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## **NYSE Adopts New Compensation Committee Rule Amendments**

As required by the Dodd-Frank Act and related SEC rules, the NYSE has adopted new listing standards related to compensation committee independence and responsibilities. The final NYSE rules are being adopted substantially as proposed. Most notably, the NYSE is not adding any mandatory independence conditions for compensation committee members, but rather adopting factors that boards must consider in determining compensation committee independence.

Nasdaq has also adopted its corresponding new listing standards, which differ in significant ways from the NYSE's final rules. For example, Nasdaq will add a new mandatory prohibition against compensation committee members' accepting any compensation from the company or its subsidiaries (other than directors' fees or certain fixed retirement payments). For more information on Nasdaq's final rules, see our memorandum on that topic at <http://www.paulweiss.com/media/1430126/28-jan-13-nas.pdf>.

### **Compensation Committee Independence**

The NYSE will require boards, in determining the independence of compensation committee members, to consider (in addition to existing independence requirements) all factors relevant to whether the director has a relationship with the company that is material to the director's ability to be independent from management in connection with compensation committee duties, including, but not limited to, the following two specified factors:

- Any compensation received by the director from any person or entity (including any consulting, advisory or other compensatory fee paid by the company to such director) and
- The director's affiliate relationships with the company, a subsidiary of the company or an affiliate of a subsidiary of the company.

The NYSE states that the board should examine the above factors broadly by considering all sources of compensation from any person or entity and any direct relationships with, or other relationships that place the director under the direct or indirect control of, the company or senior management, in each case which would impair the director's ability to make independent judgments about the company's executive compensation. Although it is unclear what types of compensation or relationships, if any, would be caught by these new factors, the final rules reiterate the NYSE's position that share ownership in the company by the director or the director's affiliates aligns the director's interests with those of unaffiliated shareholders, and thus, absent other facts that may impair independence, shareholder representatives should be able to remain members of the compensation committee.

The NYSE provides a cure period if a member of the compensation committee ceases to be independent for reasons outside his or her reasonable control. That director may, with prompt notice to the NYSE, remain a compensation committee member until the earlier of the next annual shareholders' meeting or one year from the occurrence of the event that caused the director no longer to be independent for compensation committee purposes, and only if a majority of the members of the compensation committee remain independent.

### **Compensation Committee Responsibilities**

The NYSE authorizes compensation committees, in their sole discretion, to retain or obtain the advice of compensation consultants, legal counsel or other advisors and to be directly responsible for the appointment, compensation and oversight of the work of any such advisors. Further, the company must provide appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to these advisors.

Before retaining such advisors, the compensation committee will generally be required to consider all factors relevant to the advisor's independence from management, including the following:

- The provision of other services to the company by the advisor's employer;
- The fees received from the company by the advisor's employer, as a percentage of the total revenue of the employer;
- The policies and procedures of the advisor's employer that are designed to prevent conflicts of interest;
- Any business or personal relationship of the advisor with a member of the compensation committee;
- Any stock of the company owned by the advisor; and
- Any business or personal relationship of the advisor or the advisor's employer with an executive officer of the company.

Certain categories of compensation advisors are exempted from the new required assessments, namely in-house counsel and any compensation consultant, legal counsel or other advisor whose role is limited to (i) consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of executive officers or directors of the company and that is available generally to all salaried employees or (ii) providing information that is not customized for a particular company or is customized based on parameters that are not developed by the compensation consultant, and about which the compensation

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consultant does not provide advice. Compensation committees may continue to select and receive advice from non-independent compensation advisors so long as the committee has conducted the six-pronged independence analysis outlined above.

The final rules further state that nothing in the rules should be construed to require the compensation committee to implement or act consistently with the advice or recommendations of any such advisor, or to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfilling its duties.

### **Implementation**

Companies have until the earlier of (i) their first annual meeting after January 15, 2014 and (ii) October 31, 2014 to comply with the new compensation committee member independence requirements. Other changes are effective on July 1, 2013.

In our experience, most existing NYSE companies have fairly robust compensation committee structures, which already grant the committees the necessary authority and funding with respect to retaining advisors. Thus, most of the changes that boards will need to consider will center on any compensation committee membership, charter or procedure changes necessary to address the compensation committee and compensation committee advisor independence provisions.

### **Exemptions/Transition Periods**

Any entities that are exempt from or have extended transition periods to comply with the NYSE's compensation committee rules (*e.g.*, controlled companies, foreign private issuers, limited partnerships, companies in or emerging from bankruptcy, issuers listing only preferred stock, newly listed companies, companies emerging from controlled company status or transferring from other exchanges) will continue to have those accommodations. Also, special accommodations and transition rules apply to smaller reporting companies.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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For a copy of the NYSE rule changes, see: [http://www.nyse.com/nysenotices/nyse/rule-filings/pdf;jsessionid=108F2B636ECC5053FBC4A93725506F1F?file\\_no=SR-NYSE-2012-49&seqnum=5](http://www.nyse.com/nysenotices/nyse/rule-filings/pdf;jsessionid=108F2B636ECC5053FBC4A93725506F1F?file_no=SR-NYSE-2012-49&seqnum=5)