

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.

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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.

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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).

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.

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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.

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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.

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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](#).

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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.

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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.

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Identification Number: 238

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.

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Identification Number: 275