Is shareholder approval required for an acquisition of stock or assets of another company?

Identification Number 179

Yes. Pursuant to Listing Rule 5635(a), shareholder approval is required if any director, officer or 5% or greater shareholder has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction(s) and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common stock or voting power of 5% or more.

In addition, shareholder approval is required for an acquisition of stock or assets of another company if the present or potential issuance of common stock or securities convertible into or exercisable for common stock, other than a public offering for cash, may equal or exceed 20% of the voting power or the total shares outstanding on a pre-transaction basis.

Publication Date*: 7/31/2012 Identification Number: 179

What factors need to be considered in determining whether shareholder approval is required for a transaction involving the acquisition of stock or assets of another company?

Identification Number 180

Listing Rule 5635(a) describes when shareholder approval is required for a transaction involving the acquisition of stock or assets of another company. Among the factors considered in determining whether shareholder approval is required are the number of shares to be issued, including any shares issuable pursuant to an earn-out or similar provision, the voting power of any shares to be issued, and whether any director, officer or substantial shareholder has an interest in the company or assets to be acquired or the consideration to be paid in the transaction.

In addition, please note the following:

- Even if shareholder approval is not required under Listing Rule 5635(a), shareholder approval may still be required if the transaction will result in a change of control under Listing Rule 5635(b); and
- There is no pricing test when determining if shareholder approval is required for securities issued in connection with an acquisition. Thus, shares issued in a private placement priced above the Minimum Price may require shareholder approval if the proceeds are used to fund an acquisition.

Publication Date*: 10/10/2018 Identification Number: 180

How does Nasdaq compute the number of shares issuable in a transaction?

Identification Number 181

In determining the potential issuance in a transaction, Nasdaq will include all shares that are potentially issuable, even if the circumstances for their issuance are remote. For example, if the company has any anti-dilution features or reset provisions or earn-out or similar provisions that could potentially reach the shareholder approval requirement thresholds, then the company would be required to obtain shareholder approval before issuing shares in the transaction.

Publication Date*: 9/9/2021 Identification Number: 181

How do Nasdaq's shareholder approval rules apply to strategic partnerships or stock-for-stock swaps between companies?

Identification Number 184

When a listed company and another company enter into a strategic partnership and exchange shares, the transaction should be analyzed under Listing Rule 5635(a). Thus, for these types of transactions, companies will generally be prohibited from issuing shares that equal or exceed either 5% or 20%, as applicable, of the total shares outstanding or total votes outstanding on a pre-transaction basis without first obtaining shareholder approval, without regard to the price at which the shares are issued.

Publication Date*: 7/31/2012 Identification Number: 184

Would Nasdaq consider the effect of an "earn-out" or similar provision when calculating the maximum potential share issuance in connection with the acquisition of stock or assets of another company?

Identification Number 185

Yes. Since "earn-out" provisions can result in future issuances of shares if certain targets are met, such as earnings or revenue, Nasdaq will include the shares which could be issued under such provisions in determining whether the potential share issuance associated with an acquisition can exceed the shareholder approval thresholds.

Publication Date*: 7/31/2012 Identification Number: 185

What factors does Nasdaq consider when determining whether to aggregate the shares issued in separate acquisition transactions for purposes of determining whether the threshold for shareholder approval has been triggered?

Identification Number 186

Nasdaq will consider factors including, but not limited to, the following when determining whether acquisitions should be aggregated for purposes of the shareholder approval requirement:

- Timing of the acquisitions;
- Commonality of ownership of the target companies;
- Commonality of officers and directors in target companies; and
- Existence of any contingencies between or among the transactions.

Publication Date*: 7/31/2012 Identification Number: 186

When a company completes a private placement to finance an acquisition, is the analysis of whether shareholder approval is required made, pursuant to Listing Rule 5635(d), the private placement rule, or Listing Rule 5635(a), the acquisition rule?

Identification Number 187

Generally, a private placement used to finance an acquisition will be considered under Listing Rule 5635(a), the acquisition rule. For example, if a private placement is consummated in close proximity to the acquisition of stock or assets, Nasdaq may determine that the private placement financed the acquisition, and thus the private placement shares would be aggregated with any other shares issued in connection with the acquisition in determining whether the threshold has been or will be exceeded under Listing Rule 5635(a), the acquisition rule. In making this determination, Nasdaq will consider the particular facts and circumstances including, but not limited to:

- The proximity of the financing to the acquisition;
- The stated use of the proceeds;
- The timing of board authorization for the financing and the acquisition, respectively; and
- Any stated contingencies in the financing or acquisition documents, which relate the transactions to one another.

However, any portion of the private placement proceeds specifically designated for uses other than the acquisition would be evaluated under the private placement rule.

Publication Date*: 7/31/2012 Identification Number: 187

If the shares issued in connection with the acquisition are priced at or above the Minimum Price on the date the agreement is entered into, does the company still need shareholder approval?

Identification Number 189

Yes. There is no pricing test under the acquisition rule; therefore, if the potential share issuance will exceed the shareholder approval thresholds, shareholder approval is required regardless of the price at which the shares are issued.

Publication Date*: 10/10/2018 Identification Number: 189

What is a change of control for purposes of the shareholder approval requirement of Listing Rule 5635(b)? Identification Number 195

Generally, a change of control would occur when, as a result of the issuance, an investor or a group would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or voting power and such ownership or voting power would be the largest ownership position. However, Nasdaq will consider all facts and circumstances concerning a transaction, including whether there are any other relationships or agreements between the company and the investor or group.

Publication Date*: 7/31/2012 Identification Number: 195

If a change of control occurs, but not as the result of an issuance of securities by the company, is shareholder approval required? Identification Number 196

Listing Rule 5635(b) requires shareholder approval in connection with the issuance of designated securities. If no issuance of securities by the company will occur, shareholder approval is generally not required. However, if the change of control occurs in connection with another transaction involving the company, the transactions may be aggregated and shareholder approval may be required.

Publication Date*: 7/31/2012 Identification Number: 196

Assume a shareholder holds a controlling interest prior to a transaction involving an issuance of shares to another entity. After the transaction, this shareholder will still be the largest shareholder, but will hold less than 20% of the common stock. Does this represent a change of control? Identification Number 197

No. A change of control does not occur unless a new control position is created. On these facts, given that the shareholder remains the largest shareholder, no new control position is created.

Publication Date*: 7/31/2012 Identification Number: 197

A company is planning a private placement of common stock. The company's largest shareholder currently holds 18% of the company's outstanding common stock and will hold 24% of the outstanding common stock after the transaction. Will this transaction represent a change of control? Identification Number 198

Yes. On these facts, Nasdaq would conclude that the shareholder is obtaining a new control position. As such shareholder approval pursuant to Listing Rule 5635(b) would be required.

Publication Date*: 7/31/2012 Identification Number: 198

How is the percentage of voting power to be issued in a transaction calculated? Identification Number 183

The percentage of voting power to be issued in a transaction is calculated using the following formula:

$$\frac{\text{Maximum Potential Issuance of New Votes}}{\text{Pre-transaction Votes Outstanding}}$$

The numerator of this equation should contain the voting power of all securities initially issued or potentially issuable or potentially exercisable or convertible into shares or common stock as a result of the transaction (e.g., earn-out clauses, penalty provisions, equity compensation awards assumed or in assumed plans, etc.).

In calculating the denominator, the company should not include any convertible securities that are not permitted to vote on an as-converted basis.

To determine the voting power of a company with a multiple class structure, start by obtaining the number of outstanding shares in each class of voting securities, whether or not publicly traded. Then, multiply the number of votes per share for each class of securities by the number of outstanding shares to obtain the total number of votes for each class of shares. Lastly, add together the votes of the classes.

Publication Date*: 7/31/2012 Identification Number: 183

A company has issued and subsequently repurchased shares of its common stock. The repurchased shares are now considered treasury shares. Are these shares considered outstanding? Identification Number 199

No. For purposes of the shareholder approval requirements, treasury shares are not considered to be outstanding shares.

