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CORPORATE GOVERNANCE

Director Consulting Arrangements

A director can occasionally be an appealing candidate to perform certain non-board services for a listed corporation. In considering a director consulting arrangement, the effect on director independence and implications for proxy advisor voting recommendations can be key.

By Scott D. McKinney

With ever increasing scrutiny of board of director decisions in respect of interested director transactions and potential implications for independence, boards have necessarily become more cautious and restrictive in considering director consulting arrangements. Some companies have gone so far as to prohibit such arrangements outright under their corporate governance guidelines. Yet, the circumstances that give rise to potential director consulting arrangements have not gone away. Typical consulting arrangements include, among others: the former CEO who remains on the board following severance and is asked to be available to consult; the director nominee who is asked to attend one or more board meetings prior to election; the consultant who is asked to join the board; the director who is asked to lead a special project; the director with special expertise, such as a physician, who is asked to serve on a special advisory board, such as a medical advisory board; and the director who is asked to fill a management gap on an interim basis. While most corporations can likely find qualified persons who are not directors to perform certain of these services, directors can be appealing candidates for such roles given their existing knowledge of the corporation, the competence that qualifies them to be elected to the board and the familiarity of the board and management with such director.

In considering whether to enter into, and in structuring, a consulting arrangement with a director, boards should be cognizant of director independence considerations, disclosure considerations and certain other related considerations. Approval of a director consulting arrangement calls for a process that is similar to the process used for approving director compensation generally and is typically set forth in a related party transactions policy. Continuing director consulting arrangements should be reviewed on a periodic basis to ensure they remain in the best interest of the corporation and its shareholders.

Director Independence Considerations

The implications for a director's independence of a consulting agreement should be reviewed

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prior to entering into the agreement and, for continuing arrangements, on at least an annual basis. For both the New York Stock Exchange (NYSE) and Nasdaq, the applicable objective independence test differs depending on whether payment is made directly to, or for the benefit of, the director or, alternatively, made to an entity with which the director is affiliated in specified ways. If no objective test is tripped, the board will still need to make an affirmative determination that the consulting agreement would not compromise the director's independence in order for a director to be independent. There are heightened standards of independence for service on the audit and compensation committees.

In addition to considering the independence criteria of the applicable stock exchange, it is advisable to also consider director independence criteria of relevant proxy advisory firms, such as Intuitional Shareholders Services (ISS) and Glass, Lewis & Co., LLC (Glass Lewis), which generally have more stringent criteria. These proxy advisory firms will recommend a vote against a director that is not independent under their criteria if the director sits on one of three key board committees or would cause the board to consist of less than a majority of independent directors.

If a consulting arrangement would cause a loss of independence for a director, the corporation's board would need to consider whether the benefits of the consulting arrangement for the corporation outweigh the effects of the director's loss of independence.

Service as Employee vs. Independent Contractor. A director party to a consulting arrangement generally acts as independent contractor. Because of the draconian effect of being classified as an employee for any length of time on a director's independence, there is added impetus on organizing a consulting arrangement to check as many of the independent contractor boxes as possible. A director who is, or has been within the last three years, an employee of the listed corporation, would be precluded from being found independent by a listed company board under both NYSE and Nasdaq standards.[1]

Consulting Payments Directly to Director. Both the NYSE and Nasdaq preclude a board from finding a director to be independent if the director has received during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed corporation, other than director and committee fees, non-discretionary compensation (*e.g.*, dividend or interest income), and, in the case of the NYSE, pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), and, in the case of Nasdaq, benefits under a tax-qualified retirement plan.[2]

The NYSE and Nasdaq both indicate that this independence rule is intended to capture situations where compensation is paid directly to (or for the benefit of) the director. Per the NYSE, payments to an individual's solely owned business entity are considered direct compensation.[3] According to the NYSE, whether or not an entity should be considered a solely-owned business is a facts and circumstances determination.

