

### C. Evergreen Plans

One commenter stated that “evergreen plans” can be dilutive to shareholders because “there can be no termination date for the plans and the number of shares issued can increase annually depending on the number of shares outstanding.”<sup>77</sup> The commenter urged the NYSE and Nasdaq to view increases in the shares available under an evergreen plan to be a material revision requiring shareholder approval.<sup>78</sup> One commenter, commenting solely on the NYSE proposal, requested clarification on whether, for evergreen plans, the 10-year maximum term for the plan runs from the effective date of the proposed rule, the date of the addition of the 10-year term, or the date of the original adoption or shareholder approval of the plan.<sup>79</sup> Two commenters stated that a transition period—not requiring shareholder approval until the next annual shareholder meeting—should apply to existing evergreen plans.<sup>80</sup> One commenter stated that there should be a “specific transition period for plans adopted before the effective date that do not limit the number of shares available for grant, since these plans will never be required to be amended to increase the number of authorized share.”<sup>81</sup> Another commenter suggested that evergreen increases should not be considered “material revisions” until the earliest of: (1) A subsequent material revision to the plan; (2) the expiration of the term of the plan; (3) the later of ten years from the date the plan was adopted or five years from the effective date of the NYSE proposal.<sup>82</sup> The same commenter recommended that Nasdaq conform its proposal to the NYSE proposal with respect to provisions on the treatment of evergreen plans.<sup>83</sup> One commenter stated that a “retroactive shareholder approval requirement” should not be applied to existing evergreen plans.<sup>84</sup> Another commenter requested clarification on whether an evergreen plan that was previously approved by a company’s shareholders must again be approved by the shareholders if it is for an unlimited term and has been in existence for more than ten years.<sup>85</sup>

<sup>77</sup> See ICI Letter.

<sup>78</sup> See ICI Letter.

<sup>79</sup> See Sullivan & Cromwell Letter.

<sup>80</sup> See Sullivan & Cromwell Letter and conEdison Letter.

<sup>81</sup> See Allen & Overy Letter.

<sup>82</sup> See ABA Letter.

<sup>83</sup> See ABA Letter.

<sup>84</sup> See RadioShack Letter.

<sup>85</sup> See Unisys Letter. This commenter suggested a transition period until the next annual shareholder meeting to obtain shareholder approval if it is required in these circumstances.

### D. Conformity and Clarity

A few commenters stated that the NYSE and Nasdaq proposals should be consistent with one another.<sup>86</sup> One commenter recommended specific changes to clarify and conform the NYSE and Nasdaq proposals.<sup>87</sup> Another commenter suggested that the NYSE and Nasdaq clarify the proposed rules to indicate that cash-only plans and benefits would not be subject to shareholder approval.<sup>88</sup> One commenter stated that the NYSE and Nasdaq should harmonize their proposals on the “repricing” issue; the commenter did not take a position on which approach it believed was more appropriate.<sup>89</sup> The same commenter suggested that “the NYSE proposal, like the Nasdaq proposal, should specify the significant and substantive components of its (proposed) rule in the rule’s text” rather than in a commentary or footnotes.<sup>90</sup> One commenter praised the NYSE and Nasdaq for proposing similar rules requiring shareholder approval of equity compensation plans, stating that this “coordinated approach ensures that the NYSE and Nasdaq do not compete on the basis of differences in their rules, encouraging a “race to the bottom” to attract new listings, to the detriment of investors.”<sup>91</sup>

### E. Elimination of Broker-Dealer Voting on Equity Compensation Plans

Several commenters also supported the NYSE proposed rule change to preclude broker-dealers from voting on equity compensation plans without instructions from the beneficial owner.<sup>92</sup> Some of these commenters stated that broker-dealers should be precluded from voting proxies without instructions on all other matters as well.<sup>93</sup> Some of these commenters stated that votes should be cast by the beneficial owners—the real parties in interest—and not broker-dealers who tend to side with management and override their clients’ interests.<sup>94</sup> Other

<sup>86</sup> See AFL-CIO Letter; Allen & Overy Letter; ICI Letter; and ABA Letter.

<sup>87</sup> See ABA Letter.

<sup>88</sup> See Allen & Overy Letter.

<sup>89</sup> See ABA Letter.

<sup>90</sup> See ABA Letter.

<sup>91</sup> See ICI Letter.

<sup>92</sup> See TIAA-CREF Letter; CII Letter; Barclays Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS Letter; NJ Division Letter; ISS I Letter; IBT Letter; MSRS Letter; and Employees Retirement System of Texas Letter.

<sup>93</sup> See CII Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS Letter; NJ Division Letter; ISS I Letter; IBT Letter; MSRS Letter; and Employees Retirement System of Texas Letter.

<sup>94</sup> See TIAA-CREF Letter; CII Letter; SWIB Letter; Hermes Letter; AFL-CIO Letter; CPF Letter; STRS

commenters pointed out that, because companies now routinely receive votes from more than 50 percent of their beneficial owners, broker-dealer votes are no longer necessary to meet quorum requirements.<sup>95</sup> One commenter stated that “this rule is unnecessary in an age where shareholders can vote electronically by telephone, Internet, and facsimile, in addition to the traditional means of written proxy or participation in shareholder meetings.”<sup>96</sup> One commenter stated that the NYSE should specify when the proposed new rule eliminating broker voting of equity compensation plans will become effective and stated that a transition period should be provided.<sup>97</sup>

Three commenters opposed the NYSE proposal to eliminate broker-dealer proxy voting on equity compensation plans.<sup>98</sup> Two of these commenters stated that the elimination of broker voting would harm smaller issuers and result in a significant increase in cost and administrative burden.<sup>99</sup> In addition, one commenter stated that elimination of broker-dealer voting on equity compensation plans, and thereby designating such plans as “non-routine” for proxy voting purposes, would result in uncertainty of whether there will be a quorum and, instead suggested as an alternative that unvoted broker held shares be deemed voted in proportion to the votes actually cast (*i.e.*, “echo” voting).<sup>100</sup> The commenter further stated that, while the issue of broker-dealer voting should be addresses on an industry-wide basis, it wanted clarification that the NYSE’s elimination of broker-dealer voting on equity compensation plans only applied to NYSE listed issuers “and not to Amex listed issuers “in case of a conflict in proxy voting rules of the two exchanges.”<sup>101</sup> One commenter stated that the average beneficial owner would not understand or know how to vote on his or her own.<sup>102</sup>

### F. Miscellaneous Comments

A few commenters suggested that the Commission urge the American Stock

Letter; ISS I Letter; IBT Letter; MSRS Letter; and Employees Retirement System of Texas Letter.

<sup>95</sup> See CII Letter; SWIB Letter; CPF Letter; STRS Letter; IBT Letter; and MSRS Letter. One commenter stated that, if uninstructed broker-dealer votes are needed to meet a quorum, broker voting should be limited solely to quorum votes. See ISS I Letter.

<sup>96</sup> See AFL-CIO Letter.

<sup>97</sup> See ABA Letter.

<sup>98</sup> See ABC Letter; Pella Letter; Amex I Letter; and Amex II Letter.

<sup>99</sup> See ABC Letter and Amex I Letter.

<sup>100</sup> See Amex I Letter.

<sup>101</sup> See Amex I Letter and Amex II Letter.

<sup>102</sup> See Pella Letter.