Publication Date*: 7/31/2012 Identification Number: 199

If a company issues a security with special voting rights, such as the right to appoint a director, but not general voting rights, does that security contribute towards the calculation of whether the company is issuing voting power equal to or in excess of 20% of the voting power outstanding before the issuance under Listing Rule 5635? Identification Number 200

No. A security that only has special voting rights would not be considered in the calculation of whether the company is issuing voting power in excess of 20% of the voting power outstanding before the transaction. However, Nasdaq will review the issuance of any security with special voting rights under the voting rights requirements of Listing Rule 5640.

Publication Date*: 7/31/2012 Identification Number: 200

What constitutes shareholder approval where it is required under Nasdaq's rules? Identification Number 201

Pursuant to Listing Rule 5635(e)(4), in order to satisfy Nasdaq's shareholder approval requirement, a majority of the total votes cast on the proposal must be voted in favor of the proposal.

Publication Date*: 7/31/2012 Identification Number: 201

Are abstentions and broker non-votes considered to be votes cast for a proposal? Identification Number 202

Nasdaq does not define the term "votes cast". As such, a company must calculate the "votes cast" in accordance with its governing documents and any applicable state law. Note also that the SEC requires a company to disclose the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as the company's charter and bylaw provisions.

Publication Date*: 7/31/2012 Identification Number: 202

Is the inducement exemption available to induce a member of the board of directors to enter into employment? Identification Number 248

No. Listing Rule 5635(c) provides that the exemption is available only for a "person not previously an employee or director."

Publication Date*: 7/31/2012 Identification Number: 248

Is the inducement exemption available to induce someone to become a consultant to the company? Identification Number 250

No. Pursuant to Listing Rule 5635(c), the exemption applies to issuances to induce someone to enter into employment. Because a consultant is not an employee, the exemption is not available.

Publication Date*: 7/31/2012 Identification Number: 250

Is the inducement exemption available to induce a consultant to become an employee? Identification Number 251

Provided the consultant was not already acting as an employee, the exemption would be available to induce a consultant to become an

employee. This determination would be made based on an examination of the applicable facts and circumstances.

Publication Date*: 7/31/2012 Identification Number: 251

What is "bona fide period of non-employment"? Identification Number 252

A "bona fide period of non-employment" is determined on a case-by-case basis. This analysis is not based on time alone. Additional factors in the analysis include:

- Whether there was a relationship between the former employee and the company during the time of non-employment;
- Whether the former employee received payments from the company during the period of non-employment;
- The reasons for ending the employment relationship;
- Whether the former employee was employed elsewhere after leaving the company; and
- Whether there was an agreement or understanding that the former employee would return to the company.

Publication Date*: 7/31/2012 Identification Number: 252

For purposes of the required disclosure of inducement awards, what is meant by "promptly"? Identification Number 254

As a safe-harbor, Nasdaq will consider disclosures made within four business days after the award to have been made "promptly."

Publication Date*: 7/31/2012 Identification Number: 254

What details must a company include in the press release disclosing its reliance upon the shareholder approval exception for an inducement grant? Identification Number 255

A company is required to disclose the material terms of the inducement grant, including the recipient(s) of the grant and the number of shares involved. If the disclosure relates to an award to executive officers, or the award was individually negotiated, then the disclosure must include the identity of the recipient.

Publication Date*: 7/31/2012 Identification Number: 255

Can a company disclose the combined size of inducement awards made to a number of employees? Identification Number 256

For individually negotiated awards and awards made to executive officers, aggregated disclosure of multiple awards is not permitted. Otherwise, aggregation is permitted: (i) over a period up to two weeks for a company that typically grants equity awards as inducements to new employees, and (ii) when a company makes inducement awards to employees of a target company in connection with a merger or acquisition. Aggregated disclosure must include the material terms of the awards, including the number of employees and the number of shares involved. Such aggregated disclosure does not need to identify specific employees.

Publication Date*: 6/4/2014 Identification Number: 256

May a company use a Form 8-K to disclose an inducement grant in lieu of a press release? Identification Number 257

No. If the company is relying on the exemption from shareholder approval contained in Listing Rule 5635(c)(4), the Rule specifically requires disclosure through a press release.

Publication Date*: 7/31/2012 Identification Number: 257

May a company rely on the inducement exception for a grant made immediately after an individual is hired if the grant was not discussed or negotiated in connection with the hiring process? Identification Number 258

No. Such an award would not be considered a material inducement to the individual entering into employment with the company. Only grants made in connection with an offer of employment are eligible for this exception.

Publication Date*: 7/31/2012 Identification Number: 258

May a company adopt a plan without shareholder approval that would be used solely for inducement awards? Identification Number 259

Yes. A company may do so provided that all awards made under the plan meet the requirements of Listing Rule 5635(c) and IM-5635-1.

Publication Date*: 7/31/2012 Identification Number: 259

Is shareholder approval required to amend an inducement award for which the company did not receive shareholder approval? Identification Number 260

Yes. A material amendment to an equity compensation award would require shareholder approval, even if the initial grant did not require approval because it was an inducement grant. The materiality of the amendment would be assessed according to IM-5635-1.

Publication Date*: 7/31/2012 Identification Number: 260

Do plans or arrangements involving a merger or acquisition require shareholder approval under Listing Rule 5635(c)? Identification Number 243

Under IM-5635-1, plans or arrangements involving a merger or acquisition do not require shareholder approval under Listing Rule 5635(c) in two situations.

First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction.

Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Listing Rule 5635(c). The assumed plans of the target must have been approved by the target's shareholders. The shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (i) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (ii) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. Nasdaq would view a plan or arrangement adopted in contemplation of the merger or acquisition transaction as not pre-existing for purposes of this exception.

Publication Date*: 7/31/2012 Identification Number: 243

Are the shares that are issuable as a result of the conversion of the target's outstanding awards and the assumption of the target's equity plans included in determining whether shareholder approval is required under Listing Rule 5635(a)? Identification Number 244

Yes. In determining whether shareholder approval is required of the acquisition under Listing Rule 5635(a), the shares issuable to adjust, replace, or convert the target's outstanding awards are included as are any additional shares that would be available under an assumed plan or arrangement of the target. The shares would not be included, however, to the extent they come from a shareholder approved plan of the acquiring company, provided that there is no increase in the number of shares available under such plan.

Publication Date*: 7/31/2012 Identification Number: 244

Would a plan or arrangement adopted in contemplation of a merger or acquisition be considered as a pre-existing plan for purposes of the exception from the shareholder approval requirement? Identification Number 245

No. Such a plan or arrangement would not be exempt from the shareholder approval requirement.

Publication Date*: 7/31/2012 Identification Number: 245

If the target of a merger or acquisition has a pre-existing evergreen plan that is assumed in the transaction, when will shareholder approval be required for that plan?

Identification Number 246

An assumed evergreen plan is subject to the limitation in IM-5635-1 that an evergreen plan cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. The initial ten-year period is measured from the date the target company established the plan.

Publication Date*: 7/31/2012 Identification Number: 246

Does Nasdaq require shareholder approval of "tax qualified, non-discriminatory employee benefit plans"?

Identification Number 239

No. Listing Rule 5635(c)(2) states that shareholder approval is not required for tax qualified, non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans. Please note that these plans are subject to approval by either the company's independent compensation committee or a majority of the issuer's independent directors. Similar plans for the company's non-U.S. employees, which provide features necessary to comply with applicable non-U.S. tax laws, are also exempt from shareholder approval.

Publication Date*: 7/31/2012 Identification Number: 239

What is a "parallel nonqualified plan"?

Identification Number 240

For purposes of Listing Rule 5635(c) and IM-5635-1, the term "parallel nonqualified plan" means a plan that is a pension plan within the meaning of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted.

However, a plan will not be considered a "parallel nonqualified plan" unless: (i) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted); (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limitations described in the preceding sentence; and, (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

Publication Date*: 7/31/2012 Identification Number: 240

Does Nasdaq require shareholder approval of "parallel nonqualified plans"?

Identification Number 241

No. Listing Rule 5635(c) specifically grants an exception to the shareholder approval requirement for parallel nonqualified plans. Please note that these plans are subject to approval by either the company's independent compensation committee or a majority of the company's independent directors. Similar plans for the company's non-U.S. employees, which provides features necessary to comply with applicable non-U.S. tax laws, are also exempt from shareholder approval.

