

January 3, 2017

**NYSE CLARIFIES “BROAD-BASED”  
STOCK OPTION PLAN EXEMPTION  
FROM SHAREHOLDER-APPROVAL  
REQUIREMENTS**

The New York Stock Exchange (NYSE) has long required companies that wish to grant stock options to their officers and directors to obtain shareholder approval for the plan as a prerequisite for listing the shares on the Exchange<sup>(1)</sup>. One exemption to this shareholder-approval requirement has been options granted “pursuant to a broadly-based plan that includes other employees (e.g., ESOPs)<sup>(2)</sup>.” Until now, however, what constitutes a “broadly-based plan” has not been clearly defined.

Recently, the NYSE adopted a definition for the “broadly-based plan” exemption. Two criteria must be met to avoid the shareholder-approval requirement:

1. The plan must include at least 20% of the employees as eligible to receive grants, and
2. Less than half of those eligible are officers or directors<sup>(3)</sup>.

Many plans already define “eligibility” quite broadly (e.g., all employees), but make grants only to a small number of “key” employees. To determine if such plans would qualify for the exemption, we consulted an Exchange official who said the 20 percent test should be based on *actual participation*, not just technical eligibility.

We expect that the effect of this ruling on companies that grant options low in their organizations will be the adoption of two-tier plans: one plan covering top executives and directors which is shareholder approved so that tax deductibility for stock option gains can be obtained under current tax law (i.e., IRC §162(m)); and another plan covering all other employees that is not shareholder approved. The reason for a two-tier plan structure is to reduce the number of shares that shareholders are asked to approve. The two-tier structure, however, would not be appropriate for companies (1) that wish to grant ISOs to their employees (ISO plans require

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(1) If the company is willing to limit purchases to “treasury” shares, shareholder approval is not required by the NYSE because such shares have already been listed, and “once listed, always listed.” However, shareholder approval may be required for other reasons, for example, state incorporation law, IRS or SEC requirements

(2) NYSE Listed Company Manual ¶312.03(a)(2)

(3) Ibid. ¶312.04(g)

shareholder approval), (2) that are incorporated in states which require shareholder approval to grant options to *any* employee (e.g., New York State), or (3) that believe shareholder approval of stock option plans for all employees is a matter of good corporate governance.

We believe this move by the NYSE should further spur the favorable trend toward broad-based stock option participation throughout Corporate America. Further, we assume the NASDAQ will follow the NYSE's lead and adopt the same broad-based exemption definition for those companies whose stocks trade on the NASDAQ.

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General questions may be addressed to Fred Cook at (212) 986-6330. However, the NYSE asked us to encourage companies which have specific questions to discuss them with their Exchange representative.