

Exchange, LLC ("Amex") to propose and adopt listing standards similar to the NYSE and Nasdaq proposals.¹⁰³ One commenter, commenting solely on the NYSE proposal, stated that the shareholder approval requirement should apply only to companies listing common stock on the NYSE.¹⁰⁴ The same commenter stated that NYSE should state that the requirement of shareholder approval would not apply to "cash-only" plans and other plans where securities are not deliverable.¹⁰⁵ The commenter also stated that plans adopted after the effective date of the proposed rule but before the company's stock is listed on the NYSE should also be grandfathered.¹⁰⁶ The commenter further stated that compensation committee pre-approval of certain exceptions to shareholder approval, such as for inducement grants and tax qualified plans, is unnecessary and impractical.¹⁰⁷ One commenter stated that NYSE should define "equity compensation plan."¹⁰⁸ The same commenter stated that the NYSE should specify when the proposed amendments to the NYSE Rule 452 eliminating broker voting on plans would become effective and suggested that there be a transition period.¹⁰⁹ One commenter, commenting solely on the NYSE proposal, stated that there should be an implementation period for obtaining shareholder approval for plans that are not pre-existing plans that will become "grandfathered" upon approval of the NYSE proposal.¹¹⁰ One commenter stated that "compensatory discount stock purchase plans" should not be subject to shareholder approval because this requirement would unduly restrict the management's design of long-standing compensation plans for a broad base of employees, while providing minimal benefit to shareholders.¹¹¹ Some commenters stated that the 21-day comment period was inadequate to obtain public comment on these and other proposals.¹¹²

IV. Discussion

After careful review, the Commission finds that the NYSE proposal, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.¹¹³ Specifically, the Commission finds that approval of the NYSE proposal, as amended, is consistent with section 6(b)(5) of the Act¹¹⁴ in that it is designed to, among other things, facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

In addition, after careful review, the Commission finds that the Nasdaq proposal, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.¹¹⁵ The Commission finds that the Nasdaq proposal, as amended, is consistent with provisions of section 15A of the Act,¹¹⁶ in general, and with section 15A(b)(6) of the Act,¹¹⁷ in particular, in that it is designed to, among other things, facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

The Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, restore investor confidence in the national marketplace. The Commission believes that the NYSE proposal and the Nasdaq proposal, which require shareholder approval of equity compensation plans, are the first step under this directive because they should have the effect of safeguarding the interests of

shareholders, while placing certain restrictions on their listed companies. The Commission notes that many commenters generally supported the NYSE and Nasdaq's proposals to require shareholder approval of all equity compensation plans mainly based on the premise that such a requirement would protect shareholders and overall improve the marketplace. The Commission further notes that several commenters, while supporting the general shareholder approval requirement, voiced concerns regarding certain or all of the exemptions to, and certain aspects of, the shareholder approval requirement. Accordingly, the NYSE and Nasdaq amended their proposals to: (1) Respond to specific concerns raised by the commenters and suggestions made by Commission staff; (2) clarify terms and language used in their respective proposals; and (3) harmonize and conform their respective rule proposals, in response to certain comments, so that they are more consistent with one another.

A. Exemption From Shareholder Approval for Inducement Grants

The Commission notes that several commenters were critical of the exemption from shareholder approval for inducement grants that could be made to recruit new employees. These commenters were generally concerned that the exemption could potentially lead to abuse and could be used to avoid shareholder approval. The commenters suggested either eliminating or limiting the exemption for inducement grants.

The Commission believes that the requirement that the issuance of all inducement grants be subject to review by either the issuer's independent compensation committee or a majority of the board's independent directors, in both proposals, should prevent abuse of this exemption. The Commission notes that the NYSE has also amended its proposal to include a requirement that, following the grant of any inducement award, companies must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.¹¹⁸ In addition, the

¹⁰³ See CII Letter; SWIB Letter; STRS Letter; NJ Division Letter; and Unisys Letter. In response to a Commission request, the Amex filed a proposed rule change on May 6, 2003, which proposes to require shareholder approval of stock option and equity compensation plans. See File No. SR-Amex-2003-42.

¹⁰⁴ See Sullivan & Cromwell Letter.

¹⁰⁵ See Sullivan & Cromwell Letter.

¹⁰⁶ See Sullivan & Cromwell Letter.

¹⁰⁷ See Sullivan & Cromwell Letter.

¹⁰⁸ See ABA Letter.

¹⁰⁹ See ABA Letter.

¹¹⁰ See conEdison Letter.

¹¹¹ See RadioShack Letter.

¹¹² See CII Letter; CPF Letter; CalPERS Letter; STRS Letter; IBT Letter; and MSRS Letter.

¹¹³ 15 U.S.C. 78f(b). In approving the NYSE proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹¹⁴ 15 U.S.C. 78f(b)(5).

¹¹⁵ In approving the Nasdaq proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹¹⁶ 15 U.S.C. 78o-3.

¹¹⁷ 15 U.S.C. 78o-3(b)(6).

¹¹⁸ This disclosure would, of course, be in addition to any information that is required to be disclosed in annual reports filed with the Commission. For example, Item 201(d) of Regulation S-K (17 CFR 229.201(d)) and Item 201(d) of Regulation S-B (17 CFR 228.201(d)) require issuers to present—in their annual reports on Form 10-K or Form 10-KSB—separate, tabular disclosure concerning equity compensation plans that have been approved by shareholders and equity compensation plans that have not been approved by shareholders.