

June 20, 2003

Nancy J. Sanow, Esq.
Assistant Director
Division of Market Regulation
Mail Stop 1001
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Amendment No. 2 to File No. SR-NYSE-2002-46
Proposal Relating to Shareholder Approvals and Voting of Proxies

Dear Ms. Sanow:

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934, we hereby enclose for filing nine copies of the above-captioned filing, at least one of which has been manually signed, and one copy of the filing on a diskette in Word 6.0 format. This amendment reflects changes made following conversations with the Commission's staff and in response to public comments on the proposed rule text originally filed on October 7, 2002.

Sincerely,

/s/

Darla C. Stuckey

Enclosure

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 19b-4

Proposed Rule Change

by

New York Stock Exchange, Inc.

June 20, 2003

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

Consists of 46 pages

1. Text of the Proposed Rule Change

- (a) On August 16, 2002, the New York Stock Exchange (the “Exchange” or “NYSE”) filed with the Securities and Exchange Commission (the “SEC” or the “Commission”) amendments to its Listed Company Manual to implement significant changes to its listing standards aimed at helping to restore investor confidence by empowering and ensuring the independence of directors and strengthening corporate governance practices (“SR-NYSE-2002-33” or the “Corporate Governance Proposals”).¹ This filing excerpts certain of the proposals included in the Corporate Governance Proposals, including those providing for shareholder approval of equity-compensation plans, to comply with a request from the Commission staff to address this issue separately from the remainder of the corporate governance proposals.
- (b) Except as otherwise noted below, the Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

- (a) The Exchange’s Board of Directors approved this proposed rule change on August 1, 2002. No further action by the Board of Directors or the membership of the Exchange is required. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.
- (b) The persons from the Exchange staff prepared to respond to questions and comments on the proposed rule change are:

Janice O’Neill
 Vice President
 Corporate Compliance
 (212) 656-2407

James F. Duffy
 Senior Vice President & Associate
 General Counsel
 (212) 656-5855

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

(a) Purpose

The New York Stock Exchange has long pioneered advances in corporate governance. The NYSE has required companies to comply with listing standards for nearly 150 years, and has periodically amended and supplemented those standards when the evolution of our capital markets has demanded enhanced governance standards or disclosure. On February 13, 2002, SEC Chairman Harvey Pitt asked the Exchange to review its

¹ File No. SR-NYSE-2002-33 (August 16, 2002).

corporate governance listing standards. In conjunction with that request, the NYSE appointed a Corporate Accountability and Listing Standards Committee (the “Committee”) to review the NYSE’s current listing standards, along with recent proposals for reform, with the goal of enhancing the accountability, integrity and transparency of the Exchange’s listed companies. On August 16, 2002, the NYSE filed the Corporate Governance Proposals with the SEC, proposing rule changes to its corporate governance standards which reflect the findings of the Committee and which are designed to further the ability of honest and well-intentioned directors, officers and employees to perform their functions effectively. The NYSE filed amendments to the Corporate Governance Proposals with the Commission on April 4, 2003, which were published for public comment.² The proposals for new corporate governance listing standards for companies listed on the Exchange will be codified in a new Section 303A of the Exchange’s Listed Company Manual.

Subsequent to the filing of the Corporate Governance Proposals, the SEC requested that the NYSE file proposed Section 303A(8) (relating to shareholder approval of equity-compensation plans) and proposed NYSE Rule 452 (which prohibits member organizations from giving a proxy to vote on equity-compensation plans absent specific instructions from a beneficial holder) separately from its remaining proposals to facilitate SEC handling. This filing was made on October 7, 2002 (the “October Amendments”), and reflected a number of changes from the original proposal.

Following publication of the October Amendments by the Commission, the Exchange received thirty comment letters from the public. The Exchange also participated in a number of discussions with the Commission regarding the proposed rule text. As a result of these discussions and in response to the comment letters, the Exchange has made a number of changes to the rules as proposed in the October Amendments.

Significant Changes from October Amendments

While the October Amendments reflected the original format of the recommendations made by the Committee, stating a basic principle and including additional explanation and commentary as “commentary,” the rule text of Section 303A(8) as currently proposed has been written in a “plain-English” format to enhance understanding of the rule. The Exchange has also included a new section entitled “Transition Rules” to clarify when shareholder approval will be required for plans adopted before the effective date of the proposed amendments.

The description of plans that are not equity compensation plans has been clarified to expressly exclude 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.

² See Securities Exchange Act Release No. 47672, 68 FR 19051 (April 17, 2003) (SR-NYSE-2002-33).

The language of the rule has been modified to clarify that shareholder approval is required for pre-existing plans that were not approved by shareholders and that have neither an evergreen formula nor a specific number of shares available under the plan. However, we provide a transition period for requiring shareholder approval for such plans. In addition, we specify that during the period prior to approval, the plan may be utilized, but only in a manner consistent with past practice.

In the discussion of “material revisions,” we have more specifically defined the concept of “evergreen” or “formula” plans, and we introduced the concept of “discretionary” plans. In addition, the language Under “Transition Rules” relating to evergreen plans clarifies that an evergreen plan that was approved by shareholders but that does not have a ten-year term must be (a) approved by shareholders before any shares that become available as a result of a formulaic increase are utilized or (b) amended to include a term of no more than ten years from the date the plan was adopted or last approved by shareholders. If the plan were amended to include such term, shareholder approval would not be required. No action would be required, however, if a plan were frozen at the level of shares available at the time the rule becomes effective. The enumerated list of “material revisions” has also been revised to change the term “changes the types of awards” to “expands the types of awards.” No further substantive amendment to the definition of “material revisions” have been made.

The proposal has been amended to clarify that repricings that have commenced prior to the date of effectiveness of the proposal (i.e., exchange offers to optionees) will not be subject to shareholder approval (assuming that such repricing did not require shareholder approval under our existing rules).

The proposal has been amended to clarify that inducement awards are available for rehires following a bona fide period of employment interruption. We have also clarified that inducement awards include grants to new employees in connection with a merger or acquisition. In addition, we have included a requirement that listed companies must provide prompt public disclosure following the grant of any inducement award in reliance on the exemption.

