May 20, 2002

Edward Knight, General Counsel
Sara Nelson Bloom, Associate General Counsel
The Nasdaq Stock Market, Inc.
1801 K Street, NW, 8th Floor
Washington, DC 20006

Re: Shareholder Approval of Equity Incentive Plans

Dear Mr. Knight and Ms. Bloom:

We write as the Chairman and Vice Chairman of the Subcommittee on Employee Benefits, Executive Compensation and Section 16 of the Committee on Federal Regulation of Securities of the Business Law Section of the American Bar Association ("***ABA***") in response to the recommendations of the Nasdaq Listing and Hearing Review Council (the "***Listing Council***") regarding shareholder approval of equity incentive plans. The recommendations of the Council on this subject are set forth in a letter, dated April 11, 2002, sent by Hardwick Simmons, Chairman and Chief Executive Officer of Nasdaq, Inc. to Harvey L. Pitt, Chairman of the Securities and Exchange Commission ("***SEC***").

In his letter, Mr. Simmons sets forth the Listing Council's recommendations and conclusions, focusing on courses of action to improve the corporate governance policies of Nasdaq listed issuers. Among the suggestions of the Listing Council is that equity incentive plans of Nasdaq listed issuers that include officers and directors should be subject to shareholder approval (the "***Equity Plan Proposal***"). The Listing Council has not yet proposed language for the Equity Plan Proposal, but intends to present suggestions to the next Nasdaq board meeting in May 2002. In this letter, we express our views on the Equity Plan Proposal in anticipation of rules being developed and adopted by the board of directors of Nasdaq. This letter represents our individual views and not those of the ABA, the Section, the Committee or any of its subcommittees.

In summary, we support the Equity Plan Proposal. We believe that putting these equity plans that include officers and directors to a shareholder vote would encourage good corporate governance policies in the area of executive compensation. The elimination of the current exception for broad-based plans that include officers and directors alone should not unduly burden the boards of directors in their management of the business. In addition, putting these

broad-based plans to a vote of the shareholders will provide shareholders with the benefit of timely full disclosure regarding equity plans.

We believe that while Nasdaq is considering the Equity Plan Proposal it should take the opportunity to confirm and codify its current practices in applying the rules applicable to the granting of equity incentive awards. In particular, Nasdaq should confirm that the following equity incentive grants can be made solely through action by the board of directors and without a shareholder vote:

- Awards offered to induce prospective executives to join the company, including those in connection with an acquisition ("***Inducement Awards***")
- Awards that are granted pursuant to plans that meet the requirements of Internal Revenue Code Section 401(a) ("***Tax Qualified Plan Awards***").

Detailed reasons for our views are set forth below.

A. Proposal to Require Shareholder Approval for Equity Incentive Plans that Include Officers and Directors

Recent events have highlighted the need for good corporate governance policies. Chairman Pitt, among others, has commented on the necessity for improved corporate governance policies. To this end, Chairman Pitt asked both the Nasdaq and the New York Stock Exchange to review their corporate governance listing standards. In a letter to both Nasdaq and the New York Stock Exchange dated February 12, 2002, Chairman Pitt commented that, "[W]e believe that there are a number of ways that current corporate governance standards can be improved to strengthen the resolve of honest managers and the directors who oversee management's actions."

One area of particular concern is the method by which executives choose to compensate themselves. In a speech on April 4, 2002, at Northwestern University, Chairman Pitt commented that:

> "…I believe that stock option plans (and other equity compensation plans) for officers and directors should be approved by shareholders. Making equity incentive compensation available to management is in the interest of shareholders, but because it is (or is supposed to be), companies should be required to make full

disclosure and submit such plans to a shareholder vote as a fundamental first step."

The Equity Plan Proposal directly addresses the concerns expressed by Chairman Pitt by removing the current exception given to broad-based plans through which a board can approve an equity incentive plan that permits awards to executives of the company if the majority of the awards are granted to persons other than officers and directors. Compensation arrangements for officers and directors always present the potential for self-dealing, and equity compensation seems to be an area of particular shareholder concern. By putting such plans to a shareholder vote, Nasdaq would involve shareholders in authorizing the use of equity compensation for officers and directors. Although in and of itself shareholder approval cannot eliminate the potential for self-dealing, it can at least ensure that shareholders have a voice in authorizing the use of equity for officers and directors.

In addition, requiring a shareholder vote would further enhance issuer disclosure of its equity compensation arrangements by requiring full plan disclosure in order to secure shareholder approval. Together with the new disclosure rules recently adopted by the SEC in Release No. 33-8048, 34-45189 (requiring that issuers include statistical and narrative descriptions of all equity compensation plans in effect when seeking shareholder approval of a particular compensation plan), the Equity Plan Proposal will assure that shareholders have adequate information regarding an issuer's current and prospective compensation arrangements on a timely and ongoing basis. This will enable shareholders to understand and analyze the dilution that results from the issuer's equity compensation arrangements and will allow shareholders to participate more effectively in an issuer's overall corporate governance.

