Simpson Thacher

Memorandum

Nasdaq Proposes Rule Requiring Disclosure of Third-Party Compensation to Directors and Director Nominees

February 16, 2016

On January 28, 2016, Nasdaq filed a proposed rule with the Securities and Exchange Commission ("SEC") that would require listed companies to disclose any compensation provided by a third party to the company's directors or director nominees in connection with their candidacy for or service on the company's board of directors.[1]

As explained by Nasdaq in its proposal, undisclosed third-party compensation arrangements raise several concerns. First, "they may lead to conflicts of interest among directors and call into question their ability to satisfy their fiduciary duties." Additionally, according to Nasdaq, such arrangements "tend to promote a focus on short-term results at the expense of long-term value creation." Nasdaq believes that "enhancing transparency around third-party board compensation would help address these concerns and would benefit investors by making available information potentially relevant to investment and voting decisions."

Nasdaq's proposal would require each listed company to publicly disclose – on its website or proxy statement for the next annual meeting (or, if it does not file proxy statements, in Form 10-K or 20-F) – "all agreements and arrangements between any director or nominee and any person or entity (other than the company) that provide for compensation or other payment in connection with that person's candidacy or service as a director." Nasdaq's proposal is intended to be construed broadly, such that any form of payment (e.g., health insurance premiums) would be included. The proposal, however, does not require disclosure of agreements or arrangements that:

- relate only to reimbursement of expenses in connection with candidacy as a director; or

[1] *See* SR-NASDAQ-2016-013 (Jan. 28, 2016).

- existed prior to the nominee's candidacy (e.g., compensation arrangements relating to a pre-existing employment relationship) and have been otherwise publicly disclosed in a proxy statement or annual report (but not if the arrangements were entered into in contemplation of the person's candidacy as a director).

Where disclosure is required, the listed company would need to identify the parties to and the material terms of the agreement or arrangement.

Nasdaq's proposal further provides that a company will not be deemed deficient with regard to the proposed disclosure requirement if:

- it has undertaken reasonable efforts to identify all [third-party] agreements and arrangements, including by asking each director or nominee in a manner designed to allow timely disclosure," and
- makes the required disclosure promptly upon discovery of the agreement or arrangement "by filing a Form 8-K or 6-K, where required by SEC rules, or by issuing a press release."

Under the proposed rule, in cases where a company is considered deficient, the company would be required to "submit a plan sufficient to satisfy Nasdaq staff that the Company has adopted processes and procedures designed to identify and disclose relevant agreements and arrangements" in the future. In the event that the company does not do so, "it would be issued a Staff Delisting Determination, which the company could appeal to a Hearings Panel."

Nasdaq's proposal is subject to the SEC's approval. The SEC is currently soliciting comments with regard to Nasdaq's proposal, to be received by the SEC no later than 21 days following the proposal's publication in the Federal Register.

If you have any questions or would like additional information, please do not hesitate to contact **Yafit Cohn** at +1-212-455-3815 or yafit.cohn@stblaw.com, any other member of the Firm's Public Company Advisory Practice.

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