The NYSE and Nasdaq both chose the $120,000 limit to align with the SEC's related party transaction reporting threshold amount, although the time periods over which such direct compensation is calculated differ between the NYSE and Nasdaq, on one hand, and the SEC's related party reporting requirements, on the other hand. The NYSE and Nasdaq use a 36-month look-back period from the date of determination of independence, over which there is a rolling 12-month measurement period. The SEC's related party transaction reporting rule uses the period beginning with the first day of the fiscal reporting year reported and ending on the date of the proxy statement, thus covering a period longer than 12 months.

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A stock option awarded for consulting service contributes to the $120,000 limit.[4] The option must be valued using a commonly accepted option pricing formula, such as the Black-Scholes or binomial model at the time of grant.[5] This valuation is considered a payment upon grant even if the option does not immediately vest or if there are conditions to vesting or exercise.[6]

While it may be obvious, it is worth noting that any compensation received by a director for performing "board" services (as opposed to non-board consulting services) does not count against the $120,000 limit. Nasdaq has been deferential to the boards of its listed companies regarding whether additional services performed by a director for which a director receives additional compensation are board services.[7] On the other hand, compensation received for performing "board" services while not serving as a member of the board of the relevant corporation would count towards the $120,000 limit.[8]

Also perhaps self-evident, a corporation's reimbursement of expenses incurred by a director in performing consulting services would not count as direct compensation. The NYSE has clarified that such reimbursed expenses must be bona fide and documented to avoid being counted as direct compensation.[9]

For both the NYSE and Nasdaq, compensation received by a director for former service as an interim executive officer need not be considered in determining independence under this test, provided, in the case of Nasdaq, that the interim employment did not last longer than one year.[10] Of course, the director would not be independent while serving in such capacity. The benefit of this qualification is that after leaving the interim executive officer role, the director would not be precluded from being determined to be independent as a result of such employment and the compensation received in such role.

The NYSE has addressed when severance and non-compete payments to a former executive officer serving on the board would count towards the $120,000 limit.[11] This could be relevant in circumstances where the payments continue beyond the three-year look-back period during which the director's prior service as an employee would preclude the director from being determined to be independent. The key is whether the severance or non-compete payment is part of an agreement that contains an obligation for post-termination continued service. Typically, a severance package or a non-compete arrangement is not contingent upon continued service. However, if the severance or non-compete arrangement is part of, or entered into in connection with, a consulting agreement that calls for continued service (even if that service is never rendered), this severance or noncompete payment together with the consulting payment must be counted against the $120,000 limit.

Consulting Payments to Company Affiliated with Director. The NYSE and Nasdaq have a more generous objective independence test where consulting payments are made to a company with which the director is affiliated, rather than being paid directly to the director. The NYSE and Nasdaq independence standards in this regard also differ slightly from each other, as discussed below.

Under NYSE listing standards, a director is not independent if the director is a current employee of a company that has made payments to, or received payments from, the listed corporation for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2 percent of such other company's consolidated gross revenues.[12] Both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year of such other company. The look-back provision for this NYSE test applies solely to the financial relationship between the listed corporation and the director's current

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employer; a listed corporation need not consider former employment of the director. Also, it does not matter whether that company employed the director at the time the business relationship existed.

Under Nasdaq rules, a director who is a partner in, or a controlling shareholder or an executive officer of, any organization to which the corporation made, or from which the corporation received, payments for property or services in the current or any of the past three fiscal years that exceed 5 percent of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more.[13] After the director's employment or association with the other organization ceases, the director is no longer precluded by this rule from being deemed independent—even if the relationship between the two companies continues.[14] Where a director has direct, significant business holdings that do not constitute a controlling interest, it may be appropriate to apply the corporate measurements rather than individual measurement, even though the director is not a controlling shareholder.[15]

General Independence Determination. Under NYSE listing standards, even if a director meets all the bright line independence criteria, the board is still required to make an affirmative determination that the director has no material relationship with the listed corporation (either directly or as a partner, shareholder or officer of an organization that has a relationship with the corporation) in order for the director to be characterized as independent.[16] Nasdaq has a substantially similar rule.[17] The NYSE notes in commentary that material relationships can include consulting relationships, among others.

Independence for Key Committee Service. The NYSE and Nasdaq both require that all three key committees—the audit committee, the compensation committee and the nominating committee—be composed solely of independent directors. A director who is not independent under applicable stock exchange rules would be unable to serve on such committees while the director is not independent, subject to limited exceptions. As required by SEC rules, the NYSE and Nasdaq have heightened standards of independence for service on the audit and compensation committees.