Publication Date*: 7/31/2012 Identification Number: 241

Is a plan that provides non-U.S. employees with substantially the same benefits as a Section 401(a) plan, Section 423 plan, or parallel nonqualified plans that the listed company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, also exempt from shareholder approval under Listing Rule 5635(c)(2)?

Identification Number 242

Yes. IM-5635-1 provides that an equity compensation plan that provides non-U.S. employees with substantially the same benefits as comparable tax qualified, non-discriminatory plans or parallel nonqualified plans provided to U.S. employees, but for features necessary to comply with applicable foreign tax law, are exempt from the requirement to obtain shareholder approval. However, if the company is required to obtain shareholder approval under the Internal Revenue Code for the U.S. plan, then the foreign plan would have to be approved

by shareholders on the same schedule as the counterpart U.S. plan. Alternatively, if the shares under the foreign plan would be deducted from the shares available under a compliant U.S. plan, then separate shareholder approval would not be required of the foreign plan.

Publication Date*: 7/31/2012 Identification Number: 242

Does Nasdaq require shareholder approval of equity compensation plans? Identification Number 203

Yes. Listing Rule 5635(c) requires that a Nasdaq listed company seek shareholder approval when it establishes or materially amends a stock option or purchase plan or other arrangement pursuant to which stock may be acquired by officers, directors, employees or consultants. This includes any sale of securities at a discount to the market value to an officer, director, employee or consultant, even if part of a larger financing transaction. See FAQ #275.

In addition, please see IM 5635-1 and FAQ #219, which focus on those corporate actions that would be considered material amendments to existing plans and/or arrangements, and thus, require shareholder approval. IM 5635-1 also discusses circumstances under which shareholder approval is not required pursuant to Listing Rule 5635(c).

Publication Date*: 7/31/2012 Identification Number: 203

Is there an exception for de minimis issuances under Listing Rule 5635(c)? Identification Number 209

No. The Rule requires shareholder approval whenever the company establishes or materially amends a stock option or purchase plan or other arrangement pursuant to which stock may be acquired by officers, directors, employees or consultants. Unlike the prior rule, there is no exception for de minimis issuances or "broadly- based" plans.

Publication Date*: 7/31/2012 Identification Number: 209

Are issuances of treasury shares subject to Listing Rule 5635(c)? Identification Number 210

The fact that shares will be issued from the company's treasury or repurchased shares has no impact on the analysis of whether shareholder approval is required under the Rule. Such shares are subject to the Rule.

Publication Date*: 7/31/2012 Identification Number: 210

Who is considered to be a consultant for purposes of Listing Rule 5635(c)? Identification Number 211

A consultant is anyone for whom the company is eligible to use a Form S-8. The instructions for the Form S-8 state that: "Form S-8 is available for the issuance of securities to consultants or advisors only if: (i) they are natural persons; (ii) they provide bona fide services to the registrant; and (iii) the services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities."

Notwithstanding the requirement that a consultant must be a natural person, under the SEC guidance, where the consultant performs services for the issuer through a wholly-owned corporate alter ego, the issuer may contract with, and register securities on Form S-8 as compensation to that corporate entity. See Release No. 33–7646, 34–41109, 64 FR 11103 (March 8, 1999) (citing to Aaron Spelling Productions, SEC No-Action Letter (July 1, 1987)). Accordingly, issuances to such entity, may constitute equity compensation under Listing Rule 5635(c).

Publication Date*: 9/17/2020 Identification Number: 211

Can a company establish and issue shares from an equity compensation plan or arrangement before seeking shareholder approval? Identification Number 212

A company may adopt an equity plan or arrangement, and grant options (but not shares of stock) thereunder, prior to obtaining shareholder approval provided that: (i) no options can be exercised prior to obtaining shareholder approval, and (ii) the plan can be unwound, and the outstanding options cancelled, if shareholder approval is not obtained. Companies should be aware of any accounting

issues that may arise under these circumstances.

Publication Date*: 7/31/2012 Identification Number: 212

May a company grant stock awards subject to obtaining subsequent shareholder approval? Identification Number 213

No. Unlike a situation where the exercise of stock options is contingent on obtaining shareholder approval, a company may not grant shares of stock prior to obtaining shareholder approval.

Publication Date*: 7/31/2012 Identification Number: 213

Does Nasdaq's shareholder approval requirement for equity compensation plans or arrangements apply to Foreign Private Issuers? Identification Number 214

Yes. Nasdaq's shareholder approval requirement for equity compensation plans or arrangements applies to Foreign Private Issuers. However, a Foreign Private Issuer may follow its home country practice in lieu of this requirement if it follows the process described in Listing Rule 5615(a)(3). Please see Non-U.S. Companies FAQs for additional information regarding this process.

Publication Date*: 7/31/2012 Identification Number: 214

Is Nasdaq's requirement for shareholder approval of equity compensation plans or arrangements applicable to initial listings? Identification Number 215

Generally, shareholder approval is not required of plans or arrangements that are in place at the time of a company's listing on Nasdaq. Shareholder approval is required, however, for any material amendment to such plans after listing. In addition, if the plan contains an evergreen provision, the plan cannot have a term in excess of ten years unless shareholder approval is obtained every ten years as set forth in IM-5635-1.

Publication Date*: 7/31/2012 Identification Number: 215

What is the difference between a formula plan and an evergreen plan? When is shareholder approval required of formula or evergreen plans? Identification Number 218

A formula plan provides for automatic grants pursuant to a formula. Examples include restricted stock grants based on a certain dollar amount and/or matching stock contributions based on the amount of compensation a participant elects to defer. An evergreen plan is one that contains a formula for the automatic increase in the number of shares available under the plan.

Formula and evergreen plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. Plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan.

Publication Date*: 7/31/2012 Identification Number: 218

Are there any exceptions to Nasdaq's shareholder approval requirement for equity compensation? Identification Number 238

Yes. Pursuant to Listing Rule 5635(c), shareholder approval is not required for:

- Warrants or rights issued to all security holders on equal terms;
- Stock purchase plans available to all security holders on equal terms (e.g., a dividend reinvestment plan);
- Tax qualified, non-discriminatory employee benefit plans or parallel nonqualified plans which are regulated under the Internal Revenue Code and Treasury Department regulations, provided such plans are approved by the issuer's independent compensation committee or a majority of the issuer's independent directors. A similar plan for the company's non-U.S. employees, which provides features necessary to comply with applicable non-U.S. tax laws, is also exempt from the shareholder approval requirement;
- Plans that provide a convenient way to purchase shares on the open market or from the issuer at fair market value;

- Certain plans relating to mergers and acquisitions; or
- Inducement grants.

Publication Date*: 7/31/2012 Identification Number: 238

Is a change to the "sublimit" within an equity compensation plan a material change? Identification Number 1673

An equity compensation plan must provide for an overall limit on the number of shares that may be issued under the plan. In some cases, a plan may also include a further "sublimit" on the number of shares available for a particular type of award, such as restricted stock or options.

A revision to increase the number of shares available under such a sublimit would, generally, be a material amendment to the equity compensation plan because this change would be an expansion of the types of awards available under the plan.

Publication Date*: 1/11/2019 Identification Number: 1673

What is considered a material amendment to an existing equity compensation plan or arrangement? Identification Number 219

As set forth in IM-5635-1, a material amendment includes, but is not limited to, the following:

- Any material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction);
- Any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;
- Any material expansion of the class of participants eligible to participate in the plan; and
- Any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. In that regard, absent specific authorization in the plan, a repricing, or a similar action, would not be permitted without shareholder approval.

Publication Date*: 7/31/2012 Identification Number: 219

Is an amendment to an equity compensation plan to increase the withholding rate to satisfy tax obligations, such as from the minimum tax rate to the maximum tax rate, considered a material amendment? Identification Number 1269

Generally, an amendment to increase the withholding rate to satisfy tax obligations would not be considered a material amendment to an equity compensation plan. Allowing the holder of an award to surrender unissued shares to pay tax withholdings is similar to settling the award in cash at market price, and neither creates a material increase in benefits to participants nor increases the number of shares to be issued under the plan. This type of change also is not an expansion in the types of awards provided under the plan. This analysis is the same regardless of whether the plan allows the shares surrendered for tax withholdings to be added back to the pool of shares available for issuance as future awards. Accordingly, an amendment to an equity compensation plan to increase the withholding rate to satisfy tax obligations would not be considered a material amendment to the plan.

