

LEGAL UPDATE

February 2013 By: Michael T. Campoli

SEC APPROVES ENHANCED NYSE AND NASDAQ COMPENSATION COMMITTEE LISTING STANDARDS

The U.S. Securities and Exchange Commission (the “SEC”) has approved amendments to the corporate governance and listing standards of the New York Stock Exchange (the “NYSE”) and the Nasdaq Stock Market (“Nasdaq”) regarding the authority and responsibilities of compensation committees and the independence of their members. The NYSE and Nasdaq each proposed the new listing standards on September 25, 2012 to implement the requirements of Rule 10C-1 under the Securities Exchange Act of 1934 (the “Exchange Act”), which directs the national securities exchanges to adopt listing rules relating to compensation committees that effectuate the requirements mandated by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The SEC adopted Rule 10C-1 on June 20, 2012.

The final listing standards have been approved substantially as proposed. We summarized the NYSE and Nasdaq proposals in our Legal Update, dated October 2012, entitled “NYSE and Nasdaq Propose Enhanced Compensation Committee Listing Standards.”¹ The key aspects of the final listing standards are highlighted below in this Legal Update.

SUMMARY OF LISTING STANDARDS

Establishment of Compensation Committee

For the first time, Nasdaq is requiring all issuers to establish a standing compensation committee comprised of at least two independent directors. Currently, issuers are permitted to have a majority of the independent directors serving on the board

make executive compensation decisions. Nasdaq issuers will also be required to adopt a written charter for their compensation committees, which must be reviewed and reassessed annually. The NYSE already requires issuers to have a separate compensation committee.

Compensation Committee Member Independence

The new listing standards mandate that the members of the compensation committees of issuers listed on the NYSE and Nasdaq meet certain enhanced “independence” requirements. Under the new criteria, a determination of independence will require an assessment of the following two factors:

- the source of a director’s compensation, including any consulting, advisory or other compensatory fees paid by the issuer; and
- whether the director has an affiliate relationship with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

For Nasdaq issuers, a director who accepts, directly or indirectly, any consulting, advisory or other compensatory fee from an issuer, other than payments for board service fees and fixed compensatory amounts received pursuant to a retirement plan for prior service to the issuer, is precluded from being found independent. This is the same standard for independence that currently applies to audit committee members under Rule 10A-3 of the Exchange Act. The NYSE does not have such a bright line exclusion for directors who receive payments from the issuer.

For both NYSE and Nasdaq issuers, a director will not be precluded from being found independent solely because such director, or any of his or her

¹ Available at:
<http://www.pryorcashman.com/assets/attachments/865.pdf>.

affiliates, are shareholders who own more than some specified percentage of the issuer's securities.

Authority and Responsibilities of Compensation Committees

Under the new listing standards applicable to both NYSE and Nasdaq issuers, compensation committees must possess the authority to retain compensation consultants, independent legal counsel and compensation advisers, as well as the authority to compensate and oversee such advisers. Listed issuers also must provide for adequate funding to compensate the advisers that their compensation committees select.

In addition, before engaging any compensation adviser, a compensation committee must consider the following factors, which are set forth in Rule 10C-1(b)(4) of the Exchange Act:²

- the provision of other services to the issuer by the person that employs the compensation adviser;
- the amount of fees received from the issuer by the person that employs the compensation adviser, as a percentage of the total revenue of the person that employs the compensation adviser;
- the policies and procedures of the person that employs the compensation adviser that are designed to prevent conflicts of interest;
- any business or personal relationship of the compensation adviser with a member of the compensation committee;
- any stock of the listed company owned by the compensation adviser; and
- any business or personal relationship of the compensation adviser or the person employing the adviser with an executive officer of the listed company.

Compensation committees of listed issuers may receive advice from advisers that are not independent so long as the independence

² NYSE issuers also must consider, in addition to the six factors noted above, all factors relevant to a compensation adviser's independence.

assessment is conducted, and they are not required to follow the advice or recommendations of any compensation advisers. Furthermore, no independence assessment is required for in-house legal counsel, as well as advisers whose role is limited to the types of activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S-K because such advisers are consulting only on broad-based non-discriminatory plans that are available generally to all salaried employees or are providing information that is not customized for the issuer.

EFFECTIVE DATES

Both NYSE and Nasdaq-listed issuers have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new standards for compensation committee director independence. Nasdaq issuers will also have until such date to establish a compensation committee and to adopt a written charter for such committee.

The provisions relating to the authority of a compensation committee to retain and fund compensation advisers, and the requirement that the committee consider independence factors before selecting or receiving advice from compensation advisers, will become effective on July 1, 2013.

ACTIONS TO TAKE

In anticipation of the new listing standards, issuers should take the following actions:

- analyze the composition of their compensation committees to assess whether all members will meet the enhanced independence requirements, and consider whether any members should be replaced;
- review their compensation committee charters and consider any changes that will be necessary to provide the committee with the requisite authorities and powers set forth in the new listing standards, as well as to require the committee to undertake the required independence assessment for compensation advisers;
- evaluate their existing policies and procedures regarding the retention, compensation and evaluation of compensation advisers to determine

whether they are consistent with the new listing standards, and make any necessary changes; and

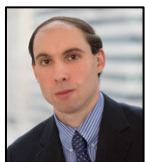
- review and revise their policies and procedures regarding the independence of potential compensation committee members, and their D&O Questionnaires, to reflect the new independence criteria.

In addition, Nasdaq issuers that do not have a compensation committee will need to establish one, and Nasdaq issuers that do not have a compensation committee charter should begin the process of drafting and adopting one.

The foregoing is merely a discussion of the new NYSE and NASDAQ listing standards regarding the composition, authority and responsibilities of the compensation committees of listed issuers. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Michael T. Campoli at 212-326-0468 or mcampoli@pryorcashman.com.

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Michael Campoli devotes his practice to counseling public and private companies of all sizes and at all stages of development on a broad range of corporate matters, including securities law compliance, Securities Exchange Act reporting, corporate formation and governance, mergers and acquisitions, public and private debt and equity financing transactions (including early-stage financing initiatives), joint ventures, and limited liability company and partnership counseling.

Mr. Campoli's work at Pryor Cashman has included the representation of:

- Several exchange-listed and OTCBB companies in the pharmaceutical and medical device industries as outside general counsel in connection with corporate governance matters, equity and debt financings, M&A initiatives (including licensing activities), and Securities Exchange Act reporting
- Domestic and multi-national entities, including Henry Schein, Inc. and Wolters Kluwer U.S. Corporation, in connection with M&A activities
- A wide range of newly-formed entities in the technology, entertainment, life sciences and telecommunications industries in connection with start-up matters and early-stage financing initiatives (including friends & family, angel and venture capital investments)
- Cowen and Company, LLC, Rodman & Renshaw, LLC and Global Hunter Securities, LLC in connection with various underwritten public offerings for domestic and foreign issuers
- Briad Restaurant Group in its prevailing tender offer for the largest T.G.I. Friday's franchisee
- Several of the firm's real estate clients in connection with their acquisition and joint venture activities, including the \$1.8 billion acquisition by The Kushner Companies of the office building located at 666 Fifth Avenue in New York
- A private telecommunications company in connection with its formation, and the later issuance of secured notes to the Rural Utilities Service of the U.S. Department of Agriculture and the concurrent placement of preferred stock to venture capital investors

Mr. Campoli is a 2000 graduate of New York University School of Law, and a 1997 Phi Beta Kappa graduate of Columbia College.