SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44135; File No. SR–NYSE–00–60]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the New York Stock Exchange, Inc. Amending NYSE Rule 416, Questionnaires and Reports

March 30, 2001.

On December 21, 2000, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Rule 416, Questionnaires and Reports. The proposed rule change was noticed in the **Federal Register** on February 2, 2001.[3] No comments were received on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposal

NYSE Rule 415 authorizes the Exchange to require members and member organizations to submit prescribed information that the Exchange believes to be essential for the protection of investors and the public interest. The Rule has been used to require the periodic submittal of specific predefined financial, operational, and other information necessary for an effective evaluation of a member's or member organization's compliance with applicable rules and regulations. NYSE Rule 416 has also been used to prepare the membership for specific initiatives such as participation in Year 2000 testing and the conversion to decimalization.

To facilitate the participation of members and member organizations in an industry-wide regulatory initiative with respect to clearing firms, the Exchange has proposed an amendment to Rule 416 (Rule 416.20) that will give the Exchange broader authority to require members and member organizations to submit to the Exchange raw trading data, on their own behalf and on behalf of firms that introduce customer accounts to them pursuant to NYSE Rule 382 (Carrying Agreements). Pursuant to Rule 416.20 members may be required by the Exchange to submit such information on an ongoing basis (*e.g.*, daily, monthly, quarterly) and in such format as the Exchange may require.[4] The Exchange, in conjunction with the Commission, the National Association of Securities Dealers Regulation, Inc., Securities Industry Association (''SIA''), several member organizations, and other securities industry representatives, has developed a broker-dealer reporting system intended to help identify potential sales practice violations, particularly those associated with low-priced microcap issues. The data that the Exchange collects for this reporting system, pursuant to proposed Rule 416.20, will be submitted to a processing center that will organize it according to exception parameters established by the Exchange and other self-regulatory organizations. The required data will initially include, among other data, various raw statistical data pertaining to cancelled trades. It is intended that additional data will be required at future dates. Once the reporting system is fully operational, it is expected that the trade information collected pursuant to this initiative will serve as an early warning system to ''red flag'' unusual trading patterns.

II. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of section 6(b)(5) of the Act,[5] which require, among other things, that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with respect to facilitating transactions in securities, 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.[6] In particular, the Commission believes that Rule 416.20 will help to prevent fraudulent and manipulative acts and practices and promote just and equitable principles of trade because it authorizes the Exchange to require clearing members to submit trading data to be analyzed for indications of sales practice violations in connection with low-priced microcap issues. Furthermore, because Rule 416 authorizes the Exchange to require its clearing members to submit this information on their own behalf and on behalf of their introducing firms, the Commission believes that the rule will broadly enable the Exchange to detect unusual trading patterns at an early stage and thereby better protect investors and the public interest from abusive sales practices.

III. Conclusion.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the act,[7] that the proposed rule change (SR–NYSE–00–60) is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 43886 (January 25, 2001), 65 FR 8829 (February 2, 2001) (SR–NYSE–00–60).

[4] The Exchange has represented that it anticipates requesting members and member organizations to submit raw data electronically.

[5] 15 U.S.C. 78f(b)(5).

[6] In approving the proposal, the Commission has considered the rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–44141; File No. SR–NYSE–00–32]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to Shareholder Approval of Stock Option Plans

March 30, 2001.

I. Introduction

On July 13, 2000, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to extend the effectiveness of a pilot regarding the Exchange's shareholder approval policy with respect to stock option and similar plans. The proposed rule change was published for comment in the **Federal Register** on August 10, 2000.[3] On August 15, 2000, the Commission extended the comment period until

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 43111 (August 2, 2000), 65 FR 49046 (''2000 Proposal''). In addition, the NYSE submitted a monitoring report that presented data regarding the use of the ''broadly-based'' exemption by NYSE-listed companies. *See* letter to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), SEC, from Catherine R. Kinney, Group Executive Vice President, Office of Chief Executive, NYSE, dated September 28, 2000 (''Pilot Monitoring Report''). This report is part of the public file and may be inspected at the Commission's Public Reference Room as well as the principle office of the NYSE.