Publication Date*: 10/19/2016 Identification Number: 1269

What is considered to be a "repricing"? Identification Number 220

Generally, "repricing" means any of the following or any other action that has the same effect:

- Lowering the strike price of an option after it is granted;
- Any other action that is treated as a repricing under generally accepted accounting principles; or
- Canceling an option at a time when its strike price exceeds the fair market value of the underlying stock, in exchange for another option, restricted stock, or other equity, unless the cancellation and exchange occurs in connection with a merger,

acquisition, spin-off or other similar corporate transaction.

Publication Date*: 7/31/2012 Identification Number: 220

If a plan is silent on repricings, would it be a material amendment if the company were to reprice outstanding stock options? Identification Number 221

Yes. Unless a plan specifically authorizes repricing, or a similar action, any repricing of options would be a material amendment requiring shareholder approval pursuant to Listing Rule 5635(c).

Publication Date*: 7/31/2012 Identification Number: 221

Does a "value for value" exchange require shareholder approval? Identification Number 222

Yes. Unless the plan authorizes it, such an exchange would be considered a material amendment that requires shareholder approval. An example of this type of exchange is where outstanding options are valued according to a pricing model and the optionees receive, in exchange for their options, shares of stock equal in value to the calculated value of the stock options.

Publication Date*: 7/31/2012 Identification Number: 222

Would it be a material amendment to change the method of determining the exercise price for newly granted stock options? Identification Number 223

No. Nasdaq would not consider it to be a material amendment to change the method of determining the exercise price for newly granted stock options to the closing market price on the date of the award when a plan provides for an exercise price of, for example: (i) the closing market price on the day prior to the grant date; (ii) the average of the high and low market price on the date of grant; or (iii) the average of the high and low market price on the date prior to the date of grant.

Publication Date*: 7/31/2012 Identification Number: 223

Would it be a material amendment for a company to buy back outstanding awards for cash? Identification Number 224

The rule applies to equity awards and not to a payment of cash. As such, buying back outstanding awards for cash would not require shareholder approval under Listing Rule 5635(c) unless, based on the specific facts and circumstances, it is treated as a repricing under Generally Accepted Accounting Principles ("GAAP").

Publication Date*: 7/31/2012 Identification Number: 224

Is a provision in a plan that generally allows for a plan administrator to "modify or amend" an award sufficient to permit a repricing or option exchange without shareholder approval absent any additional, specific authority? Identification Number 225

No. An option repricing or exchange based merely on the authority to modify or amend outstanding awards would not be permitted without shareholder approval. This is the type of general authority that IM-5635-1 indicates would not obviate the need for shareholder approval.

Generally, when preparing plans and presenting them for shareholder approval, companies should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Publication Date*: 7/31/2012 Identification Number: 225

Is an increase in the number of shares available under a plan considered a material amendment? Identification Number 226

Yes. An increase in the number of shares available under a plan would generally be considered to be material because it could result in

additional dilution to the shareholders.

Publication Date*: 7/31/2012 Identification Number: 226

Consider a plan that provides for periodic automatic awards of a specific number of options, for example, annual awards of 10,000 options. Is it a material amendment to increase the awards to 15,000? Identification Number 227

No. Generally, increasing the size of awards is not a material amendment provided that the maximum number of shares available under the plan is not increased.

Publication Date*: 7/31/2012 Identification Number: 227

Does a change in the vesting schedule of stock option or other equity awards require shareholder approval? Identification Number 228

Generally, a change in the vesting terms for an award is not a material amendment, provided that the change does not result in either an extension in the term of the award beyond the maximum allowable term under the plan or in an addition to the aggregate shares available under the plan.

Publication Date*: 7/31/2012 Identification Number: 228

Is an amendment to a plan to extend the term of an option considered a material amendment? Identification Number 229

Generally, extending the term of an option is not considered a material amendment, provided that the extension is not beyond the maximum term permissible under the plan. For example, consider a plan that authorizes the plan administrator to grant awards with a term of up to ten years. If an option is granted with a term of five years, and the plan administrator subsequently changes the term to ten years, it is not a material amendment to the plan. The same analysis would also apply to the extension of a post-termination exercise period.

Publication Date*: 7/31/2012 Identification Number: 229

Is shareholder approval required of a plan or arrangement that permits an employee or director to use cash payments to purchase stock from the company at market price? Identification Number 230

A plan that permits the purchase of stock for cash does not require shareholder approval if such purchase is at the discretion of the participant and is at or above market value. This is permissible under Listing Rule 5635(c)(2), which provides an exemption from Nasdaq's shareholder approval rules for equity compensation plans or arrangements that merely provide a convenient way to purchase shares on the open market or from the company at fair market value. Such purchases can be made on an immediate or deferred basis.

Publication Date*: 7/31/2012 Identification Number: 230

Is shareholder approval required to add stock-settled Stock Appreciation Rights ("SARs") to a plan that provides only for stock options? Identification Number 231

No. The addition of SARs will not constitute an expansion of the types of awards available, since the SARs are substantially equivalent to stock options.

Publication Date*: 7/31/2012 Identification Number: 231

Are cash settled Stock Appreciation Rights ("SARs") subject to Listing Rule 5635(c)? Identification Number 232

No. Because cash settled SARs do not involve an issuance of equity, they are not subject to the requirements of the Rule.

Publication Date*: 7/31/2012 Identification Number: 232

Is shareholder approval required to add Restricted Stock Units ("RSUs") to an equity compensation plan that allows for the issuance of restricted stock?

Identification Number 233

An award of RSUs typically results in the issuance of restricted stock on a deferred basis after vesting requirements are met. As such, this type of award is substantially equivalent to the award of restricted stock, and if the plan allows for the award of restricted stock, the addition of RSUs is not a material modification that requires shareholder approval under Nasdaq's rules. Shareholder approval would be required, however, to add RSUs to a plan that does not provide for restricted stock awards because the revision would expand the types of awards available.

Publication Date*: 7/31/2012 Identification Number: 233

Is the addition of a "cashless exercise" feature to an option plan a material amendment?

Identification Number 234

No. Adopting a provision permitting a cashless exercise does not materially increase the benefits available under the plan.

Publication Date*: 7/31/2012 Identification Number: 234

Does Nasdaq require shareholder approval for an amendment that removes a provision in a plan that permits repricing?

Identification Number 235

No. Nasdaq rules require shareholder approval for a material amendment to an equity compensation plan. Removing a repricing provision would not increase the benefits available under the plan, and therefore would not be considered a material amendment requiring shareholder approval under Nasdaq's rules.

Publication Date*: 7/31/2012 Identification Number: 235

Does Nasdaq require shareholder approval for an amendment that removes a provision in a plan that permits shares underlying forfeited awards to be reissued?

Identification Number 236

No. Nasdaq rules require shareholder approval of an increase in the number of shares available under a plan. An amendment to eliminate a provision permitting the reissuance of shares underlying forfeited awards would not result in such an increase, and would not otherwise increase the benefits available under the plan, and therefore would not be considered a material amendment requiring shareholder approval under Nasdaq's rules.

Publication Date*: 7/31/2012 Identification Number: 236

What is considered to be a material expansion of the class of participants?

Identification Number 237

The classes of participants specified in the rule are officers, directors, employees, and consultants. As such, an amendment to extend eligibility to any of these classes not already authorized under the plan would be a material amendment requiring shareholder approval. In addition, if a class of participants is specifically excluded from a plan (e.g., employee-directors from a director plan), it would be a material expansion of the class to amend the plan to include those participants. Likewise, it would be material amendment to add non-employee directors to a plan which does not include directors as a class of eligible participants.

Publication Date*: 7/31/2012 Identification Number: 237

Is an exception from the shareholder approval requirements available for a company in financial distress?