With respect to the proposed exception for parallel nonqualified plan, we have redesignated the exception as applying to “parallel excess plans” and have added an additional condition relating to employer equity contributions that a plan must satisfy in order to be deemed a parallel excess plan.

We have added a requirement that an issuer must notify the Exchange in writing when it uses one of the exemptions from the shareholder approval requirements.

The NYSE has not made any changes to the proposed amendments to Rule 452. We have provided, however, a transition period that will make the new rule applicable only to shareholder meetings that occur on or after the 90th day following the date of the SEC order approving the new rule. In addition, we have made a conforming change to Rule 452 subsection .11(9) to reflect the amendments being proposed to Rule 452 subsection .11(12) and have reflected the proposed amendments to Rule 452 in Listed Company

Manual Section 402.08 (“Giving a Proxy to Vote Stock”), which restates Rule 452 in part.

As amended, Section 303A (8) of the Exchange’s Listed Company Manual is as follows:

- 8. Shareholders must be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions explained below.** Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval, with the limited exemptions explained below.

Definition of Equity-Compensation Plan

An “equity-compensation plan” is 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. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an “equity-compensation plan” for these purposes.

However, the following are not “equity-compensation plans” even if the brokerage and other costs of the plan are paid for by the listed company:

- Plans that are made available to shareholders generally, such as a typical dividend reinvestment plan.
- Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
 - the shares are delivered immediately or on a deferred basis; or
 - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).

Material Revisions

A “material revision” of an equity-compensation plan includes (but is not limited to), the following:

- A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction).
 - If a plan contains a formula for automatic increases in the shares available (sometimes called an “evergreen formula”) or for automatic grants pursuant to a formula, each such increase or grant will be

considered a revision requiring shareholder approval *unless* the plan has a term of not more than ten years.

This type of plan (regardless of its term) is referred to below as a “formula plan.” Examples of automatic grants pursuant to a formula are (1) annual grants to directors of restricted stock having a certain dollar value, and (2) “matching contributions,” whereby stock is credited to a participant’s account based upon the amount of compensation the participant elects to defer.

- If a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval *regardless* of whether the plan has a term of not more than ten years.

This type of plan is referred to below as a “discretionary plan.” A requirement that grants be made out of treasury shares or repurchased shares will not, in itself, be considered a limit or pre-established formula so as to prevent a plan from being considered a discretionary plan.

- An expansion of the types of awards available under the plan.
- A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.
- A material extension of the term of the plan.
- A material change to the method of determining the strike price of options under the plan.
 - A change in the method of determining “fair market value” from the closing price on the date of grant to the average of the high and low price on the date of grant is an example of a change that the Exchange would not view as material.
- The deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

Note that an amendment will not be considered a “material revision” if it curtails rather than expands the scope of the plan in question.

Repricings

A plan that does not contain a provision that specifically *permits* repricing of options will be considered for purposes of this listing standard as *prohibiting* repricing. Accordingly any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. This consideration will not apply to a repricing through an exchange offer that commenced before the date this listing standard became effective. “Repricing” means any of the following or any other action that has the same effect:

- Lowering the strike price of an option after it is granted.

- Any other action that is treated as a repricing under generally accepted accounting principles.
- Canceling an option at a time when its strike price exceeds the fair market value of the underlying stock, in exchange for another option, restricted stock, or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

Exemptions

This listing standard does not require shareholder approval of employment inducement awards, certain grants, plans and amendments in the context of mergers and acquisitions, and certain specific types of plans, all as described below. However, these exempt grants, plans and amendments may be made only with the approval of the company's independent compensation committee or the approval of a majority of the company's independent directors. Companies must also notify the Exchange in writing when they use one of these exemptions.

Employment Inducement Awards

An employment inducement award is a grant of options or other equity-based compensation as a material inducement to a person or persons being hired by the listed company or any of its subsidiaries, or being rehired following a bona fide period of interruption of employment. Inducement awards include grants to new employees in connection with a merger or acquisition. Promptly following a grant of any inducement award in reliance on this exemption, the listed company must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.

Mergers and Acquisitions

Two exemptions apply in the context of corporate acquisitions and mergers. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity-compensation awards to reflect the transaction. Second, shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exemption applies to situations where a party that is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. A plan adopted in contemplation of the merger or acquisition transaction would not be considered "pre-existing" for purposes of this exemption.

Shares available under such a pre-existing plan may be used for post-transaction grants of options and other awards with respect to equity of the entity that is the listed company after the transaction, either under the pre-existing plan or another plan, without further shareholder approval, so long as:

- the number of shares available for grants is appropriately adjusted to reflect the transaction;

- the time during which those shares are available is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and
- the options and other awards are not granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or entities that were its subsidiaries immediately before the transaction.

Any shares reserved for listing in connection with a transaction pursuant to either of these exemptions would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock and thus required shareholder approval under Listed Company Manual Section 312.03(c). These merger-related exemptions will not result in any increase in the aggregate potential dilution of the combined enterprise. Further, mergers or acquisitions are not routine occurrences, and are not likely to be abused. Therefore, the Exchange considers both of these exemptions to be consistent with the fundamental policy involved in this standard.

Qualified Plans, Parallel Excess Plans and Section 423 Plans

The following types of plans (and material revisions thereto) are exempt from the shareholder approval requirement:

- plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code³ (e.g., ESOPs);
- plans intended to meet the requirements of Section 423 of the Internal Revenue Code;⁴ and
- “parallel excess plans” as defined below.

Section 401(a) plans and Section 423 plans are already regulated under the Internal Revenue Code and Treasury regulations. Section 423 plans, which are stock purchase plans under which an employee can purchase no more than \$25,000 worth of stock per year at a plan-specified discount capped at 15%, are also required by the Internal Revenue Code to receive shareholder approval. While Section 401(a) plans and parallel excess plans are not required to be approved by shareholders, U.S. GAAP requires that the shares issued under these plans be “expensed” (i.e., treated as a compensation expense on the income statement) by the company issuing the shares.

An equity-compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable Section 401(a) plan, Section 423 plan or parallel excess plan that the listed company provides to its U.S. employees, but for features necessary to

³ 26 U.S.C. §401(a) (1988).

⁴ 26 U.S.C. §423 (1988).

comply with applicable foreign tax law, are also exempt from shareholder approval under this section.

