

# CORPORATION

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## Application of Outside Adviser Independence Review © [12.1]

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**O**n January 11, 2013, the Securities and Exchange Commission (the "SEC") approved New York Stock Exchange ("NYSE") and Nasdaq listing standards designed to comply with Dodd-Frank and related SEC rules. Under the new listing standards, the compensation committee of the board of directors of an NYSE or Nasdaq-listed company may hire any compensation consultant, legal counsel or other adviser that it wishes, whether or not independent, but must take into consideration the six factors enumerated in Rule 10C-1(b)(4)

under the Securities Exchange Act of 1934, and, for NYSE-listed companies, any other factors relevant to that adviser's independence from management, before engaging such an adviser.

This rule takes effect on July 1, 2013, leaving many listed companies with questions about whether a compensation committee must assess the independence of outside legal counsel. Some commentators have taken an overly-broad view of the rule, even suggesting that outside counsel that provides comments on the Compensation Discussion & Analysis ("CD&A") section of a listed company's annual proxy statement is covered by the rule, regardless of whether the compensation committee is aware of outside counsel's involvement.

In our view, outside counsel serving in such a capacity would not be subject to the rule, as there is a distinction between advisers retained by the company and advisers retained by the compensation committee. The NYSE expressly acknowledged that distinction in response to a

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comment submitted to the SEC during the rule-making process. The NYSE stated that the compensation committee is required to oversee compensation advisers retained by the committee itself, not all compensation advisers retained by the company. Moreover, as the SEC stated in its adopting release related to the CD&A rules, the CD&A is not a report of the compensation committee and is not intended to address the committee's internal deliberations; rather it is a disclosure by the company under the purview of management.

The determination of whether outside counsel is advising the compensation committee will depend on the facts and

circumstances, including the nature of the matter and the degree to which the compensation adviser and the compensation committee are involved. However, an adviser that is retained by the company with respect to executive compensation matters that does not provide advice to the committee does not fall under the scope of this rule. Listed companies that retain outside compensation advisers solely to do such work should not fear that continuing such relationships will implicate the new rules. In any event, compensation committees may hire advisers that they wish to hire, regardless of the findings under the listing standards.