Identification Number 261

Yes. Pursuant to Listing Rule 5635(f), an exception for a specified issuance of securities may be made upon prior written application to Nasdaq when the delay in securing shareholder approval would seriously jeopardize the financial viability of the company. Generally, this is a difficult standard to meet. A company must convincingly demonstrate that the delay in closing a transaction due to the time that it would take to seek shareholder approval would have a significant detrimental impact on its financial viability.

Publication Date*: 7/31/2012 Identification Number: 261

How can a company request a financial viability exception and what should be included in its request? Identification Number 263

To request a financial viability exception, first the company must complete the Rule Interpretation Request form electronically through the Listing Center. In the supporting documentation section of this form, the company should attach a letter addressing all of the relevant issues (including those listed below) focusing on how a delay resulting from seeking shareholder approval would seriously jeopardize its financial viability and how the transaction would benefit the company. The letter should also describe the proposed transaction in detail and should include the identity of the investors.

When Nasdaq Staff has completed its review, it will provide a written response to the request. The company must obtain Nasdaq's approval to rely upon the financial viability exception prior to proceeding with the transaction.

Examples of factors that the company should address include:

- What facts and circumstances led to the company's predicament?
- How long will the company be able to meet its current obligations, such as payroll, lease payments, and debt service, if it does not complete the proposed transaction?
- What are the company's cash position and burn rate, both current and projected?
- Is the proposed transaction the last alternative, or nearly the last alternative, available to the company?
- Why can't the company structure a transaction that would satisfy the shareholder approval requirements? For example, where the applicable rule is Listing Rule 5635(d), could the company limit the initial issuance to 19.9% of the pre-transaction outstanding shares and issue any remainder only after obtaining shareholder approval?
- Would the company be required to file for bankruptcy protection due to the time that it would take to get shareholder approval?
- What would be the impact on the company's operations due to the time that it would take to get shareholder approval?
- Why didn't the company enter into a transaction when it still had the time to get shareholder approval?
- What other alternatives has the company pursued to obtain financing on other terms?
- Will the proposed financing rescue the company? The company should provide financial forecasts for several months illustrating whether the transaction will significantly strengthen the company's finances.
- Will the company meet Nasdaq's continued listing requirements over the next several months?
- If the investors will have higher voting power than the existing shareholders, then why is such voting power necessary? An example of higher voting power is preferred stock which converts at a discount and votes on an as-converted basis.

Publication Date*: 7/31/2012 Identification Number: 263

Is the company's audit committee required to approve reliance on a financial viability exception? Identification Number 265

Reliance by the company on a financial viability exception must expressly be approved by the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors. The company should submit to Nasdaq a copy of the committee resolution approving such reliance.

Publication Date*: 7/31/2012 Identification Number: 265

What disclosure is required of a company that receives a financial viability exception? Identification Number 266

A company that receives a financial viability exception must mail to all shareholders (no later than ten calendar days before issuance of the securities) a letter alerting them to its omission to seek the shareholder approval that would otherwise be required. Such notification shall disclose the terms of the transaction (including the number of shares of common stock that could be issued and the consideration received), the fact that the company is relying on a financial viability exception to the shareholder approval rules, and that the audit committee or a comparable body of the board of directors comprised solely of independent, disinterested directors has expressly approved reliance on the exception. The company must also file a Form 8-K, where required by SEC rules, or issue a press release disclosing the same information as promptly as possible, but no later than ten days before the issuance of the securities.

Publication Date*: 7/31/2012 Identification Number: 266

Can a company that receives a financial viability exception issue any securities in the transaction prior to the end of the ten-day notice period?

Identification Number 267

Listing Rule 5635(f) requires that the notice be sent at least ten days before the issuance of the securities. This means that until the end of the ten-day notice period, a company could not issue any common stock or any other securities that are, or could become, convertible into or exercisable for common stock. For example, convertible debt could not be issued prior to the end of the notice period even if no conversion could take place until after the end of the period.

Publication Date*: 7/31/2012 Identification Number: 267

Can Nasdaq waive or shorten the notice period for a financial viability exception?

Identification Number 268

No. According to Listing Rule 5635, Nasdaq requires at least ten days and the Rule contains no provision allowing for a shorter period.

Publication Date*: 7/31/2012 Identification Number: 268

Can a company initiate the ten-day notice period by mailing the notice to shareholders prior to receiving approval of its exception request from Nasdaq?

Identification Number 269

No. The mailing and the Form 8-K or press release must state that the company is relying on the exception. Such a statement can be made only after the exception is granted. Accordingly, the mailing and the Form 8-K or press release must occur after the exception is granted and at least ten days prior to the issuance of the securities.

Publication Date*: 7/31/2012 Identification Number: 269

May a company get a financial viability exception after completing a transaction?

Identification Number 270

No. A financial viability exception is available only upon prior approval by Nasdaq and is not granted if the company has completed the transaction. A company that is found to have violated Nasdaq's shareholder approval or voting rights rules after the transaction has occurred is in violation of the Listing Rules and may be subject to delisting from the Nasdaq Stock Market.

Publication Date*: 7/31/2012 Identification Number: 270

If a company has two (or more) classes of common stock, how is the potential issuance calculated under the shareholder approval rules?

Identification Number 288

Generally, the potential issuance is calculated as a percentage of the aggregate outstanding shares of all classes of common stock. For example, if a company has two classes of common stock, Class A and Class B, and plans to issue shares of Class A in a private placement, the percentage issuance would be calculated by dividing: (i) the number of Class A shares that could be issued; by (ii) the number of pre-transaction outstanding shares of both classes combined. This calculation generally applies even if only one of the classes is listed on Nasdaq.

Publication Date*: 7/31/2012 Identification Number: 288

What factors does Nasdaq consider when determining whether to aggregate the shares issued in separate transactions for purposes of determining whether the threshold for shareholder approval has been triggered?

Identification Number 283

In deciding whether to aggregate transactions to determine whether shareholder approval is required, Nasdaq will consider whether the company is engaging in a stand-alone transaction or a series of issuances.

In general, Nasdaq will consider the following factors in making this determination:

- **Timing of the issuances** - Timing alone is not necessarily a determining factor, and there is no definitive time period as to whether transactions are aggregated. Generally, if there are no other linkage factors present, transactions more than six

months apart would not be aggregated;
- **Initiation of the subsequent transaction or transactions** - At the time of the first transaction, was the company already planning the subsequent transaction? Did it already expect that it would have to raise additional capital?;
- **Commonality of investors** - Transactions with common investors are more likely to be aggregated. In addition, the time period over which transactions would be aggregated, may be extended when there are common investors;
- **Existence of any contingencies between the issuances or transactions** - Are the sales contingent upon one another? For example, a company may be required to obtain an equity line of credit before completing a discounted private placement;
- **Commonality as to the use of the proceeds/Same plan of financing** - Transactions may be aggregated if they are used for the same purpose or plan of financing; and
- **Timing of the board of directors approval.**

When transactions are aggregated, the calculation total shares outstanding or total voting power outstanding is made based on the shares and votes outstanding prior to the closing of the first issuance.

Publication Date*: 7/31/2012 Identification Number: 283

Will Nasdaq consider a transaction to be a Public Offering under IM-5635-3 if only a small number of purchasers participate in the transaction?

Identification Number 1741

Transactions that constitute a Public Offering generally are not subject to Nasdaq's shareholder approval requirements.

Generally, a firm commitment underwritten securities offering registered with the SEC will be considered a Public Offering (based on factors described in IM-5635-3) because the underwriter will market the offering and price discovery takes place through the underwriter's book building process. Nasdaq understands that while underwriters can control their marketing efforts, the ultimate number of purchasers in a transaction is out of control of the issuer and the underwriter. As such, Nasdaq relies primarily on the marketing efforts in assessing whether a transaction is a Public Offering under IM-5635-3.

However, structuring an offering as a firm commitment underwritten securities offering does not guarantee that the offering constitutes a Public Offering under IM-5635-3. For example, Nasdaq has observed firm commitment underwritten offerings that were sold to a small number of purchasers. Nasdaq believes that such a transaction may be indicative of the lack of true price discovery during the book building process or of an insufficient marketing effort. In such cases, the transaction may not be considered a Public Offering for purposes of the Nasdaq shareholder approval rules.

