

Commentators Raise Concerns with the SEC About Proposed Listing Standards for Compensation Committees

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Most of the 15 comment letters on the proposed listing standards for compensation committees by the [NYSE](#) and [Nasdaq](#) focused on committee member independence. Some commentators, including AFSCME and Teamsters, argued that the standards do not go far enough and should include additional specified factors with respect to personal and business relationships between compensation committee members and senior management, directors fees and disclosed related party transactions. They also objected to Nasdaq's proposal to retain the allowance for exceptional circumstances according to which a board may have a non-independent director serve on the compensation committee for up to two years.

Two commentators, including the Society of Corporate Secretaries and Governance Professionals, questioned Nasdaq's prohibition on the acceptance of consulting or other fees for determining compensation committee independence. Nasdaq has since submitted a comment letter defending its proposed standards as to compensation committee member independence from all of the comments received.

As to the proposal governing compensation advisers and conflicts of interest, the Society's letter on the NYSE standards advocated that the list of six specified factors should represent the exclusive determinations necessary for conducting the conflict inquiry and what appears to be a catchall provision should be eliminated, or alternatively, the NYSE should specify any additional factors that should be examined rather than include vague reference to "all factors." In addition, the Society recommended, for both NYSE and Nasdaq standards, that the conflict determination (a) be limited only to those advisers who provide advice on executive compensation, not director compensation and general employee benefits matters, (b) should not include persons that provide a range of services, such as survey information, that the committee may also use and (c) should be restricted to the lead individual providing the advice and not to others who may contribute to the advice.

While Nasdaq's comment letter did not address these adviser issues, in response to one commentator's proposed reading that the adviser standards govern only independent legal counsel, Nasdaq responded that it intends to clarify through a rule amendment that the compensation committee must consider the adviser independence factors when selecting any advisers other than in-house counsel.

In filing a notice to extend its consideration of the proposed listing standards in late November, the SEC has designated January 13, 2013, as the date to take action on the proposals. Some of the proposed listing standards under Nasdaq become effective upon SEC approval, as we described previously in our client [memo](#).

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.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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