The term “parallel excess plan” means a plan that is a “pension plan” within the meaning of the Employee Retirement Income Security Act (“ERISA”)⁵ that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a) to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may hereafter be enacted.

A plan will not be considered a parallel excess plan unless (1) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limits that may hereafter be enacted); (2) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limits described in the preceding sentence and the limitation described in clause (3); and (3) no participant receives employer equity contributions under the plan in excess of 25% of the participant’s cash compensation.

Transition Rules

Except as provided below, a plan that was adopted before the date of the Securities and Exchange Commission order approving this listing standard 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

⁵ 29 U.S.C. §1002 (1999).

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.

Broker Voting

In addition, the Exchange will preclude its member organizations from giving a proxy to vote on equity-compensation plans unless the beneficial owner of the shares has given voting instructions. This is codified in NYSE Rule 452. Amended Rule 452 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 the rule change. The NYSE will establish a working group to advise with respect to the need for, and design of, mechanisms to facilitate implementation of the proposal that brokers may not vote on equity-compensation plans presented to shareholders without instructions from the beneficial owners. This will not delay the effectiveness of the broker-may-not-vote proposal.

(b) Statutory Basis

The basis under the Securities Exchange Act of 1934 ("Exchange Act") for this proposed rule change is the requirement under Section 6(b)(5)⁶ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

⁶ 15 U.S.C. §78(f)(b)(5).

4. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Thirty comment letters were received on the rule proposal. The proposal received strong support from all commentors. A number of letters commented on the proposed exceptions from required shareholder approval for all equity-compensation plans.

A. Shareholder Approval

Two commenters supported that equity compensation plans having no senior executive or director participation should be exempted from the proposed shareholder approval requirements.

Twelve commenters specifically opposed the proposed exception from shareholder approval for inducement awards. One commenter suggested that this exception should be limited to critical management positions, followed by shareholder ratification at the next scheduled meeting and Form 8-K disclosure. One commenter stated that companies could, and should, plan for such events by having a cushion of shares available for award under existing approved plans. One commenter proposed that the exception be extended to cover individuals who were rehired after a bona fide interruption of employment. One commenter specifically supported the proposed exception.

Eleven commenters specifically opposed the exception for pre-existing shareholder approved plans in the context of mergers and acquisitions. One commenter expressed concern that the exception would allow acquired plans to be structured in ways that are opposed by shareholders of the acquirer. One commenter suggested that at a minimum, the exception should only be available for issuances that would result in dilution of 1% or less.

Seven commenters specifically opposed the exception for Section 423 tax qualified plans. One commenter supported an extension of the exception to apply to employee stock purchase plans that are not intended to qualify under Section 423, but which have similar characteristics to Section 423 plans. One commenter suggested that the reference to Section 423 plans be changed to "stock purchase plans" as defined by Rule 16b-3(b)(5) of the Exchange Act. One commenter supported an exception for all discount stock purchase plans made broadly available to employees.

One commenter suggested that the proposal relating to evergreen plans be modified to require shareholder approval of a plan with no set expiration period upon the earliest of a subsequent material revision of a plan, the expiration of the term of the plan or ten years from the effective date of the proposal. One commenter suggested a similar modification. One commenter suggested that companies have the ability to continue to use such

evergreen plans without shareholder approval, so long as they amend the plan to add a ten-year term expiring not more than 10 years after the amendment is made. Two commenters also suggested that the proposal be modified so that an evergreen plan adopted before the effective date of the proposal would not be subject to shareholder approval until the next annual shareholders' meeting. One commenter suggested a similar approach, but would include a requirement that the next annual shareholders' meeting take place within twelve months of the proposal's adoption. One commenter supported modifying the proposal to require that an automatic increase in the shares available under an evergreen plan would be considered a material revision that would require shareholder approval, even if the plan already was limited to a term of not more than 10 years. One commenter suggested that any increase in shares under an evergreen plan should be subject to shareholder approval, even if such increase is based on a formulaic increase. One commenter requested clarification on whether a previously approved evergreen plan must again be approved by shareholders if it has an unlimited term and has been in existence for more than ten years. One commenter supported that evergreen plans not be made subject to shareholder approval.

One commenter requested that the proposal be clarified to specifically state that the requirement for shareholder approval would only apply to companies listing common stock on the NYSE.

Eight commenters specifically opposed the exception for parallel non-qualified plans. Two commenters stated that the exception was too narrow and should be revised to include other categories of non-qualified plans. Two commenters suggested that the definition of "parallel nonqualified plan" should conform to the definition of "excess benefit plan" set forth in Rule 16b-3 of the Exchange Act. One commenter expressed concern that a permissible parallel plan structure could allow participants to defer up to 100% of their compensation into stock, if the qualified plan permitted such deferrals before application of the tax limits.

Five commenters requested that the NYSE more specifically define the term "material revision." One commenter supported an elimination of the concept of materiality or, at the least, that the NYSE provide a uniform definition. One commenter requested that the NYSE make public any staff determinations on requests for interpretations on the definition. Two commenters supported amending the types of revisions that would be deemed material in order to clarify that a plan amendment would not be considered material unless it is beneficial to plan participants.

Two commenters suggested that the list of plans that are not considered to be equity compensation plans be modified to include plans under which all benefits are paid in cash or property other than equity of the listed company.

Two commenters suggested that equity plans sponsored by going-public companies should be subject to shareholder approval within some reasonable time following the initial public offering. One commenter specifically opposed this notion. Two commenters stated that some equity compensation plans are part of ratified collective bargaining arrangements and urged that these be excluded from the

shareholder approval requirement, noting the shareholder protection afforded by the arms-length negotiating process.

One commenter supported a de minimis exception for equity-compensation plans that are not available to executive officers and directors at the time of grant and which do not present any meaningful risk of shareholder dilution (no more than 0.25% of the outstanding class subject to awards made in any year; no employee to receive in any one fiscal year shares with a fair market value greater than \$5,000 at the time of grant). Two commenters supported revision of the proposed rule commentary to exempt equity compensation plans covering employees residing outside the United States that are (a) designed to comply with local foreign tax laws and (b) open to all full-time employees, subject to certain permissible limitations.

