

COMPENSATION, GOVERNANCE &amp; ERISA | July 15, 2016

## Nasdaq Golden Leash Disclosure Rule Approved by SEC

On July 1, 2016, the Securities and Exchange Commission (the “SEC”) approved a change to the Listing Rules of NASDAQ Stock Market LLC (“Nasdaq”). New Listing Rule 5250(b)(3) will require Nasdaq listed companies to publicly disclose payments made by third parties to any directors or director candidates in connection with their candidacy for, and/or their service on, company boards of directors.<sup>1</sup> These payments, commonly referred to as “golden leashes,” are often paid by activist shareholders to directors the activist was able to appoint to a company’s board. The new Listing Rule will be effective August 1, 2016, and company disclosures will be required when the company files a proxy statement for the next shareholders’ meeting at which directors are elected.

### Disclosure of Golden Leashes

Pursuant to Listing Rule 5250(b)(3), Nasdaq listed companies must publicly disclose the material terms of all agreements and arrangements between any director or nominee and any person or entity other than the company relating to compensation or other payments in connection with the director’s or nominee’s candidacy or service as a director. The disclosure must be made through the company’s website or proxy statement or information statement for any shareholders’ meeting at which directors are elected.<sup>2</sup> At a minimum, the disclosure should identify the parties and the material terms of the arrangement.

Disclosures made pursuant to Listing Rule 5250(b)(3) must be made no later than the date on which the company files or furnishes a proxy or information statement in connection with the next shareholders’ meeting at which directors are elected.<sup>3</sup> Thereafter, the company must make the disclosure at least annually until the earlier of the resignation of the director or one year following termination of the arrangement.

<sup>1</sup> The proposed rule change was originally filed with the SEC by Nasdaq on March 15, 2016, and was amended twice (File No. SR-NASDAQ-2016-013). The approved proposal, as amended, is available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-013\\_Amendment\\_2.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-013_Amendment_2.pdf). The SEC’s approval of the new Listing Rule is available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-013\\_Approval.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2016/SR-NASDAQ-2016-013_Approval.pdf) (Release No. 34-78223).

<sup>2</sup> A company making the disclosure through its website or by hyperlinking to another website must ensure that the disclosure is continuously available.

<sup>3</sup> Companies will not be required to make an initial disclosure of new agreements so long as disclosure is made in connection with the next shareholders meeting at which directors are elected. If a company does not file proxy or information statements, the disclosure must be made no later than when the company files its next Form 10-K or Form 20-F.

It is intended that the terms “compensation” and “other payment” be interpreted broadly and apply to agreements and arrangements that provide for non-cash compensation, such as health insurance premiums or indemnification. The rule would not apply to arrangements that only relate to reimbursement of expenses incurred in connection with a director’s candidacy. Further, the rule would not apply to any arrangement that existed prior to the nominee’s candidacy if the nominee’s relationship with the third party has been publicly disclosed in a proxy statement, information statement or annual report. This exception protects directors or nominees who are employed by a private equity or venture capital firm, or a fund established by such firm, where employees are expected to and routinely serve on the boards of the fund’s portfolio companies and their compensation is not materially affected by such service. If, however, a director or nominee’s remuneration is materially increased in connection with the person’s candidacy or service as a director, the difference between the new and previous level of compensation must be disclosed.

### **Failure to Disclose**

A company that fails to disclose a “golden leash” arrangement will not be deficient if it has undertaken reasonable efforts to identify all relevant agreements, including by asking each director and nominee in a timely manner. If an undisclosed agreement is discovered, the company must file an 8-K or issue a press release regarding the arrangement. If it is determined that a company is deficient with respect to the Listing Rule 5250(b)(3), the company must, within 45 calendar days, provide Nasdaq with a plan to reestablish compliance. Failure to do so will lead to Nasdaq issuing a Staff Delisting Determination, which the company could appeal to a Hearings Panel pursuant to Listing Rule 5815.<sup>4</sup>

### **Foreign Private Issuers**

Nasdaq has amended Listing Rule 5615 to provide that a foreign private issuer may follow home country practice in lieu of the requirements of Listing Rule 5250(b)(3). In order to take advantage of this exception, the foreign private issuer must adhere to the requirements of Listing Rule 5615(a)(3). That rule requires the foreign private issuer to: (1) comply with the Notification of Noncompliance Requirement (Listing Rule 5625), (2) comply with the Voting Rights Requirement (Listing Rule 5640), (3) have an audit committee that satisfies Listing Rule 5605(c)(3), (4) ensure that the audit committee’s members meet the independence requirement in Listing Rule 5605(c)(2)(A)(ii) and (5) submit to Nasdaq a written statement from an independent counsel certifying that the company’s practices are not prohibited by home country law.

<sup>4</sup> Listing Rule 5810.

## Conclusion

Nasdaq's new rule comes at a time when activist investors are increasingly successful in their efforts to appoint board members. In preparation for their next shareholders' meeting, each Nasdaq listed issuer should begin soliciting from their directors and director candidates information sufficient to satisfy the new disclosure requirements. It remains to be seen whether other exchanges, such as the New York Stock Exchange, will adopt a similar rule.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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