September 20, 2000.[4] The Commission received 25 comment letters on the proposal in response to both the regular and extended comment periods.[5] On March 7, 2001, the NYSE submitted its response to the comment letters.[6] On January 19, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change, which was published in the **Federal Register** on February 2, 2001.[7] No comments were received on Amendment No. 1. This order approves the proposal, as amended, on a pilot basis until September 30, 2001.

II. Background

On June 4, 2000, the Commission approved, on a pilot basis, an Exchange proposal to amend Sections 312.01, 312.03, and 312.04 of the Exchange's Listed Company Manual (''Manual'') with respect to the definition of a ''broadly-based'' stock option plan (''1999 Pilot'').[8] The 1999 Pilot was scheduled to expire on September 30, 2000. Therefore, the Exchange submitted the 2000 Proposal to extend the effectiveness of the 1999 Pilot. In addition, the NYSE submitted its Pilot Monitoring Report to provide the Commission with data regarding the use of the ''broadly-based'' exemption.[9] Originally, the Exchange sought a three-year extension of the 1999 Pilot. However, in Amendment No. 1, the Exchange shortened its extension request to one year and also modified the ''broadly-based'' definition to address a potential loop-hole. To provide time for consideration of the 2000 Proposal, the effectiveness of 1999 Pilot was extended through March 30, 2001.[10]

Paragraphs 312.01, 312.03, and 312.04 of the Manual set forth the Exchange's policy with respect to shareholder approval of stock option and similar plans (''Plans''). As a prerequisite to listing, shareholder approval of Plans or any other arrangement pursuant to which officers or directors acquire stock is required. There are, however, four exemptions from the shareholder approval requirement, one of which is an exemption for Plans that are ''broadly-based.'' Historically, the Exchange had not provided a definition of what constituted a ''broadly-based'' Plan other than to state that such a Plan must include employees other than officers and directors. The only express example of such a Plan in the Manual was an employee stock option plan, or ''ESOP.''

In December 1997, the Exchange filed a proposed rule change, which codified, among other things, existing Exchange interpretations regarding ''broadly-based'' Plans (''Original Proposal'').[11] Specifically, in the Original Proposal, the Exchange amended the Manual to state that the determination of whether a Plan was ''broadly-based'' required a review of a number of factors, including the number of persons included in the Plan, and the nature of the company's employees, such as whether there were separate compensation arrangements for salaried and hourly employees. The Original Proposal also codified a non-exclusive safe harbor for Plans in which at least 20 percent of a company's employees were eligible to participate in the Plan, provided that the majority of those eligible were neither officers nor directors. The Commission did not receive any comments on the Original Proposal, and subsequently approved it, on April 8, 1998.[12]

Following the Commission's approval of the Original Proposal, the Exchange and the Commission received a significant number of inquiries and comments regarding the Original Proposal. Many of these inquiries and comments originated from the institutional investor community and focused on the ''broadly-based'' definition. Commenters expressed general concern that, without shareholder approval, companies could dilute the value of existing shares by creating new Plans.

In response, the Exchange issued a request for comment regarding the definition of ''broadly-based'' Plans. According to the NYSE, the listed company community favored retaining the new Policy, while the institutional investor community favored a narrower definition of what constituted a ''broadly-based'' Plan, and suggested that such definition be an exclusive test instead of a non-exclusive safe harbor.

A Stockholder Approval Policy Task Force (''Task Force'') was subsequently established by the NYSE to review the comments and to make

[4] Securities Exchange Act Release No. 43155, 65 FR 51382 (August 23, 2000). As originally noticed, the comment period expired on August 31, 2000.