Audit Committee. Pursuant to Rule 10A-3 under the Securities Exchange Act of 1934, as amended (Exchange Act), there is a more restrictive standard of independence for audit committee service.[18] Acceptance directly or indirectly of any compensation other than for board service would preclude a director from being independent for audit committee purposes, other than receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed corporation (provided that such compensation is not contingent in any way on continued service). Rule 10A-3 does not have a look-back period.

Compensation Committee. There is an elevated standard of independence review for compensation committee service. While receipt of compensation other than for board service would not necessarily preclude a director from being determined independent for compensation committee purposes, boards are specifically required to consider the source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the corporation to such director.[19] When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, boards must consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed corporation's executive compensation.

In addition to satisfying independence criteria under stock exchange rules, the compensation committee (or a subcommittee thereof) should consist of only those persons who satisfy the "outside director" requirements of Internal

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Revenue Code (IRC) Section 162(m) and the "nonemployee director" requirements under Rule 16b-3 of the Exchange Act. Approval by "outside directors" is a necessary requirement for exclusion of performance-based compensation from the $1 million cap under IRC Section 162(m). To qualify as an outside director, the director must receive no compensation in the capacity as a consultant. Approval by a committee of "nonemployee directors" can exempt awards of stock options and other equity-based incentives from the short-swing profit liability provisions of Section 16 of the Exchange Act. The nonemployee director definition permits consulting arrangements up to the $120,000 reporting threshold of Item 404(a) of Regulation S-K. The nonemployee director definition contemplates that the director must satisfy the definition's tests at the time he or she votes to approve a transaction.

Exceptions to Independence Condition for Key Committee Service. Both the NYSE and Nasdaq provide a transition period following an IPO for audit, compensation and nominating committees to meet independent director composition requirements.[20] There must be one independent director on each such committee by the date the transaction closes, at least a majority of independent members within 90 days of the listing date (effective date of registration statement for audit committee), and a fully independent committee within one year of the listing date (effective date of registration statement for audit committee).

Nasdaq also permits a non-independent director to serve on the audit, compensation or nominating committee under "exceptional and limited circumstances." One non-independent director who is not a current executive officer, employee or family member of an executive officer (and in the case of the audit committee, satisfies the criteria under Section 10A(m)(3) of the Exchange Act)[21] may serve on such committee (of at least three members) for a period of no longer than two years if board of directors, under exceptional and limited circumstances, determines that membership on such committee by that person is in the "best interests of the company and its shareholders."[22] A company that relies on this exception must disclose such reliance, the nature of relationship and reasons for the determination on company's website or in its annual meeting proxy statement (or, if it does not file a proxy statement, in its annual report on Form 10-K or 20-F).[23]

Proxy Advisory Services; Institutional Investors. ISS classifies directors into three categories of independence: inside directors, affiliated outside directors, and independent outsiders.[24] ISS will vote against or withhold from affiliated outside directors when, among other things: (1) the affiliated outside director serves on any of three key committees: audit, compensation, or nominating; or (2) independent outside directors make up less than a majority of the directors. ISS' definition of affiliated outside director includes a director who (1) currently provides professional services to the corporation in excess of $10,000 per year or (2) is a partner in, or a controlling shareholder or an employee of, an organization which provides professional services to the corporation in excess of $10,000 per year. $10,000 happens to be the threshold amount requiring footnote disclosure for the "all other compensation" column in the director compensation table.[25] ISS also categorizes as affiliated outside director an individual who is a former interim officer if the service was longer than 18 months.[26] Fortunately, there's no look-back to the ISS affiliated outside director rule. ISS' low $10,000 threshold is out-of-step with the independence standards of the stock exchanges, other proxy advisors and many prominent institutional investors. The ISS staff have indicated that once they finish with the 2015 proxy season, they intend to review their definitions of independence.[27]

Glass Lewis uses a three year look-back and threshold of $50,000 for directors who are paid directly for a service they have agreed to perform for the corporation, outside of their service as a

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director.[28] The Glass Lewis threshold is $120,000 for directors employed by a professional services firm, such as a law firm, investment bank or consulting firm, and the corporation pays the firm, not the individual. CalPERS uses a $50,000 threshold and three year look-back for fees paid directly to a director or a company with which the director is affiliated for services other than as a director.[29] The Council of Institutional Investors uses a $50,000 threshold and a five year look-back.[30]

Disclosure Considerations

Boards should be familiar with the disclosure that would be required with respect to a director consulting agreement prior to entering into such agreement.

