

---

December 13, 2013

## **NASDAQ Amends its Compensation Committee Independence Requirements**

The Securities and Exchange Commission has approved Nasdaq's amendment of its listing rules to eliminate the strict prohibition against the receipt by compensation committee members of consulting, advisory or other compensatory fees from the company or its subsidiaries (other than directors' fees or certain fixed compensation under a retirement plan). Instead, Nasdaq will now only require that the receipt of compensation be considered when a board is weighing eligibility for compensation committee membership. The new rules are less restrictive and more closely align Nasdaq requirements with those of the New York Stock Exchange and other national stock exchanges. This change is effective immediately, however, companies have until the earlier of their first annual meeting after January 15, 2014 or October 31, 2014 to comply with Nasdaq's compensation committee independence requirements generally.

### **Background**

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 mandated that the SEC direct the national stock exchanges to require listed companies to comply with certain independence considerations for compensation committee members. Earlier this year, Nasdaq amended its listing rules to reflect those provisions. Similar to what other stock exchanges did, Nasdaq adopted a requirement that boards, in determining whether a director is eligible to sit on the compensation committee, must consider whether he or she is affiliated with the company in such a way as would impair the director's judgment as a compensation committee member. However, in a move that diverged from those taken by other stock exchanges and went beyond what was mandated by the Dodd-Frank Act, Nasdaq adopted a strict prohibition against compensation committee members' accepting directly or indirectly any consulting, advisory or other compensatory fee from the company or its subsidiaries (other than directors' fees or fixed compensation under a retirement plan (including deferred compensation) for prior service and that is not contingent on continued service).

Although it did not receive many comments on this provision during the rulemaking process, after so amending its rules, Nasdaq received negative feedback from listed companies that the new requirement was overly burdensome and would make it difficult to recruit eligible directors. Also, Nasdaq feared that its more burdensome rules would put it at a competitive disadvantage relative to other stock exchanges and could deter companies from choosing to list with it.

---

**The Changes to Listing Rules**

Nasdaq has now amended its listing rules to eliminate that prohibition and replaced it with a requirement that when determining the independence of a director who will serve on the compensation committee, a company's board must consider the source of compensation of the director, including consulting, advisory or other compensatory fees paid by the company (defined to include any consolidated parent and subsidiary entities) to the director and whether any compensation that the director receives from any person or entity would impair his or her ability to make independent judgments about the company's executive compensation. "Compensation" of the director is no longer subject to any exceptions (for example for retirement benefits or other deferred compensation) and is meant to cover any compensation received by the director from the company, including directors' fees.

Nasdaq also clarified that when evaluating affiliate relationships for compensation committee independence purposes, the board should consider whether that relationship puts the candidate under the direct or indirect control of company management such that it would impair the director's ability to make independent judgments about the company's executive compensation.

For the rule changes, see <http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2013/SR-NASDAQ-2013-147.pdf>.

\* \* \*

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:

David S. Huntington

212-373-3124

[dhuntington@paulweiss.com](mailto:dhuntington@paulweiss.com)

John C. Kennedy

212-373-3025

[jkennedy@paulweiss.com](mailto:jkennedy@paulweiss.com)

Frances F. Mi

212-373-3185

[fmi@paulweiss.com](mailto:fmi@paulweiss.com)

*Joseph S. Straus contributed to this memorandum.*