[5] *See* letters to Jonathan G. Katz, Secretary, SEC from Sarah A.B. Teslik, Executive Director, Council of Institutional Investors, dated August 17, 2000 (''CII''), Linda S. Selbach, Global Proxy Manager, Barclays Global Investors, dated August 21, 2000 (''Barclays Global Investors''); Jeffrey W. States, *et al.,* Sacramento County Employees' Retirement System, dated August 23, 2000 (''Sacramento County''); James P. Hoffa, General President, International Brotherhood of Teamsters, dated August 28, 2000 (''Teamsters''); Alan G. Hevesi, Comptroller, Comptroller of the City of New York, dated August 24, 2000 (''Comptroller of the City of New York''); Kay R.H. Evans, Executive Director, Maine State Retirement System, dated August 29, 2000 (''Maine State Retirement System''); Peter C. Clapman, Senior Vice President and Chief Counsel, Investments, Teachers Insurance and Annuity Association College Retirement Equities Fund, dated August 23, 2000 (''TIAA–CREF''); Tom Herndon, Executive Director, State Board of Administration of Florida, dated August 28, 2000 (''State Board of Florida''); Keith Johnson, Chief Legal Counsel, State of Wisconsin Investment Board, dated September 1, 2000 (''State of Wisconsin Investment Board''); Steven E. Kornrumpf, Director, State of New Jersey, Department of the Treasury, Division of Investment, dated August 31, 2000 (''State of New Jersey''); Peter M. Gilbert, Chief Investment Officer, Commonwealth of Pennsylvania, State Employees' Retirement System, dated September 7, 2000 (''PA State Employees' Retirement System''); Mark E. Brossman, Counsel to Longview Funds, Schulte, Roth & Zabel, dated September 12, 2000 (''Schulte, Roth & Zabel''); Nell Minnow, Editor, The Corporate Library, dated September 19, 2000 (''Corporate Library''); Denise L. Nappier, Treasurer, State of Connecticut, Office of the Treasurer, dated September 18, 2000 (''State of Connecticut''); Michael R. Zucker, Director, Office of Corporate Affairs, American Federation of State, County and Municipal Employees, AFL–CIO, dated September 19, 2000 (''AFSCME''); Joseph T. Hansen, International Secretary-Treasurer, United Food & Commercial Workers International Union, AFL–CIO & CLC, dated September 19, 2000 (''UFCW''); William Patterson, Director, Office of Investment, American Federation of Labor and Congress of Industrial Organizations, dated September 20, 2000 (''AFL–CIO''); Gary K. Duberstein, Managing Director, Greenway Partners, L.P., dated September 20, 2000 (''Greenway Partners''); H.W. Ward, Chief Executive Officer, Hotel Employees and Restaurant Employees International Union, Welfare-Pension Funds, dated September 19, 2000 (''Hotel Employees and Restaurant Employees International Union''); John F. Olsen, Gibson, Dunn & Crutcher LLP, dated October 9, 2000 (''Gibson, Dunn & Crutcher''); James P. Ryan, Senior Counsel, Fund Business Management Group, Capital Research and Management Company, dated November 13, 2000 (''Capital Research and Management Company''); Eugene P. Stein, Executive Vice President, Capital Guardian Trust Company, dated November 22, 2000 (''Capital Guardian Trust Company''); Sheila W. Beckett, Executive Director, Employees Retirement System of Texas, dated December 11, 2000 (''Employees Retirement System of Texas''); Deb Lingle, e-mail received on September 25, 2000; and John Johnson, e-mail received on September 25, 2000.

[6] *See* letter to Jonathan G. Katz, Secretary, SEC, from James E. Buck, Senior Vice President and Secretary, dated March 5, 2001 (''NYSE Letter'').

[7] Securities Exchange Act Release No. 43879 (January 24, 2001), 66 FR 8827 (''Amendment No. 1'').

[8] Securities Exchange Act Release No. 41479, 64 FR 31667 (June 11, 1999).

[9] *See* note 3 *supra.* In the Pilot Monitoring Report, the NYSE stated that of the 319 listing applications with respect to stock option or purchase plans submitted to the Exchange from June 4, 1999 through May 2000, 209 were submitted to shareholders for a vote and 60 Plans relied on the ''broadly-based'' exemption approved in the 1999 Pilot.