Six commenters specifically supported the fact that an exception for plans funded by treasury stock was not proposed.

B. Elimination of Broker Voting

Ten commenters noted strong support for this proposal. One commenter suggested that the NYSE undertake a broad-based review of the broker voting process, with a view towards narrowing, if not eliminating entirely the rights of brokers to cast unrestricted votes. Two commenters supported that all broker voting be eliminated. One commenter requests that the NYSE clarify when the proposal would be effective and supports a transition period. One commenter also supports clarification on whether there are any types of equity compensation plan matters on which broker voting is not prohibited absent specific shareholder instruction. Two commenters opposed the proposal, one suggesting that either the rule remain unchanged or that the rule allow for “mirrored” voting of uninstructed proxies delivered by investors based proportionately on the votes received by type of investor that has delivered an instructed proxy, i.e. based on the percentage of individual or institutional shareholders that have delivered instructed proxies and how they voted.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period specified in Section 19(b)(2) of the Exchange Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

This proposed rule change is not based on the rules of another self-regulatory organization or of the Commission.

9. Exhibits

Exhibit 1 - Form of Notice of Proposed Rule Change for Publication in the Federal Register

Exhibit 2 – Written Comments on the Proposed Rule -
The comment letters received by the NYSE with respect to this proposal were previously provided to the SEC.

Exhibit A – Text of the Proposed Rule Change

Exhibit A-1 – New Listed Company Manual Section 303A

Exhibit A-2 – Amendments to Listed Company Manual Sections 303 and 312.03(a)

Exhibit A-3 – Amendment to NYSE Rule 452

Exhibit A-4 – Amendment to Listed Company Manual Section 402.08

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the self-regulatory organization has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

New York Stock Exchange, Inc.

By /s/
Darla C. Stuckey
Corporate Secretary

SECURITIES AND EXCHANGE COMMISSION
 (Release No. 34- : File No. SR-NYSE-2002-46)

[Date]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Shareholder Approvals and Voting of Proxies

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 and Rule 19b-4 thereunder,² notice is hereby given that on June 20, 2003, the New York Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in items I, II, III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The New York Stock Exchange is filing the below-described amendments to its Listed Company Manual to implement significant changes to its listing standards aimed at helping to restore investor confidence by empowering and ensuring the independence of directors and strengthening corporate governance practices.

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 self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

may be examined at the places specified in item IV below and is set forth in Sections A, B, and C below.

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

1. Purpose

The New York Stock Exchange has long pioneered advances in corporate governance. The NYSE has required companies to comply with listing standards for nearly 150 years, and has periodically amended and supplemented those standards when the evolution of our capital markets has demanded enhanced governance standards or disclosure. On February 13, 2002, SEC Chairman Harvey Pitt asked the Exchange to review its corporate governance listing standards. In conjunction with that request, the NYSE appointed a Corporate Accountability and Listing Standards Committee (the "Committee") to review the NYSE's current listing standards, along with recent proposals for reform, with the goal of enhancing the accountability, integrity and transparency of the Exchange's listed companies. On August 16, 2002, the NYSE filed the Corporate Governance Proposals with the SEC, proposing rule changes to its corporate governance standards which reflect the findings of the Committee and which are designed to further the ability of honest and well-intentioned directors, officers and employees to perform their functions effectively. The NYSE filed amendments to the Corporate Governance Proposals with the Commission on April 4, 2003, which were published for public comment.³ The proposals for new corporate governance listing standards for companies listed on the Exchange will be codified in a new Section 303A of the Exchange's Listed Company Manual.

³ See Securities Exchange Act Release No. 47672, 68 FR 19051 (April 17, 2003) (SR-NYSE-2002-33).

Subsequent to the filing of the Corporate Governance Proposals, the SEC requested that the NYSE file proposed Section 303A(8) (relating to shareholder approval of equity-compensation plans) and proposed NYSE Rule 452 (which prohibits member organizations from giving a proxy to vote on equity-compensation plans absent specific instructions from a beneficial holder) separately from its remaining proposals to facilitate SEC handling. This filing was made on October 7, 2002 (the “October Amendments”), and reflected a number of changes from the original proposal.

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Significant Changes from October Amendments

While the October Amendments reflected the original format of the recommendations made by the Committee, stating a basic principle and including additional explanation and commentary as “commentary,” the rule text of Section 303A(8) as currently proposed has been written in a “plain-English” format to enhance understanding of the rule. The Exchange has also included a new section entitled “Transition Rules” to clarify when shareholder approval will be required for plans adopted before the effective date of the proposed amendments.

The description of plans that are not equity compensation plans has been clarified to expressly exclude 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.

The language of the rule has been modified to clarify that shareholder approval is required for pre-existing plans that were not approved by shareholders and that have neither an evergreen formula nor a specific number of shares available under the plan. However, we provide a transition period for requiring shareholder approval for such plans. In addition, we specify that during the period prior to approval, the plan may be utilized, but only in a manner consistent with past practice.

In the discussion of “material revisions,” we have more specifically defined the concept of “evergreen” or “formula” plans, and we introduced the concept of “discretionary” plans. In addition, the language Under “Transition Rules” relating to evergreen plans clarifies that an evergreen plan that was approved by shareholders but that does not have a ten-year term must be (a) approved by shareholders before any shares that become available as a result of a formulaic increase are utilized or (b) amended to include a term of no more than ten years from the date the plan was adopted or last approved by shareholders. If the plan were amended to include such term, shareholder approval would not be required. No action would be required, however, if a plan were frozen at the level of shares available at the time the rule becomes effective. The enumerated list of “material revisions” has also been revised to change the term “changes the types of awards” to “expands the types of awards.” No further substantive amendment to the definition of “material revisions” have been made.

The proposal has been amended to clarify that repricings that have commenced prior to the date of effectiveness of the proposal (i.e., exchange offers to optionees) will not be subject to shareholder approval (assuming that such repricing did not require shareholder approval under our existing rules).

The proposal has been amended to clarify that inducement awards are available for rehires following a bona fide period of employment interruption. We have also clarified that

inducement awards include grants to new employees in connection with a merger or acquisition. In addition, we have included a requirement that listed companies must provide prompt public disclosure following the grant of any inducement award in reliance on the exemption.

