

in Items I and II below, which Items have been prepared by the Exchange. On October 2, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.³ On October 29, 2003, the Exchange filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to adopt a new section entitled "Equity Compensation Plans" in Chapter XXVII, *Listed Securities—Requirements*, regarding shareholder approval of equity compensation plans and to amend its rules related to the voting of proxies.

Below is the text of the proposed rule change, as amended.⁵ Proposed new language is *italicized*; proposed deleted language is [bracketed].

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Chapter XXXVI: Proxies

Secs. 1–2, no change.

Sec. 3(a)–(d), no change.

Proxy Voting on Equity Compensation Plans

(e) A member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by Chapter XXVII, Listed Securities, Equity Compensation Plans, of these Rules).

Secs. 4–6, no change.

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³ Amendment No. 1 replaces the Exchange's original Rule 19b–4 filing in its entirety.

⁴ See letter from John Boese, Vice President, Legal Compliance, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated October 29, 2003 ("Amendment No. 2"). In Amendment No. 2, the Exchange made a technical correction to its proposed rule language by underlining proposed BSE Rule 3(e), *Proxy Voting on Equity Compensation Plans*, to indicate that it is proposed new language. Because this is a technical amendment, it is not subject to notice and comment.

⁵ The Exchange's rules under Chapter XXVII, *Listed Securities—Requirements*, are not numbered, so the Exchange is adding its proposed section entitled "Equity Compensation Plans" to the end of the chapter.

Chapter XXVII: Listed Securities—Requirements

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Equity Compensation Plans

Shareholders must be given the opportunity to vote on all equity-compensation plans and material revisions thereto, with limited exemptions explained below.

Equity-compensation plans can help align shareholder and management interests, and equity-based awards are often very important components of employee compensation. To provide checks and balances on the potential dilution resulting from the process of earmarking shares to be used for equity-based awards, the Exchange requires that all equity-compensation plans, and any material revisions to the terms of such plans, be subject to shareholder approval, with the limited exemptions explained below.

Definition of Equity-Compensation Plan

An "equity-compensation plan" is a plan or other arrangement that provides for the delivery of equity securities (either newly issued or treasury shares) of the listed company to any employee, director or other service provider as compensation for services. Even a compensatory grant of options or other equity securities that is not made under a plan is, nonetheless, an "equity-compensation plan" for these purposes.

However, the following are not "equity-compensation plans" even if the brokerage and other costs of the plan are paid for by the listed company:

- *Plans that are made available to shareholders generally, such as a typical dividend reinvestment plan.*
- *Plans that merely allow employees, directors or other service providers to elect to buy shares on the open market or from the listed company for their current fair market value, regardless of whether:*
 - *The shares are delivered immediately or on a deferred basis; or*
 - *The payments for the shares are made directly or by giving up compensation that is otherwise due (for example, through payroll deductions).*

Material Revisions

A "material revision" of an equity-compensation plan includes (but is not limited to), the following:

- *A material increase in the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction).*
- *If a plan contains a formula for automatic increases in the shares available (sometimes called an*

"evergreen formula") or for automatic grants pursuant to a formula, each such increase or grant will be considered a revision requiring shareholder approval unless the plan has a term of not more than ten years.

This type of plan (regardless of its term) is referred to below as a "formula plan." Examples of automatic grants pursuant to a formula are (1) annual grants to directors of restricted stock having a certain dollar value, and (2) "matching contributions," whereby stock is credited to a participant's account based upon the amount of compensation the participant elects to defer.

- *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 regardless of whether the plan has a term of not more than ten years.*

This type of plan is referred to below as a "discretionary plan." A requirement that grants be made out of treasury shares or repurchased shares will not, in itself, be considered a limit or pre-established formula so as to prevent a plan from being considered a discretionary plan.

- *An expansion of the types of awards available under the plan.*
- *A material expansion of the class of employees, directors or other service providers eligible to participate in the plan.*
- *A material extension of the term of the plan.*
- *A material change to the method of determining the strike price of options under the plan.*
- *A change in the method of determining "fair market value" from the closing price on the date of grant to the average of the high and low price on the date of grant is an example of a change that the Exchange would not view as material.*

- *The deletion or limitation of any provision prohibiting repricing of options. See the next section for details.*

Note that an amendment will not be considered a "material revision" if it curtails rather than expands the scope of the plan in question.

Repricings

A plan that does not contain a provision that specifically permits repricing of options will be considered for purposes of this listing standard as prohibiting repricing. Accordingly any actual repricing of options will be considered a material revision of a plan even if the plan itself is not revised. This consideration will not apply to a repricing through an exchange offer that