



msk comment letter on nasdaq 20% rule (rule 5635)

February 15, 2016

In a letter written to the NASDAQ Listing and Hearing Review Council, Kevin Friedmann and Gabrielle Napolitano provided comments regarding potential revisions to NASDAQ Rule 5635 ("Rule 5635"), which requires listed companies to obtain shareholder approval in certain circumstances.

From the letter:

"Given our firm's extensive representation of early stage listed companies backed by venture capital funds, which we refer to in this letter as venture stage companies, we will focus our comments on what we believe to be the disproportionate disadvantages faced by such companies as they relate to subsections (b) and (d) of Rule 5635. We believe that subsection (b), which requires shareholder approval if the issuance of securities will result in a change of control, and subsection (d), which requires shareholder approval for certain private placements at a price less than the greater of book or market value of the stock, create the most consistently adverse and unintended consequences for venture stage companies. In regards to subsection (b), NASDAQ presumes that a change of control would occur when, as a result of the issuance, an investor or group of investors would own or have the right to acquire 20% or more of the outstanding shares or voting power of the company and such ownership or voting power would be the largest position. In regards to subsection (d), Rule 5635 prohibits, unless shareholder approval is first obtained, the issuance of common stock or securities convertible into common stock equal to 20% or more of the common stock or voting power outstanding at a price less than the greater of book or market value of the stock."

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