

limits such grants to five percent of the company's outstanding common stock, which is in conformance with recently approved New York Stock Exchange, Inc. ("NYSE") and The Nasdaq Stock Market, Inc. ("Nasdaq") proposals.⁹ The Exchange does not believe that shareholder approval is necessary in these circumstances for several reasons. The Exchange believes that inducement grants are often subject to some urgency and the need to obtain shareholder approval could thus be impracticable. Furthermore, the Exchange believes that such grants are negotiated at "arms" length" and do not involve the potential for self-dealing on the part of existing officers and directors. However, the Exchange represents that all inducement grants will be subject to approval by either the issuer's independent compensation committee or a majority of its independent directors. Additionally, the Exchange represents that promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, rights and warrants issued generally to all shareholders will not require shareholder approval, nor would plans that merely provide a convenient way for all security holders to purchase shares on the open market or from the issuer at fair market value on equal terms. The Amex believes that such issuances do not raise the same concerns regarding self-dealing and dilution as stock option plans.

Further, the Exchange proposes to require the issuer to notify the Exchange in writing when it uses any of the exceptions to the shareholder approval requirement contained in Section 711 of the *Amex Company Guide*, and such grants are also subject to Part 3 of the *Amex Company Guide* with respect to the requirements applicable to the additional listing of the underlying shares.

The Exchange also proposes to delete the existing provision of Section 711 of the *Amex Company Guide*, which contains an exception from the shareholder approval requirement for an option plan that does not authorize the issuance to officers, directors or key employees of more than five percent of outstanding common stock in any one

year (provided all such arrangements adopted without shareholder approval in any five year period do not authorize the issuance of more than ten percent of outstanding common stock), and which governs participation by controlling shareholders, officers, directors and key employees in discounted private placements.¹⁰

Finally, the Exchange notes that the Commission has asked the Amex to adopt a rule similar to the NYSE's rule prohibiting members and member organizations from giving a proxy to vote without instructions from beneficial owners when the matter to be voted on authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan.¹¹ The Amex has consented to reconsidering this issue.¹²

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6 of the Act¹³ in general and furthers the objectives of Section 6(b)(5)¹⁴ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

¹⁰ The Exchange has submitted a separate rule change proposal (SR-Amex-2003-70) to amend Section 713 of the *Amex Company Guide* to reincorporate this policy solely in the context of discounted private placements. The Commission notes that this separate proposed rule change filed by the Amex is currently pending before the Commission and has not been approved.

¹¹ See NYSE Rule 452 and Section 402.08 of the NYSE's *Listed Company Manual*.

¹² Telephone conversation between Claudia Crowley, Vice President, Listing Qualifications, Amex, and Sapna C. Patel, Special Counsel, Division, Commission, on October 2, 2003. The Commission notes that equity compensation plans have become an important issue for shareholders. Because of the potential for dilution from such issuances, the Commission believes that shareholders should be making the determination rather than brokers on their behalf. The Commission further notes that, generally under Amex rules, only matters that are considered routine are allowed to be voted on by a broker on behalf of a beneficial owner. Because of the recent significance and concern about equity compensation plans, the Commission strongly urges the Amex to designate that shareholder approval of equity compensation plans is not a routine matter and must be voted on by the beneficial owner.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2003-42 and should be submitted by November 6, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the Amex's proposal, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b) of the Act.¹⁵ Specifically, the Commission finds that approval of the Amex's proposal, as amended, is consistent with Section 6(b)(5) of the Act¹⁶ in that it is designed to, among other things, facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and

¹⁵ 15 U.S.C. 78f(b). In approving the Amex's proposal, as amended, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁶ 15 U.S.C. 78f(b)(5).

⁹ See Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (order approving File Nos. SR-NYSE-2002-46 and SR-NASD-2002-140). See also Section 303A(8) of the NYSE's *Listed Company Manual*; NASD Rule 4350(i) and IM-4350-5; and File No. SR-NASD-2003-130.