

determination rather than brokers on their behalf. The Commission further notes that NASD rules do not provide for broker voting on any matters and NYSE rules prohibit broker voting on equity compensation plans.<sup>20</sup> Therefore, the Exchange's proposed provision would be consistent with NASD and NYSE rules regarding broker voting on 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.<sup>21</sup> 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 also notes that the Exchange proposes to implement 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 Exchange's proposal.

#### *I. Summary*

Overall, the Commission believes that the Exchange's proposal, as amended, is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.<sup>22</sup> The Commission therefore believes that the Exchange's amended proposal should provide for more clear and uniform standards for shareholder approval of equity compensation plans. The Commission notes that, even with the availability of the proposed limited exemptions from shareholder approval under the Exchange's amended proposal, shareholder approval under the new standards would be required in more circumstances than under existing Exchange rules. The Commission further notes that the Exchange proposes to adopt a requirement that an issuer must notify it in writing when it uses one of the exemptions from the shareholder approval requirements. The Commission believes that such a requirement, coupled with the additional disclosure requirements for inducement grants, should reduce the potential for abuse of any of the exemptions.<sup>23</sup> In addition, the Exchange's proposed amendment to BSE Section 3, 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 NYSE and NASD rules.

The Commission believes that the Exchange's proposal, as amended, which is similar to the NYSE and Nasdaq's shareholder approval rules,<sup>24</sup> sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Exchange's proposal, as amended, should help to ensure that companies will not make listing decisions simply to avoid shareholder approval requirements for equity compensation plans and should provide shareholders with greater protection from the potential dilutive effect of equity compensation plans. Based on the above, the Commission finds that the Exchange's proposal, as amended, should help to protect investors, is in the public interest, and does not unfairly discriminate among issuers, consistent with Section 6(b)(5) of the Act.<sup>25</sup> The Commission therefore finds the Exchange's proposal, as amended, to be consistent with the Act and the rules and regulations thereunder.

#### **V. Accelerated Approval of the Exchange's Proposal and Amendment Nos. 1 and 2**

The Commission finds good cause for approving the Exchange's proposal and Amendment Nos. 1 and 2 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that the Exchange's proposal, as amended, is similar to the NYSE and Nasdaq's proposals requiring shareholder approval of equity compensation plans. Both the NYSE and Nasdaq's proposals were published for comment in the **Federal Register** and recently approved by the Commission.<sup>26</sup> The Commission believes that it already considered and addressed the issues that may be raised by the Exchange's amended proposal in its approval of the NYSE and Nasdaq's proposals.<sup>27</sup>

<sup>24</sup> See *supra* note 6; see also *supra* note 14.

<sup>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> See Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 (notice of the NYSE's proposal). The Commission also published a correction to the notice of the NYSE's proposal. See Securities Exchange Act Release No. 44620A (October 21, 2002), 67 FR 65617 (October 25, 2002). See Securities Exchange Act Release No. 46649 (October 11, 2002), 67 FR 64173 (notice of Nasdaq's proposal). See *supra* note 6; see also *supra* note 14.

<sup>27</sup> Some of the substantive provisions ultimately adopted by the NYSE and Nasdaq, and now being proposed for adoption by the Exchange, were in response to these comments. The comments on the NYSE and Nasdaq proposals were also discussed in detail in the Commission's approval order of the NYSE and Nasdaq proposals. See *supra* note 6; see also *supra* note 14.

The Commission believes that accelerated approval of the Exchange's proposal, as amended, is essential to allow for immediate harmonization of, and consistency in, the shareholder approval requirements for equity compensation plans among the markets. This will prevent issuers from making listing decisions based on differences in self-regulatory organization shareholder approval requirements and should provide equal investor protection to shareholders on the dilutive effects of plans irrespective of where the security trades. The Commission further believes that making the Exchange's new shareholder approval rules effective upon Commission approval will immediately impose the same requirements on the Exchange's issuers as those imposed upon NYSE, Nasdaq, and Amex issuers. Based on the above, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act,<sup>28</sup> to approve the Exchange's proposal and Amendment Nos. 1 and 2 thereto on an accelerated basis.

#### **VI. Conclusion**

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-BSE-2003-16) and Amendment Nos. 1 and 2 thereto are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-48737; File No. SR-CBOE-2003-45]

#### **Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change by the Chicago Board Options Exchange, Inc. and Amendment No. 1 Thereto Relating to Shareholder Approval of Equity Compensation Plans and the Voting of Proxies**

October 31, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>28</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).

<sup>20</sup> See NASD Rule 2260; NYSE Rule 452; and Section 402.08 of the NYSE's *Listed Company Manual*.

<sup>21</sup> See *supra* notes 6 and 20.

<sup>22</sup> See *supra* note 6; see also *supra* note 14.

<sup>23</sup> See also *supra* note 16 and accompanying text.