

# Executive Compensation and Corporate and Securities Alert:

## SEC Adopts NYSE and Nasdaq Rules Relating to Compensation Committees and Compensation Consultants

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On January 11, 2013 the Securities and Exchange Commission (“SEC”) approved the equity listing standards proposed by the NYSE and Nasdaq, as amended<sup>1</sup> regarding compensation committee independence criteria and compensation adviser independence criteria, which are required under Dodd-Frank Act Section 952.

A more detailed summary of the NYSE and Nasdaq proposals in our previous client alert dated December 20, 2012 is available here: <http://www.fenwick.com/publications/Pages/Executive-Compensation-and-Corporate-and-Securities-Alert-UPDATED-NYSE-and-Nasdaq-Propose-Rules-Relating-to-Compensation.aspx>.

### Effective Dates

The NYSE Proposed Rules generally take effect on July 1, 2013. NYSE-listed companies would have until the earlier of October 31, 2014 or their first annual meeting after January 15, 2014 to comply with the independence standards.

The Nasdaq Proposed Rules relating to compensation committee responsibilities and relating to 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, are effective July 1, 2013. The remainder of the Nasdaq Proposed Rules, including the committee member independence standards and specific charter requirements, must be complied with by the earlier of either October 31, 2014 or the first annual meeting held after January 15, 2014. Nasdaq will require a certification as to compliance within 30 days after the final implementation deadline applicable to a listed company. The form of compensation committee certification will be available through Nasdaq’s Listing Center website (<http://listingcenter.nasdaqomx.com/>) prior to the effective date of the Nasdaq Proposed Rules.

### Endnotes

1. In Amendment No. 3, the NYSE: (a) revised the transition period for companies that cease to be Smaller Reporting Companies to comply with the full range of new requirements; (b) changed references in the rule text from Regulation S-K, Item 10(f)(1) to Exchange Act Rule 12b-2; (c) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the compensation adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S-K; and (d) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not require the adviser to be independent, only that the compensation committee consider the enumerated factors before selecting or receiving advice from the adviser. Amendment No. 1 was included in the text of the Federal Register and summarized in our previous client Alert and Amendment No. 2 was withdrawn.

In Amendment No. 1, Nasdaq: (a) added language regarding the authority of a compensation committee to retain compensation advisers, the requirement that a listed company fund such advisers, and the independence assessment required to be made before selecting or receiving advice from such advisers, rather than incorporating these details by reference as in the original proposal; (b) revised the dates by which companies currently listed on Nasdaq will be required to comply with the new rules so that the new rules take effect on July 1, 2013; (c) revised the phase-in schedule for companies that cease to be Smaller Reporting Companies to comply with the full range of the new requirements; and (d) added a preamble to the new rules clarifying that, during the transition periods until the new rules apply, a company must continue to comply with the corresponding provisions, if any, in the current rules. Nasdaq also added an exhibit setting forth the form that it will provide for companies to certify their compliance with the rules. In Amendment No. 2, Nasdaq revised the proposed rules to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S-K.

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