[10] Securities Exchange Act Release Nos. 44018 (February 28, 2001), 66 FR 13821 (March 7, 2001); 43647 (November 30, 2000, 65 FR 77404 (December 11, 2000) (Notice of Filing to extend the effectiveness of the 1999 Pilot through February 28, 2001); 43329 (September 22, 2000), 65 FR 58833 (October 2, 2000) (Notice of Filing to extend the effectiveness of the 1999 Pilot through November 30, 2000).

[11] Securities Exchange Act Release No. 39659 (February 12, 1998), 63 FR 9036 (February 23, 1998).

[12] Securities Exchange Act Release No. 39839, 63 FR 18481 (April 15, 1998).

recommendations concerning possible changes to the NYSE's Policy. The Task Force was composed of representatives of the Exchange's legal Advisory Committee, Individual Investors Committee, Pension Managers Advisory Committee, and Listed Company Advisory Committee. In addition, members of other Exchange constituencies, including the Council of Institutional Investors, were represented on the Task Force.

Following its deliberations, the Task Force recommended that certain changes be made to the definition of a ''broadly-based'' Plan.[13] In addition, the Task Force recommended that the Exchange actively consider setting an overall dilution maximum for all non-tax qualified Plans that otherwise would be exempt from shareholder approval requirements.

The Exchange responded by submitting the 1999 Pilot, which amended Sections 312.01, 312.03, and 312.04 of the Manual to reflect the recommendations to the Task Force. The Exchange also directed the Task Force to continue its work to consider the dilution issue with a target date of NYSE's September 1999 meeting of the Board of Directors.

The Task Force submitted its finding to the Exchange's Board at the November 1999 meeting.[14] The Task Force recommended implementing enhanced disclosure requirements for the compensation tables contained in a company's SEC filings.[15] Although the Task Force formulated dilution standards and presented them in its report, the Task Force believed, and the Exchange's Board agreed, that such standards should be adopted uniformly by all the major listing markets in the United States. The Task Force was concerned that adoption of the dilution standard by only one market would lead to competition for listings based on disparities in the corporate governance rules of the respective markets. The Task Force believed that this would compromise the purposes intended to be served by those rules, and could undermine the public's confidence and trust in the markets.

Accordingly, the Exchange began discussions with the management of the National Association of Securities Dealers, Inc. regarding a dilution standard. On December 5, 2000, the Nasdaq Stock Market, Inc. (''Nasdaq'') solicited comment from its members and investors on the NYSE Task Force's dilution standard. The comment period for the Nasdaq request for comment expired on February 5, 2001.

III. Description of the Proposal

As approved in the 1999 Pilot, a Plan is currently considered ''broadly-based,'' and thus exempt from the Exchange's shareholder approval requirements, if, pursuant to the terms of the Plan (a) at least a majority of the issuer's full time, exempt U.S. employees are eligible to participate under the Plan; and (b) at least a majority of the shares awarded under the Plan, or shares of stock underlying options awarded under the Plan, during the shorter of the three-year period commencing on the date the Plan is adopted by the issuer or the term of the Plan itself are made to employees who are not officers or directors of the issuer.

In the 2000 Proposal, as amended, the Exchange requested that the Commission extend the 1999 Pilot through September 30, 2001 in order to permit additional industry discussions of the issues, while at the same time enabling the Exchange to continue to study the experience of NYSE-listed companies and their investors that utilize the exemption from shareholder approval for ''broadly-based'' Plans.[16]

In addition, the Exchange proposed to amend the second part of the ''broadly-based'' definition, which focuses on actual grants made under a Plan.[17] Specifically, the Exchange proposed to amend this provision by requiring that at least a majority of shares of stock or shares of stock underlying options awarded under a Plan during *any* three-year period must be awarded to employees who are not officers or directors of the company. According to the NYSE, the three-year period refers to periods of consecutive years and is a continuing requirement that should be applied on a rolling three-year basis by Plans with terms longer than three years. In the event that a Plan is implemented with a stated term shorter than three years, awards, under the revision, would have to be made in a way that would meet the rule criteria during such shorter period.

