

SEC Approves Nasdaq Rule Requiring Disclosure of “Golden Leash” Arrangements

Nasdaq’s new rule requires disclosure of special payments to “third party” nominees to boards. It focuses largely on activist hedge fund nominees, and explicitly exempts most VC directors.

The SEC recently approved a new [Nasdaq rule](#), requiring disclosure of “Golden Leash” director compensation arrangements, which took effect August 1. Nasdaq-listed companies must comply with the new disclosure no later than the date on which they first file a proxy or information statement in connection with the first meeting where directors are to be elected. Thereafter, the disclosure is required for each director at least annually until the resignation of the director or one year following the termination of the “golden leash” agreement or arrangement.

Disclosure must be made on the company website or via hyperlink available through the website, in the company’s proxy statement, or other information statement for any shareholders’ meeting at which directors are elected. Exceptions are available for Foreign Private Issuers.

Disclosure Requirements

The new rule requires Nasdaq-listed companies to publicly disclose the material terms of all agreements and arrangements between any director or nominee and any person or entity other than the company (i.e., a “Third Party”) relating to compensation or other payment in connection with that person’s candidacy or service as a director. The terms “compensation” and “other payment” as used in the rule are intended to be construed broadly and apply to agreements and arrangements that provide for non-cash compensation and other payment obligations, such as health insurance premiums or indemnification, made in connection with a person’s candidacy or service as a director. Further, at a minimum, the disclosure should identify the parties to, and the material terms of, the agreement or arrangement relating to compensation.

No disclosure will be required for arrangements that:

- Relate only to reimbursement of expenses in connection with candidacy as a director;
- Have been disclosed under Item 5(b) of the proxy rules (relating to interests of certain persons in connection with a proxy contest) or Item 5.02(d)(2) of Form 8-K (relating to description of arrangements in connection with election of a new director) in the current fiscal year; or
- Existed prior to the nominee’s candidacy in the ordinary course of business, and where the nominee’s relationship with the third party has been publicly disclosed in a definitive proxy or annual report.

The final exception specifically applies in the context of a **director or nominee employed by a private equity or venture capital firm**, or a fund established by such firm, where employees are expected to and routinely serve

on the boards of the fund's portfolio companies and their remuneration is not materially affected by such service. However, if that individual's compensation is materially increased as a result of service as a director or nominee, the difference between the new and previous level of compensation or other payment obligation must be disclosed.

The primary focus of this new rule appears to be to ensure disclosure of third-party arrangements that could create divergent views among directors regarding corporate strategy or call into question the directors' ability to satisfy their fiduciary duties.

One type of arrangement specifically identified as potentially problematic is third party director pay based on achieving benchmarks, such as an increase in share price over a fixed term. Nasdaq's initial proposing release notes that such benchmarks could incentivize third party directors to focus on short-term results at the expense of long-term value creation.

However, the rule takes pains to avoid sweeping up more ordinary course of service arrangements between private equity and venture capital firms and their employees serving on the boards of portfolio companies. For VC and PE directors, only a material increase in pay connected to their nomination or service as a director must be disclosed.

To speak with a member of Radford's compensation consulting group about how this release might impact your company, please write to consulting@radford.com.

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