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KIRKLANDPEN
Private Equity Newsletter

September 28, 2012

Stock Exchanges Propose Compensation Committee Independence and Related Rules

PENpoints

NYSE and Nasdaq proposed rules to implement Dodd-Frank Act's mandate that a listed company's compensation committee consist entirely of independent directors.

On September 25, 2012, NYSE and Nasdaq proposed rules to implement Dodd-Frank Act's mandate that a listed company's compensation committee consist entirely of independent directors.[1] Most importantly for a private fund owning a large position in a listed company, the proposed rules would not prohibit a director affiliated with the fund from serving on the company's compensation committee.

As expected, in determining the "independence" of compensation committee members, the proposed rules require listed companies to consider certain criteria including (1) the source of compensation of the compensation committee member, including whether any consulting, advisory or other compensatory fee is paid by the listed company to such member, and (2) whether the compensation committee member is affiliated with the listed company, a subsidiary of the listed company, or another affiliate of the listed company.

Companies listed on the Nasdaq would, for the first time, be required to formally appoint a compensation committee of at least two members and adopt a written compensation committee charter (requirements which have historically applied to NYSE listed companies, and a practice which many Nasdaq listed companies had voluntarily adopted as best practices and to qualify for certain exemptions under Section 16 of the Exchange Act and Section 162(m) of the Internal Revenue Code).

In addition, Nasdaq proposed rules would prohibit an individual from serving on the compensation committee if that individual, directly or indirectly, received any consulting, advisory or other compensatory fee from the company or any of its subsidiaries (excluding directors fees and certain exempt compensation). By contrast, NYSE proposed rules merely require the company to "consider" compensation paid to the committee member, whether by the company or any other person or entity that would impair such member's ability to make independent judgments about executive compensation.

As anticipated, the exchanges made clear that, unlike the independence requirements for membership on an audit committee, directors affiliated with significant shareholders are not *per se* excluded from serving on compensation committees. The proposed NYSE rules note that "rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive."

Nasdaq echoed the NYSE's view, saying, "… such a blanket prohibition would be inappropriate for compensation committees … [and] it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program."

The new heightened compensation committee independence requirements would not apply to controlled companies (*i.e.*, a company with a 50 percent or more stockholder or group) or smaller reporting companies (*i.e.*, a company with less than $75 million of public float held by non-affiliates).

If adopted, a company listed on the NYSE would have until the earlier of its first annual meeting after January 15, 2014 or October 31, 2014 to comply with the new rules. A Nasdaq listed issuer would be required to comply with (1) compensation committee authorization and

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funding requirements immediately upon adoption of the new rules and (2) the remainder of the rules at the earlier of the issuer's second annual meeting held after adoption of the final rules or December 31, 2014.

1 The rules also address Dodd-Frank Act's requirement that a compensation committee have authority and funding to engage a compensation consultant, legal counsel and other advisers. Both NYSE and Nasdaq proposed rules also would require compensation committees to consider six factors, earlier identified by the SEC, when evaluating the independence of a compensation committee adviser.

If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

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PENnotes

7th Annual Kirkland Real Estate Private Equity Symposium
New York, New York
October 3, 2012

Kirkland will hold its seventh annual Real Estate Private Equity Symposium at the Firm's New York office on October 3, 2012. The symposium will feature three panel discussions with guest speakers from Firm clients. Panelists for "Reworking New and Existing Investments" will includ Laurence Geller, President, CEO and director of Strategic Hotels & Resorts, Christopher Linkas, managing director at Fortress and William Rahm, senior managing director at Centerbridge Partners; "New Perspectives on the Capital Stack" will include Jim Halliwell, managing director of acquisitions and dispositions at Principal Real Estate Investors, David Helfand, co-president of Equity Group Investments, and Barry Malkin, senior managing partner of GEM Realty Capital; and "Current Trends in Fundraising" will includ Eric Mogentale, managing principal of Walton Street Capital, Chuck Purse, managing principal of Park Hill Real Estate, and Scott White, senior vice president of Brookfield Private Funds Group.

2012 Registered Adviser Seminar & CCO Summit
San Francisco - October 25, 2012
Chicago - October 30, 2012
New York - November 8, 2012

The 2012 Registered Adviser Seminar & CCO Summit will take place in San Francisco, Chicago and New York. This seminar will focus on practical tips for new RIAs to private funds, CCO panel and compliance peer benchmarking, SEC inspection and enforcement trends, fund marketing under JOBS Act, Form PF update, CFTC exemptions update and AIFM Directive update. Kirkland partners Scott A. Moehrke, Robert H. Sutton, Nabil Sabki and Charles J. Clark will be speaking at this event. Click here for more information or to register for this event.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis' nearly 400 private equity attorneys have handled leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 300 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named "Private Equity Group of the Year" for 2012 by *Law360* and was commended as being the most active private equity law firm of the last decade in *The PitchBook Decade Report*. In addition, Kirkland was awarded "Best M&A Firm in the United States" at *World Finance*'s 2011 Legal Awards and was honored as the "Private Equity Team of the Year" at the 2011 *IFLR* Americas Awards.

The Firm was ranked as the #1 law firm for both Global and U.S. Buyouts by deal volume in Mergermarket's *League Tables of Legal Advisors to Global M&A for Full Year 2011*, and has consistently received top rankings among law firms in Private Equity by Chambers & Partners, *The Legal 500*, the Practical Law Company and *IFLR*, among others.

The Lawyer magazine has recognized Kirkland as one of its "Transatlantic Elite" every year since 2008, having noted that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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