

Nasdaq Doesn't Require Shareholder Approval of Equity Compensation Plan Amendments to Increase Tax Withholding

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Material amendments to equity compensation plans require shareholder approval under Nasdaq rules. Last week, Nasdaq posted a new FAQ #1269 regarding amendments to equity compensation plans to increase the tax withholding rate. FAQ #1269 is set forth below.

“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.”

This interpretation is broader than the NYSE interpretation on the same issue. In August, the NYSE published guidance regarding compensation plans, and in Question C-1, noted “an amendment to a plan to provide for the withholding of shares based on an award recipient’s maximum tax obligation rather than the statutory minimum tax rate is not a material revision if the withheld shares are never issued, even if the withheld shares are added back to the plan.” (emphasis added)

For more information about the NYSE guidance published in August, please see our publication [“NYSE Clarifies Answers to Certain FAQs on Equity Compensation Plans”](#)

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