

NASDAQ Proposes Requiring Companies to Disclose Outside Compensatory Payments to Directors

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The SEC has [published](#) a proposed Nasdaq listing standard for public comment. Comments are due 21 days after publication in the *Federal Register*, which occurred yesterday.

If adopted, effective June 30, 2016, NASDAQ-listed companies will be required to publicly disclose any agreements with a director or nominee if anyone other than the company provides compensation in connection with that person's candidacy or service as a director. The rule is intended to be construed broadly to include payments such as health insurance premiums. The information must be made available on a company's website or proxy statement (or Form 10-K or 20-F if the company is not required to file a proxy statement).

While the spotlight on NASDAQ's proposal has been focused on nominees in activist situations, it also covers a director or nominee employed by private equity or other shareholder whose compensation is "materially increased" by the board service or candidacy. Disclosure is not required if those employees routinely serve on such boards and their compensation is not "materially affected" by such service, and it is already disclosed in the biography of the director or elsewhere. Only the additional amount from what they would normally receive as compensation needs to be disclosed. The proposed rule also does not apply to arrangements deemed reimbursement of expenses in connection with a candidacy.

A company must undertake reasonable efforts to identify these arrangements, including by asking directors or nominees. The disclosure requirement terminates only when the director resigns or one year after the agreement ends, whichever is earlier.

NASDAQ believes these undisclosed arrangements could create conflicts of interest or fiduciary duty concerns, similar to other criticisms of third-party compensation, also known as "golden leashes." The prospect of golden leashes had previously caused some companies to adopt bylaws prohibiting them altogether, a practice that abated when those companies faced negative recommendations against directors, which we previously discussed [here](#). See an interesting debate on the topic [here](#).

If the rule becomes effective by the end of June when many companies have already released proxy statements, companies may need to survey their directors and post any relevant information on their websites.

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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