MERIDIAN
COMPENSATION PARTNERS, LLC

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

The Nasdaq recently updated its FAQs on Equity Compensation Plans to clarify that a Nasdaq listed company may amend its equity plan to allow for share withholding up to the maximum statutory withholding amount 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).

Practitioners have questioned whether such an amendment would constitute a "material amendment" requiring shareholder approval under the applicable stock exchange listing requirements. Nasdaq 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 amendment requiring shareholder approval. The updated FAQ applies equally to equity plans that permit and prohibit liberal share recycling.

As discussed in our Client Update dated August 31, 2016, the New York Stock Exchange also updated its FAQs to provide that such a plan amendment is not a "material revision" requiring shareholder approval.

We recommend that companies amend their equity plans to permit, but not require, share withholding up to the maximum statutory withholding requirement. This will provide a company the latitude to determine if and, to what extent, it will allow maximum share withholding. In that regard, companies should note that the universal application of maximum share withholding will negatively effect cash flow (as a company would be required to self-monetize more shares than under the prior minimum share withholding requirements).

Meridian Comment. The Nasdaq updated FAQs provides welcomed guidance to Nasdaq 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.

* * * * *

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.

This report is a publication of Meridian Compensation Partners, LLC, provides general information for reference purposes only, and should not be construed as legal or accounting advice or a legal or accounting opinion on any specific fact or circumstances. The information provided herein should be reviewed with appropriate advisers concerning your own situation and issues.

www.meridiancp.com