



Nasdaq-listed companies are required to certify their compliance with the amended listing rules on compensation committees within 30 calendar days following the earlier of (1) the company's first annual meeting after January 15, 2014 or (2) October 31, 2014. The certification must be submitted online through the Nasdaq OMX Listing Center page of Nasdaq's website located at <https://listingcenter.nasdaqomx.com/home.aspx>.

The new compensation committee requirements include the following:

- Companies must have a compensation committee consisting of at least two members, each of whom must be an independent director as defined under Nasdaq [Listing Rule 5605\(a\)\(2\)](#).
- In determining whether a director is eligible to serve on the compensation committee, a company's board must consider any consulting, advisory or other compensatory fee, other than for board service, paid by the company to the director and whether the director is affiliated with the company, to determine whether any relationship exists that would impair the director's ability to be independent from management as a member of the compensation committee. See Listing Rule 5606(d)(2). Smaller reporting companies are not subject to this requirement.
- Companies must adopt a formal, written compensation committee charter that specifies certain compensation committee responsibilities and authority set forth in Listing Rule 5605(d)(1). The compensation committee must review and reassess the adequacy of the charter on an annual basis. Smaller reporting companies can utilize a board resolution in lieu of a charter and are exempt from certain other aspects of this requirement.

Independence

Each compensation committee member must meet the general Nasdaq definition of an independent director set forth in Nasdaq Listing Rule 5605(a)(2). If the company is not a smaller reporting company, then in affirmatively determining the independence of any director who will serve on the compensation committee, the board of directors also must consider all factors specifically relevant to determining whether the director has a relationship to the company which is material to the director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to:

- (i) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company to the director; and

- (ii) whether the director is affiliated with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. “Affiliated” status could include ownership of a controlling interest in the company’s stock, though Nasdaq has said that this does not, by itself, preclude service on the compensation committee. Nasdaq also has said that it may be appropriate for representatives of significant stockholders to serve on the compensation committee, since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.

If a company fails to comply with the compensation committee composition requirements, it may be eligible for a cure period. In addition, a company may rely on an exception to these composition requirements to permit an otherwise ineligible director to serve on a compensation committee under exceptional and limited circumstances.

Compensation Committee Charter

A compensation committee charter must specify:

- (i) the scope of the committee's responsibilities, and how it carries out those responsibilities, including structure, processes and membership requirements;
- (ii) the committee’s responsibility for determining, or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company; and
- (iii) that the CEO may not be present during voting or deliberations on his or her compensation.

A smaller reporting company may use a board resolution that covers the above items in lieu of adopting a charter. A company that is not a smaller reporting company also must set forth in the charter of its compensation committee the specific responsibilities and authority referenced in Listing Rule 5605(d)(3) relating to the retention, compensation, oversight and funding of compensation consultants, legal counsel and other advisers. Companies other than smaller reporting companies were required to provide their compensation committees with these responsibilities and this authority effective July 1, 2013, and smaller reporting companies remain exempt from this requirement. As a reminder, effective July 1, 2013, compensation committees of companies other than smaller reporting companies may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the following six factors:

1. the provision of other services to the company by the person that employs the compensation consultant, legal counsel or other adviser;
2. the amount of fees received from the company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the

- total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
3. the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
 4. any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
 5. any stock of the company owned by the compensation consultant, legal counsel or other adviser; and
 6. any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an Executive Officer of the company.

However, it is important to note that compensation committees may select, or receive advice from, any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors outlined above (see [Rule Update 2013-004](#)).

Should you have any questions regarding the content of this Alert or need assistance, please do not hesitate to contact the SFTT attorney with whom you work. Additional information about these requirements is available in Nasdaq [Rule Update 2013-001](#), [Rule Update 2013-005](#) and [IM 5605-6](#).

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