IV. Summary of Comments

The Commission received 25 comment letters on the proposed rule change.[18] Of the 25 comment letters, 20 comment letters opposed the Exchange's proposal to extend the effectiveness of the pilot for three years,[19] and two commenters while opposing the three-year extension request, supported a one-year extension of the 1999 Pilot.[20] One commenter was from a member of the Task Force and responded to issues raised by various commenters.[21] Two commenters did not address the issues raised in the proposed rule change.[22]

The Exchange submitted a written response to the issues raised in the comment letters.[23] The following discussion summarizes the issues raised by the commenters and the Exchange's response.

A. Three-Year Extension Request

A majority of commenters opposed the original three-year extension requested by the NYSE and argued that the NYSE should adopt a dilution standard immediately or by the 2001 proxy season.[24] For example, several commenters noted that the 1999 Pilot

[13] *See Report of the Special Task Force on Stockholder Approval Policy* dated August 28, 1998.

[14] *See Report of the New York Stock Exchange Special Task Force on Stockholder Approval Policy.* The Task Force had previously submitted a status report to the Commission in October 1999. *See* letter to Annette Nazareth, Director, Division, SEC, from Catherine Kinney, Group Executive Vice President, Office of Chief Executive, NYSE, dated October 28, 1999 (Status Report Submission NYSE–98–32). The Task Force Report and the Status Report are part of the public file and may be inspected at the Commission's Public Reference Room as well as at the principle office of the NYSE.

[15] In January 2001, the Commission approved for publication and public comment a proposed rule that would enhance disclosure of equity compensation plans. *See* Securities Act Release No. 7944 (January 26, 2001), 66 FR 8732 (February 1, 2001). A copy of the Commission's proposal also can be found on the Commission's website at *www.sec.gov.* The comment period for this proposal ends on April 2, 2001.

[16] *See* Amendment No. 1, note 7 *supra.* As discussed above, the Exchange originally requested an extension until September 30, 2003.

[17] *See* Amendment No. 1, note 7 *supra.*

[18] *See* note 5 *supra.*

[19] *See* letters from CII; Barclays Global Investors; Sacramento County; Teamsters; Comptroller of the City of New York; Maine State Retirement System; State Board of Florida; State of Wisconsin Investment Board; State of New Jersey; PA State Employees' Retirement System; Schulte, Roth & Zabel; Corporate Library; State of Connecticut; UFCW; AFL-CIO; Greenway Partners; Hotel Employees and Restaurant Employees International Union; Capital Research and Management Company; Capital Guardian Trust Company; and Employees Retirement System of Texas.

[20] *See* letters from TIAA-CREF and AFSCME.

[21] *See* letter from Gibson, Dunn & Crutcher. The Commission notes that the following commenters were also members of the NYSE Task Force: Barclays Global Investors; TIAA–CREF; State Board of Florida; and State of Wisconsin Investment Board.

[22] *See* e-mails from Deb Lingle and John Johnson.

[23] *See* NYSE Letter, note 6 *supra.*

[24] *See* letters from CII; Barclays Global Investors; Sacramento County; Teamsters; Comptroller of the City of New York; Maine State Retirement System; TIAA–CREF; State Board of Florida; State of Wisconsin Investment Board; State of New Jersey; PA State Employees' Retirement System; Schulte, Roth & Zabel; Corporate Library; State of Conneticut; AFSCME; UFCW; AFL–CIO; Greenway Partners; Hotel Employees and Restaurant Employees International Union; Capital Research and Management Company; Capital Guardian Trust Company; and Employees Retirement System of Texas.

was approved on a pilot basis with the understanding that a new standard be in place for the 2000 proxy season.[25]

As described above, the Exchange modified its extension request in Amendment No. 1 so that the 2000 Proposal now proposes an extension until September 30, 2001.

