

Client Alert

NYSE and Nasdaq Representatives Discuss New Corporate Governance Rules; NYSE Issues Related FAQs

At a conference sponsored by the Practising Law Institute held on January 29, 2004, representatives of the New York Stock Exchange and Nasdaq discussed the recently approved NYSE and Nasdaq corporate governance rules (described in our client alert entitled "New NYSE and Nasdaq Corporate Governance Rules Take Effect in 2004"¹) with which a listed company generally must comply by the earlier of (i) the company's first annual meeting after January 15, 2004 or (ii) October 31, 2004. In their discussions, the NYSE and Nasdaq representatives provided an overview of the new corporate governance rules and offered the following insights:

- **Three-Year Look-Back:**
 - Under NYSE independence standards, a director who receives more than \$100,000 per year in direct compensation from a listed company (other than certain enumerated payments) is not independent until three years after he or she ceases to receive more than \$100,000 per year in such compensation. The NYSE representative clarified that if \$100,000 in direct compensation is paid within any 12-month period, a director may not qualify as independent during that 12-month period and the three-year look-back period following the end of that 12-month period. Examples of the rule's application are included in the NYSE FAQs described below.
 - Under Nasdaq independence standards, a director who accepts payments from a listed company (other than certain enumerated payments) in excess of \$60,000 during the current or any of the past three fiscal years cannot be considered independent. The Nasdaq representative acknowledged that the reference in the current rule to fiscal years may have the unintended effect of extending the look-back period to up to four years and indicated that

¹ The client alert is available on our website at www.chadbourne.com/publications/sub_Publications.html

Nasdaq would file with the SEC a proposed amendment to change the look-back period to 36 months.

- **Employment with Auditors:** Under NYSE independence standards, a director who is affiliated with or employed in a professional capacity by a present or former internal or external auditor of a listed company is not independent until three years after the end of the affiliation or the employment or auditing relationship. The NYSE representative clarified that for purposes of the independence standards, employment in a "professional capacity" with the company's auditor is limited to audit and assurance and tax compliance functions and does not cover administrative or clerical functions.
- **Cure Provision:** Nasdaq rules provide that if a listed company fails to comply with the majority of independent directors requirement due to a vacancy or one director ceasing to be independent due to circumstances beyond the director's control, then the company must comply with the independence requirement by the earlier of its next annual shareholder meeting or one year from the occurrence of the event that resulted in its non-compliance. The Nasdaq representative stated that the cure provision can be used by the listed company in the following manner if a director ceases to be independent:
 - If the circumstances resulting in the non-compliance are beyond the director's reasonable control, the director may remain in office during the cure period.
 - If the non-compliance is due to any other reason, the director shall resign or be removed, creating a vacancy, which may continue until the end of the cure period.
- **Certifications:**
 - NYSE requires annual CEO certifications, as well as annual and interim written affirmations regarding compliance with the new corporate governance standards. The NYSE representative indicated that the certification form and written affirmation forms will be made available on the NYSE website shortly.
 - Nasdaq's one-time corporate governance compliance certification form is currently available on the Nasdaq website at www.nasdaq.com/about/CG_Certification_Form.pdf.

NYSE FAQs

Also on January 29, 2004, the NYSE made available on its website Frequently Asked Questions about the new corporate governance rules, including transition periods for the new rules, annual report and proxy statement disclosure, certifications, independence determinations, communications with non-management directors and compensation and audit committee requirements. The FAQs are available on the NYSE website at www.nyse.com/pdfs/section303Afaqs.pdf.

* * * * *

February 4, 2004

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at www.chadbourne.com/publications/sub_Publications.html. If you have questions regarding the NYSE or Nasdaq corporate governance rules, please contact any of the following:

New York

Marc A. Alpert	+1 (212) 408-5491	malpert@chadbourne.com
Philip L. Colbran	+1 (212) 408-1122	pcolbran@chadbourne.com
A. Robert Colby	+1 (212) 408-5571	rcolby@chadbourne.com
Barry S. Eisler	+1 (212) 408-1073	beisler@chadbourne.com
Morton E. Grosz	+1 (212) 408-5592	mgrosz@chadbourne.com
Charles E. Hord, III	+1 (212) 408-5353	chord@chadbourne.com
Peter K. Ingerman	+1 (212) 408-5422	pingerman@chadbourne.com
Peter R. Kolyer	+1 (212) 408-5564	pkolyer@chadbourne.com
Rachel C. Lee	+1 (212) 408-5176	rlee@chadbourne.com
Sey-Hyo Lee	+1 (212) 408-5122	shlee@chadbourne.com
J. Allen Miller	+1 (212) 408-5454	amiller@chadbourne.com
John G. Moon	+1 (212) 408-1117	jmoon@chadbourne.com
Kessar Nashat	+1 (212) 408-5468	knashat@chadbourne.com
Anne-Marie F. Shelley	+1 (212) 408-5272	ashelley@chadbourne.com
Edward P. Smith	+1 (212) 408-5371	esmith@chadbourne.com
Kevin C. Smith	+1 (212) 408-1092	ksmith@chadbourne.com

Washington, D.C.

Thomas V. Sjoblom	+1 (202) 974-5636	tsjoblom@chadbourne.com
-------------------	-------------------	-------------------------

London

William Greason	+44 (20) 7337-8010	wgreason@chadbourne.com
David Levin	+44 (20) 7337-8048	dlevin@chadbourne.com
Claude S. Serfilippi	+44 (20) 7337-8030	cserfilippi@chadbourne.com