Form 8-K Current Report. Entering into a consulting arrangement with a director would not trigger an 8-K reporting obligation, unless the arrangement is entered into in connection with electing such director other than by a vote of security holders. If the corporation enters into such a consulting arrangement with such a director, the disclosure required in Form 8-K would include, among other things: (1) a brief description of any material arrangement (whether or not written) with the corporation to which the director is a party; and (2) the related party transaction information required by Item 404(a) of Regulation S-K. The consulting arrangement need not be filed as an exhibit to the 8-K.

Form 10-K Annual Report. The following Regulation S-K disclosure items that are required in Form 10-K, and may be incorporated by reference from a proxy statement, are relevant in considering a director consulting arrangement.

- *Item 402(k): Director Compensation Table*. The corporation must disclose in the director compensation table as part of the "all other compensation" column, consulting fees earned from, or paid or payable by the corporation and/or its subsidiaries (including joint ventures) for the corporation's last completed fiscal year, even where such arrangements cover services provided by the director to the company other than as a director.[31] Any item reported for a director as part of the "all other compensation" column that is not a perquisite or personal benefit and whose value exceeds $10,000 must be identified and quantified in a footnote. Thus, if the consulting fees paid to a director exceed $10,000, the consulting fees must be described and specified in a footnote.
- *Item 404(a): Related Party Transactions*. Item 404(a) requires a corporation describe any transaction, since the beginning of the corporation's last fiscal year, or any currently proposed transaction, in which the corporation was or is to be a participant and the amount involved exceeds $120,000, and in which any related person (including a director) had or will have a direct or indirect material interest. The SEC's related party transaction reporting rule uses the period beginning with the first day of the fiscal reporting year reported and ending on the date of the proxy statement, which covers a period longer than 12 months.
- *Item 407(a): Independence Determinations.* Item 407(a) requires that a corporation identify each director and each nominee for director that is independent under the independence standards applicable to the corporation, which consist of the applicable stock exchange standards and any categorical standards the corporation has adopted. In addition, the corporation must identify each director that is a member of the compensation, nominating or audit committee who is not independent. For each director and nominee for director that is identified as independent, the corporation must describe, by specific category or type, any transactions, relationships or arrangements not disclosed pursuant to Item 404(a) that were considered by the board of directors under the applicable

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independence definitions in determining that the director is independent. Thus, if a director with a consulting arrangement is identified as independent and the consulting arrangement is not described under Item 404(a), it will need to be described under this Item 407(a).

- *Item 601: Exhibits*. The director consulting arrangement will need to be filed as an exhibit to the Form 10-K.[32] If the arrangement is executed or becomes effective during the first three quarters of the fiscal year, the arrangement will also need to be filed as exhibit for the applicable 10-Q.

Notice to Applicable Stock Exchange. A U.S. domestic company must notify the NYSE by interim written affirmation within five business days of when, among things, a director who was deemed independent is no longer independent and vice versa or there is a change in the composition of audit, compensation or nominating committees.[33] A U.S. domestic company's annual written affirmation to the NYSE must, among other things, identify which directors are independent and describe any related party transaction that would be required to be disclosed pursuant to Item 404 of Regulation S-K.[34]

Entry into a director consulting arrangement would not ordinarily require notice to Nasdaq, unless the arrangement results in a material noncompliance with any Nasdaq corporate governance requirement.[35]

Certain Other Considerations

Other factors a board may want to take into consideration in determining whether to enter into a director consulting agreement are corporate governance scores, bank and high yield debt covenants and PCAOB auditing standards.

