

# PUBLICATION

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## SEC Approves Nasdaq Rule Addressing Compensation Committees, Consultants [Ober|Kaler]

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*A periodic bulletin keeping small businesses informed about current developments in securities law and related matters.*

### Final Nasdaq Rule

In our October 2012 Bulletin, we discussed The NASDAQ Stock Exchange LLC's (Nasdaq) proposed amendment to Rule 5605(d) to implement new listing standards regarding independence of compensation committees and compensation consultants and advisers in compliance with rules issued by the Securities and Exchange Commission (SEC) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Last month the SEC approved the amended rule, which includes two prior amendments that were not part of the original proposal. This Bulletin provides an overview of the amended rule (which we refer to here as the "new rule") and highlights material differences between the original proposal and the new rule as adopted. For more in-depth information about the new rule's requirements, please review our October 2012 bulletin.

Unlike the original proposed rule, which would have required listed companies to have their compensation committee charter set forth the committee's authorities and responsibilities as set forth in Rule 5605(d)(3), as discussed below, upon the effective date of the rule, companies now have until July 1, 2013 to comply. Compliance with the remaining provisions of the rule is required the earlier of (i) a company's first annual meeting after January 1, 2014, or (ii) October 31, 2014.

### Independence; Compensation Committee Charter

Under the new rule, *all* Nasdaq-listed companies must have a compensation committee consisting of at least two independent directors. Compensation committee members of a listed company that is not a smaller reporting company are prohibited from accepting "any consulting, advisory or other compensatory fee from the [listed] company or any subsidiary thereof." This prohibition does not include payments for board/committee service or fixed amounts under a retirement plan for prior service not contingent on continued service. In addition, the board of directors of such companies must consider whether any affiliation between a director and the listed company (or subsidiary or affiliate of the listed company) would impair the director's judgment as a member of the compensation committee.

As proposed, the new rule requires listed companies to adopt a compensation committee charter (or, for smaller reporting companies, a board resolution) that specifies the committee's authority and responsibilities set forth in Rule 5605(d)(1)(A)-(C) with respect to the scope of the committee's responsibilities and how it carries them out, its responsibility for determine or recommending to the board officer compensation, and that the company's CEO may not be present during voting or deliberations regarding his or her compensation. Companies that are not smaller reporting companies must also include in the charter (1) that the committee will review and reassess the adequacy of the charter on an annual basis and (2) the committee's responsibilities and authority with respect to compensation advisers and consultants discussed immediately below.

## Compensation Consultants and Other Advisers

Nasdaq-listed companies that are not smaller reporting companies will also be required to provide in their compensation committee charters the authorities and responsibilities set forth in Rule 5605(d)(3) with respect to the retention, compensation, oversight and funding of compensation consultants, legal counsel and other advisers, and that the committee must consider the six independence factors set forth in the rule when retaining or receiving advice from any such consultant, adviser or legal counsel other than in-house legal counsel.

Unlike the original proposal, the final rule provides that compensation committees need not consider the independence factors with respect to a compensation adviser that “acts in a role limited to (i) consulting on any broad-based plan that does not discriminate in scope, terms or operation in favor of Executive Officers or directors of the Company, and that is available to all salaried employees; and/or (ii) providing information that either is not customized for a particular [company] or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice.” This exception is consistent with the exception provided in Item 407(e)(3)(iii) of Regulation S-K with respect to the disclosure of any role of compensation consultants in determining or recommending the amount and form of a company's executive and director compensation.

The SEC expects that the compensation committee will conduct the independence assessment of advisers, consultants and legal counsel whom they retain or receive advice from at least annually.

While this part of the rule is not applicable to them, smaller reporting companies that retain compensation consultants will still need to obtain information regarding and consider the same independence factors when retaining or receiving advice from compensation consultants, however, since Item 407 of Regulation S-K was amended in 2012 (as discussed in our June 2012 Bulletin) to require conflict of interest disclosure in companies' proxy statements regarding compensation consultants (but not counsel or other advisers) receiving more than \$120,000 from the company and who had any role in determining or recommending the amount or form of executive and director compensation. In determining whether a conflict of interest exists, the six independence factors noted above must be considered. In addition, we expect that many smaller reporting companies will include, to the extent they have not already, provisions in their charter allowing the compensation committee to retain consultants and advisers despite the fact that the new rule does not require it for such companies.

## Certification

Consistent with the original proposal, listed companies would be required to certify that they are in compliance with the applicable provisions of the new rule within 30 days of the applicable listing requirement applying to them. Nasdaq will provide the required certification form to listed companies, and also included a form of certification it intends to use in an amendment to the proposed rule.

The SEC adopting release approving the new rule is available [here](#) [PDF].