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Final Nasdaq Rule Requiring Listed Companies to Disclose Third-Party Payments to Directors and Director Nominees

Authors: Jeffrey Nadler and Nir Servatka

On August 1, 2016, the Nasdaq Stock Market LLC (Nasdaq) adopted a rule requiring listed companies to publicly disclose the material terms of all agreements and arrangements between a director or director nominee and any third party relating to compensation and other payments in connection with that person's candidacy or service as a director. The new rule is intended to enhance the transparency of the governance processes of listed companies by disclosing compensation arrangements that could raise conflicts of interest among directors. The new rule applies to all Nasdaq-listed companies, except that foreign private issuers may elect to follow their home country practices in lieu of the new rule, subject to the typical conditions in the Nasdaq rules that are applicable to foreign private issuers that elect to follow their home country practices.

Disclosure of such agreements and arrangements is required by the date the company files or furnishes a definitive proxy or information statement in connection with its 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 the date on which the company files its next annual report on Form 10-K or Form 20-F.[1] The disclosure must be made either on the company's website (either directly or through a hyperlink) or in the company's definitive proxy or information statement for its next shareholders' meeting at which directors are elected (or, if the company does not file proxy or information statements, in its annual report on Form 10-K or Form 20-F). A company must make the disclosure required by the rule annually until the earlier of the resignation of the director or one year following the termination of the agreement or arrangement.

Under the new rule, Nasdaq-listed companies are not required to disclose agreements and arrangements that

- relate only to reimbursement of expenses in connection with the nominee's candidacy as a director;
- existed before the nominee's candidacy (including as an employee of the other person or entity) and the nominee's relationship with the third party has been publicly disclosed in a definitive proxy or information statement or annual report (such as in the director's or nominee's biography), provided that a material increase in the amount of a director's or nominee's remuneration is disclosed if it specifically relates to his or her candidacy or service as a director; or

[1] Canadian companies eligible to file annual reports on Form 40-F may use this form.

- have been disclosed under Item 5(b) of Schedule 14A or Item 5.02(d) of Form 8-K in the current fiscal year.

The new rule provides a safe harbour for a company that fails to provide timely disclosure of a third-party director compensation arrangement. Under the new rule, a company that fails to provide timely disclosure of a third-party director compensation arrangement will not be considered deficient in its disclosure requirements if (i) it has undertaken reasonable efforts to identify all arrangements required to be disclosed under the new rule, including by asking each director or nominee in a manner designed to allow timely disclosure; and (ii) upon discovery of the failure to disclose such arrangement, it promptly makes the required disclosure in a Form 8-K or 6-K, where required by SEC rules, or in a press release. A company that is deficient in its disclosure requirements must submit to Nasdaq a plan to regain compliance within 45 days of its receipt of a written notification from the Nasdaq staff informing the company of such deficiencies. If the company does not do so, the Nasdaq staff would issue the company a delisting determination, which the company could appeal in accordance with Nasdaq rules.

If you have any questions regarding the foregoing, please contact Jeffrey Nadler (212.588.5505) in our New York office.

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