SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ABOUT SHAREHOLDER APPROVAL RULES

The Nasdaq shareholder approval rules generally require companies to obtain approval from shareholders prior to issuing securities in connection with:

(i) the acquisition of the stock or assets of another company;
(ii) equity-based compensation of officers, directors, employees or consultants;
(iii) a change of control; and
(iv) certain private placements at a price less than the greater of book or market value.

These rules were adopted in 1990 and over the last 25 years, the capital markets and securities laws, as well as the nature and type of share issuances, have evolved significantly. Since these rules were first established, other investor protection mechanisms have been put in place, including, for example, requirements for majority independent boards and stronger corporate governance practices by listed companies, as well as the increased threat of shareholder litigation. As a result, certain provisions of the rules may no longer serve their original shareholder protection purpose and others may no longer make sense. In addition, companies may face higher costs of capital by structuring transactions in sub-optimal ways in order to satisfy Nasdaq's shareholder approval rules.

Nasdaq recognizes that our rulebook should not be static, just as the public company model is not static. As part of Nasdaq's ongoing effort to engage with the public and foster a dialogue about Nasdaq rules, Nasdaq believes it is appropriate and timely to review these shareholder approval rules to consider whether they can be updated and improved, without sacrificing the crucial investor protections they provide.

In order to assist with this review, Nasdaq is seeking comment, input and guidance from the public, including investors and companies, and their representatives. These comments will be reviewed by Nasdaq staff and the Nasdaq Listing and Hearing Review Council. The Listing Council is a standing independent advisory committee appointed by the Board of Directors of The Nasdaq Stock Market, whose mission is to review the application of Nasdaq's listing rules and public policy issues related to listing, and, where appropriate, suggest new or modified rules for consideration by the Board. The Listing Council is comprised of individuals with diverse credentials and includes institutional investors, company representatives, lawyers, accountants, securities industry professionals and academics. Each Listing Council member is a respected leader in his or her field, committed to working with Nasdaq to enhance investor protection and the integrity of the Nasdaq Stock Market. The comments may influence Nasdaq's application of subjective areas of the existing rules and could lead to proposed changes in those rules.

While all comments on the subject are welcome, the following discussion identifies issues on which Nasdaq is specifically soliciting comment. Nasdaq also solicits comment on other changes to the shareholder approval rules that would help provide additional clarity about the requirements, enhance the benefits to companies and their investors, and reduce the costs to achieve those benefits.

The comment period will run until March 1, 2016. Please send comments by email to comments@nasdaq.com or by hard copy to:

Nasdaq Listing Qualifications
c/o Stan Higgins
805 King Farm Blv.
Rockville, MD 20850

Nasdaq and the Listing Council express gratitude for your comments and attention to this important matter.

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Acquisitions

Nasdaq Rule 5635(a) generally requires a listed company to obtain shareholder approval in connection with an acquisition if the potential issuance is equal to 20% of the number of shares of common stock or voting power outstanding, or, if insiders have an interest in the target entity, 5% of the number of shares of common stock or voting power outstanding.

- It has been suggested that the 20% threshold is restrictive. Should Nasdaq consider changing the rule to allow companies to issue a higher percentage of total shares outstanding or voting power without shareholder approval in connection with an acquisition? Why or why not?

- It has been suggested that given enhanced investor protection mechanisms and disclosure requirements surrounding related party transactions, the heightened shareholder approval rules governing insider interest in an acquisition are no longer necessary. Should Nasdaq consider changing the rule to allow companies to issue more than 5% of voting power or total shares outstanding without shareholder approval where insiders have an interest in the assets to be acquired? Why or why not?

Change of control

Nasdaq Rule 5635(b) requires shareholder approval prior to the issuance of securities when the issuance or potential issuance will result in a change of control. In determining whether an issuance will potentially result in a change of control, Nasdaq considers the voting power, ownership and board representation of investors receiving securities in the transaction. Nasdaq will also consider all facts and circumstances concerning a transaction, including whether there are any relationships or agreements between the company and the investors, and among the investors, and whether the investor is entitled to board representation.

While there is no bright-line test or safe-harbor within the rule, Nasdaq will generally conclude that a change of control would occur for purposes of the shareholder approval rules when, as a result of the issuance, an investor or a group of investors would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or of the voting power and such ownership or voting power would be the largest position.

- Would a bright-line test or safe-harbor be beneficial to investors and companies to define when a transaction will result in a change of control?

- Is Nasdaq's presumption that a change of control would occur when, as a result of the issuance, an investor or a group of investors would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or of the voting power and such ownership or voting power would be the largest position an appropriate threshold for purposes of the shareholder approval rules? If not, please indicate the level of ownership or voting power that you believe would represent a change of control for purposes of determining if shareholder approval should be required and list any other factors that you believe should be considered.

- Are there other definitions of a change of control, such as in accounting literature or securities law, which Nasdaq should rely upon in determining whether a transaction should require shareholder approval because a change of control may occur?

- If an investor or group of investors publicly discloses an intent, or enters into a covenant, to remain passive and not exert control of the listed company, is a higher threshold of ownership or voting power appropriate before Nasdaq determines that a change of control may occur for purposes of the shareholder approval rules? If not, why? If so, what would be an appropriate threshold accompanied by such disclosure?

