

discriminatory employee benefit plans and parallel nonqualified plans for their non-U.S. employees.

D. Material Amendments to Plans

The Commission notes that the Amex proposes to provide a non-exclusive list, similar to lists found in the NYSE and Nasdaq's shareholder approval rules,²¹ as to what constitutes a material amendment to a plan. As noted above, material amendments to plans will require shareholder approval under Amex rules. A material amendment under the Amex proposal, as amended, would include, but is not limited to: A material increase in the number of shares to be issued under the plan (other than to reflect a reorganization, stock split, merger, spinoff or similar transaction); a material increase in benefits to participants, including any material change to (1) permit a repricing (or decrease in exercise price) of outstanding options, (2) reduce the price at which shares or options to purchase shares may be offered, or (3) extend the duration of the plan; a material expansion of the class of participants eligible to participate in the plan; an expansion of the type of options or awards available under the plan. The Amex's proposal, as amended, also describes what would constitute a material amendment for plans containing a formula for automatic increases (such as evergreen plans) and automatic grants requiring shareholder approval.

The Commission believes that the Amex's non-exclusive list of what would constitute a material amendment 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 Amex's proposal to conform its non-exclusive list with the NYSE and Nasdaq's rules on material amendments/revisions should help to ensure that the concept of material amendments is consistent among the markets so that differences between the markets cannot be abused.

E. Repricing of Plans

The Commission notes that, under the Amex's proposal, as amended, if a plan is amended to permit repricing, such an amendment would be considered a material amendment to a plan requiring shareholder approval. In addition, the Amex recommended in its proposal that plans meant to permit repricing should explicitly and clearly state that repricing is permitted.

The Commission believes that the Amex's proposal, 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 the Amex's approach to repricings is similar to the NYSE and Nasdaq's respective approaches to repricings, 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.

F. Evergreen or Formula Plans and Plans Without a Formula or Limit on the Number of Shares Available

The Commission notes the Amex's proposal, as amended, provides guidance for the treatment of evergreen/formula plans. More specifically, under the Amex's proposal, as amended, if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. In addition, under the Amex's proposal, as amended, if a plan contains no limit on the number of shares available and is not a formula plan, then each grant under the plan will require separate shareholder approval. Furthermore, the Amex's proposal, as amended, provides that a requirement that grants be made out of treasury or repurchased shares will not alleviate the need for shareholder approval for additional grants.²²

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 believes that Amex's proposed rules relating to the treatment of evergreen/formula plans and plans that do not contain a formula or place a limit on the number of shares available should provide more clarity and transparency to issuers as to when shareholder approval would be required for such plans. Finally, the Commission believes that the provision ensuring that treasury and repurchased shares cannot be used to avoid these additional shareholder approval requirements strengthens the proposal and ensures that companies cannot avoid compliance with the rule.

G. Miscellaneous Provisions and Other Items

The Commission notes that the Amex's amended proposal—similar to the NYSE and Nasdaq's recently approved shareholder approval rules²³—incorporates the term “equity compensation” and proposes that plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market price on equal terms to all security holders would not require shareholder approval. The Commission believes that the Amex's proposal, as amended, is consistent with the NYSE and Nasdaq's rules in this area and should provide greater clarity with respect to which plans would and would not require shareholder approval.

The Commission notes that the Amex's proposal, as amended, provides that pre-existing plans, which were adopted prior to the SEC's approval of the Amex's proposal, would essentially be “grandfathered” and would not require shareholder approval unless the plans were materially amended. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the new Amex shareholder approval requirements.

Finally, the Commission urges the Amex to quickly adopt a standard prohibiting discretionary broker voting of equity compensation plans. NASD rules do not provide for broker voting on any matters, and NYSE rules prohibit broker voting on equity compensation plans. In its approval of the NYSE and Nasdaq proposals, the Commission considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments received on this issue.²⁴ The Commission believes that the benefit of ensuring that the votes reflect the views of beneficial shareholders on equity compensation plans outweighs the potential difficulties in obtaining the vote, and, therefore, strongly recommends that the Amex quickly adopt a prohibition on broker voting of equity compensation plans.²⁵

H. Summary

Overall, the Commission believes that the Amex's proposal, as amended, is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.²⁶ The Commission therefore believes that the Amex's proposal, as amended, should provide for more clear

²¹ See *supra* note 9.

²² See also *supra* note 8.

²³ See *supra* note 9.

²⁴ See also *supra* notes 9 and 11.

²⁵ See also *supra* note 12 and accompanying text.

²⁶ See *supra* note 9.