With respect to the proposed exception for parallel nonqualified plan, we have redesignated the exception as applying to “parallel excess plans” and have added an additional condition relating to employer equity contributions that a plan must satisfy in order to be deemed a parallel excess plan.

We have added a requirement that an issuer must notify the Exchange in writing when it uses one of the exemptions from the shareholder approval requirements.

The NYSE has not made any changes to the proposed amendments to Rule 452. We have provided, however, a transition period that will make the new rule applicable only to shareholder meetings that occur on or after the 90th day following the date of the SEC order approving the new rule. In addition, we have made a conforming change to Rule 452 subsection .11(9) to reflect the amendments being proposed to Rule 452 subsection .11(12) and have reflected the proposed amendments to Rule 452 in Listed Company Manual Section 402.08 (“Giving a Proxy to Vote Stock”), which restates Rule 452 in part.

As amended, Section 303A (8) of the Exchange’s Listed Company Manual is as follows:

8. Shareholders must be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions explained below.

Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation.

To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all

equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval, with the limited exemptions explained below.

Definition of Equity-Compensation Plan

An “equity-compensation plan” is 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. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an “equity-compensation plan” for these purposes.

However, the following are not “equity-compensation plans” even if the brokerage and other costs of the plan are paid for by the listed company:

- Plans that are made available to shareholders generally, such as a typical dividend reinvestment plan.
- Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
 - the shares are delivered immediately or on a deferred basis; or
 - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).

Material Revisions

A “material revision” of an equity-compensation plan includes (but is not limited to), the following:

- A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction).

– If a plan contains a formula for automatic increases in the shares available (sometimes called an “evergreen formula”) or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval *unless* the plan has a term of not more than ten years.

This type of plan (regardless of its term) is referred to below as a “formula plan.” Examples of automatic grants pursuant to a formula are (1) annual grants to directors of restricted stock having a certain dollar value, and (2) “matching contributions,” whereby stock is credited to a participant’s account based upon the amount of compensation the participant elects to defer.

– If a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval *regardless* of whether the plan has a term of not more than ten years.

This type of plan is referred to below as a “discretionary plan.” A requirement that grants be made out of treasury shares or repurchased shares will not, in itself, be considered a limit or pre-established formula so as to prevent a plan from being considered a discretionary plan.

- An expansion of the types of awards available under the plan.
- A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.
- A material extension of the term of the plan.
- A material change to the method of determining the strike price of options under the plan.

- A change in the method of determining “fair market value” from the closing price on the date of grant to the average of the high and low price on the date of grant is an example of a change that the Exchange would not view as material.
- The deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

Note that an amendment will not be considered a “material revision” if it curtails rather than expands the scope of the plan in question.

Repricings

A plan that does not contain a provision that specifically *permits* repricing of options will be considered for purposes of this listing standard as *prohibiting* repricing. Accordingly any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. This consideration will not apply to a repricing through an exchange offer that commenced before the date this listing standard became effective.

“Repricing” means any of the following or any other action that has the same effect:

- Lowering the strike price of an option after it is granted.
- Any other action that is treated as a repricing under generally accepted accounting principles.
- Canceling an option at a time when its strike price exceeds the fair market value of the underlying stock, in exchange for another option, restricted stock, or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

Exemptions

This listing standard does not require shareholder approval of employment inducement awards, certain grants, plans and amendments in the context of mergers and acquisitions, and certain specific types of plans, all as described below. However, these exempt grants, plans and amendments may be made only with the approval of the company's independent compensation committee or the approval of a majority of the company's independent directors. Companies must also notify the Exchange in writing when they use one of these exemptions.

Employment Inducement Awards

An employment inducement award is a grant of options or other equity-based compensation as a material inducement to a person or persons being hired by the listed company or any of its subsidiaries, or being rehired following a bona fide period of interruption of employment. Inducement awards include grants to new employees in connection with a merger or acquisition. Promptly following a grant of any inducement award in reliance on this exemption, the listed company must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.

Mergers and Acquisitions

Two exemptions apply in the context of corporate acquisitions and mergers.

First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity-compensation awards to reflect the transaction.

Second, shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exemption applies to situations where a party that is not a listed company

following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. A plan adopted in contemplation of the merger or acquisition transaction would not be considered “pre-existing” for purposes of this exemption.

Shares available under such a pre-existing plan may be used for post-transaction grants of options and other awards with respect to equity of the entity that is the listed company after the transaction, either under the pre-existing plan or another plan, without further shareholder approval, so long as:

- the number of shares available for grants is appropriately adjusted to reflect the transaction;
- the time during which those shares are available is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and
- the options and other awards are not granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or entities that were its subsidiaries immediately before the transaction.

Any shares reserved for listing in connection with a transaction pursuant to either of these exemptions would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the company’s outstanding common stock and thus required shareholder approval under Listed Company Manual Section 312.03(c).

These merger-related exemptions will not result in any increase in the aggregate potential dilution of the combined enterprise. Further, mergers or acquisitions are not routine occurrences, and are not likely to be abused. Therefore, the Exchange considers both of these exemptions to be consistent with the fundamental policy involved in this standard.

Qualified Plans, Parallel Excess Plans and Section 423 Plans

The following types of plans (and material revisions thereto) are exempt from the shareholder approval requirement:

- plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code⁴ (e.g., ESOPs);
- plans intended to meet the requirements of Section 423 of the Internal Revenue Code;⁵ and
- “parallel excess plans” as defined below.

Section 401(a) plans and Section 423 plans are already regulated under the Internal Revenue Code and Treasury regulations. Section 423 plans, which are stock purchase plans under which an employee can purchase no more than \$25,000 worth of stock per year at a plan-specified discount capped at 15%, are also required by the Internal Revenue Code to receive shareholder approval. While Section 401(a) plans and parallel excess plans are not required to be approved by shareholders, U.S. GAAP requires that the shares issued under these plans be “expensed” (i.e., treated as a compensation expense on the income statement) by the company issuing the shares.

An equity-compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable Section 401(a) plan, Section 423 plan or parallel excess plan that the listed company provides to its U.S. employees, but for features necessary to

⁴ 26 U.S.C. §401(a) (1988).

