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# nasdaq's change of control rule – does it apply in a public offering?

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*MSK Client Alert*

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Are you concerned about whether Nasdaq's change of control rule will limit the size of your public offering? According to the Nasdaq staff, you don't need to worry about this, as long as you have a bona fide public offering.

Nasdaq Listing Rule 5635(b) provides that shareholder approval is required prior to the issuance of securities when the issuance or potential issuance will result in a change of control of the company. According to Nasdaq, a change of control would occur when, as a result of the issuance, an investor or a group would own, or have the right to acquire, 20% or more of the outstanding shares of common stock or voting power and such ownership or voting power would be the largest ownership position (the "*Change of Control Rule*"). See Nasdaq FAQ ID#195.

Nasdaq Listing Rule 5635(d) provides that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20% or more of the common stock or 20% or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock (the "*Private Placement Rule*"). Under the Private Placement Rule, however, shareholder approval is not required for a "public offering."

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