In addition, a company must provide any disclosure required by Instruction 1 to Item 407(a) of Regulation S-K regarding its reliance on the exception.

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Compensation Committee Charter	A formal written Committee charter is not required.	<p>Companies must adopt a formal, written Committee charter that specifies:</p> <ul style="list-style-type: none"> ■ 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 the compensation of the CEO and other executive officers; ■ that the CEO may not be present during voting or deliberations by the Committee on his/her compensation; and ■ the specific Committee responsibilities and authority set forth in Rule 10C-1(b)(2), (3), and (4)(i)-(vi), relating to the retention of compensation advisers. Companies must review the charter on an annual basis.
Compensation Advisers	Not applicable.	Issuer must provide the Committee with funding for compensation advisers. Committees must consider the six

Topic	Current NASDAQ Listing Rules	Proposed Amendments to the NASDAQ Listing Rules
		independence factors provided under SEC Rule 10C-1 when choosing their advisers. ⁸ (But a Committee does not have to retain an independent adviser.)
Exemptions ⁹ and Phase-in Schedules	<p>There are exemptions for: asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies and controlled companies. In addition, a foreign private issuer may follow its home country practice in lieu of NASDAQ's compensation-related listing rules if it discloses in its annual reports filed with the SEC each requirement that it does not follow and describes the home country practice followed by the company in lieu of such requirements.</p> <p>NASDAQ's current listing rules include phase-in schedules for: companies listing in connection with an IPO, companies emerging from bankruptcy and companies ceasing to be controlled companies.</p>	<p>These exemptions will continue to apply.</p> <p>Existing phase-in schedules will generally be unchanged, but none of the phase-in schedules will apply to the requirement to adopt a formal written Committee charter.</p>

⁸ The factors are: (i) the provision of other services to the issuer by the entity or person employing the compensation adviser (the "employer"); (ii) the amount of fees received from the issuer by the employer as a percentage of the employer's total revenue; (iii) the policies and procedures of the employer that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the adviser with a member of the Committee; (v) any issuer stock owned by the adviser; or (vi) any business or personal relationship of the adviser or the employer with an executive officer of the issuer.

⁹ Smaller reporting companies will not be exempt from the requirement to have a Committee composed of at least two independent directors. Smaller reporting companies will not be required to adhere to the new requirements relating to compensatory fees and affiliation or to incorporate in their formal written Committee charter or board resolution the Committee's responsibility and authorities relating to compensation advisers.