

Nasdaq Proposed Standards on Compensation Committees Differs from NYSE Approach

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We just [discussed](#) the NYSE's proposed standards applicable to compensation committee members and their advisers, which closely follow the SEC final rules. Nasdaq has posted its proposed [version](#), which contains some differences worth mentioning. Details will follow in a client memorandum, but headline items include:

Compensation Committee Requirement

Nasdaq currently permits CEO and executive officer compensation to be determined by an independent compensation committee or independent directors constituting a majority of the board's independent directors, but has proposed to eliminate the latter alternative and to require companies to have a standing compensation committee, with a minimum of at least two members. Nasdaq also proposed to retain its existing exception that allows a company to have a non-independent director serve on the compensation committee under exceptional and limited circumstances if the committee consists of three members, and the non-independent director is not an executive.

Compensation Committee Member Independence

Unlike the NYSE, Nasdaq proposed that it follow the same standards for audit committees with respect to the prohibition on accepting directly or indirectly any consulting, advisory or other compensatory fee from the listed company, rather than making this a factor for boards to consider in assessing independence. However, unlike for audit committees and similar to the NYSE, Nasdaq-listed company boards can consider affiliated relationships without such relationships being a strict bar to service, and evaluate whether the director's affiliation would impair the director's judgment as a member of the compensation committee.

In fact, Nasdaq reiterates that, similar to the NYSE, it does not believe that ownership of company stock by itself, or possession of a controlling interest through ownership of company stock by itself, precludes a board finding that it is appropriate for a director to serve on the compensation committee. The proposed standards affirmatively state that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.

Compensation Committee Charter

Similar to its requirement for audit committees, Nasdaq's proposal requires companies to certify as to the adoption of formal written compensation committee charters and the review and reassessment of the adequacy of such charters, with specific requirements for the scope of the committee's responsibilities.

Compensation Committee Adviser Independence

Like the NYSE, Nasdaq's proposal only adopts the six factors that are in the SEC's final rules for compensation committees' assessment of advisers' independence.

Effective Date

Nasdaq proposed that rules relating to compensation committee responsibilities and authority, be effective immediately, including the (a) authority to retain compensation consultants, independent legal counsel and other compensation advisers; (b) authority to fund such advisers; and (c) responsibility to consider certain independence factors before selecting such advisers, other than in-house legal counsel. The remaining provisions (including the compensation committee independence and charter requirements) must be complied with by the earlier of either the second annual meeting held after the date of approval of Nasdaq's amended listing rules or December 31, 2014. Nasdaq will require a certification as to compliance.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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