

will not be subject to shareholder approval under this section unless and until it is materially revised.

In the case of a discretionary plan (as defined in "Material Revisions" above), whether or not previously approved by shareholders, additional grants may be made after the effective date of this listing standard without further shareholder approval only for a limited transition period, defined below, and then only in a manner consistent with past practice. See also "Material Revisions" above. In applying this rule, if a plan can be separated into a discretionary plan portion and a portion that is not discretionary, the non-discretionary portion of the plan can continue to be used separately, under the appropriate transition rule. For example, if a shareholder-approved plan permits both grants pursuant to a provision that makes available a specific number of shares, and grants pursuant to a provision authorizing the use of treasury shares without regard to the specific share limit, the former provision (but not the latter) may continue to be used after the transition period, under the general rule above. Similarly, in the case of a formula plan (as defined in "Material Revisions" above) that either (1) has not previously been approved by shareholders or (2) does not have a term of ten years or less, additional grants may be made after the effective date of this listing standard without further shareholder approval only for a limited transition period, defined below.

The limited transition period described in the preceding two paragraphs will end upon the first to occur of:

- The listed company's next annual meeting at which directors are elected that occurs more than 180 days after the effective date of this listing standard;
- The first anniversary of the effective date of this listing standard; and
- The expiration of the plan.

A shareholder-approved formula plan may continue to be used after the end of this transition period if it is amended to provide for a term of ten years or less from the date of its original adoption or, if later, the date of its most recent shareholder approval. Such an amendment may be made before or after the effective date of this listing standard, and would not itself be considered a "material revision" requiring shareholder approval.

In addition, a formula plan may continue to be used, without shareholder approval, if the grants after the effective date of this listing standard are made only from the shares available immediately before the effective date, in

other words, based on formulaic increases that occurred prior to such effective date.

Transiti on Rules for Proxy Voting on Equity Compensation Plans

Members or member-organizations are precluded from giving a proxy to vote on equity compensation plans unless the beneficial owner of the shares has given voting instructions, as set forth in Chapter XXVI, Proxies, Section 3(e), Proxy Voting on Equity Compensation Plans, of these Rules. This provision regarding equity compensation plans will be effective for any meeting of shareholders that occurs on or after the 90th day following the date of the Securities and Exchange Commission order approving this provision.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with a review of its corporate listing standards with the goal of enhancing accountability, integrity and transparency of listed companies, the Exchange is proposing listing standards related to shareholder approval of equity compensation plans.⁶

⁶ The Commission notes that the Exchange is proposing to adopt listing standards relating to shareholder approval of equity compensation plans that are similar to those that the Commission recently approved for the New York Stock Exchange, Inc. ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"). See also Securities Exchange Act Release No. 48627 (October 14, 2003), 68 FR 60426 (October 22, 2003) (notice of filing and order granting accelerated approval to File No. SR-NASD-2003-130, incorporating amendments to the NASD's recently approved shareholder approval rules for equity compensation plans applicable to Nasdaq quoted securities). The Commission also published a correction to the notice of File No. SR-NASD-2003-130. See Securities Exchange Act Release No. 48627A (October 22, 2003), 68 FR

The Exchange is proposing to adopt a new section entitled "Equity Compensation Plans" in Chapter XXVII, *Listed Securities—Requirements*, which would require shareholder approval of all equity-compensation plans and material revisions to such plans, subject to limited exemptions. Under the Exchange's proposal, as amended, an equity compensation plan is defined as a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services, including a compensatory grant of options or other equity securities that is not made under a plan. The Exchange is also proposing to provide clarification on certain plans that would not be considered equity compensation plans under this definition, such as plans that do not provide for delivery of equity securities of the issuer (e.g., plans that pay in cash) and deferred compensation plans under which employees pay full current market value for deferred shares.

In addition, the proposal, as amended, provides for certain types of grants that are exempted from shareholder approval. These limited exemptions include: (1) Inducement awards to person's first becoming an employee of an issuer or any of its subsidiaries, to rehires following a bona fide period of employment interruption, and for grants to new employees in connection with a merger or acquisition;⁷ (2) mergers and acquisitions, when conversions, replacements or adjustments of outstanding options or other equity compensation awards are necessary to reflect the transaction, and when shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval; and (3) plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code⁸ (e.g., ESOPs), plans intended to meet the requirements of Section 423 of the Internal Revenue Code,⁹ and parallel excess plans that meet certain conditions. The Exchange also proposes that, in circumstances in which equity compensation plans and amendments to plans are not subject to

61532 (October 28, 2003). The Commission notes that these additional amendments by Nasdaq make the NYSE and Nasdaq proposals more consistent and uniform. See also *infra* note 14 (regarding the Commission's recent approval of a similar proposal by the American Stock Exchange LLC ("Amex")).

⁷ The Exchange is also proposing to include a requirement that listed companies provide prompt public disclosure following the grant of any inducement award in reliance on the exemption.

⁸ 26 U.S.C. 401(a).

⁹ 26 U.S.C. 423.