In addition, if the Company and its broker dealer indicate to Nasdaq that an offering was broadly marketed, but resulted in a disproportionately small number of purchasers, Nasdaq may investigate the broker dealer, or refer the matter to FINRA for further investigation, to determine whether the marketing efforts were, in fact, consistent with the representations made.

Publication Date*: 6/30/2020 Identification Number: 1741

Do Nasdaq rules require shareholder approval if a transaction is priced below "book value"?

Identification Number 1649

While Nasdaq's shareholder approval rules previously considered book value in determining whether shareholder approval was required for certain transactions, this rule was changed, and book value is no longer considered, as of September 26, 2018. See SEC Release No. 34-84287; File No. SR-NASDAQ-2018-008 and FAQ #271.

Publication Date*: 10/16/2018 Identification Number: 1649

Do Nasdaq's listing rules limit or restrict the issuance of warrants that provide for cashless exercise and/or exchanges of the warrant for stock?

Identification Number 1143

Listed companies may issue warrants that allow the holder, under certain circumstances, to exercise or exchange them for stock in a cashless transaction. Nasdaq's Listing Rules do not explicitly prohibit or restrict the issuance of warrants with this kind of cashless exercise/exchange provision. However, these warrants may be Future Priced Securities, as defined in Rule IM-5635-4. Typically, a warrant that is a Future Priced Security would allow the warrant holder to surrender an "out-of-the-money" warrant in exchange for a fixed dollar value of shares (usually calculated through a formula) with the actual number of shares determined based on the share price at the

time of surrender. This would result in the issuance of an increasing number of shares as the share price declines. Depending on the circumstances, Nasdaq may determine that the issuance of securities with this provision raises public interest concerns under the Rule 5100 Series.

Warrants may be structured to limit or mitigate these concerns through features that may limit the dilutive effect of the transaction. Such features may provide incentives to the investor to hold the security for a longer time period or limit the number of shares into which the Future Priced Security may be converted.

When reviewing transactions that include these types of securities for compliance with the Listing Rules, including whether they raise public interest concerns, Nasdaq generally assumes that conversion of the warrants will result in the maximum possible dilution over the shortest period of time. In addition, in determining whether the issuance of a warrant that is a Future Priced Security raises public interest concerns, Nasdaq staff will consider among other things: (1) the business purpose of the transaction; (2) the amount to be raised in the transaction relative to the Company's existing capital structure; (3) the dilutive effect of the transaction on the existing shareholders; (4) the risk undertaken by the Future Priced Security investor(s); (5) the relationship between the investor(s) and the Company; (6) whether the transaction was preceded by other similar transactions; (7) whether the transaction is consistent with the just and equitable principles of trade; and (8) whether the warrant includes features to limit the potential dilutive effect of its conversion or exercise, including floors on the conversion or exercise price. In order to properly reflect the potential dilutive effect, such floors must be subject to adjustment for reverse stock splits and other changes to the company's capital structure. Nasdaq encourages any company considering issuing a warrant that provides for cashless exercise and/or exchanges of the warrant for stock to review IM-5635-4 and to consult with the Listing Qualifications Department at (301) 978-8008.

Publication Date*: 2/11/2016 Identification Number: 1143

May a Nasdaq-listed company issue "penny warrants" or other deeply discounted equity securities in a Public Offering?

Identification Number 280

Transactions that constitute a Public Offering generally are not subject to Nasdaq's shareholder approval requirements. Nasdaq determines whether a transaction constitutes a Public Offering based on factors described in IM-5635-3, one of which is the extent of any discount to the market price of the securities offered.

Nasdaq closely examines any transaction that includes deeply discounted equity securities, including warrants that are exercisable for little or no consideration, sometimes called "penny warrants." Such a transaction may provide little economic benefit for the company and be highly dilutive to existing public shareholders.

Issuance of deeply discounted securities in a transaction (including a registered underwritten offering) may result in such issuance not qualifying as a Public Offering for purposes of determining whether shareholder approval is required. For this purpose, a discount to the Minimum Price (as defined in Listing Rule 5635(d)) in excess of 50%, typically, precludes a determination that such transaction is a Public Offering. Note that the previous sentence is not meant to be interpreted as a "safe harbor" and, therefore, an offering with 45% discount may not constitute a Public Offering based on this discount in conjunction with an analysis of the other factors in IM-5635-3.

In addition, if an issuance includes common stock (or the equivalent) and other securities sold together as an investment unit, it is necessary to attribute a value to securities issued with common stock.

For example, if an offering includes the issuance of warrants (other than placement agent warrants), then in determining the discount to the Minimum Price Nasdaq will attribute a value of $0.125 to each "plain vanilla" warrant with an exercise price no less than the offering price of the common stock. For warrants that are in the money or contain price protection or any other structured provisions that increase the potential dilution in the transaction, Nasdaq will attribute a value to each warrant equal to, or greater than, the value determined based on the Black Scholes model.

Generally, Nasdaq does not consider pre-funded warrants to be deeply discounted equity securities because the purchaser typically "pre-funds" the warrant at the time of issuance by paying the price that approximates the price of the underlying share of common stock.

In addition, Nasdaq may exercise its discretionary authority under Listing Rule 5101 to object to a transaction that includes deeply discounted securities, even when shareholder approval is not required. Any Nasdaq-listed company considering a transaction involving "penny warrants" or other deeply discounted securities is encouraged to contact its Listing Qualifications analyst by phone at +1 301 978 8008 to discuss the transaction prior to entering into a definitive agreement.

Publication Date*: 6/30/2020 Identification Number: 280

May a company utilize a generic proxy proposal to obtain shareholder approval prior to entering into a transaction? Identification Number 286

If shareholder approval of a transaction is required, then the proposal in the proxy should give specific details on the nature of the transaction (e.g., the number of shares offered, type of security being issued, the names of the investors and the purchase price).

If the proposal in the proxy is for a non-specific transaction, Nasdaq will consider whether the shareholders have sufficient information to make a meaningful decision. For example, proposals that ask for shareholder approval to issue more than 20% of the company's total shares outstanding or total voting power for future unspecified acquisitions would not be acceptable. Similarly, a generic proxy proposal would not suffice for shares issued as equity compensation.

However, if the company seeks shareholder approval for a private placement, but has not yet identified the investors or arrived at specific terms, Nasdaq may consider the proposal sufficient for the purposes of compliance with the shareholder approval requirements of Listing Rule 5635(d) if the company discloses:

- The maximum number of shares to be issued;
- The maximum dollar amount of the issuance;
- The maximum amount of discount to the market;
- The purpose of the transaction; and
- The time frame to complete the transaction - generally, within three months.

In addition, if the generic proposal relates to a potential change of control, which requires shareholder approval under Listing Rule 5635(b), the proxy must also identify the potential new controlling shareholder.

Publication Date*: 10/10/2018 Identification Number: 286

Is shareholder approval required for share issuances made pursuant to a court-ordered reorganization under federal or comparable non-U.S. bankruptcy laws? Identification Number 287

No. See Listing Rule 5635(e)(5).

Publication Date*: 7/31/2012 Identification Number: 287

Can an investor in a Nasdaq-listed company obtain the right to nominate or designate directors to the company's board? Identification Number 292

A Nasdaq-listed company may allow an investor to nominate or designate directors to its board. However, under Listing Rule 5640 (the Voting Rights Rule), the voting rights of existing shareholders cannot be disparately reduced through any corporate action. Thus, should a company allow an investor to nominate or designate directors at a level which is disproportionately greater than its ownership position, Nasdaq would view that corporate action as disparately reducing the voting power of the other shareholders.

The investor's ownership position should generally be consistent with the voting power held by the investor as a percentage of the overall votes entitled to be cast in the election of directors. For example, if the investor has a 30% ownership interest in the company, it could nominate or designate 30% of the members of the board. The number of directors can be rounded up to next whole number. However, rounding up would not be acceptable where the investor has less than a 50% ownership position but rounding up would allow the investor to nominate or designate a majority of the board. Please note that in evaluating voting power, Nasdaq will generally consider votes attributable to otherwise non-voting securities that are immediately convertible into voting securities at the investor's option, unless the investor must make additional payments to receive the voting security (such as with warrants).