⁵ 26 U.S.C. §423 (1988).

comply with applicable foreign tax law, are also exempt from shareholder approval under this section.

The term “parallel excess plan” means a plan that is a “pension plan” within the meaning of the Employee Retirement Income Security Act (“ERISA”)⁶ that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a) to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may hereafter be enacted. A plan will not be considered a parallel excess plan unless (1) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limits that may hereafter be enacted); (2) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limits described in the preceding sentence and the limitation described in clause (3); and (3) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

⁶ 29 U.S.C. §1002 (1999).

Transition Rules

Except as provided below, a plan that was adopted before the date of the Securities and Exchange Commission order approving this listing standard will not be subject to shareholder approval under this listing standard 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.

Broker Voting

In addition, the Exchange will preclude its member organizations from giving a proxy to vote on equity-compensation plans unless the beneficial owner of the shares has given voting instructions. This is codified in NYSE Rule 452. Amended Rule 452 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 the rule change. The NYSE will establish a working group to advise with respect to the need for, and design of, mechanisms to facilitate implementation of the proposal that brokers may not vote on equity-compensation plans presented to shareholders without instructions from the beneficial owners. This will not delay the effectiveness of the broker-may-not-vote proposal.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (“Exchange Act”) for this proposed rule change is the requirement under Section 6(b)(5)⁷ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Thirty comment letters were received on the rule proposal. The proposal received strong support from all commentors. A number of letters commented on the proposed exceptions from required shareholder approval for all equity-compensation plans.

A. Shareholder Approval

Two commenters supported that equity compensation plans having no senior executive or director participation should be exempted from the proposed shareholder approval requirements.

Twelve commenters specifically opposed the proposed exception from shareholder approval for inducement awards. One commenter suggested that this exception should be limited to critical management positions, followed by shareholder ratification at the next scheduled meeting and Form 8-K disclosure. One commenter stated that companies could, and should,

⁷ 15 U.S.C. 78f(b)(5).

plan for such events by having a cushion of shares available for award under existing approved plans. One commenter proposed that the exception be extended to cover individuals who were rehired after a bona fide interruption of employment. One commenter specifically supported the proposed exception.

Eleven commenters specifically opposed the exception for pre-existing shareholder approved plans in the context of mergers and acquisitions. One commenter expressed concern that the exception would allow acquired plans to be structured in ways that are opposed by shareholders of the acquirer. One commenter suggested that at a minimum, the exception should only be available for issuances that would result in dilution of 1% or less.

Seven commenters specifically opposed the exception for Section 423 tax qualified plans. One commenter supported an extension of the exception to apply to employee stock purchase plans that are not intended to qualify under Section 423, but which have similar characteristics to Section 423 plans. One commenter suggested that the reference to Section 423 plans be changed to “stock purchase plans” as defined by Rule 16b-3(b)(5) of the Exchange Act. One commenter supported an exception for all discount stock purchase plans made broadly available to employees.

One commenter suggested that the proposal relating to evergreen plans be modified to require shareholder approval of a plan with no set expiration period upon the earliest of a subsequent material revision of a plan, the expiration of the term of the plan or ten years from the effective date of the proposal. One commenter suggested a similar modification. One commenter suggested that companies have the ability to continue to use such evergreen plans without shareholder approval, so long as they amend the plan to add a ten-year term expiring not more than 10 years after the amendment is made. Two commenters also suggested that the proposal be modified so that an evergreen plan adopted before the effective date of the proposal would not

be subject to shareholder approval until the next annual shareholders' meeting. One commenter suggested a similar approach, but would include a requirement that the next annual shareholders' meeting take place within twelve months of the proposal's adoption. One commenter supported modifying the proposal to require that an automatic increase in the shares available under an evergreen plan would be considered a material revision that would require shareholder approval, even if the plan already was limited to a term of not more than 10 years. One commenter suggested that any increase in shares under an evergreen plan should be subject to shareholder approval, even if such increase is based on a formulaic increase. One commenter requested clarification on whether a previously approved evergreen plan must again be approved by shareholders if it has an unlimited term and has been in existence for more than ten years. One commenter supported that evergreen plans not be made subject to shareholder approval.

One commenter requested that the proposal be clarified to specifically state that the requirement for shareholder approval would only apply to companies listing common stock on the NYSE.

Eight commenters specifically opposed the exception for parallel non-qualified plans. Two commenters stated that the exception was too narrow and should be revised to include other categories of non-qualified plans. Two commenters suggested that the definition of "parallel nonqualified plan" should conform to the definition of "excess benefit plan" set forth in Rule 16b-3 of the Exchange Act. One commenter expressed concern that a permissible parallel plan structure could allow participants to defer up to 100% of their compensation into stock, if the qualified plan permitted such deferrals before application of the tax limits.

Five commenters requested that the NYSE more specifically define the term "material revision." One commenter supported an elimination of the concept of materiality or, at the least, that the NYSE provide a uniform definition. One commenter requested that the NYSE make

public any staff determinations on requests for interpretations on the definition. Two commenters supported amending the types of revisions that would be deemed material in order to clarify that a plan amendment would not be considered material unless it is beneficial to plan participants.

Two commenters suggested that the list of plans that are not considered to be equity compensation plans be modified to include plans under which all benefits are paid in cash or be subject to shareholder approval within some reasonable time following the initial public offering. One commenter specifically opposed this notion.

Two commenters stated that some equity compensation plans are part of ratified collective bargaining arrangements and urged that these be excluded from the shareholder approval requirement, noting the shareholder protection afforded by the arms-length negotiating process.

One commenter supported a de minimis exception for equity-compensation plans that are not available to executive officers and directors at the time of grant and which do not present any meaningful risk of shareholder dilution (no more than 0.25% of the outstanding class subject to awards made in property other than equity of the listed company).

Two commenters suggested that equity plans sponsored by going-public companies should any year; no employee to receive in any one fiscal year shares with a fair market value greater than \$5,000 at the time of grant).

Two commenters supported revision of the proposed rule commentary to exempt equity compensation plans covering employees residing outside the United States that are (a) designed to comply with local foreign tax laws and (b) open to all full-time employees, subject to certain permissible limitations.

Six commenters specifically supported the fact that an exception for plans funded by treasury stock was not proposed.

