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NYSE Clarifies That Boards May Unilaterally Amend Equity Plans to Allow Maximum Withholding on Equity Awards

The New York Stock Exchange (NYSE) recently updated its FAQs on Equity Compensation Plans to clarify that a NYSE listed company may amend its equity plan to allow for withholding up to the maximum without seeking shareholder approval.

As discussed in our Client Update of April 21, 2016, the Financial Accounting Standards Board (FASB) recently issued amended accounting rules that allow for (but do not require) share withholding upon settlement of an equity award up to the maximum statutory withholding requirement beginning in 2017. Prior to this change in the accounting standards, an equity plan that allowed for share withholding in excess of the minimum statutory withholding requirement could subject equity awards to variable accounting.

As a result of the change in the accounting rules, many companies are considering amending their equity plan to allow the plan administrator discretion to withhold shares up to the maximum statutory withholding requirement, particularly in the case of an equity plan that provides for liberal share recycling (e.g., shares tendered for an option’s exercise price or withheld to cover tax withholding obligations are returned to the share pool).

It is important to note that the issue of whether a company should allow for maximum stock withholding is not quite as obvious as one may think. Allowing for maximum share withholding (up to 39.6% for federal tax purposes) will have a cash outflow issue for a company. Further, if a company adopts the maximum withholding provision, the company must comply with all of the other requirements and provisions found within this accounting rule.

Practitioners have questioned whether such an amendment would constitute a “material revision” requiring shareholder approval under the applicable stock exchange listing requirements. The New York Stock Exchange (NYSE) has responded to this concern by issuing updated FAQs, which provide that an equity plan amendment to permit share withholding up to the maximum statutory withholding amount is ***not*** a material revision requiring shareholder approval.

The updated FAQ applies equally to equity plans that permit and prohibit liberal share recycling.

Meridian Comment. The NYSE updated FAQs provides welcomed guidance to NYSE listed companies. These companies may now amend their equity plans to allow for share withholding up to the maximum statutory withholding requirement without seeking prior shareholder approval. However, Nasdaq has yet to address this matter. Therefore, Nasdaq listed companies should seek advice from legal counsel as to whether prior shareholder approval is required under Nasdaq listing requirements.

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The ***Client Update*** is prepared by Meridian Compensation Partners' Technical Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-235-3605 or dkalfen@meridiancp.com.

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