April 16, 2013

Deadline Approaches for Amending Compensation Committee Charters

Companies must comply with certain final NYSE and NASDAQ listing rules by July 1.

By July 1, affected companies must comply with recent amendments to the listing rules of the New York Stock Exchange (NYSE) and the NASDAQ Stock Market (NASDAQ) relating to compensation committees.[1] These changes, which were approved by the Securities and Exchange Commission (SEC) on January 11, 2013, were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the SEC's implementing regulations.

The following discusses the changes that listed companies must make by July 1, 2013, to comply with the new listing rules.

Changes Required for Compensation Committee Charters

As of July 1, the charter of each listed company's compensation committee must include the following provisions:

- The compensation committee must have authority, in its sole discretion, to retain or obtain advice of a compensation consultant, independent legal counsel, or other adviser (collectively, compensation advisers).
- The compensation committee must be responsible for the appointment, compensation, and oversight of any compensation adviser they retain.
- The listed company must provide appropriate funding, as determined by the compensation committee, for the payment of reasonable compensation to its compensation advisers.
- The compensation committee, before retaining any compensation adviser, must consider factors affecting his or her independence, including the following:
  - Other services provided to the listed company by the compensation adviser's firm
  - The fees the compensation adviser's firm receives from the listed company as a percentage of that firm's total revenue
  - The policies and procedures of the compensation adviser's firm that are designed to prevent conflicts of interest
  - Any business or personal relationship between the compensation adviser and a compensation committee member or an executive officer of the listed company
  - Whether the compensation adviser owns stock in the listed company

Neither the listing criteria nor the Dodd Frank Act prohibits the retention of a compensation adviser who may not be independent, and neither requires a compensation committee to follow the recommendations of a compensation adviser it retains.

1. For more information on the new listing rules, view our February 5, 2013, LawFlash, "SEC Approves Final NYSE and NASDAQ Compensation Committee Rules," available at http://www.morganlewis.com/pubs/Securities_LF_NYSE-NASDAQCompensationCommitteeRules_05feb13.

Board Actions by NASDAQ-Listed Companies Without Compensation Committee Charters

By July 1, any NASDAQ-listed company that has independent directors who act in lieu of a compensation committee or a compensation committee that has no charter must provide such independent directors or compensation committee with the responsibilities and authority described above, either through a board resolution or other corporate action. These NASDAQ-listed companies do not have to comply with the new requirements relating to forming a compensation committee and adopting a charter until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014.

Exemptions

The compensation committee listing rules of both the NYSE and NASDAQ have exemptions from some of the new criteria for controlled companies, smaller reporting companies and foreign private issuers, asset-backed issuers, limited partnerships, and management investment companies. Smaller reporting companies and foreign private issuers should review these exemptions to determine whether they need to amend their compensation committee charters.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.		
Linda L. Griggs	202.739.5245	lgriggs@morganlewis.com
David A. Sirignano	202.739.5420	dsirignano@morganlewis.com
George G. Yearsich	202.739.5255	gyearsich@morganlewis.com
New York		
Stephen P. Farrell	212.309.6050	sfarrell@morganlewis.com
Christopher T. Jensen	212.309.6134	cjensen@morganlewis.com
Finnbarr D. Murphy	212.309.6704	fmurphy@morganlewis.com
David W. Pollak	212.309.6058	dpollak@morganlewis.com
Allan D. Reiss	212.309.6390	areiss@morganlewis.com
Philadelphia		
James W. McKenzie	215.963.5134	jmckenzie@morganlewis.com
Alan Singer	215.963.5224	asinger@morganlewis.com
Palo Alto		
Thomas W. Kellerman	650.843.7550	tkellerman@morganlewis.com
Pittsburgh		
Amy I. Pandit	412.560.7415	apandit@morganlewis.com
Princeton		
Emilio Ragosa	609.919.6633	eragosa@morganlewis.com
Irvine		
Ellen S. Bancroft	949.399.7130	ebancroft@morganlewis.com
Bryan S. Gadol	949.399.7140	bgadol@morganlewis.com
Moscow/London		
Carter Brod	+7 495 212 2550	cbrod@morganlewis.com
Iain Wright	+44 (0)20 3201 5630	iwright@morganlewis.com

Morgan Lewis

About Morgan, Lewis & Bockius LLP

With 24 offices across the United States, Europe, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.