John Endean President

American
Business
Conference A Coalition of Growth Companies

April 28, 2016

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090
*rule-comments@sec.gov*

RE: File Number SR-NASDAQ-2016-013. *Proposal to require listed companies to publicly disclose compensation or other payments by third parties to any nominee for director or sitting director in connection with their candidacy for or service on the companies Board of Directors.*

Dear Mr. Fields:

The American Business Conference (ABC) is a Washington-based coalition of CEOs of midsized growth companies founded in 1981 by Arthur Levitt, Jr. and chaired by Alfred West, Chairman and CEO of SEI Investments, Oaks, Pennsylvania.

ABC represents the interests of small and mid-cap issuers. Some of our members also sit on the boards of NASDAQ companies. Therefore, listing requirements that affect board members for NASDAQ companies are important to us.

As we have noted in the context of other governance controversies, the capital markets landscape for small and mid-cap companies is quite different than that for the largest companies. The Williams Act rules that delay disclosure of large positions in public companies are one example of the way rules that might be appropriate for large companies have a much different effect for smaller companies. Because of such rules and the practices of activist private funds, the smaller companies that ABC represents are far more vulnerable to stealthy campaigns from which a threatened takeover can arise. Board

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candidates in the pay of large investors are yet another recent trend that should be promptly and properly disclosed to shareholders and the investing public.

***Proposed Rule*** ABC supports NASDAQ's proposal to require disclosure of "all agreements and arrangements between: (i) any director or nominee for director, and (ii) any person or entity other than the Company, which provide for compensation or other payment in connection with such person's candidacy or service as a director of the Company."[1]

Disclosure of such relationships are important for shareholders in voting on board candidates, whether they are sitting board members or initially seeking a seat on the board. Such arrangements present numerous problems besides the obvious potential conflict of interest that shareholders should consider in voting for board members. In addition, the ability to keep both arrangement and the terms thereof secret provides "raiders" and other types of activists an unfair tactical advantage over the incumbent board members. Furthermore, if an insurgent candidate is elected to the board, secrecy around that board member's outside compensation can inhibit the effective functioning of the board of directors. At a time when boards are being required to do more work on more issues, collegiality and clarity as to their shared duties are essential.

We also commend the NASDAQ's recognition that the ability of a listed company to assure that all such relationships are disclosed is limited. By definition the company is not party to the arrangement. Therefore, the "cure" and "reasonable efforts" provisions of subparagraphs (3)(B) and (C)[2] are essential to the fairness and practicality of the proposal. Given the dependence of listed companies on the cooperation of potentially hostile parties to obtain the essential information, we hope that NASDAQ will distinguish between "foot fault" violations of this rule and ones that require a listed company to submit a full plan for compliance under Nasdaq rule 5810. Staff discretion in this area would be especially important during the initial period after the rule goes into effect.

***Further Consideration of Prohibitions on Board Service*** We note that NASDAQ is considering whether its listing standards should go a step further

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[1] SR-NASDAQ-2016-013, p. 21, Exhibit 5.

[2] *Id.*

and prohibit individuals from board service based on their receiving compensation from a third party.[3]

The difference between shedding light on such arrangements and actually prohibiting them is substantial. A prohibition on board service in a listing standard would cross into territory normally left to state corporation law. In addition, as a matter of well-settled corporate law, one's fitness to serve on a board is largely left the sound judgment of shareholders who elect them and board members with whom they serve. A prohibition base on particular third party relationships amounts to a *per se* determination that such a person cannot fulfill the duty of loyalty every board member owes the corporation and its shareholders.

In general, we believe that the flexibility the law and NASDAQ listing standards[4] provide to boards of directors regarding individual's fitness to serve is worth preserving. Moving down a path toward a prohibition based on third-party remuneration could well raise questions regarding other outside relationships a board candidate or member may have. Therefore, as a preliminary note of caution, ABC advises NASDAQ to tread warily as it considers any *per se* prohibitions in this area.

Sincerely,

John Endean

President

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[3] *Id.*, p. 8, footnote 9. ("Separate from this proposed rule change, Nasdaq is surveying interested parties as to whether Nasdaq should propose additional requirements surrounding directors and candidates that receive third party payments, including whether such directors should be prohibited from being considered independent under Nasdaq rules or prohibited from serving on the board altogether.")

[4] For example, Rule 5610 – Code of Conduct and IM 5610 place the requirement to develop and enforce a Code of Conduct on the Board and require transparency regarding any waivers. Boards are required to evaluate situations where "when the real or perceived private interest of a director, officer or employee is in conflict with the interests of the Company, as when the individual receives improper personal benefits as a result of his or her position with the Company, or when the individual has other duties, responsibilities or obligations that run counter to his or her duty to the Company."