B. Continuation of Current Nasdaq Rules Permitting Inducement Awards

As noted above, while we support the Equity Plan Proposal and agree with the Listing Council that broad-based equity incentive plans in which officer and directors participate should be subject to shareholder approval, we believe that Nasdaq should maintain its current exemption from the shareholder approval requirements for Inducement Awards pursuant to Nasdaq Rule 4350. We believe that board approved Inducement Awards are necessary to enable companies to react quickly to competitive opportunities and pressures.

Inducement Awards. Inducement Awards are specifically targeted to enable the issuer to make new awards to new executives at a time when existing shareholder approved equity incentive plans may not have sufficient shares available for grant of the proposed new hire award. If Nasdaq were to require shareholder approval for Inducement Awards, issuers would be

severely limited in their ability to recruit and compensate new executives. Today's competitive pressures often force employers to act quickly in developing compensation packages to ensure that recruits can be hired and that current employees can be retained. An employer that fails to offer competitive compensation packages quickly could miss opportunities to hire prospective key employees that ultimately could erode shareholder value. We believe that the cost of potential delays caused by obtaining shareholder approval outweigh the benefits of requiring shareholder approval for Inducement Awards. Moreover, self-dealing concerns that are inherent in non-shareholder approved plans do not exist with Inducement Awards because Inducement Awards are, by definition, available only to newly hired executives who exercise no control over the issuer at the time of the award.

In supporting the Equity Plan Proposal, we also encourage Nasdaq to clarify that shareholder approval is not required for equity awards issued to new officers hired in connection with an acquisition. Awards granted to new employees in connection with an acquisition or merger do not create self-dealing issues because they are made only to prospective, rather than current, employees. Equity compensation often plays a crucial role both in the closing and in the ultimate success of any acquisition. By linking new employees' compensation to the performance of the acquiring company, employees align their fate with that of their new employer.

If an existing shareholder-approved equity pool is not sufficient for awards granted to new employees in an acquisition and new shareholder approval is required by Nasdaq, the timing required by and confidential nature of most acquisition or merger negotiations would in effect preclude options being used to incentivize employees of the acquired entity to remain employed following the proposed acquisition. Failure to grant awards could jeopardize the proposed acquisition. (We note that the New York Stock Exchange has explicitly approved "Acquisition Awards" in their formulation of a dilution standard. See Report of the New York Stock Exchange Special Task Force on Stockholder Approval Policy dated October 22, 1999). Moreover, we do not believe that the current exemption for Inducement Awards is sufficiently explicit to authorize awards in all circumstances, especially where new employment agreements are not required to be executed by those executives receiving awards.

We recommend that Nasdaq (i) retain the current rule that permits issuers to grant Inducement Awards without shareholder approval and (ii) clarify that the exemption for Inducement Awards encompasses awards to officers who become employees of the issuer immediately following an acquisition by the issuer.

C. Codification of Nasdaq Rule Permitting Exempted Awards

Under current Nasdaq Rule 4350, plans meeting the requirements of Section 401(a) of the Internal Revenue Code, pursuant to which shares may be issued by the issuer to or for the benefit of employees (including officers), do not require shareholder approval because they are broad-based plans and fell under the broad-based plan exception. We note, however, that if the Equity Plan Proposal is adopted by Nasdaq without including the existing exemption for plans meeting the requirements of Section 401(a) of the Internal Revenue Code, then plans that meet those requirements would require shareholder approval. Because of rules and limitations that govern Section 401 (a) plans, we believe that shareholder approval of Tax Qualified Plan Awards are unnecessary from a good corporate governance perspective. The NYSE believed a similar exemption was warranted when it issued its Task Force Report.

We recommend that Nasdaq codify its rules to exempt Tax Qualified Plan Awards from the shareholder approval requirements to I.R.C. Section 401(a).

D. Definition of Officer

We recommend that Nasdaq take the opportunity in adopting the Equity Plan Proposal to clarify its current interpretation that the term "officer" is defined with reference to Rule 16a-1(f) of the Regulations promulgated under Section 16 of the Securities and Exchange Act of 1934, as amended.

E. Cooperation with Other Exchanges

We believe that Nasdaq and other exchanges must cooperate to ensure that no issuer is unduly burdened solely because of the exchange it is listed on. We firmly believe that disparities in corporate governance rules should be avoided to prevent a competition between exchanges based on different rules, which could erode confidence in the markets. We recommend that Nasdaq and the other exchanges work together to formulate a uniform standard relating to shareholder approval of equity plans.

F. Conclusion

In conclusion, we agree that improved corporate governance policies will strengthen both the issuers and the markets in which their stock is traded. However, good corporate governance does not necessarily dictate the need for shareholders to approve every action taken by the management or board of the issuer where the risk of self-dealing and the effect on shareholders are minimal and the cost of obtaining shareholder approval is significant. Boards of directors of

issuers must maintain the ability to effectively manage the issuer's business in, and respond quickly to, the pressures of today's highly competitive business environment. We fully support the Equity Plan Proposal, but also encourage Nasdaq to maintain the current rules exempting Inducement Awards. In addition, we encourage Nasdaq to explicitly codify exemptions from the shareholder approval requirements for Tax Qualified Awards and to codify its definition of "officer."

One or more of the undersigned would be pleased to meet with you, if appropriate, to more fully discuss the views expressed in this letter.

Sincerely,

Scott P. Spector, Chairman

Anne G. Plimpton, Vice Chairman