B. Elimination of Broker Voting

Ten commenters noted strong support for this proposal. One commenter suggested that the NYSE undertake a broad-based review of the broker voting process, with a view towards narrowing, if not eliminating entirely the rights of brokers to cast unrestricted votes. Two commenters supported that all broker voting be eliminated. One commenter requests that the NYSE clarify when the proposal would be effective and supports a transition period. One commenter also supports clarification on whether there are any types of equity compensation plan matters on which broker voting is not prohibited absent specific shareholder instruction. One commenter opposed the proposal, suggesting that either the rule remain unchanged or that the rule allow for “mirrored” voting of uninstructed proxies delivered by investors based proportionately on the votes received by type of investor that has delivered an instructed proxy, i.e. based on the percentage of individual or institutional shareholders that have delivered instructed proxies and how they voted.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve the proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street N.W., Washington, D.C. 20549.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in 450 Fifth Street, N.W., Washington, D.C. 20549.

Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from date of publication].

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

⁸ 17 CFR 200.30-3(a)(12).

Deputy Secretary
Margaret H. McFarland

Dated:

Text of the Proposed Rule Change
(All language is new)

Listed Company Manual

* * * *

303.00 Corporate Governance Standards

* * * *

303A

Section 303A

1. – 7. Reserved.

8. Shareholders must be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions explained below.

Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval, with the limited exemptions explained below.

Definition of Equity-Compensation Plan

An “equity-compensation plan” is 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. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an “equity-compensation plan” for these purposes.

However, the following are not “equity-compensation plans” even if the brokerage and other costs of the plan are paid for by the listed company:

- Plans that are made available to shareholders generally, such as a typical dividend reinvestment plan.
- Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:
 - the shares are delivered immediately or on a deferred basis; or
 - the payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).

Material Revisions

A “material revision” of an equity-compensation plan includes (but is not limited to), the following:

- A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction).

- If a plan contains a formula for automatic increases in the shares available (sometimes called an “evergreen formula”) or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval *unless* the plan has a term of not more than ten years.

This type of plan (regardless of its term) is referred to below as a “formula plan.” Examples of automatic grants pursuant to a formula are (1) annual grants to directors of restricted stock having a certain dollar value, and (2) “matching contributions,” whereby stock is credited to a participant’s account based upon the amount of compensation the participant elects to defer.

- If a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval *regardless* of whether the plan has a term of not more than ten years.

This type of plan is referred to below as a “discretionary plan.” A requirement that grants be made out of treasury shares or repurchased shares will not, in itself, be considered a limit or pre-established formula so as to prevent a plan from being considered a discretionary plan.

- An expansion of the types of awards available under the plan.
- A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.
- A material extension of the term of the plan.
- A material change to the method of determining the strike price of options under the plan.
 - A change in the method of determining “fair market value” from the closing price on the date of grant to the average of the high and low price on the date of grant is an example of a change that the Exchange would not view as material.
- The deletion or limitation of any provision prohibiting repricing of options. See the next section for details.

Note that an amendment will not be considered a “material revision” if it curtails rather than expands the scope of the plan in question.

Repricings

A plan that does not contain a provision that specifically *permits* repricing of options will be considered for purposes of this listing standard as *prohibiting* repricing. Accordingly any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. This consideration will not apply to a repricing through an exchange offer that commenced before the date this listing standard became effective.

“Repricing” means any of the following or any other action that has the same effect:

- Lowering the strike price of an option after it is granted.
- Any other action that is treated as a repricing under generally accepted accounting principles.
- Canceling an option at a time when its strike price exceeds the fair market value of the underlying stock, in exchange for another option, restricted stock, or other equity, unless the cancellation and exchange occurs in connection with a merger, acquisition, spin-off or other similar corporate transaction.

Exemptions

This listing standard does not require shareholder approval of employment inducement awards, certain grants, plans and amendments in the context of mergers and acquisitions, and certain specific types of plans, all as described below. However, these exempt grants, plans and amendments may be made only with the approval of the company’s independent compensation committee or the approval of a majority of the company’s independent directors. Companies must also notify the Exchange in writing when they use one of these exemptions.

Employment Inducement Awards

An employment inducement award is a grant of options or other equity-based compensation as a material inducement to a person or persons being hired by the listed company or any of its subsidiaries, or being rehired following a bona fide period of interruption of employment. Inducement awards include grants to new employees in connection with a merger or acquisition. Promptly following a grant of any inducement award in reliance on this exemption, the listed company must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.

Mergers and Acquisitions

Two exemptions apply in the context of corporate acquisitions and mergers.

First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity-compensation awards to reflect the transaction.

Second, shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exemption applies to situations where a party that is not a listed company following the transaction has shares available for grant under pre-existing plans that were previously approved by shareholders. A plan adopted in contemplation of the merger or acquisition transaction would not be considered “pre-existing” for purposes of this exemption.

Shares available under such a pre-existing plan may be used for post-transaction grants of options and other awards with respect to equity of the entity that is the listed company after the transaction, either under the pre-existing plan or another plan, without further shareholder approval, so long as:

- the number of shares available for grants is appropriately adjusted to reflect the transaction;

- the time during which those shares are available is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction; and
- the options and other awards are not granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or entities that were its subsidiaries immediately before the transaction.

Any shares reserved for listing in connection with a transaction pursuant to either of these exemptions would be counted by the Exchange in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock and thus required shareholder approval under Listed Company Manual Section 312.03(c).

These merger-related exemptions will not result in any increase in the aggregate potential dilution of the combined enterprise. Further, mergers or acquisitions are not routine occurrences, and are not likely to be abused. Therefore, the Exchange considers both of these exemptions to be consistent with the fundamental policy involved in this standard.

Qualified Plans, Parallel Excess Plans and Section 423 Plans

The following types of plans (and material revisions thereto) are exempt from the shareholder approval requirement:

- plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code (e.g., ESOPs);
- plans intended to meet the requirements of Section 423 of the Internal Revenue Code; and
- “parallel excess plans” as defined below.

