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Securities Alert

First Deadline Approaching for NYSE and Nasdaq Listed Companies to Comply with New Compensation Committee Rules

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May 9, 2013

As noted in our Securities Alert dated October 9, 2012, the New York Stock Exchange (NYSE) and the Nasdaq Stock Market (Nasdaq) proposed rule changes to their respective listing standards affecting public company boards of directors, compensation committees and compensation advisers in response to directives of the Securities and Exchange Commission. On January 11, 2013, the SEC approved the final rules proposed by NYSE and Nasdaq.

Under the new rules, both NYSE and Nasdaq have implemented a two-step compliance approach, with some requirements under the rules requiring implementation by **July 1, 2013** (the first deadline) and other rules requiring implementation by **the earlier of the company's first annual meeting after January 15, 2014, or October 31, 2014** (the second deadline).

NYSE or Nasdaq listed companies that have not yet taken action to implement these new rules should analyze their status under these new listing standards and take any necessary action to be in compliance as soon as possible.

First Deadline – July 1, 2013

Independence

A NYSE listed company must have a compensation committee composed entirely of independent directors. A Nasdaq listed company either may have a compensation committee (if it does, all of its members must be independent directors), or may instead delegate to independent directors on the board, acting in place of a committee, the responsibility for either determining executive compensation, or recommending the compensation to the full board for determination.

Engagement of Consultants

For a company listed on either exchange, the compensation committee must have the authority and direct responsibility to retain or obtain the advice of a compensation committee consultant, independent legal counsel or other adviser ("consultants"). However, the committee is not required to engage consultants. The listed company must provide for appropriate funding for payment of reasonable compensation to any consultant retained by the compensation committee.

Consideration of Consultant Independence

For a company listed on either exchange, before retaining any compensation consultant, the compensation committee must consider the consultant's independence from management and must specifically consider these factors:

- The provision of other services to the listed company by the person that employs the consultant;
- The amount of fees received from the listed company by the person that employs the consultant, as a percentage of the total revenue of that person;
- The policies and procedures of the person that employs the consultant that are designed to prevent conflicts of interest;
- Any business or personal relationship of the consultant with a member of the compensation committee;

- Any stock of the listed company owned by the consultant; and
- Any business or personal relationship of the consultant, or the person employing the consultant, with an executive officer of the listed company.

There are no other new Nasdaq requirements for compensation committees that must be met by **July 1, 2013**. The following requirements are for NYSE listed companies.

CEO Compensation

The compensation committee must be responsible for reviewing and approving the corporate goals and objectives relevant to the compensation of the CEO, evaluating the CEO's performance in light of those goals and objectives, and determining and approving the CEO's compensation level based on such evaluation.

Executive Officer Compensation

The compensation committee must also be responsible for making recommendations to the board with respect to non-CEO executive officer compensation and incentive compensation and equity based plans that are subject to board approval.

Regulatory Disclosure

The compensation committee is also responsible for preparing the compensation committee disclosure required by Item 407(e)(5) of Regulation S-K (which generally governs proxy statement disclosure about use of consultants and related matters).

Performance Evaluation

The compensation committee will be required to complete a performance evaluation of itself annually.

Written Charter

The listed company must adopt a written committee charter giving the compensation committee direct responsibility for addressing and implementing all the foregoing requirements, and must post the charter on its company website and include disclosure in its annual proxy statement that the charter is available there.

Second Deadline – By the First Annual Meeting after January 15, 2014, but not Later than October 31, 2014

Independent Directors

By the second deadline, a NYSE listed company must consider stricter standards for determining the independence of the directors on its compensation committee. These include (i) the sources of compensation of a member of the board, including any consulting, advisory or other compensatory fees ("additional fees") paid by the listed company to such director, and (ii) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company. A Nasdaq listed company must have and maintain a compensation committee of at least two members, who must meet the customary Nasdaq independence standards as well as the more stringent standards noted in clause (ii) of the preceding sentence. The Nasdaq rules also bar any director who receives "additional fees" as defined in clause (i) above from serving on the company's compensation committee.

Written Charter

By the second deadline, a Nasdaq listed company must adopt a written committee charter giving the compensation committee direct responsibility for addressing and implementing all of the above requirements. The charter must specify:

- The scope of the committee's responsibilities, and how it carries out those responsibilities, including structure, process and membership requirements;
- The committee's authority to retain consultants and the requirement to consider each of the consultant independence factors listed above prior to such retention;

- The committee’s responsibility for determining , or recommending to the board for determination, the compensation of the CEO and the other executive officers of the company; and
- That the CEO may not be present during voting or deliberations on his or her compensation.

A company must also certify to Nasdaq that it has adopted a formal written compensation committee charter and that the compensation committee will review and reassess the adequacy of the charter on an annual basis.

Smaller Reporting Companies

Under NYSE rules, a “controlled company” (basically a majority owned company) is exempt from the new compensation committee rules. The rules of both exchanges provide some relief to “smaller reporting companies,” including less onerous requirements for committee charters.

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