B. Dilution

A majority of commenters argued that the NYSE should adopt the dilution standard developed by its Task Force.[26] Generally, dilution refers to the diminished value of a shareholder's investment that can occur when stock options are granted. As noted above, the Task Force developed a dilution standard to measure the effects of Plans on shareholders' interests but recommended that the NYSE delay adopting the dilution standard until the other major listing markets followed suit. Several commenters believed that a dilution standard should be added to the current rule along with the ''broadly-based'' standard.[27] One commenter noted that the extension request would ''increase the risk of excessive dilution of [its] investments in NYSE listed companies that establish ''broad-based'' stock option plans.'' [28] Another commenter argued that delaying implementation of a dilution standard is unacceptable given the cost of Plans to shareholders.[29] Finally, one commenter argued that the NYSE should adopt both of its Task Force's recommendations on dilution and shareholder approval of all Plans that permit officer and director participation.[30]

In response, the Exchange stated that it continues to believe that a change as significant as a move to a dilution-based standard cannot be made by only one of several competing listing markets. According to the Exchange, a uniform approach that is supported by as broad a consensus as possible is necessary. The Exchange noted several developments including the Commission's proposal to enhance disclosure, which NYSE's Task Force found to be an important adjunct to a dilution-based standard, as well as Nasdaq's solicitation of comments on this issue. The Exchange committed to continue working with its constituents, the Commission, and other markets to achieve a consensus that adequately addresses the needs of all involved.

C. Enhanced Disclosure

Several commenters argued that enhanced disclosure of Plans was needed.[31] These commenters urged the Commission to adopt new Plan disclosure rules. The Commission notes that in January 2001, it approved for publication and public comment a proposal to enhance disclosure of equity compensation plans.[32]

D. Uniform Standards

Several commenters disagreed with NYSE's argument that a dilution standard should be implemented on a uniform basis with other listing markets.[33] One commenter argued that it believed that ''there is no need to wait for other exchanges to join-in'' because ''the market place will surely have them follow.'' [34] Another commenter questioned the Exchange's commitment to adopting a dilution-based standard.[35] They along with another commenter argued that adoption of a dilution-based standard should not hinge on approval of a similar rule by the Nasdaq/Amex market.[36] Finally, one commenter noted that because many Nasdaq companies rely heavily on Plans to compensate and retain highly skilled employees, it is unlikely that Nasdaq would propose a standard to require shareholder approval of Plans and thus, NYSE's pre-condition for moving forward with a dilution-based standard was unreasonable.[37]

As noted above, the NYSE continues to believe that a shareholder approval standard based on dilution is a significant change and cannot be made by one of several competing listing markets. NYSE argues that a uniform approach should be adopted.

E. Other Issues

Many commenters raised other issues related generally to the ''broadly-based'' definition that were raised and considered in the 1999 Pilot.[38] For example, several commenters argued that the ''broadly-based'' exemption denies shareholders of the right to oversee and consider potentially dilutive Plans.[39] In this regard, a few commenters noted that they acted as fiduciaries for clients and had obligations to protect their clients' interests, which they believed the NYSE rule usurped.[40]

Two commenters argued that the definition should be amended to delete the reference to ''exempt'' employees.[41] Two other commenters stated shareholders should have the authority to approve all stock option plans.[42] Finally, one commenter reiterated the concern about conflicts of interest of officers and directors that implement Plans in which they participate noting that lower level employees could be excluded from participating in such Plans.[43]

V. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[44] In particular, the Commission believes that the proposal is consistent with the requirements of

[25] *See e.g.,* letters from Teamsters and State of Wisconsin Investment Board. *See also* letter from TIAA–CREF, which stated that the 1999 Pilot was understood as a stop-gap measure until permanent resolution could be reached.

