

# State Securities Laws – Granting Options and Equity Comp in the United States

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A Canadian company that proposes to grant stock options or other types of equity compensation to persons in the United States must comply with the securities laws of the state in which the recipient is located, unless the type of equity being issued (e.g., the underlying common shares, in the case of options to purchase common shares) is listed on a “national securities exchange” such as the NYSE, Nasdaq, and NYSE MKT. This means that private companies, Canadian public companies that are not listed in the United States, and Canadian companies that are listed in the United States only in over-the-counter markets such as the OTCQX, OTCQB, or Pink Sheets, are required to comply with state securities laws.

Canadian companies should not assume that because they have taken the requisite steps under U.S. federal laws, such as registering the underlying securities by filing a Form S-8 with the SEC or complying with an exemption from registration under SEC Rule 701, that no further actions are required.

While some states’ laws do not require additional actions to be taken, many states impose requirements that differ from federal laws. For example,

- Some states require that an application for exemption be filed and accepted by the state, or another type of notice be filed, and a fee be paid, prior to making the first equity award in that state.
- Some states’ exemptions from registration requirements restrict the types of awards that can be made, the types of persons that can receive awards, and the types of companies that can rely on the exemption. For example, some states’ exemptions are unavailable for awards to consultants and non-employee directors, are subject to bad boy disqualifications, are available only for certain types of equity plans, or are unavailable for awards made on an SEC-registered basis.
- Some states have no specific exemption for equity-based compensation, and a company seeking to make equity-based awards in those states must either register the plan or comply with another type of exemption, such as an exemption that might be available for a private placement to a limited number of persons satisfying certain investment criteria.

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- The State of California imposes substantive requirements on the plan itself, including terms related to the number of securities to be issued, minimum vesting criteria, minimum post-termination exercise periods, information delivery requirements, and shareholder approval requirements, in addition to the requirement to file a notice and pay a fee.