

this exception from the shareholder approval requirements.

Nasdaq further proposes to clarify IM-4350-5, which provides interpretative guidance regarding shareholder approval for stock option plans or other equity compensation arrangements. As previously mentioned, NASD Rule 4350(i)(1)(A) requires, in part, shareholder approval when a stock option or purchase plan is materially amended. IM-4350-5 currently provides that while general authority to amend a plan does not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. Stock option plans that contain a formula for automatic increases in the shares available or for automatic grants pursuant to a dollar-based formula, however, cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. Nasdaq proposes to amend IM-4350-5 to clarify that plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. This change will provide greater transparency regarding the shareholder approval requirements for material changes to stock option plans.

In addition, Nasdaq proposes to clarify IM-4350-5 with respect to tax qualified, non-discriminatory employee benefit plans and parallel nonqualified plans. These plans are excepted from the shareholder approval requirements because they are regulated under the Internal Revenue Code and Treasury Department regulations. Nasdaq proposes to clarify IM-4350-5 by stating that an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from the shareholder approval requirements. This change will provide greater transparency for issuers regarding tax qualified, non-discriminatory employee benefit plans and parallel nonqualified plans for their non-U.S. employees.

Nasdaq also proposes to make a change to the terms "compensation committee" and "compensation committee comprised of a majority of independent directors" by replacing these terms with "independent compensation committee."

Lastly, Nasdaq proposes to move the text of footnote 1 of IM-4350-5 into the text of the IM in order to provide greater clarity of the IM in the NASD Manual.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with Section 15A of the Act,<sup>5</sup> in general, and furthers the objectives of Section 15A(b)(6) of the Act,<sup>6</sup> in particular, in that it is designed 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, in general, to protect investors and the public interest. Specifically, the proposed rule change will strengthen shareholder approval requirements with respect to stock option and purchase plans and provide greater transparency for investors as well as issuers and their counsel.

### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at

<sup>5</sup> 15 U.S.C. 78o-3.

<sup>6</sup> 15 U.S.C. 78o-3(b)(6).

the principal office of the NASD. All submissions should refer to file number SR-NASD-2003-130 and should be submitted by November 12, 2003.

## IV. Commission Findings and Order Granting Accelerated Approval of the Proposed Rule Change

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.<sup>7</sup> The Commission finds that the Nasdaq proposal, as amended, is consistent with provisions of Section 15A of the Act,<sup>8</sup> in general, and with Section 15A(b)(6) of the Act,<sup>9</sup> in particular, in that the 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 notes that the changes and clarifications proposed by Nasdaq in this proposal are similar to provisions that are currently in the NYSE's rule relating to shareholder approval of equity compensation plans, Section 303A(8) of the NYSE's Listed Company Manual. In particular, the Commission notes that Nasdaq proposes to adopt a disclosure requirement similar to the NYSE's disclosure requirement that, promptly 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.<sup>10</sup> The Commission believes that such a disclosure requirement should help to provide transparency to investors and reduce the potential for abuse of this exception for inducement grants.

In addition, the Commission notes that, similar to the NYSE's exemption

<sup>7</sup> In approving the Nasdaq proposal, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>10</sup> 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.