[26] *See* letters from CII; Barclays Global Investors; Sacramento County; Teamsters; Comptroller of the City of New York; Maine State Retirement System; TIAA–CREF; State Board of Florida; State of Wisconsin Investment Board; State of New Jersey; PA State Employees' Retirement System; Schulte, Roth & Zabel; State of Connecticut; AFSCME; UFCW; AFL–CIO; Greenway Partners; Hotel Employees and Restaurant Employees International Union; Capital Research and Management Company; Capital Guardian Trust Company; and Employees Retirement System of Texas.

[27] *See* letters from Capital Research and Management Company, which supported the ''broadly-based'' definition but believed that a dilution standard was also necessary; and Capital Guardian Trust Company.

[28] *See* letter from Comptroller of the City of New York.

[29] *See* letter from AFSCME.

[30] *See* letter from Hotel Employees and Restaurant Employees International Union.

[31] *See* letters from CII; Barclays Global Investors; Sacramento County; Teamsters; Maine State Retirement system; TIAA–CREF; State of Wisconsin Investment Board; Schulte, Roth & Zabel; AFSCME; Hotel Employees and Restaurant Employees International Union; Deb Lingle; John Johnson; and Employees Retirement System of Texas.

[32] *See* note 15 *supra.*

[33] *See* letters from Comptroller of the City of New York; State Board of Florida; PA State Employees' Retirement System; Schulte Roth & Zabel; AFSCME; Greenway Partners; and Hotel Employees and Restaurant Employees International Union.

[34] *See* letter from Hotel Employees and Restaurant Employees International Union.

[35] *See* letter from Schulte, Roth & Zabel, which stated ''we believe that the NYSE could have resolved this issue with Nasdaq/Amex by now, and grow increasingly concerned about NYSE's commitment to adopting a dilution-based standard.''

[36] *Id. See also* letter from State Board of Florida.

[37] *See* letter from Comptroller of the City of New York.

[38] *See* order approving the 1999 Pilot, note 8 *supra*

[39] *See* letter from Teamsters; Comptroller of the City of New York; State of Wisconsin Investment Board; PA State Employees' Retirement System; UFCW; Hotel Employees and Restaurant Employees International Union; and Capital Guardian Trust Company.

[40] *See* letters from Barclays Global Investments; Comptroller of the City of New York; PA State Employees' Retirement System; and Capital Guardian Trust Company.

[41] *See* letters from Teamsters and AFL–CIO.

[42] *See* letters from State of New Jersey and UFCA.

[43] *See* letter from PA State Employees' Retirement System.

[44] In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Section 6(b)(5) of the Act, which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between issuers.[45]

The Commission has carefully considered the issues raised by this proposed rule change and continues to believe that it is consistent with the requirements of the Act.[46] In approving this proposal, the Commission recognizes that a majority of the commenters continue to believe that a dilution standard would be more appropriate. Nevertheless, the Commission believes that the current 2000 Proposal, which addresses concerns that the 1999 Pilot permitted grants made under ''broadly-based'' Plans to be made in a non-broadly-based fashion, is still a better test that the previous non-exclusive safe harbor approved in the Original Proposal.[47]

The Commission approved the 1999 Pilot basis to provide the NYSE with time to develop a dilution test. The NYSE Task Force did develop such a test but recommended that the NYSE Board of Directors refrain from proposing and implementing its dilution standard until such time as the other listing markets, specifically Nasdaq, would adopt similar requirements. At this time, Nasdaq has not adopted the NYSE dilution standard and has not developed its own dilution standard. However, as noted above, Nasdaq has taken substantial steps in considering the NYSE dilution proposal by issuing a request for comment from its issuers and investors. Nasdaq received approximately 275 comment letters on the NYSE dilution proposal. The Commission expects to receive the Nasdaq analysis on these letters in the near future. In addition, in its response to the comment letters, the NYSE stated that it intends to coordinate with Nasdaq in developing a consensus on the issue.[48] In addition, the NYSE has substantially shortened the duration of the extension request from three years to one year. Thus, the Commission believes that extending the pilot through September 30, 2001 is appropriate at this time to enable the markets to continue to work on developing a potential uniform standard.

