

letters generally supported the proposals requiring shareholder approval of all equity compensation plans based on the general premise that these proposals would improve corporate governance standards overall and would help restore investor confidence in the marketplace.<sup>28</sup> Several other commenters were supportive of certain aspects of the proposals, but expressed concerns about some or all of the exceptions in the proposed rules.<sup>29</sup> Five comment letters commented only on specific aspects of the NYSE and Nasdaq proposals.<sup>30</sup> Four comment letters stated that there should be a collective bargaining agreement exception.<sup>31</sup> Another comment letter supported shareholder approval solely for plans including senior executives and directors.<sup>32</sup> One comment letter stated that companies' compensation practices should not be micro-managed and that shareholder approval should be required only for plans that "dilute (shareholder) ownership over a certain threshold (e.g., 1% to 2%) or on plans where a potential for self dealing exists (e.g., for top management and directors)." <sup>33</sup> One comment letter found the proposals to be too complicated and stated that "the better solution may be to eliminate stock options from a company's source of funds for employees." <sup>34</sup>

Thirteen comment letters supported the NYSE proposed rule change to preclude broker-dealers from casting proxy votes on equity compensation plans without instructions from the beneficial owner,<sup>35</sup> while three

commenters opposed this provision.<sup>36</sup> Eleven of these commenters, supporting the elimination of broker voting on equity compensation plans, suggested precluding broker-dealers from voting proxies without instructions on all other matters as well.<sup>37</sup> In addition, several commenters also supported the NYSE proposed rule change that would eliminate the "treasury share exception." <sup>38</sup>

#### *A. Exceptions to Shareholder Approval of Equity Compensation Plans*

Several commenters, while agreeing with the general concept of shareholder approval for all equity compensation plans, had concerns with various exceptions for the general requirement <sup>39</sup> and some believed that the exceptions should be removed from the proposed rules.<sup>40</sup>

##### **1. Exception for Inducement Grants**

Several commenters were critical of the exception from the shareholder approval requirement for inducement options offered in an arms-length transaction.<sup>41</sup> One commenter, who commented separately on the NYSE and Nasdaq proposals, stated that this exception could have the effect of encouraging the use of inducement grants simply to avoid having to acquire shareholder approval to issue shares, and that this exception should therefore be limited.<sup>42</sup> Another commenter stated that such an exception invites companies to offer huge one-time awards of options to incoming executives.<sup>43</sup> One commenter, stated

that there should not be an exception for inducement awards from shareholder approval, but noted that companies should anticipate the hiring of new executives and have a "cushion of shares available for awards under existing shareholder-approved plans." <sup>44</sup> This commenter was concerned that an exception for inducement awards would provide an incentive for management to move between companies to take advantage of the exception in obtaining larger option awards.<sup>45</sup> Another commenter suggested that the exception should also be made available to individuals who are rehired by an issuer or one of its subsidiaries after a bona fide interruption of employment." <sup>46</sup> One commenter suggested that Nasdaq conform its proposal to the NYSE proposal and permit the issuance of inducement awards to persons who were previously employees of or served on the board of directors of the issuer.<sup>47</sup>

##### **2. Exception for Mergers and Acquisitions**

Several commenters were generally critical of the exception from the shareholder approval requirement for plans acquired in an acquisition or merger.<sup>48</sup> These commenters specifically opposed the exception for shares available to employees of the acquired or targeted company, stating that such additional issuances could be dilutive to the shareholders of the acquiring company. Two commenters suggested that this exception could have "the unintended consequence of making the availability of shares authorized under assumed plans dependent on the transaction structure." <sup>49</sup> Another commenter argued that the exception could allow management to "use a merger or acquisition to 'adopt' a plan that otherwise would not be approved by their shareholders." <sup>50</sup>

<sup>44</sup> See CalPERS Letter. Two other commenters recommended that companies plan in advance for these situations and set aside shares of stock for this specific purpose with shareholder approval. See IBT Letter and Employees Retirement System of Texas Letter.

<sup>45</sup> See CalPERS Letter.

<sup>46</sup> See Allen & Overy Letter. This commenter stated that Nasdaq should be also permit inducement grants to an independent director who is hired as an employee of an issuer or one of its subsidiaries.

<sup>47</sup> See ABA Letter.

<sup>48</sup> See CII Letter; Barclays Letter; SWIB Letter; AFL-CIO Letter; CalPERS Letter; STRS Letter; NJ Division Letter; ISS I Letter; ISS II Letter; Unisys Letter; and Employees Retirement System of Texas Letter.

<sup>49</sup> See Allen & Overy Letter and NJ Division Letter.

<sup>50</sup> See Employees Retirement System of Texas Letter.

<sup>28</sup> See TIAA-CREF Letter; Barclays Letter; Allen & Overy Letter; SWIB Letter; Hermes Letter; ICI Letter; NJ Division Letter; ISS I Letter; ISS II Letter; NVCA I Letter; NVCA II Letter; LACERA Letter; conEdison Letter; Unisys Letter; Employees Retirement System of Texas Letter; and Gillespie Letter. As discussed below, some of these commenters, while supporting the overall proposals, recommended eliminating or changing some of the exceptions to shareholder approval or requested clarification.

<sup>29</sup> See CII Letter; SWIB Letter; CPF Letter; IBT Letter; STRS Letter; MSRS Letter; and Employees Retirement System of Texas Letter.

<sup>30</sup> See CalPERS Letter; Sullivan & Cromwell Letter; ABA Letter; Radioshack Letter; and ABC Letter.

<sup>31</sup> See Southwest Airlines Letter; IAM Letter; AFL-CIO Letter; and IBT Letter. For example, see Southwest Airlines Letter, stating that the NYSE shareholder approval proposal is overly broad as currently drafted and that it would be "unwise" and "unfair" to approve unless a collective bargaining exception is added to the exceptions.

<sup>32</sup> See AFL-CIO Letter.

<sup>33</sup> See Employees Retirement System of Texas Letter.

<sup>34</sup> See Pella Letter.

<sup>35</sup> See TIAA-CREF Letter; CII Letter; Barclays Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS Letter; NJ Division Letter; ISS I Letter; IBT Letter; MSRS Letter; and Employees Retirement System of Texas Letter. As noted above,

NASD rules already prohibit broker-dealer discretionary voting on such matters. See *supra* note .

<sup>36</sup> See ABC Letter; Pella Letter; Amex I Letter; and Amex II Letter. The Commission considers the Amex I Letter and Amex II Letter to be from the same commenter.

<sup>37</sup> See CII Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS Letter; NJ Division Letter; ISS I Letter; IBT Letter; MSRS Letter; and Employees Retirement System of Texas Letter.

<sup>38</sup> See CII Letter; Barclays Letter; SWIB Letter; Hermes Letter; CPF Letter; STRS Letter; NJ Division Letter; Unisys Letter; and Employees Retirement System of Texas Letter.

<sup>39</sup> See CII Letter; Barclays Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS Letter; LACERA Letter; Unisys Letter; and Employees Retirement System of Texas Letter.

<sup>40</sup> See Barclays Letter; SWIB Letter; Hermes Letter; and LACERA Letter.

<sup>41</sup> See CII Letter; Barclays Letter; SWIB Letter; Hermes Letter; CalPERS Letter; STRS Letter; NJ Division Letter; ISS I Letter; ISS II Letter; Unisys Letter; and Employees Retirement System of Texas Letter.

<sup>42</sup> See ISS I Letter and ISS II Letter.

<sup>43</sup> See Hermes Letter. See also AFL-CIO Letter, which refers to inducement grants as "golden handshake" compensation packages for newly recruited executives.