- Are there other factors Nasdaq should consider when determining if a transaction results in a change of control for purposes of the shareholder approval rules? If so, what are they?

Private Placements

Nasdaq Rule 5635(d) requires listed companies to obtain shareholder approval prior to the issuance of common stock or securities convertible into common stock equal to 20% or more of the common stock or voting power outstanding at a price less than the greater of book or market value of the stock.

- Nasdaq rules measure market value by reference to the company's closing bid price. It has been suggested that this is not the best measure of market value for purposes of the shareholder approval rules and that Nasdaq should instead allow or require the use of: the Last Sale Price (which may be more transparent), the Nasdaq Official Closing Price (which may be more representative of the market), a volume-weighted average of closing prices over a period of days (which may address single-day anomalies), or other market measurements. Should Nasdaq continue to use the company's closing bid price to measure market value? If not, what other measures are more appropriate and why? If a volume-weighted average is preferable, how long is an appropriate measurement period?

- It has been suggested that shareholder approval should not be required for an issuance at a price below the book value of a security. Should Nasdaq eliminate the book value measurement for purposes of determining if shareholder approval is required? Why or why not?

- It has been suggested that the shareholder approval rules disproportionately affect smaller companies, which generally can raise less money before exceeding the 20% tests. Should Nasdaq consider changing the rule to allow smaller companies to issue a higher percentage of voting power or total shares outstanding without shareholder approval?

- If yes, what is the appropriate definition of a small company for this purpose? Should Nasdaq rely on existing definitions, such as those for Emerging Growth Companies, Smaller Reporting Companies, Non-accelerated Filers or companies that are not Well-Known Seasoned Issuers? How large of an issuance is appropriate before shareholder approval should be required for small companies?

- Should Nasdaq allow a company to obtain pre-approval to issue shares in capital raising or acquisition transactions on a periodic basis? If so, what terms should be included in the approval (e.g., maximum discount, maximum number of shares, maximum voting power, use of proceeds, etc.)? How long should such approval be valid? Should Nasdaq's rules specify a maximum discount allowable for such pre-approval?

- Nasdaq interprets its rules to require shareholder approval if any shares are issued to an officer or director in a private placement at a discount to market value. It has been noted that new investors often demand that insiders, including officers and directors, invest on the same terms that the investors have negotiated. Should Nasdaq consider changing its rules to allow such insiders to participate in a private placement without shareholder approval, where the insiders participate on the same terms negotiated by the other investors? If so, how much of such a transaction should the insiders be allowed to purchase? Are any other limits on such transactions appropriate?

- It has been suggested that the investor protections of the shareholder approval rules could be best achieved with a sliding scale, where the number of shares that could be issued without shareholder approval is based on the size of the discount to market price. Thus, a greater number of shares could be issued without shareholder approval if the shares are issued at a nominal discount, whereas few shares could be issued if there is a substantial discount. Should Nasdaq consider changing its rule to allow such a sliding scale when determining whether shareholder approval is required? If so, how should such a rule be structured? Are there other factors that should lead to a sliding scale, where more shares could be issued without shareholder approval, such as approval of the transaction by the company's independent directors or significant participation by retail investors in the transaction?

- In determining whether a transaction is at market price, Nasdaq assigns a value of $0.125 to each warrant to purchase a share of common stock when warrants are issued along with common stock or other securities convertible into common stock. Should Nasdaq exclude the value of the warrant when determining if a transaction is at a discount if the warrant cannot be exercised for six months and the exercise price of the warrant is equal to or greater than market value? Are there other instances where Nasdaq should not consider the value of warrants issued in a transaction?

- Nasdaq Rule IM-5635-3 outlines the factors Staff considers when determining whether an issuance of shares is a public offering and describes how those factors are applied. Are these factors appropriate? Are there other characteristics of an offering that Nasdaq should consider when determining if an issuance is a public offering?

- When determining whether or not to aggregate two or more transactions for purposes of the shareholder approval rules, Nasdaq looks to the following factors: timing of the issuances; facts surrounding the initiation of the subsequent transaction(s); commonality of investors; existence of any contingencies between the transactions; specified use of proceeds for each of the transactions; and the timing of the board of directors' approvals. Generally Nasdaq does not aggregate transactions that are more than six months apart. It has been suggested that Nasdaq establish a bright line test for a specific time period after which two or more transactions would not be aggregated for purposes of the shareholder approval rules, unless governed by the same agreement. Should Nasdaq establish such a bright line time period? If yes, should this period be shorter than six months? If no, please explain why not.

- It has been suggested that a stable shareholder base of long-term holders is an indication of implied approval by shareholders of how the Company is managed and that companies with such support and approval should be allowed greater latitude to issue shares before shareholder approval is required. For example, companies with a stable shareholder base could be permitted to create a committee comprised of representatives of long-term holders empowered to consent to certain types of transactions in lieu of shareholder approval. Alternatively, companies with a stable shareholder base could be held to higher thresholds than the 20% requirement before needing shareholder approval for a private placement. Should Nasdaq consider proposing a rule to modify the shareholder approval requirements for a company with a stable shareholder base? Why or why not? If so, how should a stable shareholder base be defined and monitored?