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SEC Approves Requirement to Disclose Third-Party Director Compensation for Nasdaq Companies

In a bid to enhance transparency, help investors make more informed investing and voting decisions and address concerns that undisclosed compensation agreements could raise conflicts of interest among directors, the Securities and Exchange Commission has approved a new Nasdaq rule to require a listed company to disclose the material terms of any third-party compensation or payments made to any nominee for director, or sitting director, in connection with his or her candidacy or service on the company's board of directors. The NYSE has not yet proposed a similar rule for its listed companies, so only Nasdaq-listed companies are subject to this requirement for the time being.

The Disclosure Requirement. Nasdaq's new Rule 5250(b)(3) requires listed companies to disclose the material terms of all agreements and arrangements between any director or nominee for director and any third party relating to compensation or other payment in connection with such person's candidacy or service as a director. This disclosure must be made on an annual basis until the earlier of the resignation of the director or one year after the termination of the compensation arrangement, either on the company's website or in the definitive proxy or information statement for the shareholders' meeting at which directors are to be elected (or in the Form 10-K or 20-F, if the company does not file proxy or information statements). If a company makes the disclosure on its website, the disclosure must be available no later than the date of filing of the definitive proxy or information statements in connection with the applicable shareholder meeting (or the Form 10-K or Form 20-F, if the company does not file proxy or information statements) and must be continuously accessible.

What constitutes compensation and payment is broadly construed and includes non-cash compensation (such as payments for health insurance and indemnification). A company does not, however, have to disclose any third party agreements or arrangements that:

- Existed before a nominee's candidacy, and his or her relationship with the third party has been disclosed in the company's proxy or information statement or annual report, e.g., in a director's biography in the company's periodic filings. If, however, the nominee's or director's remuneration with the third party is materially increased specifically in connection with his or her candidacy or service as a director, then the difference between the new and old levels of compensation or other payments must be disclosed. An example of this type of excepted arrangement, as cited in the adopting release, is a director or a nominee who is employed by a private equity or venture capital firm (or a fund established by such a firm) where employees are expected to and routinely serve on the boards of portfolio companies and their remuneration is not materially affected by such service;

- Relate only to reimbursement of expenses incurred in connection with candidacy as a director, regardless of whether these agreements and arrangements have been publically disclosed; or

- Are disclosed under Item 5(b) of Schedule 14A (relating to disclosures made in opposition materials in a proxy contest) or disclosed under Item 5.02(d)(2) of Form 8-K (relating to disclosures of any arrangement or understanding between a new director and any other persons) in the current fiscal year.

Newly executed agreements do not have to be disclosed separately at the time of entry, but must be disclosed with materials for the next director election.

Exception for Foreign Private Issuers. The final rule clarifies that foreign private issuers may follow home country practices in lieu of the new disclosure requirements, subject to typical conditions (namely, that the foreign private issuer must submit to Nasdaq a written statement from independent counsel in its home country certifying that the company's practices are not prohibited by local law and must disclose in its annual SEC filings (or in certain circumstances on its website) that it follows home country practice in lieu of these requirements).

Effective Dates. The final rule will be effective for definitive proxy and information statements filed after July 31, 2016 (or the next Form 10-K or Form 20-F filed after July 31, if a company does not file a proxy or information statement). Thus, companies with late annual meetings will be subject to these requirements for this proxy season, and should, among other things, consider revising their D&O questionnaires to solicit information from directors in response to the new rule.

Cure Procedures. If a company discovers an agreement or arrangement that was not disclosed but should have been, prompt disclosure must be made (in addition to the annual disclosure requirements) either by filing a Form 8-K or Form 6-K, where required by SEC rules, or by issuing a press release. However, companies will not be considered deficient if they have taken reasonable efforts to identify any agreements and arrangements, including by asking each director or nominee in a manner designed to allow timely disclosure. If a company is considered deficient, the company must provide a plan to regain compliance within 45 calendar days.

For a copy of the final rule text, click here.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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