The number of directors that can be nominated or designated is determined based on the ownership position at the time that the directors are initially appointed. Any agreement for the nomination or designation of directors must take into account subsequent reductions in the investor's voting power. As such, if the investor’s ownership position materially declines, whether through sales by the investor or additional issuances by the company, the investor's nomination or designation rights should be concomitantly reduced (this is sometimes called a "step-down"). In addition, the agreement with respect to directors should include a minimum level below which the investor would lose these rights. For example, Nasdaq has allowed agreements which provided that if the investor's ownership position were to fall below 5%, it would lose its director rights. Nasdaq would not require that a director be forced to resign intra-term as a result of a change to the investor's ownership.

In limited circumstances, such as when director rights derive from a substantial investment in the debt or non-voting securities of a troubled company, it may be appropriate to afford voting rights to the investor. In such cases, Nasdaq will generally evaluate such investments by comparing the amount of the investment to the company's market value.

Publication Date*: 2/2/2016 Identification Number: 292

What is the effect of shareholder approval on a transaction that violates Nasdaq's voting rights rule?

Identification Number 296

Shareholders may not vote to disenfranchise themselves or to disparately reduce their voting rights. Thus, shareholder approval for the transaction that led to a violation of the voting rights rule will not remedy the violation.

Publication Date*: 7/31/2012 Identification Number: 296

How can I find the appropriate closing price or consolidated closing bid price?

Identification Number 272

For purposes of Listing Rule 5635(d) "Minimum Price" means a price that is the lower of: (i) the closing price (as reflected on Nasdaq.com) immediately preceding the signing of the binding agreement; or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. Please note that the Nasdaq Official Closing Price is different from the Closing Price. For purposes of Listing Rule 5635(d), the “closing price” means the Nasdaq Official Closing Price and is reported on https://www.nasdaq.com/market-activity/quotes/historical-nocp. See also FAQ #271.

For purposes of determining "market value" under the shareholder approval requirements related to equity compensation under Listing Rule 5635(c), Nasdaq looks to the consolidated closing bid price as of 4 PM Eastern time. A Nasdaq company can view its security's relevant closing bid price on Nasdaq Online (www.nasdaq.net). This information is under the “4:00 Close” column in the “Bids and Asks” tab of the “Trade History.” Nasdaq-listed companies can also call their representative at Nasdaq's Market Intelligence Desk. Companies can find the telephone number for their representative by logging into Nasdaq Online and clicking on "My MID." When requesting this information, please be sure to specify the consolidated closing bid price. Others may call the Market Intelligence Desk at +1 646 344 7777 or Nasdaq MarketWatch at +1 301 978 8500 or +1 800 537 3929. When requesting this information, please be sure to specify the consolidated closing bid price.

Publication Date*: 11/26/2019 Identification Number: 272

How does Nasdaq determine whether securities that are convertible into or exercisable for common stock are issued at a discount?

Identification Number 276

To determine whether securities that are convertible into or exercisable for common stock are issued at a discount to the Minimum Price, the conversion or exercise price is compared to the Minimum Price of the common stock. For purposes of Listing Rule 5635(d) "Minimum Price" means a price that is the lower of: (i) the Nasdaq Official Closing Price (as reflected on https://www.nasdaq.com/market-activity/quotes/historical-nocp) immediately preceding the signing of the binding agreement; or (ii) the average Nasdaq Official Closing Price of the common stock (as reflected on https://www.nasdaq.com/market-activity/quotes/historical-nocp) for the five trading days immediately preceding the signing of the binding agreement. See FAQ #271. If the conversion or exercise price is less than the Minimum Price, then the issuance is at a discount to the applicable value. Please note that the Nasdaq Official Closing Price is different from the Closing Price.

A potential adjustment to the number of shares or conversion price due to a change to the company's capital structure, such as due to a stock split or extraordinary dividend, does not affect the determination of whether a transaction is at a discount to Minimum Price. However, if the company may reduce the conversion price, issue additional shares, or make a cash payment to the investors as a result of subsequent transactions or events, including "make whole" payments, the calculation of the conversion price will presume that the maximum amount of any such adjustments will be made. Similarly, potential cash payments to the security holders at the time of conversion, other than for accrued interest, are deducted from the value of the note and the resulting amount would be divided by the number of shares issuable when determining the effective conversion price. An example of such cash payments is payments for "foregone interest" that would have been earned by the investors after the time of conversion.

Note that the determination as to whether convertible securities are issued at a discount may differ for insiders (officers, directors, employees and consultants) and all other investors. When considering an issuance to an insider, the security must be issued at a price

greater than "market value". See FAQ#271.

Publication Date*: 11/26/2019 Identification Number: 276

Does a flexible settlement provision in a convertible instrument change the way Nasdaq determines whether securities that are convertible into common stock are issued at a discount? Identification Number 1136

No. A flexible settlement provision in a convertible instrument allows the issuer to settle conversions through payment or delivery of cash, shares of the company's common stock, or a combination of cash and shares. A convertible instrument with a flexible settlement provision that affects only the form of the settlement, without changing the conversion price of the instrument, will be treated under Rule 5635(c) and (d) the same as a convertible instrument with physical settlement only. See also FAQ#271 and 276.

Publication Date*: 3/2/2015 Identification Number: 1136

What is the effect of an anti-dilution provision for purposes of determining whether an issuance is at a discount? Identification Number 277

The presence of any provision that could cause the conversion or exercise price to be reduced to below the Minimum Price immediately before the entering into of the binding agreement will cause the transaction to be viewed as a discounted issuance. These provisions include anti-dilution provisions (except for stock splits or similar changes to the company's capitalization) or provisions allowing the company to voluntarily reduce the conversion or exercise price.

Note that if the issuance is to insiders (officers, directors, employees and consultants), then the conversion or exercise price cannot be reduced below the market value, which is the consolidated closing bid price. See FAQ #271.

Publication Date*: 10/10/2018 Identification Number: 277

When an issuance includes common stock (or the equivalent) issued at a discount to the Minimum Price and warrants, are the shares underlying the warrants aggregated with the common stock portion? Identification Number 278

Generally, shares underlying warrants are aggregated with an accompanying issuance of common stock (or the equivalent) at a discount unless the warrants: (i) are not exercisable for at least six months following closing, and (ii) are not exercisable for less than the Minimum Price.

Publication Date*: 10/10/2018 Identification Number: 278

When an issuance includes common stock (or the equivalent) and warrants, is it necessary to attribute a value to warrants for purposes of determining whether the common stock portion is at a discount? Identification Number 279

Yes. A value of $0.125, plus any amount that the warrant is currently in the money or could be in the money due to adjustments, such as for price protection, is attributed to each warrant. For example, consider a company with a market value of common stock of $10 per share. In the transaction, the company will issue units consisting of one share of common stock and one warrant exercisable for one share at $10 per share. Nasdaq will consider the common stock to be issued at a discount unless the issuance price of the units is at least $10.125. Increasing the exercise price of the warrants by $0.125 does not satisfy this pricing requirement. If, in the above example, a company issues a convertible instrument rather than common stock, Nasdaq will consider the common stock issuable in such transaction to be at market price if the conversion price is at least $10.125 and warrant exercise price is at least $10.

This analysis is without regard to whether the warrants are immediately exercisable because delay in the exercisability of the warrant does not render it without value.

Note that the determination as to whether the warrant is at a discount may differ for insiders (officers, directors, employees and consultants) and all other investors. See FAQ #271.

Publication Date*: 10/10/2018 Identification Number: 279

What is a share cap and how is it used in relation to the shareholder approval rules?

Identification Number 284

Companies sometimes comply with the 20% limitation of the shareholder approval rule by placing a "cap" on the number of shares that can be issued in the transaction or acquisition, such that there cannot, under any circumstances, be an issuance of 20% or more of the common stock or voting power previously outstanding without prior shareholder approval. If a company determines to defer a shareholder vote in this manner, shares that are issuable under the cap in the first part of the transaction must not be entitled to vote to approve the remainder of the transaction. This restriction on voting must continue to apply even if the shares are subsequently transferred.

