

Nasdaq and New York Stock Exchange Modify Rules for Director Independence

The Nasdaq Stock Market and the New York Stock Exchange have both recently made changes to their bright-line tests for director independence.

I. NASDAQ

On August 8, 2008, the Securities and Exchange Commission (“SEC”) approved a rule change proposed by the Nasdaq Stock Market LLC¹ modifying the definition of “independent director.”

The previous rule² prohibited a director who had accepted, or who had a family member who had accepted, compensation in excess of \$100,000 during any 12 month period within the preceding three years from being considered an “independent director.” The rule change raises this threshold to \$120,000 and is now consistent with the threshold established in Regulation S-K Item 404(a).³

It is important to note that even if a director (or a member of the director’s family) receives less than \$120,000 in the relevant 12 month period, the company’s board still must conclude that the director has no relationship with the company that would interfere with his or her exercise of independent judgment if the director is to be viewed as “independent.”

II. NYSE

The New York Stock Exchange also recently modified its bright-line tests for director independence.⁴ First, following the Nasdaq rule change described above, the direct compensation threshold for a director, and the family members of directors, was increased from \$100,000 to \$120,000.

The NYSE also revised its auditor affiliation rules to allow an independent director to have an immediate family member who is a current employee (but not a partner) of the company’s auditor as long as the immediate family member is not personally involved with the company’s audit. This change is consistent with the existing Nasdaq provision.⁵

As with Nasdaq, even if the bright-line tests of the NYSE are not triggered, a company’s board must affirmatively find that a director has no material relationship with the company in order to be deemed “independent.”

These two NYSE rule changes will become operative on September 11, 2008.

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¹ SEC Release 34-58335 (August 8, 2008) *available at* <http://www.sec.gov/rules/sro/nasdaq/2008/34-58335.pdf>.

² Nasdaq Rule 4200(a)(15)(B).

³ Regulation S-K Item 404(a) requires disclosure of financial transactions between a public company and related persons specified in Item 404(a) if the amount involved exceeds \$120,000.

⁴ SEC Release 34-58367 (August 15, 2008) *available at* <http://www.sec.gov/rules/sro/nyse/2008/34-58367.pdf>.

⁵ Nasdaq Rule 4200(a)(15)(F).

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Tafari Mbadiwe at 212.701.3342 or tmbadiwe@cahill.com.

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