

equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

The Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, restore investor confidence in the national marketplace. The Commission believes that the Amex's amended proposal, which requires shareholder approval of equity compensation plans and which follows the Commission's approval of similar proposals by the NYSE and Nasdaq,¹⁷ is the first step under this directive because it should have the effect of safeguarding the interests of shareholders, while placing certain restrictions on Amex-listed companies.

In addition, the Commission notes that the Amex's proposal, as amended, is similar and almost identical to proposals by NYSE and Nasdaq requiring shareholder approval of equity compensation plans that have previously been approved by the Commission.¹⁸ The Commission believes that it has already considered and addressed the issues that may be raised by the Amex's proposal when it approved the NYSE and Nasdaq's proposals. The Commission notes that approval of the Amex's proposal, as amended, will conform Amex's shareholder approval requirements for equity compensation plans with those of the NYSE and Nasdaq, and will immediately impose the same requirements on Amex issuers as those imposed upon NYSE and Nasdaq issuers. The adoption of these standards by the Amex is an important step to ensure that issuers will not be able to avoid shareholder approval requirements for equity compensation plans based on their listed marketplace.

A. Exception From Shareholder Approval for Inducement Grants

The Commission believes that the requirement that the issuance of all inducement grants be subject to review by either the issuer's independent compensation committee or a majority of the board's independent directors, under the Amex's amended proposal, should prevent abuse of this exception from shareholder approval. The Commission notes that the Amex is proposing to include a requirement, similar to the requirement under NYSE's recently approved shareholder

approval rule, that, promptly following the grant of any inducement award, companies must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.¹⁹ The Commission notes that the Amex is also proposing a requirement, similar to the requirements under the NYSE and Nasdaq's recently approved shareholder approval rules,²⁰ that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that these disclosure and notification requirements will provide transparency to investors and should reduce the potential for abuse of this exception for inducement grants.

In addition, the Amex proposes to limit its exception for inducement grants to new employees or to previous employees being rehired after a bona fide period of interruption of employment, and to new employees in connection with an acquisition or merger. The Commission believes that these limitations should help to prevent the inducement exception from being used inappropriately.

B. Exception From Shareholder Approval for Mergers and Acquisitions

The Commission notes that the Amex's exception from shareholder approval for mergers and acquisitions contains safeguards that should prevent abuse in this area. First, only pre-existing plans that were previously approved by the acquired company's shareholders would be available to the listed company for post-transactional grants. In addition, shares under those previously approved plans could not be granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or its subsidiaries. The Commission also notes that, under both the Amex's proposal, as amended, any shares reserved for listing in connection with a merger or acquisition pursuant to this exception 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, thereby requiring shareholder approval under Section 712(b) of the Amex *Company Guide*. Finally, the Commission notes that the Amex proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. Based on the above, the Commission believes that the Amex has provided measures to ensure that the exception for mergers and acquisitions is only used in limited circumstances, which should help reduce the potential for dilution of shareholder interests.

C. Exception From Shareholder Approval for Tax Qualified and Parallel Nonqualified Plans

The Commission believes that, given the extensive government regulation—the Internal Revenue Code and Treasury regulations—for tax qualified plans and the general limitations associated with parallel nonqualified plans, shareholders should not experience significant dilution as a result of this exception. In addition, the Commission notes that the Amex proposes to add a limitation under this exception that a plan would not be considered a nonqualified parallel under its proposal if employees who are participants in such plans receive employer contributions under the plans in excess of 25% of the participants' cash compensation. The Commission further notes that the Amex proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that, taken together, these limitations should reduce concerns regarding abuse of this exception from the shareholder approval requirements.

In addition, the Commission notes that, similar to the exemption under Section 303A(8) of the NYSE's *Listed Company Manual*, the Amex proposes to adopt an exception from the shareholder approval requirements for 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. The Commission believes that this change will conform Amex's shareholder approval rule to that of the NYSE and will provide greater clarity for issuers regarding tax qualified, non-

¹⁷ See *supra* note 9.

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¹⁹ This disclosure would, of course, be in addition to any information that is required to be disclosed in annual reports filed with the Commission. For example, Item 201(d) of Regulation S-K [17 CFR 229.201(d)] and Item 201(d) of Regulation S-B [17 CFR 228.201(d)] require issuers to present—in their annual reports on Form 10-K or Form 10-KSB—separate, tabular disclosure concerning equity compensation plans that have been approved by shareholders and equity compensation plans that have not been approved by shareholders.

²⁰ See Section 303A(8) of the NYSE's *Listed Company Manual* and NASD Rules 4310(c)(17)(A) and 4320(e)(15)(A).