

of what would constitute a material amendment or revision to a plan provides companies with clarity and guidance for when certain amendments to plans would require shareholder approval. The Commission also believes that the NYSE and Nasdaq proposed amendments in this area should help to ensure that the concept of material amendments or revisions between their respective proposals is consistent with each other so that differences between the markets cannot be abused.

E. Repricing of Plans

A minority of commenters suggested that Nasdaq should address the issue of the repricing of options in plans and adopt the NYSE's approach to this issue. The NYSE proposal provides that, if a plan explicitly contains a repricing provision, shareholder approval would be required to delete or limit the repricing provisions. In addition, the NYSE proposal provides that, if a plan is silent on repricing, it will be considered as prohibiting repricing and shareholder approval would be required to permit repricing under the plan. In response to the commenters' concerns on this issue, Nasdaq proposed amendments to its proposal to state that it would be considered a material amendment to a plan requiring shareholder approval if the plan was amended to permit repricing. In addition, Nasdaq recommended in its proposed amendments that plans meant to permit repricing should explicitly and clearly state that repricing is permitted. The NYSE proposed an amendment to its proposal to clarify that repricings that have commenced prior to the date of effectiveness of its proposal would not be subject to shareholder approval, provided that such repricing does not require shareholder approval under the NYSE's existing shareholder approval rules.

The NYSE and Nasdaq proposals, as amended, should benefit shareholders by ensuring that companies cannot do a repricing of options, which can have a dilutive effect on shares, without explicit shareholder approval of such provisions and their terms. The Commission also believes that NYSE and Nasdaq proposals now provide similar views in the area of repricing and should offer companies clarity and guidance as to when a change in a plan regarding the repricing of options would trigger a shareholder approval requirement and addresses commenters' concerns in this area.

F. Evergreen or Formula Plans and Discretionary Plans

A minority of commenters raised concerns about plans containing evergreen formulas, which would allow for automatic increases in the number of shares available or for automatic grants pursuant to a formula in the plans. These commenters were generally concerned about evergreen/formula plans that provided no termination date and that did not place a limit on the number of shares that could be issued. The commenters wanted the NYSE and Nasdaq to consider increases in the number of shares under such plans as material revisions to the plans requiring shareholder approval. In addition, some of these commenters suggested that the NYSE and Nasdaq provide a transition period for existing evergreen/formula plans to comply with the new shareholder approval requirements. Some commenters wanted more clarity as to when shareholder approval would be required for evergreen/formula plans that were adopted prior to the effective date of the NYSE and Nasdaq proposals, and one commenter suggested that Nasdaq adopt NYSE's approach to evergreen/formula plans.

The Commission notes that both the NYSE and Nasdaq have proposed amendments to the respective proposals in response to commenters' concerns and are proposing similar approaches as to the treatment of evergreen/formula plans. More specifically, under both the NYSE and Nasdaq proposals, if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, each increase or grant will require shareholder approval unless the plan has a term of not more than ten years. In addition, under both the NYSE and Nasdaq proposals, if a plan contains no limit on the number of shares available and is not a formula plan (the NYSE amended its proposal to refer to such plans as "discretionary plans"), then each grant under the plan will require separate shareholder approval. Furthermore, both the NYSE and Nasdaq proposals provide that a requirement that grants be made out of treasury or repurchased shares will not alleviate the need for shareholder approval for additional grants.

The Commission believes that these provisions should help to ensure that certain terms of a plan cannot be drafted so broad as to avoid shareholder scrutiny and approval. The Commission also notes that the NYSE and Nasdaq's conforming rules relating to the treatment of evergreen/formula and discretionary plans should provide

more clarity and transparency to issuers as to when shareholder approval would be required for such plans.

The Commission further notes that the NYSE has proposed amendments to its proposal to provide for a transition period for evergreen/formula plans and discretionary plans. The limited transition period would end on the first to occur of the following: (1) The listed company's next annual meeting at which directors are elected that occurs more than 180 days after the date of the effective date of the NYSE proposal; (2) the first anniversary of the effective date of the NYSE proposal; or (3) the expiration of the plan. The Commission believes that the NYSE's proposed transition period for evergreen/formula and discretionary plans should provide companies with additional clarity and guidance as to when shareholder approval would be required for such plans while in the transition period, and should provide companies with more time to comply with the new NYSE shareholder approval requirements for evergreen/formula type plans. The Commission believes that this period is not so long as to permit abuse of the shareholder approval requirement, and at most, will last one year from the date of this Commission approval order.

G. Miscellaneous Concerns

Some commenters had suggested that there should be an exemption from shareholder approval for plans entered into pursuant to a collective bargaining agreement mainly because they believed that a shareholder approval requirement would hinder negotiations regarding equity compensation plans by both parties in the collective bargaining process. The Commission believes, however, that such an exemption could expose shareholders to significant dilution because of the lack of shareholder oversight in the collective-bargaining process. Accordingly, the Commission agrees with the NYSE and Nasdaq decisions not to provide such an exemption to their respective shareholder approval requirements.

The Commission notes that commenters requested clarification as to what type of plans would be considered "equity compensation plans" and what type of plans would not be considered "equity compensation plans." In response to commenters' concerns, the NYSE proposed amendments to its proposal to better define "equity compensation plans" and clarified that such plans would expressly exclude plans that do not provide delivery of equity securities of the issuer—for example, "cash plans"—and deferred compensation plans under which