

plan; a material extension of the term of the plan; a material change to limit or delete any provisions prohibiting repricing of options in a plan or for determining the strike or exercise price of options under a plan. The Exchange's proposal, as amended, also describes what would constitute a material revision for plans containing a formula for automatic increases (such as evergreen plans) and automatic grants requiring shareholder approval.

The Commission believes that the Exchange's non-exclusive list of what would constitute a material revision to a plan provides companies with clarity and guidance for when certain amendments and revisions to plans would require shareholder approval. The Commission also believes that the Exchange's amended 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/revisions is consistent among the markets so that differences between the markets cannot be abused.

E. Repricing of Plans

The Commission notes that the Exchange's proposal, as amended, provides that, if a plan explicitly contains a repricing provision, shareholder approval would be required to delete or limit the repricing provisions. The Commission further notes that the Exchange's proposal, as amended, provides that, if a plan is silent on repricing, it will be considered as prohibiting repricing and shareholder approval would be required to permit repricing under the plan. The Exchange's proposal, as amended, also clarifies that repricings that have commenced prior to the date of effectiveness of its proposal would not be subject to shareholder approval, provided that such repricing does not require shareholder approval under the Exchange's existing shareholder approval rules.

The Commission believes that the Exchange'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 Exchange'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 Exchange's proposal, as amended, provides guidance for the treatment of evergreen/formula plans. More specifically, under the Exchange'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 Exchange's amended proposal, 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 Exchange'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.

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 the Exchange'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.

The Commission further notes that the Exchange has proposed a transition period for evergreen/formula plans and discretionary plans. The limited transition period would end on the first to occur of the following: (1) The listed company's next annual meeting at which directors are elected that occurs more than 180 days after the date of the effective date of the Exchange's proposal; (2) the first anniversary of the effective date of the Exchange's proposal; or (3) the expiration of the plan. The Commission believes that the Exchange's proposed transition period for evergreen/formula and discretionary plans should provide companies with additional clarity and guidance as to when shareholder approval would be required for such plans while in the transition period, and should provide

companies with more time to comply with the Exchange's new shareholder approval requirements for evergreen/formula type plans. The Commission believes that this period is not so long as to permit abuse of the shareholder approval requirement, and at most, will last one year from the date of this Commission approval order.

G. Miscellaneous Provisions

The Commission notes that the Exchange's amended proposal similar to the NYSE and Nasdaq's recently approved shareholder approval rules¹⁹—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 Exchange'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 Exchange's proposal, as amended, provides that pre-existing plans, which were adopted prior to the SEC's approval of the Exchange's proposal, would essentially be "grandfathered" and would not require shareholder approval unless the plans were materially amended. Under the Exchange's amended proposal, however, shareholder approval is required for each grant made pursuant to any pre-existing plans that were not approved by shareholders and that do not have an evergreen formula or a specific number of shares available under the plan. This is consistent with the NYSE, Nasdaq, and Amex shareholder approval rules on this matter. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the Exchange's new shareholder approval requirements.

H. Elimination of Broker-Dealer Voting on Equity Compensation Plans

The Commission believes that the Exchange's proposed provision, BSE Section 3(e), to preclude broker voting on equity compensation plans is consistent with the Act. The Commission notes that equity compensation plans have become an important issue for shareholders. Because of the potential for dilution from issuances under such plans, shareholders should be making the

¹⁹ See *supra* note 6; see also *supra* note 14.