Corporate Governance Scores. Corporate governance scoring systems remain controversial due to the arbitrariness of certain rated criteria, the subjective weighting of governance elements, and the simple fact a rating score is an attempt to reduce a complex system down to a single number. Nonetheless, a falling governance score could result in bad press or unwanted investor attention. Consequently, it may be useful to know the implication of a director consulting arrangement on a corporation's corporate governance scores. The ISS corporate governance scoring system, for instance, looks at, among other things, the percentage of the board and its committees that are independent under ISS's standards.

Bank and High Yield Debt Covenants. Bank and high yield debt covenants often include a restriction on transactions with affiliates (such as directors). Such a covenant would prohibit a company from entering into a transaction with affiliate, unless (a) the transaction is on arm's length terms, and (b) the transaction is approved by a majority of disinterested directors. These conditions generally are satisfied by the approval process followed under a company's related party transactions policy.

PCAOB Auditing Standards. In June 2014, the PCAOB adopted a new auditing standard to strengthen auditor performance requirements with regard to related party transactions. The standard became effective for audits of financial statements for fiscal years beginning on or after December 15, 2014. The audit standard requires, among other things, that the auditor communicate to the audit committee the auditor's evaluation of the company's (1) identification of, (2) accounting for, and (3) disclosure of its related party transactions.

Structuring Director Consulting Arrangements

The most critical concern in structuring a director consulting arrangement is attempting to maintain the independence of the director, if possible, assuming that is a goal. The structuring topics discussed below all relate to maintaining a consulting director's independence.

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Characterization of Services. Consider whether the additional services a director is asked to perform can be characterized as director services. Nasdaq generally has deferred to board determinations as to whether additional services for which a director receives additional compensation are director services. If the additional compensation is for director services, such payment would not count against the NYSE and Nasdaq $120,000 limit for non-board services or any proxy advisor's or institutional investor's limit for non-board services. Footnote 46 in the adopting release, Rel. No. 33-8820, "Standards Relating to Listed Company Audit Committees," in addressing Rule 10A-3 audit committee independence criteria, notes that, "The final rule does not specify any limits or restrictions on fees paid for capacity as a member of the board of directors or any board committee."

Interim Executive Officer. If the consulting arrangement is for a limited duration, the services cannot be characterized as director services and the fees to be paid exceed applicable independence limits, consider whether to appoint the consulting director as an interim executive officer. The director would not be independent while serving in the capacity as interim executive officer. However, upon completing the consulting assignment and ceasing to be an interim executive officer, the director would not be precluded from being determined to be independent under both stock exchange and ISS independence standards.

Payment Schedule. Both the NYSE and Nasdaq have a rolling 12-month limit of $120,000 in fees for non-board services. If the consulting fees are not intended to exceed $120,000 a year, caution should be exercised to space payments so that the $120,000 limit is not inadvertently exceeded.

Stock Options. A corporation may consider awarding stock options for director consulting services. Options count against the $120,000 limit, and must be valued using a commonly accepted option pricing formula, such as Black-Scholes, at the time of grant.

Expense Reimbursement. The NYSE stated in a FAQ that the reimbursement of expenses that are bona fide and documented will not be considered direct compensation. Thus, it is better for a director to be reimbursed for an expense, rather than receive extra compensation to cover the expense. To avoid confusion regarding which expenses are reimbursed, the consulting agreement should specifically list expenses that will be reimbursed, as well as provide for general reimbursement of consulting expenses.

Independent Contractor. Given the detrimental effect that being determined to be an employee would have on independence (other than as an interim executive officer) with a three year look-back, it would be advantageous to clearly delineate the arrangement as an independent contractor relationship in the consulting agreement. The consulting director should also make efforts to act as independent contractor.

Timing of Completion of Agreement. ISS' low $10,000 consulting fee threshold to be deemed an "affiliated outside director" (i.e., not independent) can be a significant impediment to structuring a consulting arrangement where the goal is for the consulting director to remain independent. This restrictive independence standard is mitigated somewhat by the absence of a look-back period. If the consulting arrangement can be completed prior to filing and distributing the proxy statement for the annual shareholder meeting, ISS would not consider the director to be an affiliated outside director as a result of the completed consulting arrangement. The corporation should be very clear in the proxy statement that the consulting arrangement has ended and does not expect to renew it.

