

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48108; File Nos. SR-NYSE-2002-46 and SR-NASD-2002-140]

Self-Regulatory Organizations; New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.; Order Approving NYSE and Nasdaq Proposed Rule Changes and Nasdaq Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to NYSE Amendments No. 1 and 2 and Nasdaq Amendments No. 2 and 3 Thereto Relating to Equity Compensation Plans

June 30, 2003.

I. Introduction

On October 7, 2002, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposal relating to shareholder approval of equity-compensation plans and the voting of proxies. On October 11, 2002, the NYSE proposal was published for public comment in the **Federal Register**.³ On November 6, 2002, the NYSE filed NYSE Amendment No. 1 to the proposed rule change.⁴ The Commission received a total of 30 comment letters on the NYSE proposal.⁵ On June 20, 2003,

the NYSE filed NYSE Amendment No. 2 to its proposal.⁶

Overy Letter"); Keith Johnson, Chief Legal Counsel, State of Wisconsin Investment Board ("SWIB"), dated October 31, 2002 ("SWIB Letter"); Peter A. Irwin, Vice President, Legal Services, Consolidated Edison Company of New York, Inc. ("conEdison"), dated October 31, 2002 ("conEdison Letter"); John P. Clarson, Assistant Corporate Secretary and Senior Corporate Attorney, Law Department, RadioShack Corporation, dated October 30, 2002 ("RadioShack Letter"); Paul Lee, Shareholder Engagement Manager, Hermes Investment Management Limited, dated October 29, 2002 ("Hermes Letter"); John Endean, President, American Business Conference ("ABC"), dated October 31, 2002 ("ABC Letter"); James P. Hoffa, General President, International Brotherhood of Teamsters ("IBT"), dated November 1, 2002 ("IBT Letter"); Dorothy M. Donohue, Associate Counsel, Investment Company Institute ("ICI"), dated November 1, 2002 ("ICI Letter"); Damon A. Silvers, Associate General Counsel, American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), dated November 1, 2002 ("AFL-CIO Letter"); Nancy Straus Sundheim, Senior Vice President and General Counsel, Unisys Corporation, dated November 1, 2002 ("Unisys Letter"); Michael R. Fanning, Chief Executive Officer, Central Pension Fund of the International Union of Operating Engineers and Participating Employers ("CPF"), dated October 29, 2002 ("CPF Letter"); Ted White, Director, Corporate Governance, California Public Employees' Retirement System ("CalPERS"), dated October 31, 2002 ("CalPERS Letter"); Sheila W. Beckett, Employees Retirement System of Texas, dated October 30, 2002 ("Employee Retirement System of Texas Letter"); Herbert L. Dryer, Executive Director, State Teachers Retirement System of Ohio ("STRS Ohio"), dated October 30, 2002 (STRS Ohio Letter"); William G. Clark, Deputy Director, New Jersey Division of Investment ("NJ Division"), Department of Treasury, dated October 31, 2002 ("NJ Division Letter"); James E. Heard, Chief Executive Officer and Patrick McGurn, Vice President and Special Counsel, Institutional Shareholder Services ("ISS"), dated October 31, 2002 ("ISS I Letter"); Sullivan & Cromwell, dated November 1, 2002 ("Sullivan & Cromwell Letter"); Mark Heesen, President, National Venture Capital Association ("NVCA"), dated November 1, 2002 ("NVCA I Letter"); Marsha Richter, Chief Executive Officer, Los Angeles County Employees Retirement Association ("LACERA"), dated November 7, 2002 ("LACERA Letter"); Stanley Keller, Chair, Committee on Federal Regulation of Securities, American Bar Association ("ABA"), Section of Business Law, dated November 11, 2002 ("ABA Letter"); Kay R. H. Evans, Executive Director, Maine State Retirement System ("MSRS"), dated October 28, 2002 ("MSRS Letter"); Jerome Pella, dated October 30, 2002 ("Pella Letter"); Michael Ryan, Executive Vice President and General Counsel, American Stock Exchange LLC ("Amex"), dated December 19, 2003 ("Amex I Letter"); Claudia Crowley, Vice President, Listing Qualifications, Amex, dated February 19, 2003 ("Amex II Letter"); and William and Margaret Gillespie, dated May 17, 2003 (Gillespie Letter").

⁶ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated June 20, 2003 ("NYSE Amendment No. 2"). In NYSE Amendment No. 2, the NYSE proposed changes to the NYSE proposal based on discussions with Commission staff and in response to the comment letters. As discussed below, NYSE Amendment No. 2, among other things, did the following: (1) Clarified the terms "equity compensation plan," "material revision," and "repricing"; (2) defined "evergreen," "formula" and "discretionary" plans; and (3) provided new transition rules. For a more detailed description of NYSE Amendment No. 2, see Section II.A., *infra*.

