

shareholder approval, the plans and amendments still must be subject to the approval of the company's independent compensation committee or a majority of the company's independent directors. In addition, the Exchange proposes that an issuer must notify the Exchange in writing when it uses any of the exemptions from the shareholder approval requirements (assuming that such repricing would not require shareholder approval under other Exchange rules).

The Exchange is also proposing to provide a non-exclusive list of "material revisions" to a plan that would require shareholder approval. Within this list of revisions, the Exchange proposed to define the concepts of "evergreen plans" (*i.e.*, plans that contain a formula for automatic increases in the shares available), "formula plans" (*i.e.*, plans that provide for automatic grants pursuant to a formula), and "discretionary plans" (*i.e.*, plans that contain no limit on the number of shares available and are not a formula plan). The Exchange proposes that each grant under a discretionary plan require shareholder approval regardless of whether the plan has a term of not more than 10 years.

Shareholder approval will be required for plans adopted before the effective date of these proposed amendments that have not been approved by shareholders and have neither an evergreen formula nor a specific number of shares available under the plan. The Exchange is proposing to provide transition rules to clarify when shareholder approval will be required for these pre-existing plans. In addition, during the period prior to the approval, pre-existing plans may be utilized, but only in a manner consistent with past practice. The transition rules provide that an evergreen plan that was approved by shareholders but does not have a ten-year term must be: (1) Approved by shareholders before any shares that become available as a result of a formulaic increase are utilized, or (2) amended to include a term of no more than ten years from the date the plan was adopted or last approved by shareholders. If the plan were amended to include such term, shareholder approval would not be required. No action would be required, however, if a plan were frozen at the level of shares available at the time the rule becomes effective. The transition rules also provide that repricings that have commenced prior to the effectiveness of the proposal (*i.e.*, exchange offers to optionees) will not be subject to shareholder approval.

Finally, the Exchange is also proposing to amend Section 3 in Chapter XXXVI, *Proxies*, to prohibit member organizations from giving a proxy to vote on the implementation of, or material changes to, equity compensation plans unless the beneficial owner of the shares has given voting instructions. The Exchange proposes a transition period that will make this provision applicable only to shareholder meetings that occur on or after the 90th day following the date of the Commission order approving this rule.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6 of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹¹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and 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.

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 that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments on the proposed rule change were neither solicited nor received.

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-BSE-2003-16 and should be submitted by November 28, 2003.

IV. Commission's Findings and Order Granting Accelerated Approval to the Proposed Rule Change, As Amended

After careful review, the Commission finds that the Exchange'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.¹² Specifically, the Commission finds that approval of the Exchange's proposal, as amended, is consistent with Section 6(b)(5) of the Act¹³ 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 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 Exchange's proposal, as amended, which requires shareholder approval of equity compensation plans and which follows the Commission's approval of similar proposals by the NYSE, Nasdaq, and Amex¹⁴ is the first step under this directive because it should have the effect of safeguarding the interests of shareholders, while placing certain restrictions on Exchange-listed companies.

In addition, the Commission notes that the Exchange's proposal, as amended, is similar and almost

¹² 15 U.S.C. 78f(b). In approving the Exchange'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).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See *supra* note 6. The Commission notes that it has recently approved similar rules requiring shareholder approval of equity compensation plans for the American Stock Exchange LLC ("Amex"). See Securities Exchange Act Release No. 48610 (October 9, 2003), 68 FR 59650 (October 16, 2003).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).