Separate from Non-Compete or Severance Payment. The NYSE provides in a FAQ that a payment a director receives other than for

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director services without an obligation of the director to provide continued service does not count against the $120,000 independence fee limit for non-director services. Typically, a severance package or a non-compete arrangement is not contingent upon continued service. However, if the non-compete arrangement is part of, or entered into in connection with a consulting agreement that calls for continued service (even if that service is never rendered), the entire payment under the agreement must be considered. Thus, any consulting services a former executive on the board is to provide after ceasing to be an executive should be made part of an agreement that is separate from any severance or non-compete payment agreement.

Adjusting to Loss of Independence

While maintaining the independence of a director in structuring a consulting arrangement is typically a focus, this is not always the case. Provided a board continues to consist of a majority of independent directors following a consulting director's loss of independence and there are sufficient numbers of independent and qualified directors to fill the three key committees, a corporation would not necessarily need to change the membership of the board. However, it may be necessary to reconsider the committee assignments of the consulting director.

Committees Not Requiring Independence. Many corporations have board committees, in addition to the three key committees, that can accept non-independent directors as members, such as a finance committee, risk committee, public responsibilities committee, acquisition committee or technology committee.

Nasdaq's Exceptional and Limited Circumstances Exception. If a consulting arrangement would cause a director of a Nasdaq-listed corporation to be precluded from being determined to be independent, the corporation may consider whether to utilize Nasdaq's "exceptional and limited circumstances" exception to permit the director to serve while not independent for up to two years on the compensation committee, the nominating committee or, following termination of the consulting arrangement, the audit committee.[36] Unfortunately, neither ISS nor Glass Lewis recognizes this exception to the requirement that the three key committees consist of independent directors and will make voting recommendations accordingly.

Approving Director Consulting Arrangements

Related Party Transactions Policy. In connection with complying with Item 404(b) of Regulation S-K, which requires that companies describe their policies and procedures for the review, approval, or ratification of any related party transaction required to be reported Item 404(a), many companies have adopted standalone related party transaction policies applicable to only such persons for which disclosure is required under Item 404(a), including directors and executive officers. Other companies include such a policy in their code of ethics.[37]

The NYSE and Nasdaq both require that each related party transaction be reviewed and evaluated by an appropriate group within the listed company involved.[38] While the NYSE does not specify who should review related party transactions, the NYSE believes that the Audit Committee or another comparable body might be considered as an appropriate forum for this task. Per the NYSE, following the review, the company should determine whether or not a particular relationship serves the best interest of the company and its shareholders and whether the relationship should be continued or eliminated.

The related party transaction policies of certain corporations pre-approve related party transactions by either (1) including such transactions in a list of pre-approved transactions or (2) defining the term "related party transaction" in the policy

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to exclude such items. Such pre-approved transactions may correlate to a corporation's categorical director independence standards in its corporate governance guidelines, in that a pre-approved related party transaction may be a type of transaction the board has determined would not compromise the independence of a director.

Review and Approval Process. The related party transaction policy will specify a procedure for reviewing and approving related party transactions. This process generally will be designed to meet state law requirements for interested director transactions, so that the transaction is not voidable and the approval receives the benefit of the business judgment rule. This review process generally should consist of something along the following lines: after legal review, a proposed director consulting arrangement should be submitted to a committee of disinterested directors, which could be the Audit Committee. The consulting director should provide full disclosure to the committee regarding the proposed consulting arrangement. The committee should consider alternatives to the proposed director consulting arrangements. If the committee approves the proposed consulting arrangement, the proposed consulting arrangement should then be submitted to the full board of directors for review and approval. The consulting director should recuse himself or herself from board deliberations regarding the proposed consulting arrangement. In connection with considering approval of a director consulting arrangement, the board should make a determination regarding the impact of the arrangement on the independence of the consulting director.

Conclusion

There is nothing inherently improper about a director consulting arrangement. Such arrangements often offer efficiencies and other advantages that might not otherwise be available. Certainly, the effect of such an arrangement on a director's independence will need to be carefully considered. Such arrangements also should be fully and clearly disclosed in accordance with applicable requirements.

