

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.⁴

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Rule 4200. Definitions

(a) For purposes of the Rule 4000 Series, unless the context requires otherwise:

(1)–(13) No change.

(14) “*Family Member*” means any person who is a relative by blood, marriage or adoption or who has the same residence.

(15) “Independent director” means a person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company’s board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent:

(A) a director who is, *or during the past three years was*, employed by the [corporation] company or by any parent or subsidiary of the company [any of its affiliates for the current year or any of the past three years];

(B) a director who accepts *or who has a Family Member who accepts* any [compensation] payments from the [corporation] company or any [of its affiliates] parent or subsidiary of the company in excess of \$60,000 during the current fiscal year or any of the past three fiscal years [previous fiscal year], other than compensation for board service, *payments arising solely from investments in the company’s securities, compensation paid to a Family Member who is an employee of the company or a parent or subsidiary of the company (but not if such person is an executive officer of the company or any parent or subsidiary of the company),* benefits under a tax-qualified retirement plan, or non-discretionary compensation (provided, however, that audit committee members are subject to heightened requirements under Rule 4350(d));

(C) a director who is a [member of the immediate] [f]Family Member of an individual who is, or [has been in any of] during the past three years was, employed by the [corporation] company

or by any [of its affiliates] parent or subsidiary of the company as an executive officer[. Immediate family includes a person’s spouse, parents, children, siblings, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, and anyone who resides in such person’s home];

(D) a director who is a partner in, or a controlling shareholder or an executive officer of, any [for-profit business] organization to which the [corporation] company made, or from which the [corporation] company received, payments (other than those arising solely from investments in the [corporation’s] company’s securities) that exceed 5% of the recipient’s [corporation’s or business organization’s] consolidated gross revenues for that year, or \$200,000, whichever is more, in the current fiscal year or any of the past three fiscal years;

(E) a director of the listed company who is employed as an executive officer of another entity where any of the [company’s] executive[s] officers of the listed company serve on [that entity’s] the compensation committee of such other entity, or if such relationship existed during the past three years; or

(F) a director who is or was a partner or employee of the company’s outside auditor, and worked on the company’s audit, during the past three years.

Former (15)–(37) renumbered as (16)–(38).

IM—4200 Definition of Independence—Rule 4200(a)(15)

It is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 4200. Rule 4200 also provides a list of certain relationships that preclude a board finding of independence. These objective measures provide transparency to investors and companies, facilitate uniform application of the rules, and ease administration. Because Nasdaq does not believe that ownership of company stock by itself would preclude a board finding of independence, it is not included in the aforementioned objective factors. The Rule’s reference to a “parent or subsidiary” is intended to cover entities that are consolidated with the issuer’s financial statements. It should also be noted that there are additional, more stringent requirements that apply to audit committees, as specified in Rule 4350.

Rule 4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq Small Cap Market Issuers Except for Limited Partnerships

(a)–(b) No change.

(c) Independent Directors

[Each issuer shall maintain a sufficient number of independent directors on its board of directors to satisfy the audit committee requirement set forth in Rule 4350(d)(2).]

(1) A majority of the board of directors must be comprised of independent directors as defined in Rule 4200.

(2) Independent directors must have regularly scheduled meetings at which only independent directors are present (“executive sessions”).

(3) Compensation of Officers

(A) Compensation of the chief executive officer of the company will be determined either by:

(i) a majority of the independent directors meeting in executive session, or

(ii) a compensation committee comprised solely of independent directors meeting in executive session.

(B) Compensation of all other officers, as that term is defined in section 16 of the Act and Rule 16a-1 thereunder, will be determined either by:

(i) a majority of the independent directors, or

(ii) a compensation committee comprised solely of independent directors.

The chief executive officer may be present during deliberations, but may not vote.

(C) Notwithstanding paragraphs (3)(A)(ii) and (3)(B)(ii) above, if the compensation committee is comprised of at least three members, one director who is not independent as defined in Rule 4200 and is not a current officer or employee or a Family Member of such person, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual’s membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the next annual meeting proxy statement subsequent to such determination, the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.

(4) Nomination of Directors

(A) The nomination of company directors will be determined either by:

(i) a majority of the independent directors, or

⁴ At Nasdaq’s request, a few nonsubstantive changes were made to the proposed rule text as filed with the Commission to correct formatting errors. Telephone calls between Sara Bloom, Office of General Counsel, Nasdaq, and Jennifer Lewis, Attorney, Division of Market Regulation (“Division”), Commission, on March 14, 2003 and Eleni Constantine, Office of General Counsel, Nasdaq, and Jennifer Lewis, Attorney, Division, Commission, on March 17, 2003.