

employees pay full market value for deferred shares. The Commission notes that Nasdaq also amended its proposal to incorporate the term "equity compensation" and proposes to adopt a similar concept as the NYSE as to this term so that plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market price would not require shareholder approval. The Commission believes that the proposed amendments should make the NYSE and Nasdaq proposals more consistent and provide greater clarity with respect to which plans would and would not require shareholder approval.

Finally, many commenters wanted clarification as to how the new NYSE and Nasdaq shareholder approval requirements would apply to pre-existing plans. The NYSE and Nasdaq have proposed amendments to their proposals to clarify the applicability and transition period for their shareholder approval requirements. In particular, the NYSE and Nasdaq have provided that pre-existing plans, which were adopted prior to the SEC's approval of the NYSE and Nasdaq proposals, would essentially be "grandfathered" and would not require shareholder approval unless the plans were materially revised or amended. The NYSE provides further clarification that shareholder approval is required for pre-existing plans that were not approved by shareholders and that do not have an evergreen formula or a specific number of shares available under the plan. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the new NYSE and Nasdaq shareholder approval requirements.

#### *H. Elimination of Broker-Dealer Voting on Equity Compensation Plans*

The Commission notes that several commenters supported the NYSE's proposed rule change to prohibit broker-dealers from voting proxies on equity compensation plans without the beneficial owner's explicit consent. These commenters urged the NYSE to adopt a prohibition for broker voting without instructions on all matters, not just with respect to equity compensation plans. Some of these commenters were concerned that broker-dealers tend to side with management and do not always vote in their client's best interest. One commenter requested clarification on the effective date for eliminating broker voting on equity compensation plans and suggested that the NYSE consider a transition period for the effective of the new rule.

The Commission further notes that three commenters opposed the elimination of broker voting on equity compensation plans, stating that such elimination would harm smaller issuers and provide uncertainty as to whether there will be a quorum at the next meeting. These commenters suggested that the NYSE consider an alternative to the elimination of broker voting—"mirror" or "echo" voting—where unvoted shares held by a broker-dealer would be deemed as being voted proportionally to votes that were actually cast. One commenter requested clarification that the NYSE's proposed elimination of broker voting on equity compensation plans would only apply to NYSE listed issuers and not to Amex listed issuers.

The Commission believes that the NYSE's provision precluding broker voting on equity compensation plans is consistent with the Act. The Commission notes that equity compensation plans have become an important issue for shareholders. Because of the potential for dilution from such issuances, shareholders should be making the determination rather than brokers on their behalf. The Commission further notes that, generally under NYSE rules, only matters that are considered routine are allowed to be voted on by a broker on behalf of a beneficial owner. Because of the recent significance and concern about equity compensation plans, the Commission believes that it is appropriate for the NYSE to decide that shareholder approval of equity compensation plans is not a routine matter and must be voted on by the beneficial owner. As noted above, NASD rules do not provide for broker voting on any matters, so the NYSE's rule is now consistent for equity compensation plans. The Commission has considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments on this issue. The Commission believes that the benefit of ensuring that the votes reflect the views of beneficial shareholders on equity compensation plans outweighs the potential difficulties in obtaining the vote.

The Commission notes that, in its original filing, the NYSE committed to establishing a working group to advise on how to facilitate the implementation of this new rule prohibiting brokers from voting on equity compensation plans without voting instructions from the beneficial owner of the shares. The Commission also notes that the NYSE, in response to a commenter's concerns, has implemented a transition period

that would make the new rule eliminating broker voting on equity compensation plans applicable only to shareholder meetings that occur on or after the 90th day from the effective date of the NYSE proposal.

#### *I. Summary*

Overall, the Commission believes that the proposed amendments to the NYSE and Nasdaq proposals should alleviate many of the concerns raised by the commenters and should provide for more clear and uniform standards for shareholder approval of equity compensation plans under both NYSE and NASD rules. The Commission notes that, even with the availability of the proposed limited exemptions to shareholder approval under the NYSE and Nasdaq proposals, shareholder approval under the new standards would be required in more circumstances than under existing NYSE and NASD rules. The Commission further notes that the NYSE proposes to add a requirement that an issuer must notify it in writing when it uses one of the exemptions from the shareholder approval requirements and that Nasdaq has committed to considering such a requirement. The Commission believes that this disclosure requirement should reduce the potential for abuse of any of the exemptions.<sup>121</sup> In addition, the NYSE's proposed amendment to NYSE Rule 452, which would preclude broker-dealers from voting on equity compensation plans without explicit instructions from the beneficial owner, is consistent with the standard under current NASD rules.

The Commission notes that the NYSE and Nasdaq proposals, while not identical, set a consistent, minimum standard for shareholder approval of equity compensation plans. These proposals should help to ensure that companies will not make listing decisions simply to avoid shareholder approval requirements for equity compensation plans. As noted above, many of the commentators expressed concerns over the differences between the proposals, as well as over issues of scope and clarity. The Commission believes the proposed amendments have addressed these concerns. Thus, the Commission believes that the NYSE and Nasdaq proposals should provide shareholders with greater protection from the potential dilutive effect of equity compensation plans. Based on the above, the Commission finds that the NYSE and Nasdaq proposals should help to protect investors, are in the

<sup>121</sup> See also *supra* note 118.