

SEC Approves NASDAQ Rules to Report Third-Party Director Compensation

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On Friday, the SEC [approved NASDAQ rules](#) that require its listed companies to publicly disclose compensation or other payments by third parties to board members or nominees.

NASDAQ made two amendments to the original rule proposal. We previously discussed the first amendment [here](#). On June 30, 2016, NASDAQ filed a second amendment to the proposal, which replaced the proposal in its entirety and contains the version of the rules that the SEC approved.

Unfortunately, Amendment No. 2, which made several clarifying changes and is dated June 30, is not yet available on NASDAQ's site for rule filings and is not part of the SEC approval order, so that the full text of the changed rules cannot be examined. At this time we can only rely on the SEC's summary of the NASDAQ rules in its approval order. According to the SEC order, the effective date of the disclosure is 30 days after SEC approval and NASDAQ intends to notify its listed companies of the effective date.

Under these rules, NASDAQ companies must disclose the material terms of all third-party compensatory agreements or arrangements for nominees and directors by the date that the company files or furnishes a definitive proxy or information statement relate to the company's next shareholder meeting to elect directors. If a company does not file proxy or information statements, then the disclosure must be made in its next Form 10-K or Form 20-F. Notably, the timing requirement means that disclosure is not required at the time that the initial compensatory arrangements are made.

The disclosure can be made on a company's website instead, either directly or through a hyperlink. The disclosure must be made each year until the earlier of the resignation of the director or one year following the termination of the arrangement. The meaning of "compensation" would also encompass non-cash payments, such as indemnification agreements.

No disclosure is required for payments related to: (a) reimbursement of expenses in connection with a director's candidacy, which is not uncommon in proxy contests; (b) arrangements that existed before the nominee's candidacy, including as an employee of the other person or entity providing payments, and the relationship has been publicly disclosed in a proxy or information statement; or (c) the arrangements that have already been disclosed under Schedule 14A or Form 8-K in the current fiscal year.

A company will not be considered deficient with respect to the rule if it undertakes reasonable efforts to identify the arrangements, including asking each director or nominee in a way that is designed to allow for timely disclosure, and makes remedial disclosure promptly in a Form 8-K or 6-K promptly if it discovers that disclosure was not provided as required.

For foreign private issuers, this rule will be included among the provisions where such an issuer would be permitted to follow home country practice so long as, following current requirements, the issuer submit to NASDAQ a written statement from an independent counsel in its home country certifying that the company's practices are not prohibited by the home country's laws, and disclose in filings with the Commission that it does not follow these NASDAQ rules and state the home country practices that it follows instead.

A few commenters, including the New York City Bar and the NYC Business Council, recommended that the SEC not approve the rule because they were concerned that the rule was possibly duplicative of existing SEC requirements, and that companies would be providing different information based on what exchanges they were listed on. They argued that the SEC should instead mandate uniform disclosure about public company director compensation. NASDAQ responded

that the nature, scope and timing of the rules make it different from current SEC requirements. The SEC also noted that it is not unusual for a securities exchange to have listing rules that supplement or overlap with its own requirements, such as additional audit committee independence requirements beyond SEC rules.

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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