On October 9, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq") filed a similar proposal relating to shareholder approval for stock option plans and other equity compensation arrangements. On October 10, 2002, Nasdaq filed Nasdaq Amendment No. 1 to the proposed rule change.⁷ On October 17, 2002, the Nasdaq proposal, as amended, was published for comment in the **Federal Register**.⁸ The Commission received a total of 18 comment letters on the Nasdaq proposal.⁹ On March 24, 2003, Nasdaq filed Nasdaq Amendment No. 2 to the proposed rule change.¹⁰ On June 23, 2003, Nasdaq filed Nasdaq Amendment No. 3 to its proposal.¹¹ This order

⁷ See letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated October 10, 2002 ("Nasdaq Amendment No. 1"). In Amendment No. 1, Nasdaq did the following: (1) Made technical corrections to its proposed rule language; (2) clarified the exceptions to shareholder approval for tax qualified, non-discriminatory employee benefit plans, parallel nonqualified plans, and plans relating to an acquisition or merger; and (3) clarified in the purpose section of its filing that it was proposing to make conforming changes to NASD Rules 4310(c)(17)(A) and 4320(e)(15)(A).

⁸ See Securities Exchange Act Release No. 46649 (October 11, 2002), 67 FR 64173 ("Notice of the Nasdaq Proposal"). Nasdaq represents that it made a technical error in its reprinting of the original rule text of NASD Rule 4320(e)(15). Nasdaq is not proposing to change this language. Telephone conversation between Sara Nelson Bloom, Associate General Counsel, Nasdaq, and Sapna C. Patel, Attorney, Division, Commission, on June 30, 2003.

⁹ See letters to Jonathan G. Katz, Secretary, Commission, from James E. Heard, Chief Executive Officer and Patrick McGurn, Vice President and Special Counsel, ISS, dated November 6, 2002 ("ISS I Letter"); and Mark Heesen, President, NVCA, dated November 1, 2002 ("NVCA II Letter"). The Commission notes that 16 of the 18 comment letters received on the Nasdaq proposal are letters commenting jointly on the NYSE and Nasdaq proposals. See TIAA CREF Letter; CII Letter; Barclays Letter; Allen & Overy Letter; SWIB Letter; MSRS Letter; Hermes Letter; ICI Letter; AFL-CIO Letter; CPA Letter; CalPERS Letter; STRS Letter; NJ Division Letter; LACERA Letter; ABA Letter; and Pella Letter.

¹⁰ See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated March 24, 2003 ("Nasdaq Amendment No. 2"). In Nasdaq Amendment No. 2, Nasdaq clarified the term "material amendment" to a stock option plan by providing a non-exclusive list of what Nasdaq would consider to be "material," and proposed an exception to shareholder approval for plans that provide a way to purchase shares on the open market or from the issuer at fair market value. Nasdaq replaced Nasdaq Amendment No. 2 in its entirety with Nasdaq Amendment No. 3. As noted below, some of the proposed changes in Nasdaq Amendment No. 2 were incorporated into Nasdaq Amendment No. 3. See *infra* note 11 and Section II.B.

¹¹ See letter from Sara Nelson Bloom, Associate General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division, Commission, dated June 23, 2003 ("Nasdaq Amendment No. 3"). In

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¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 ("Notice of the NYSE Proposal"). The Commission also published a correction to the Notice of the NYSE Proposal to indicate that the word "less" in footnote 10 should be changed to "greater." See Securities Exchange Act Release No. 44620A (October 21, 2002), 67 FR 65617 (October 25, 2002).

⁴ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 5, 2002 ("NYSE Amendment No. 1"). In NYSE Amendment No. 1, the NYSE made technical corrections to its proposed rule language.

⁵ See letters to Jonathan G. Katz, Secretary, Commission, from Deborah Ackerman, Vice President and General Counsel, Southwest Airlines Co., dated October 15, 2002 ("Southwest Airlines Letter"); Peter C. Clapman, Senior Vice President and Chief Counsel, Corporate Governance, Teacher Insurance and Annuity Association of America College Retirement and Equities Fund ("TIAA CREF"), dated October 24, 2002 ("TIAA CREF Letter"); R. Thomas Buffenbarger, International President, International Association of Machinists and Aerospace Workers ("IAM"), dated October 22, 2002 ("IAM Letter"); Sarah A.B. Teslik, Executive Director, Council of Institutional Investors ("CII"), dated October 24, 2002 ("CII Letter"); Linda S. Selbach, Global Proxy Manager, Barclays Global Investors, dated October 24, 2002 ("Barclays Letter"); Henry I. Morgenbesser *et al.*, Allen & Overy *et al.*, dated October 31, 2002 ("Allen &