Notes

1. NYSE § 303A.02(b)(i); Nasdaq Rule 5605(a)(2)(A).
2. NYSE § 303A.02(b)(ii); Nasdaq Rule 5605(a)(2)(B).
3. Section C.11. of NYSE FAQs on Section 303A Corporate Governance Standards (Revised Jan. 4, 2010) ("NYSE FAQS").
4. Nasdaq FAQ 139 (July 31, 2012); NYSE staff email message to author (Dec. 17, 2013).
5. Nasdaq FAQ 139 (July 31, 2012).
6. *Id.*
7. *See, e.g.,* Nasdaq staff interpretation letter 2006-1, which indicates that additional compensation paid to a non-executive Chairman for exercising additional, extraordinary, oversight over a new CEO could be considered additional Board service.
8. *See* Topic # 8112 on Q and A Discussion Forum of TheCorporateCounsel.net (last post July 7, 2014). A forum participant reports that the Nasdaq staff advised that payments for board services are only "exempt" from counting toward the $120,000 limit for non-board services if those payments are made to a person who is officially serving as a director, on a board of directors.
9. Section C.9. of NYSE FAQs.
10. Nasdaq IM-5605; commentary to NYSE §§ 303A.02(B)(i) and (ii).
11. Section C.10. of NYSE FAQs.
12. NYSE § 303A.02(b)(i).
13. Nasdaq Rule 5605(a)(2)(D).
14. Nasdaq Rule 5605(a)(2)(D); Nasdaq FAQ 138 (July 31, 2012).
15. Nasdaq IM-5605.
16. NYSE § 303A.02(a)(i).
17. Nasdaq Rule 5605(a)(2).
18. *See also,* NYSE § 303A.06 and Nasdaq Rule 5605(c)(2)(A)(ii).
19. Rule 10C-1 under the Exchange Act, NYSE §303A.02(a)(ii) and Nasdaq Rule 5605(d)(2)(A).
20. NYSE § 303A.00 and Nasdaq Rule 5615(b).
21. A director currently receiving compensation other than as a director would not qualify for the audit committee exception. However, given there is no look-back for the independence criteria of Rule 10A-3, the audit committee exception could be relevant for a director who formerly exceeded the $120,000 limit and whose consulting arrangement has ended.
22. *See* Nasdaq Rules 5605(c)(2)(B), 5605(d)(2)(B) and 5605(e)(3).
23. *See also,* Regulation S-K Item 407(a), Instruction 1.
24. ISS U.S. Summary Proxy Voting Guidelines: 2015 Benchmark Policy Recommendations (Updated Mar. 4, 2015).

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25. *See* Instruction 2 to Item 402(k)(2)(vii) of Regulation S-K.

26. If the service was between 12 and 18 months, an assessment of the interim officer's employment agreement will be made. In particular, ISS will determine if such employment agreement contains severance pay, long-term health and pension benefits, or other such standard provisions typically contained in contracts of permanent, non-temporary CEOs. ISS will also consider if a formal search process was under way for a full-time officer at the time.

27. ISS staff email message to author (June 12, 2015).

28. Glass Lewis U.S. Guidelines for 2015 Proxy Season.

29. CalPERS Global Principles of Accountable Corporate Governance (Updated May 19, 2014).

30. Council of Institutional Investors Corporate Governance Policies (Updated Apr. 1, 2015).

31. Interpretation 227.01 of the SEC Staff's Regulation S-K Compliance and Disclosure Interpretations.

32. *See* Item 601(b)(iii)(A) of Regulation S-K.

33. Form of NYSE Domestic Company Interim Written Affirmation (Updated Jan. 16, 2014).

34. Form of NYSE Domestic Company Annual Written Affirmation (Updated Jan. 16, 2014).

35. Nasdaq Company Event Notification Form.

36. *See* end note 22.

37. Both the NYSE and Nasdaq require that listed companies adopt and disclose a code of ethics applicable to all directors, officers and employees, which may consist of multiple codes. *See* NYSE §303A.10 and Nasdaq Rule 5610. Such codes must address conflicts of interest.

38. NYSE § 314; Nasdaq Rule 5630.

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