

### 3. Exception for Tax Qualified and Parallel Nonqualified Plans

Several commenters were generally critical of the exception from the shareholder approval requirement for tax qualified and parallel nonqualified plans.<sup>51</sup> These commenters stated that shareholder oversight was necessary for tax qualified and parallel non-qualified plans. In addition, commenters noted that the exception for parallel nonqualified plans may result in a potential for abuse because participants in these plans could defer up to 100 percent of their compensation into stock if the plan allowed such deferrals before the application of tax limits.<sup>52</sup> Commenters further noted that parallel nonqualified plans are structured solely to benefit highly compensated employees and, therefore, should be subject to shareholder approval.<sup>53</sup> One commenter stated that “the fact that such plans are expensed is not a valid reason to exempt them from the shareholder approval process.”<sup>54</sup> Two commenters stated that the definition of parallel nonqualified plan should be similar to the definition of “excess benefit plan” under Rule 16b-3 of the Act.<sup>55</sup> Another commenter stated that requiring non-parallel plans to be substantially similar to tax qualified plans is too narrow and restrictive a standard.<sup>56</sup> One commenter suggested the use of “stock purchase plans” as defined in Rule 16b-3(b)(5) under the Act, stating that this definition should replace the reference to Section 423 plans under this exception.<sup>57</sup> One commenter suggested that the exception for tax qualified and parallel nonqualified plans should be extended to cover employee stock option purchase plans that would qualify as noncompensatory plans under APB Opinion 25 of the Financial Accounting Standards Board.<sup>58</sup>

### 4. Material Revisions to Plans

Several commenters suggested that the NYSE and Nasdaq define “material” for purposes of defining major changes

to an equity compensation plan.<sup>59</sup> One commenter stated that Nasdaq should adopt the NYSE’s list of what is considered a “material revision.”<sup>60</sup> Another commenter suggested that the NYSE follow Nasdaq’s approach by defining “materiality” “by reference to former Rule 16b-3 under the Act.”<sup>61</sup> One commenter suggested adopting a “global standard” and providing a “transparent definition of materiality” to ensure that issues regarding materiality are handled similarly by the NYSE and Nasdaq.<sup>62</sup> Another commenter, while supporting a uniform definition, objected to the use of “materiality,” stating that the concept is too vague and subjective.<sup>63</sup> Another commenter suggested that the definition of “material” should be more specific to ensure that companies have a practical and enforceable standard that they can apply.<sup>64</sup> One commenter, separately commenting on both of the NYSE and Nasdaq proposals, suggested that, because it is difficult to determine what types of changes qualify as material, the Commission should require the NYSE and Nasdaq to separately publish, on a website in real time, determinations of all their staff determinations on requests for exemptions from the their rules and listing standards.<sup>65</sup> One commenter stated that the definition of “material revision” of an equity compensation plan should be clarified so as not to include any decreases in any benefits under the plan, and thereby subject only material increases, to any benefits under a plan, to shareholder approval.<sup>66</sup>

### 5. Repricing of Plans

Several commenters suggested that Nasdaq should address the issue of repricing, and that it should adopt the NYSE’s approach for such repricing provisions in equity compensation plans.<sup>67</sup> Under the NYSE proposal, unless a plan explicitly contains a repricing provision, shareholder approval would be required for any revisions deleting or limiting the repricing provisions; a plan that is silent on repricing would also require shareholder approval in these instances. One commenter, commenting solely on the NYSE proposal, stated that

shareholder approval should not be required for plans that are silent on repricing.<sup>68</sup> Another commenter suggested that repricing should only be considered a “material revision” of a plan for newly adopted plans or for plans that were materially revised after the effective date of the NYSE proposal.<sup>69</sup>

### 6. Foreign Exemption

Two commenters suggested that the exemption for plans covering employees residing in non-U.S. jurisdictions should also apply to plans that are designed to comply with local foreign tax laws and under which all full-time employees of the sponsoring entity are, in general, eligible to participate subject to certain service, age or other requirements permitted under the foreign jurisdiction’s law.<sup>70</sup> Both commenters stated that Nasdaq should adopt a similar exemption.<sup>71</sup> One commenter stated that a transition period should be provided for plans of listed domestic issuers and their affiliates covering employees residing in a non-U.S. jurisdiction.<sup>72</sup>

### B. Collective Bargaining Agreements

Four commenters suggested that there be an exception for the shareholder requirement for equity compensation plans for plans entered into pursuant to a collective bargaining agreement.<sup>73</sup> Two of the commenters limited this suggestion to collective bargaining agreements that do not permit participation by officers and directors.<sup>74</sup> Three of the commenters argued that proposed rules are overly-broad, would significantly impact the collective bargaining process, and provide disincentives for parties on both sides of the bargaining table to negotiate equity compensation plans.<sup>75</sup> One commenter stated that a shareholder approval requirement would deny employees, who have given up pay raises for a number of years over the term of the collective bargaining agreement in order to receive stock options, the opportunity to participate fully in the growth and success of their companies.<sup>76</sup>

<sup>51</sup> See CII Letter; Barclays Letter; SWIB Letter; CalPERS Letter; STRS Letter; ISS I Letter; ISS II Letter; Unisys Letter; and Employees Retirement System of Texas Letter.

<sup>52</sup> See CII Letter; AFL–CIO Letter; CalPERS Letter; STRS Letter; and Unisys Letter.

<sup>53</sup> See CII Letter; SWIB Letter; CalPERS Letter; STRS Letter; and Unisys Letter.

<sup>54</sup> See Employees Retirement System of Texas Letter.

<sup>55</sup> See Sullivan & Cromwell Letter and ABA Letter.

<sup>56</sup> See RadioShack Letter.

<sup>57</sup> See ABA Letter.

<sup>58</sup> See Allen & Overy Letter.

<sup>59</sup> See CII Letter; STRS Letter; Sullivan & Cromwell Letter; ABA Letter; and Unisys Letter.

<sup>60</sup> See ISS II Letter.

<sup>61</sup> See Sullivan & Cromwell Letter.

<sup>62</sup> See AFL–CIO Letter.

<sup>63</sup> See CalPERS Letter.

<sup>64</sup> See IBT Letter.

<sup>65</sup> See ISS I Letter and ISS II Letter.

<sup>66</sup> See RadioShack Letter.

<sup>67</sup> See CII Letter; SWIB Letter; Hermes Letter; ICI Letter; CalPERS Letter; STRS Letter; NJ Division Letter; and Unisys Letter.

<sup>68</sup> See Sullivan & Cromwell Letter.

<sup>69</sup> See ABA Letter.

<sup>70</sup> See Allen & Overy Letter and ABA Letter.

<sup>71</sup> See Allen & Overy Letter and ABA Letter.

<sup>72</sup> See ABA Letter.

<sup>73</sup> See Southwest Airlines Letter; IAM Letter; AFL–CIO Letter; and IBT Letter.

<sup>74</sup> See Southwest Airlines Letter and IBT Letter.

<sup>75</sup> See Southwest Airlines Letter; IAM Letter and AFL–CIO Letter.

<sup>76</sup> See Southwest Airlines Letter.