

making, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111-203, set out as an Effective Date of 2010 Amendment note under section 77b of this title.

### **§ 78j-3. Compensation committees**

#### **(a) Independence of compensation committees**

##### **(1) Listing standards**

The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer, other than an issuer that is a controlled company, limited partnership, company in bankruptcy proceedings, open-ended management investment company that is registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], or a foreign private issuer that provides annual disclosures to shareholders of the reasons that the foreign private issuer does not have an independent compensation committee, that does not comply with the requirements of this subsection.

##### **(2) Independence of compensation committees**

The rules of the Commission under paragraph (1) shall require that each member of the compensation committee of the board of directors of an issuer be—

- (A) a member of the board of directors of the issuer; and
- (B) independent.

##### **(3) Independence**

The rules of the Commission under paragraph (1) shall require that, in determining the definition of the term “independence” for purposes of paragraph (2), the national securities exchanges and the national securities associations shall consider relevant factors, including—

- (A) the source of compensation of a member of the board of directors of an issuer, including any consulting, advisory, or other compensatory fee paid by the issuer to such member of the board of directors; and
- (B) whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

##### **(4) Exemption authority**

The rules of the Commission under paragraph (1) shall permit a national securities exchange or a national securities association to exempt a particular relationship from the requirements of paragraph (2), with respect to the members of a compensation committee, as the national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.

#### **(b) Independence of compensation consultants and other compensation committee advisers**

##### **(1) In general**

The compensation committee of an issuer may only select a compensation consultant, legal counsel, or other adviser to the compensation committee after taking into consideration the factors identified by the Commission under paragraph (2).

#### **(2) Rules**

The Commission shall identify factors that affect the independence of a compensation consultant, legal counsel, or other adviser to a compensation committee of an issuer. Such factors shall be competitively neutral among categories of consultants, legal counsel, or other advisers and preserve the ability of compensation committees to retain the services of members of any such category, and shall include—

(A) the provision of other services to the issuer by the person that employs the compensation consultant, legal counsel, or other adviser;

(B) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel, or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel, or other adviser;

(C) the policies and procedures of the person that employs the compensation consultant, legal counsel, or other adviser that are designed to prevent conflicts of interest;

(D) any business or personal relationship of the compensation consultant, legal counsel, or other adviser with a member of the compensation committee; and

(E) any stock of the issuer owned by the compensation consultant, legal counsel, or other adviser.

#### **(c) Compensation committee authority relating to compensation consultants**

##### **(1) Authority to retain compensation consultant**

###### **(A) In general**

The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant.

###### **(B) Direct responsibility of compensation committee**

The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of a compensation consultant.

###### **(C) Rule of construction**

This paragraph may not be construed—

- (i) to require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant; or
- (ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

##### **(2) Disclosure**

In any proxy or consent solicitation material for an annual meeting of the shareholders (or a special meeting in lieu of the annual meeting) occurring on or after the date that is 1 year after July 21, 2010, each issuer shall disclose in the proxy or consent material, in accordance with regulations of the Commission, whether—

(A) the compensation committee of the issuer retained or obtained the advice of a compensation consultant; and

(B) the work of the compensation consultant has raised any conflict of interest and, if so, the nature of the conflict and how the conflict is being addressed.

**(d) Authority to engage independent legal counsel and other advisers**

**(1) In general**

The compensation committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain and obtain the advice of independent legal counsel and other advisers.

**(2) Direct responsibility of compensation committee**

The compensation committee of an issuer shall be directly responsible for the appointment, compensation, and oversight of the work of independent legal counsel and other advisers.

**(3) Rule of construction**

This subsection may not be construed—

(A) to require a compensation committee to implement or act consistently with the advice or recommendations of independent legal counsel or other advisers under this subsection; or

(B) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee.

**(e) Compensation of compensation consultants, independent legal counsel, and other advisers**

Each issuer shall provide for appropriate funding, as determined by the compensation committee in its capacity as a committee of the board of directors, for payment of reasonable compensation—

(1) to a compensation consultant; and

(2) to independent legal counsel or any other adviser to the compensation committee.

**(f) Commission rules**

**(1) In general**

Not later than 360 days after July 21, 2010, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of this section.

**(2) Opportunity to cure defects**

The rules of the Commission under paragraph (1) shall provide for appropriate procedures for an issuer to have a reasonable opportunity to cure any defects that would be the basis for the prohibition under paragraph (1), before the imposition of such prohibition.

**(3) Exemption authority**

**(A) In general**

The rules of the Commission under paragraph (1) shall permit a national securities exchange or a national securities association to exempt a category of issuers from the re-

quirements under this section, as the national securities exchange or the national securities association determines is appropriate.

**(B) Considerations**

In determining appropriate exemptions under subparagraph (A), the national securities exchange or the national securities association shall take into account the potential impact of the requirements of this section on smaller reporting issuers.

**(g) Controlled company exemption**

**(1) In general**

This section shall not apply to any controlled company.

**(2) Definition**

For purposes of this section, the term “controlled company” means an issuer—

(A) that is listed on a national securities exchange or by a national securities association; and

(B) that holds an election for the board of directors of the issuer in which more than 50 percent of the voting power is held by an individual, a group, or another issuer.

(June 6, 1934, ch. 404, title I, §10C, as added Pub. L. 111-203, title IX, §952(a), July 21, 2010, 124 Stat. 1900.)

**Editorial Notes**

**REFERENCES IN TEXT**

The Investment Company Act of 1940, referred to in subsec. (a)(1), is title I of act Aug. 22, 1940, ch. 686, 54 Stat. 789, which is classified generally to subchapter I (§80a-1 et seq.) of chapter 2D of this title. For complete classification of this Act to the Code, see section 80a-51 of this title and Tables.

**Statutory Notes and Related Subsidiaries**

**EFFECTIVE DATE**

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as a note under section 5301 of Title 12, Banks and Banking.

**§ 78j-4. Recovery of erroneously awarded compensation policy**

**(a) Listing standards**

The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that does not comply with the requirements of this section.

**(b) Recovery of funds**

The rules of the Commission under subsection (a) shall require each issuer to develop and implement a policy providing—

(1) for disclosure of the policy of the issuer on incentive-based compensation that is based on financial information required to be reported under the securities laws; and

(2) that, in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will