

discretionary plan is a plan that contains no limit on the number of shares available and is not a formula plan. The NYSE proposes that each grant under such a discretionary plan will require shareholder approval regardless of whether the plan has a term of not more than 10 years. In addition, the NYSE represents that the proposed 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: (1) Approved by shareholders before any shares that become available as a result of a formulaic increase are utilized, or (2) 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 "expansion of the types of awards." The NYSE represents that no further substantive amendment to the definition of "Material Revisions" have been made.

The NYSE 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 existing NYSE rules).

The NYSE proposal has also been amended to clarify that inducement awards are available for rehires following a bona fide period of employment interruption. The NYSE further proposes to clarify that inducement awards include grants to new employees in connection with a merger or acquisition. In addition, the NYSE proposes to include a requirement that listed companies must provide prompt public disclosure following the grant of any inducement award in reliance on the exemption.²⁰

With respect to the proposed exception for parallel nonqualified plans, the NYSE proposes to redesignate the exception as applying to "parallel excess plans" and proposes to add an additional condition relating to employer equity contributions that a plan must satisfy in order to be deemed a parallel excess plan.

The NYSE proposes to add a requirement that an issuer must notify the NYSE in writing when it uses any of the exemptions from the shareholder approval requirements.

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

2. Amended New Section 303A(8) of the NYSE's Listed Company Manual

As amended by NYSE Amendments No. 1 and 2, proposed new section 303A(8) of the NYSE's Listed Company Manual will read 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

²⁰ See Section II.A.2., *infra*.