

Amendment No. 3 to the Nasdaq Independent Director Proposal, Nasdaq proposes to add Interpretive Material clarifying the application of the Nasdaq Business Relationship Provision. The Interpretive Material states that this proposal is generally intended to capture payments to an entity with which the director or Family Member of the director is affiliated by serving as a partner (other than a limited partner), controlling shareholder or executive officer of such entity.¹²⁵ The Interpretive Material states that under exceptional circumstances, such as where a director has direct, significant business holdings, it may be appropriate to apply the corporate measurements in the Nasdaq Business Relationship Provision, rather than the individual measurements of the Nasdaq Payments Provision, and that issuers should contact Nasdaq if they wish to apply the rule in this manner.¹²⁶ The Interpretive Material further notes that the independence requirements of the Nasdaq Business Relationship Provision are broader than the rules for audit committee member independence set forth in Rule 10A-3(e)(8) under the Exchange Act.¹²⁷

Moreover, the Interpretive Material states that under the Nasdaq Business Relationship Provision, a director who is, or who has a Family Member who is, an executive officer of a charitable organization may not be considered independent if the company makes payments to the charity in excess of the greater of the greater of 5% of the charity's revenues or \$200,000.¹²⁸ The Interpretive Material also discusses the treatment of payments from the issuer to a law firm in determining whether a director who is a lawyer may be considered independent.¹²⁹ The Interpretive Material notes that any partner in a law firm that receives payments from the issuer is ineligible to serve on that issuer's audit committee.¹³⁰

Fifth, a director of the listed company who is, or has a Family Member who is, employed as an executive officer of another entity at any time during the past three years where any of the executive officers of the listed company

include Family Members, and to clarify that disqualifying payments are payments for "property or services."

¹²⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note, and NASD-IM—4200—Definition of Independence—Rule 4200(a)(15).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

serves on the compensation committee of such other entity, would not be deemed independent ("Nasdaq Interlocking Directorate Provision").¹³¹

Sixth, a director who is, or has a Family Member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor, and worked on the company's audit, at any time, during the past three years, would not be deemed independent ("Nasdaq Auditor Relationship Provision").¹³²

Seventh, Nasdaq proposes that, in the case of an investment company, a director would not be considered independent if the director is an "interested person" of the company as defined in section 2(a)(19) of the Investment Company Act, other than in his or her capacity as a member of the board of directors or any board committee.¹³³ This provision would be in lieu of the other tests for independence specified in the rule.

With respect to the look-back periods referenced in the Nasdaq Employee Provision, the Nasdaq Family of Executive Officer Provision, the Nasdaq Interlocking Directorate Provision, and the Nasdaq Auditor Relationship Provision, Nasdaq proposes to clarify that "any time" during any of the past three years should be considered,¹³⁴ and to add Interpretive Material stating that these three year look-back periods commence on the date the relationship ceases. As an example, the Interpretive Material states that a director employed by the company would not be independent until three years after such employment terminates.¹³⁵ Nasdaq also proposes to add Interpretive Material stating that the reference to a "parent or subsidiary" in the definition of independence is intended to cover entities the issuer controls and consolidates with the issuer's financial statements as filed with the Commission (but not if the issuer reflects such entity solely as an investment in its financial

¹³¹ See NASD Rule 4200(a)(15)(E). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to expand this proposal to include Family Members.

¹³² See NASD Rule 4200(a)(15)(F). In Amendment No. 3 to the Independent Director Proposal, *supra* note, Nasdaq proposes to expand this proposal to include a director who is, or has a Family Member who is, a current partner of the company's outside auditor, regardless of whether such partner worked on the company's audit.

¹³³ See NASD Rule 4200(a)(15)(G) and Amendment No. 3 to the Nasdaq Independent Director Proposal, *supra* note.

¹³⁴ See Amendment No. 3 to the Independent Director Proposal, *supra* note, and NASD Rules 4200(a)(15)(A), (C), (E), and (F).

¹³⁵ See Amendment No. 3 to the Independent Director Proposal, *supra* note and NASD IM—4200 "Definition of Independence" Rule 4200(a)(15).

statements). The Interpretive Material also adds that the reference to "executive officer" has the same meaning as the definition in Rule 16a-1(f) under the Exchange Act.¹³⁶

2. Separate Meetings for Board Members

Nasdaq proposes to require independent directors to have regularly scheduled meetings at which only independent directors would be present.¹³⁷

3. Compensation of Officers

Nasdaq proposes to require the compensation of the CEO of a listed company to be determined or recommended to the board for determination either by a majority of the independent directors, or by a compensation committee comprised solely of independent directors ("Nasdaq Compensation of Executives Provision").¹³⁸ In addition, the compensation of all other officers would have to be determined or recommended to the board for determination either by a majority of the independent directors, or a compensation committee comprised solely of independent directors.¹³⁹

Under the Nasdaq proposal, if the compensation committee was comprised of at least three members, one director, who is not independent (as defined in NASD Rule 4200) and is not a current officer or employee or a Family Member of such person, would be permitted to be appointed to the 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 (or, if the issuer does not file a proxy, in its Form 10-K or 20-F), the nature of the relationship and the reasons for the determination.¹⁴⁰ A member appointed under such exception would not be permitted to serve longer than two years.

¹³⁶ *Id.* 17 CFR 240.16a-1(f).

¹³⁷ See NASD Rule 4350(c)(2).

¹³⁸ See NASD Rule 4350(c)(3)(A). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to delete the requirement that the independent directors meet in executive session to determine CEO compensation, and add the requirement that the CEO may not be present during voting or deliberations.

¹³⁹ See NASD Rule 4350(c)(3)(B). In Amendment No. 3 to the Independent Director Proposal, *supra* note 12, Nasdaq proposes to add the option that the compensation of the CEO and other officers could be recommended to the board for its determination rather than determined by the committee.

¹⁴⁰ See NASD Rule 4350(c)(3)(C).