Pursuant to IM-5635-2, a shareholder cap must apply for as long as the security is outstanding. Caps that apply only if the company is listed on Nasdaq do not obviate the need for shareholder approval before issuing any securities in the transaction.

Publication Date*: 7/31/2012 Identification Number: 284

Must a conversion cap apply for the life of the transaction?

Identification Number 194

Yes. A cap must apply for the life of the transaction or until shareholder approval is obtained. Thus, as stated in IM-5635-2, caps that do not apply if a company is no longer listed on Nasdaq do not obviate the need for shareholder approval of the transaction. Otherwise, shareholders could face dilution from a transaction that occurred while the security was listed on Nasdaq without the ability to approve such dilution.

Publication Date*: 7/31/2012 Identification Number: 194

What is an alternative outcome clause?

Identification Number 285

There have been situations where companies have attempted to cap the issuance of shares below 20% of the shares outstanding before the transaction, but have also provided an alternative outcome that could occur as a result of shareholders not approving the issuance, for example, a "penalty" or "sweetener". In these cases, Nasdaq considers the cap to be defective and the transaction does not comply with the shareholder approval rules.

Some examples of alternative outcomes include:

- In a debt security, the indenture provides for the interest rate to increase or decrease based on whether shareholders don't approve or do approve the transaction;
- A provision requiring redemption of the securities if shareholders don't approve the transaction; or
- A provision reducing the conversion price of a convertible security if shareholders do not approve the issuance.

Publication Date*: 7/31/2012 Identification Number: 285

What is the effect of a transaction containing an alternative outcome?

Identification Number 191

If a transaction contains an alternative outcome, no common shares can be issued prior to the shareholder vote even if there is a cap such that the issuance cannot exceed 19.9% without shareholder approval. Such a share cap would be considered defective.

Publication Date*: 7/31/2012 Identification Number: 191

Is a rescission an alternative outcome?

Identification Number 192

Yes. Any change based on the outcome of the shareholder vote is an alternative outcome, including a rescission where the funds are returned to the investor if shareholder approval is not obtained. This is because the company may be unable to complete a rescission without facing a financial burden. Other examples of an alternative outcome include changes to the interest and/or dividend rates, changes to maturity dates, and changes to investment amounts, even if these changes may benefit the company.

Publication Date*: 7/31/2012 Identification Number: 192

Can a convertible security be issued prior to a shareholder vote, if the transaction involves an alternative outcome?

Identification Number 193

A convertible security can be issued prior to the vote even if the transaction contains an alternative outcome, provided that no common shares are issued prior to the vote. After the vote, the securities can fully convert if approved by the shareholders, or if shareholders disapprove the proposal, conversions can take place up to but not reaching an amount that would require shareholder approval.

Publication Date*: 7/31/2012 Identification Number: 193

Is shareholder approval required of an equity award to a new employee?

Identification Number 247

Under Listing Rule 5635(c)(4) shareholder approval is not required of an issuance to a person not previously an employee or director of the company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the company, provided that such an issuance is approved by the company's compensation committee or a majority of the company's independent directors. In addition, the company must issue a press release promptly following the grant, which discloses the material terms of the award.

Publication Date*: 11/26/2019 Identification Number: 247

What is required for a company to rely on the exception from the shareholder approval requirement for an equity compensation inducement award?

Identification Number 253

In order to rely on the exception from the shareholder approval requirement for equity compensation awarded as an inducement material to the individual's entering into employment with the company, the issuance must be approved by the company's compensation committee or a majority of the company's independent directors. In addition, the company must issue a press release promptly following the grant, which discloses the material terms of the award.

Publication Date*: 7/31/2012 Identification Number: 253

How is the percentage of shares of common stock to be issued in a transaction calculated?

Identification Number 182

The percentage of shares of common stock to be issued in a transaction is calculated using the following formula:

$$\frac{\text{Maximum Potential Issuance of Shares of Common Stock}}{\text{Pre-transaction Issued and Outstanding Shares of Common Stock}}$$

To correctly calculate the percentage of shares to be issued, the numerator of this equation must contain all securities initially issued or potentially issuable or potentially exercisable or convertible into shares or common stock as a result of the transaction (e.g., earn-out clauses, penalty provisions, equity compensation awards assumed or in assumed plans, etc.).

To correctly determine the denominator, the company should use only issued and outstanding shares. If the company has multiple classes of common stock, all shares should be added together (see FAQ #288). However, the denominator should not assume the conversion or exercise of any options, warrants or other convertible securities.

Publication Date*: 7/31/2012 Identification Number: 182

For purposes of Nasdaq's shareholder approval rules, what is "Minimum Price" and "Market Value"?

Identification Number 271

Nasdaq rules require shareholder approval for certain transactions that are priced below the "Minimum Price," as defined in Nasdaq's rules. Under Listing Rule 5635(d), shareholder approval is required in connection with a transaction, other than a public offering, at a price below the Minimum Price involving the sale, issuance or potential issuance by the Company of common stock (or securities convertible into or exercisable for common stock), which alone or together with sales by officers, directors or Substantial Shareholders of the Company, equals 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance. Listing Rule

5635(d) defines "Minimum Price" as the lower of: (i) the closing price (as reflected on Nasdaq.com); or (ii) the average closing price of the common stock (as reflected on Nasdaq.com) for the five trading days immediately preceding the signing of the binding agreement. Please note that the Nasdaq Official Closing Price is different from the Closing Price. For purposes of Listing Rule 5635(d), the “closing price” means the Nasdaq Official Closing Price, available at https://www.nasdaq.com/market-activity/quotes/historical-nocp. See also FAQ #272.

In addition, under Listing Rule 5635(c), shareholder approval is required for any issuance to an officer, director, employee or consultant of the company at a price less than market value. For this purpose, Listing Rule 5005(a)(23) defines "market value" as the consolidated closing bid price per share immediately preceding the entering into of the binding agreement to issue the securities.

If the transaction is entered into during market hours, before the close of the regular session at 4 PM Eastern Time, market value or Minimum Price are determined based on the previous trading day's closing bid or closing price (or the average closing price for the previous five trading days), as applicable. If the transaction is entered into after the close of the regular session, then that day's closing bid or closing price (or the average closing price for that day and the previous four trading days) is used. Please note that the closing price (Nasdaq Official Closing Price) may differ from the consolidated closing bid price and, therefore, a transaction priced at or above the Minimum Price may still be at a discount to market value for purposes of Listing Rule 5635(c). See also FAQ #275.

Publication Date*: 11/26/2019 Identification Number: 271

Does a sale of securities in a transaction (other than a public offering) at a discount to the market value to officers, directors, employees, or consultants require shareholder approval under Listing Rule 5635(c)?

Identification Number 275

Yes. The issuance of common stock (or equivalents) or securities convertible into or exercisable for common stock to officers, directors, employees, or consultants at a price less than the market value of the stock is considered a form of "equity compensation" and requires shareholder approval unless the issuance is part of a public offering (as described in IM-5635-3). For this purpose, market value is the consolidated closing bid price immediately preceding the time the company enters into a binding agreement to issue the securities.

Issuances to an entity controlled by an officer, director, employee, or consultant of the listed company may also be considered equity compensation under certain circumstances, such as where the issuance would be accounted for under Generally Accepted Accounting Principles as equity compensation or result in the disclosure of compensation under the applicable provisions of Regulation S-K.

Note that this provision also applies to limited partnerships, which are required by Rule 5615(a)(4)(H) to obtain the same approval for equity compensation as would be required under Rule 5635(c) and IM-5635-1. Also note that the Minimum Price, as defined in Listing Rule 5635(d), is not applicable to Listing Rule 5635(c) and thus is not relevant to this FAQ.

A company considering an issuance to an entity controlled by an officer, director, employee, or consultant is encouraged to contact its Listing Qualifications analyst by phone at +1 301 978 8008 to discuss the transaction prior to entering into a definitive agreement.

Publication Date*: 10/10/2018 Identification Number: 275