Section 401(a) plans and Section 423 plans are already regulated under the Internal Revenue Code and Treasury regulations. Section 423 plans, which are stock purchase plans under which an employee can purchase no more than \$25,000 worth of stock per year at a plan-specified discount capped at 15%, are also required by the Internal Revenue Code to receive shareholder approval. While Section 401(a) plans and parallel excess plans are not required to be approved by shareholders, U.S. GAAP requires that the shares issued under these plans be “expensed” (i.e., treated as a compensation expense on the income statement) by the company issuing the shares.

An equity-compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable Section 401(a) plan, Section 423 plan or parallel excess plan that the listed company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, are also exempt from shareholder approval under this section.

The term “parallel excess plan” means a plan that is a “pension plan” within the meaning of the Employee Retirement Income Security Act (“ERISA”) that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a) to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits

under qualified plans) and/or any successor or similar limitations that may hereafter be enacted. A plan will not be considered a parallel excess plan unless (1) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limits that may hereafter be enacted); (2) its terms are substantially the same as the qualified plan that it parallels except for the elimination of the limits described in the preceding sentence and the limitation described in clause (3); and (3) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

Transition Rules

Except as provided below, a plan that was adopted before the date of the Securities and Exchange Commission order approving this listing standard will not be subject to shareholder approval under this listing standard 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.

Broker Voting

In addition, the Exchange will preclude its member organizations from giving a proxy to vote on equity-compensation plans unless the beneficial owner of the shares has given voting instructions. This is codified in NYSE Rule 452. Amended Rule 452 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 the rule change.

The NYSE will establish a working group to advise with respect to the need for, and design of, mechanisms to facilitate implementation of the proposal that brokers may not vote on equity-compensation plans presented to shareholders without instructions from the beneficial owners. This will not delay the effectiveness of the broker-may-not-vote proposal.

9. – 13. Reserved.

Text of the Proposed Rule Change
(New language is underscored, deletions are [bracketed])

Listed Company Manual

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303.00 Corporate Governance Standards

Pending the implementation of the new corporate governance standards set forth in Section 303A (1)-(7) and (9)-(13) infra, in accordance with the transition provisions adopted by the Exchange, the standards contained in this Section 303.00 will continue to apply.

* * * *

312.00 Shareholder Approval Policy

* * * *

312.03 Shareholder Approval

Shareholder approval is a prerequisite to listing in [four] the following situations:

- (a) This section is reserved. New provisions regarding shareholder approval of equity compensation plans are now contained in subsection 8 of Section 303A. [Shareholder approval is required with respect to a stock option or purchase plan, or any other arrangement, pursuant to which officers or directors may acquire stock (collectively, a “Plan”) except:
- (1) for warrants or rights issued generally to security holders of the company;
 - (2) pursuant to a broadly-based Plan;
 - (3) where options or shares are to be issued to a person not previously employed by the company, as a material inducement to such person’s entering into an employment contract with the company; or
 - (4) pursuant to a Plan that provides that (i) no single officer or director may acquire under the Plan more than one percent of the shares of the issuer’s common stock outstanding at the time the Plan is adopted, and (ii) together with all Plans of the issuer (other than Plans for which shareholder approval is not required under subsections (1) to (3) above), does not authorize the issuance of more than five percent of the issuer’s common stock outstanding at the time the Plan is adopted.]
- (b) – (d) No change.

312.04 For the Purpose of Para. 312.03

For the purpose of Para. 312.03:

(a) Shareholder approval is required if any of the subparagraphs [(a), (b), (c) or (d)] of Para. 312.03 require such approval, notwithstanding the fact that the transaction does not require approval under one or more of the other subparagraphs.

(b) – (g) No change.

[(h) A Plan is "broadly-based" if, pursuant to the terms of the Plan:

at least a majority of the company's full-time employees in the United States, who are "exempt employees," as defined under Fair Labor Standards Act of 1938, are eligible to receive stock or options under the Plan; and

at least a majority of the shares of stock or shares of stock underlying options awarded under the Plan during any three year period must be awarded to employees who are not officers or directors of the company.]

Text of the Proposed Rule Change
 (Original new language is underscored, original deletions are [bracketed], new deletions are [[double bracketed]])

NYSE Constitution and Rules

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Rule 452 Giving Proxies by Member Organization

A member organization shall give or authorize the giving of a proxy for stock registered in its name, or in the name of its nominee, at the direction of the beneficial owner. If the stock is not in the control or possession of the member organization, satisfactory proof of the beneficial ownership as of the record date may be required.

* * * *

Supplementary Material:

Giving a Proxy To Vote Stock

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.11 When member organization may not vote without customer instructions. In the list of meetings of stockholders appearing in the Weekly Bulletin, after proxy material has been reviewed by the Exchange, each meeting will be designated by an appropriate symbol to indicate either (a) that members may vote a proxy without instructions of beneficial owners, (b) that members may not vote specific matters on the proxy, or (c) that members may not vote the entire proxy.

Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

* * * *

(9) involves waiver or modification of preemptive rights [[(except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock option or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares (see Item 12))]];

* * * *

(12) [authorizes issuance of stock, or options to purchase stock, to directors, officers, or employees in an amount which exceeds 5% of the total amount of the class outstanding]

authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by subsection 8 of Section 303A of the Exchange's Listed Company Manual);

* * * *

Text of the Proposed Rule Change
 (New language is underscored, deletions are [bracketed])

Listed Company Manual

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402.08 Giving a Proxy to Vote Stock

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(B) When Member Organization May Not Vote Without Customer Instructions

Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

* * * *

9. involves waiver or modification of preemptive rights [(except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock option or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares (see Item 12)];

10. changes existing quorum requirements with respect to stockholder meetings;

11. alters voting provisions or the proportionate voting power of a stock, or the number of its votes per share except where cumulative voting provisions govern the number of votes per share for election of directors and the company's proposal involves a change in the number of its directors by not more than 10% or not more than one;

12. [authorizes issuances of stock, or options to purchase stock, to directors, officers, or employees in an amount which exceeds 5% of the total amount of the class outstanding; when a plan is amended to extend its duration, the Exchange factors into the calculation the number of shares that remain available for issuance, the number of shares subject to outstanding options and any shares being added. Should there be more than one plan being considered at the same meeting, all shares are aggregated.] authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by subsection 8 of Section 303A of the Exchange's Listed Company Manual);

* * * *