In the order approving the 1999 Pilot, the Commission noted that its standard for reviewing the NYSE's proposal is whether its consistent with the Act. The Commission must apply this same standard to the current 2000 Proposal. While the Commission still strongly urges the markets to address the issues in this area and review adoption of a dilution standard, we nonetheless continue to believe that the 2000 Proposal is consistent with the Act because it represents a reasonable effort by the Exchange to clarify which Plans are ''broadly-based'' and therefore exempt from shareholder approval. Accordingly, the adoption of the proposed rule change on a pilot basis should protect investors in accordance with Section 6(b)(5) of the Act[49] by helping ensure that only ''broadly based'' Plans will be exempted from shareholder approval.

Further, as noted above, the NYSE has modified its definition of ''broadly-based'' to require that awards granted to Plan participants must be considered on a rolling three year period to determine if in fact the awards are granted in a ''broadly-based'' fashion, *i.e.,* a majority of shares must be awarded to non-officer and director Plan participants. The Commission notes that, in approving the 1999 Pilot, it received numerous comments about a loop-hole in the definition of ''broadly-based'' Plans because the definition only required actual grants to be awarded to non-officers and directors during the first three years of the Plan. The Commission believes that the modification of the rolling three-year period shall strengthen the definition and should help to ensure that Plans that are established by NYSE-listed companies are actually implemented in ''broadly-based'' fashion. Accordingly, the new rolling three-year definition should address the previous concerns by preventing NYSE-listed companies from establishing Plans and only implementing them in a ''broadly-based'' fashion during the first three years of the Plan. This modification should further protect the interests of investors by ensuring that only truly ''broadly-based'' Plan are exempt from shareholder approval requirements consistent with Section 6(b)(5) of the Act.[50]

The Commission has decided to approve the proposed rule change on a pilot basis to permit the markets to continue their consideration of a dilution standard. The Commission notes that the majority of commenters that opposed the 2000 Proposal were opposed to the three-year extension. In addition, two members of the Task Force, while questioning the length of time requested, believed that some extension of the pilot was justified.[51] In response, the NYSE shortened its extension request to one year. In the NYSE Letter, the Exchange reiterated its commitment to continue working with its constituents, the Commission, and other markets to achieve a consensus solution that adequately addresses the needs of all involved. Further, Nasdaq recently displayed its willingness to consider the issues regarding shareholder approval standards for Plans. Therefore, the Commission believes that it is appropriate to approve the NYSE proposal on a pilot basis until September 30, 2001 to enable the markets to continue working on a solution that balances the needs of investors with the needs of listed companies.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[52] that the amended proposed rule change (SR–NYSE–00–32) is approved on a pilot basis until September 30, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[53]

Margaret H. McFarland,

Deputy Secretary.

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[45] 15 U.S.C. 78f(b)(5).

[46] *See also* order approving the 1999 Pilot, note 8 *supra.* In addition, the Commission has reviewed the Pilot Monitoring Report. The Commission expects the NYSE to continue to monitor its listed companies' use of the ''broadly-based'' exemption and to submit a similar report prior to any future submission regarding this matter.

[47] The Commission notes that if it found that the current ''broadly-based'' definition was not consistent with the requirements of the Act, the Original Proposal approved by the Commission in 1998 would become effective. *See* notes 11 and 12 *supra.*

[48] *See* note 6 *supra.*

[49] 15 U.S.C. 78f(b)(5).

[50] 15 U.S.C. 78f(b)(5).

[51] *See* letters from TIAA–CREF, which stated ''we believe that the issues are capable of a comprehensive resolution within one year based on the recommended standards already conditionally approved by the NYSE * * *''; and Gibson, Dunn & Crutcher, which stated ''[w]hile the duration of the extension can legitimately be the subject of discussion, the justification for an extension cannot be seriously questioned.''

[52] 15 U.S.C. 78s(b)(2).

[53] 17 CFR 200.30–3(a)(12).