

G. Miscellaneous Provisions

The Commission notes that the Exchange's proposal—similar to the NYSE and Nasdaq's recently approved shareholder approval rules¹⁷—incorporates the term “equity compensation” and proposes that plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market price on equal terms to all security holders would not require shareholder approval. The Commission believes that the Exchange's proposal is consistent with the NYSE and Nasdaq's rules in this area and should provide greater clarity with respect to which plans would and would not require shareholder approval.

The Commission notes that the Exchange's proposal provides that pre-existing plans, which were adopted prior to the SEC's approval of the Exchange's proposal, would essentially be “grandfathered” and would not require shareholder approval unless the plans were materially amended. Under the Exchange's proposal, however, shareholder approval is required for each grant made pursuant to any 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. This is consistent with the NYSE, Nasdaq, and Amex shareholder approval rules on this matter. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the Exchange's new shareholder approval requirements.

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

The Commission believes that the Exchange's proposed provision, CSE Rule 3.3(d), to preclude 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 issuances under such plans, shareholders should be making the 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.¹⁸ 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.¹⁹ 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 is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.²⁰ The Commission therefore believes that the Exchange's 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 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.²¹ In addition, the Exchange's proposed amendment to CSE Rule 13.3, 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, which is similar to the NYSE and Nasdaq's shareholder approval rules,²² sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Exchange's proposal 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 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.²³ The Commission therefore finds the Exchange's proposal to be consistent with the Act and the rules and regulations thereunder.

V. Accelerated Approval of the Exchange's Proposal and Amendment No. 1

The Commission finds good cause for approving the Exchange's proposal and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Exchange has requested accelerated approval of the proposed rule change so as to avoid a delay in the implementation of these listing standards designed to protect investors and the public interest, which standards the Exchange represents are substantially similar to standards recently approved by the Commission for the NYSE and Nasdaq. The Exchange therefore believes that the Exchange's adoption of the proposed listing standards presents no novel issues. The Commission notes that the Exchange's proposal 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.²⁴ The Commission believes that it already considered and addressed the issues that may be raised by the Exchange's proposal in its approval of the NYSE and Nasdaq's proposals.²⁵

²³ 15 U.S.C. 78f(b)(5).

²⁴ 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 4; see also *supra* note 12.

²⁵ 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 4; see also *supra* note 12.

¹⁷ See *supra* note 4; see also *supra* note 12.

¹⁸ See NASD Rule 2260; NYSE Rule 452; and Section 402.08 of the NYSE's *Listed Company Manual*.

¹⁹ See *supra* notes 4 and 18.

²⁰ See *supra* note 4; see also *supra* note 12.

²¹ See also *supra* note 14 and accompanying text.

²² See *supra* note 4; see also *supra* note 12.