

## Notice to Listed Companies and their Stockholders:

The Exchange is considering whether to modify or eliminate the "treasury stock exception" to the provision in the Exchange's Listed Company Manual requiring shareholder approval as a prerequisite to listing additional shares in certain situations or in significantly large amounts. Given the potential significance of such a change, the Exchange is seeking the input of interested constituents, particularly listed companies and those who invest in their stock.

### Background.

The Exchange has for many years had a provision in its Listed Company Manual requiring companies to obtain shareholder approval before issuing stock in certain situations or in significantly large amounts. The precise terms have changed somewhat over the years, but the rule has historically not been applied to any issuance by a company of shares from the treasury, that is, a reissuance of shares once issued but then reacquired by the company. This aspect of the rule has at times been controversial, and has recently been highlighted in a well-publicized matter involving a controversial transaction by a listed company. Accordingly, The Exchange has determined to review this aspect of the shareholder approval requirement to determine whether a change is warranted.

### Discussion.

The provision at issue is Section 312.03 of the Listed Company Manual. The section provides that shareholder approval is a "prerequisite to listing" additional shares by a listed company in several situations. To paraphrase, they are an issuance of more than 1% of the current outstanding common stock to an insider (an officer or director, or an entity affiliated with an officer or director), more than 5% of the current outstanding to a 5% or greater shareholder or an affiliate thereof, or more than 20% of the current outstanding in any transaction other than a public offering or "bona fide private financing". The latter generally covers either an underwritten 144A offering, or a private placement to multiple purchasers, no one of which acquires more than 5% of the issuer's outstanding. Approval is also required when an issuance will result in a "change of control of the issuer." These provisions apply in the same way to offerings of securities that are convertible into common stock, and the percentages in each case apply either to outstanding common equity or common voting power.

The "treasury shares exception" results from the way the rule is written, making shareholder approval a "prerequisite to listing". The Exchange takes the view that once listed, shares remain listed even if they are repurchased by the company and taken back into "treasury". Accordingly, when treasury shares are re-issued, we do not require that they be "re-listed". Since no listing application is required, Section 312.03 is not triggered.

Note that prior to 2003, the Exchange's rule requiring shareholder approval of stock option plans resided in 312.03 as well, and the treasury share exception was also applied in that context. The rule regarding such plans was significantly revised in 2003, and codified in a different section of the Manual, 303A.08. At this time, the "treasury share exception" was specifically made unavailable for equity compensation plans, so that shareholder approval would be required regardless of whether a plan was funded in whole or in part through the use of treasury shares.

There has been criticism of the treasury share exception to the effect that it potentially allows companies to store up large reserves of stock against a future issuance, while the market may not consider the overhang when evaluating likely future dilution that could occur without shareholder approval. One way to address this, of course, is to eliminate the treasury share exception entirely, as was done recently for the rule on shareholder approval of equity compensation plans. An alternative approach would be to limit the treasury share exception to shares acquired by the company within a specific recent period of time, perhaps one or two years.

Additional approaches could be to continue a treasury share exception, but limit it to a specific percentage of the overall issuance. Alternatively, it may be appropriate to limit or eliminate the exception in the context of issuances to one holder or a related group of holders.

#### Request for comments.

A change to Section 312.03 to eliminate or change the treasury stock exception would require the Exchange to file a formal rule change with the SEC and obtain SEC approval of the proposal. That process itself involves the solicitation of comment from the public on the proposed rule change. However, the Exchange has not yet determined whether to implement such a change, or what the change should be.

Given the significance of such a proposal, however, the Exchange would very much appreciate the input of those constituents that both use the policy and are impacted by it, our listed companies and their investors. Comments can be as widely or narrowly focused as you wish, but in essence we are seeking your views on whether the treasury stock exception should be retained, eliminated or modified, and if your view is that it should be modified, how you would advise that modification be structured.

We are happy to entertain either written or oral comments. Written comments may be emailed to [CorporateGovernance@nyse.com](mailto:CorporateGovernance@nyse.com). If you wish to speak with the Exchange staff, you may telephone either Janice O'Neill, Vice President Corporate Compliance on 212-656-2407 or Jim Duffy, Senior Vice President and Deputy General Counsel on 212-656-5855. They will be happy to take your comments over the phone, or schedule an in-person meeting if you prefer. Please let us have your comments by January 20, 2006.

Thank you very much for your assistance to the Exchange on this important issue.