

the limitations described in the preceding sentence; and (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

See also Section 806.

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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 Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange represents that Section 711 of the Amex *Company Guide* currently requires listed companies to obtain shareholder approval for many stock option plans and other arrangements in which officers, directors and key employees participate, to address concerns about the possibility of self-dealing and dilution to the detriment of shareholders. The Exchange further states that under Section 711(b)(i) of the Amex *Company Guide* there is an exception for "broadly based" plans in which all, or substantially all, of the company's employees participate in a fair and equitable manner, even if officers, directors and key employees receive option grants under the plan, as well as for *de minimus* grants.

The Exchange represents that, in order to enhance investor confidence and provide consistency across marketplaces, it is proposing to eliminate the existing exceptions to the shareholder approval requirements under current Section 711 of the Amex *Company Guide* and to require shareholder approval of all stock option and equity compensation plans, subject to limited exceptions.⁶ The proposed amendments to Section 711 of the Amex

Company Guide will become effective upon SEC approval.

The Exchange represents that existing plans will not require shareholder approval unless there is a material amendment to the plan. Proposed Commentary .01 to Section 711 of the Amex *Company Guide* specifies a non-exclusive list of plan amendments that would be considered material, and also clarifies that while broad general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would be required. Certain provisions in a plan, however, cannot be amended without shareholder approval. For example, plans that contains a formula for automatic increases in the shares available (sometimes called an "evergreen plan") or for automatic grants pursuant to a dollar-based formula cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. In addition, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements. The proposed Commentary also provides that issuers should strive to make plan terms easily understandable and that plans meant to permit repricing should use explicit terminology in this regard.

With respect to plans involving a merger or acquisition, shareholder approval would not be required in two situations. First, shareholder approval would 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 exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of revised Section 711 of the Amex *Company Guide*.⁷ These shares may be used for post-transaction grants of options and other equity

awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or another plan, without further shareholder approval, so long as (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company at the time the merger or acquisition was consummated. The Exchange would view a plan adopted in contemplation of the merger or acquisition as not pre-existing for purposes of this exception. This exception is appropriate because it would not result in any increase in the aggregate potential dilution of the combined enterprise.⁸

The adoption of tax-qualified, non-discriminatory benefit plans (pursuant to Internal Revenue Code and Treasury Department regulations) or parallel nonqualified plans, will not require shareholder approval, but must be approved by either the issuer's independent compensation committee or a majority of its independent directors. In addition, an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax-qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from shareholder approval under Section 711 of the Amex *Company Guide*. However, the proposed rule addresses only the issue of whether shareholder approval is required pursuant to Amex rules, and would not impact any shareholder approval or other requirements under the Internal Revenue Code or other applicable laws or requirements with respect to such plans.

The Exchange is also proposing to retain its existing exception for inducement grants to new employees (including a previous employee following a bonafide period of non-employment by the listed company), including grants to new employees in connection with a merger or acquisition. The Exchange is also proposing to remove the existing restriction which

⁶ Section 302 of the Amex *Company Guide* provides that listed companies may not reissue treasury shares without first obtaining shareholder approval, for any purpose where the rules or policies of the Exchange would require such approval had the shares to be issued been previously authorized but unissued. This requirement is unchanged by the current proposal.

⁷ The Amex represents that such post-transaction grants can only be made under pre-existing plans that were previously approved by shareholders. Telephone conversation between Claudia Crowley, Vice President, Listing Qualifications, Amex, and Sapna C. Patel, Attorney, Division, Commission, on July 23, 2003.

⁸ The Amex notes that any such shares reserved for listing in connection with the transaction would be counted by the Amex 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 Section 712(b) of the Amex *Company Guide*.