

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

The Commission notes that the Exchange's proposal—similar to the NYSE and Nasdaq's recently approved shareholder approval rules¹⁶—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 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 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 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.

The Commission further notes that the Exchange proposes to adopt an exception from the shareholder approval requirement for warrants or rights offered generally to all shareholders. This exception would exclude stock purchase plans available on equal terms to all security holders of the company (e.g., a dividend reinvestment plan). The Commission believes that the adoption of such an exception would make the Exchange's proposal consistent with the rules of other markets in this area.

Finally, the Commission notes that the proposed amendments to CBOE Form 1 concerning Listing Agreements, which requires advance written notice to the Exchange when issuers use any of

the exceptions from shareholder approval, should help the Exchange to ensure that the use of any exception is consistent with the intent of the shareholder approval requirements for equity compensation plans.

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

The Commission believes that the Exchange's proposed amendment to CBOE Rule 31.85 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 determination rather than brokers on their behalf. The Commission further notes that NASD rules do not provide for broker voting on any matters and NYSE rules prohibit broker voting on equity compensation plans.¹⁷ Therefore, the Exchange's proposed provision would be consistent with NASD and NYSE rules regarding broker voting on equity compensation plans. The Commission has considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments on this issue.¹⁸ 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.¹⁹

I. Summary

Overall, the Commission believes that the Exchange's proposal is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.²⁰ The Commission therefore believes that the Exchange's proposal should provide for more clear and uniform standards for shareholder approval of equity compensation plans. The Commission notes that, even with the availability of the proposed limited exceptions from shareholder approval under the Exchange's proposal, shareholder

approval under the new standards would be required in more circumstances than under existing Exchange rules. The Commission further notes that the Exchange proposes to adopt a requirement that an issuer must notify it in writing when it uses one of the exceptions from the shareholder approval requirements. The Commission believes that such a requirement, coupled with the additional disclosure requirements for inducement grants, should reduce the potential for abuse of any of the exceptions.²¹ In addition, the Exchange's proposed amendment to CBOE Rule 31.85, which would preclude broker-dealers from voting on equity compensation plans without explicit instructions from the beneficial owner, is consistent with the standard under current NYSE and NASD rules.

The Commission believes that the Exchange's proposal, which is similar to the NYSE and Nasdaq's shareholder approval rules,²² sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Exchange's proposal should help to ensure that companies will not make listing decisions simply to avoid shareholder approval requirements for equity compensation plans and should provide shareholders with greater protection from the potential dilutive effect of equity compensation plans. Based on the above, the Commission finds that the Exchange's proposal should help to protect investors, is in the public interest, and does not unfairly discriminate among issuers, consistent with Section 6(b)(5) of the Act.²³ The Commission therefore finds the Exchange's proposal to be consistent with the Act and the rules and regulations thereunder.

V. Accelerated Approval of the Exchange's Proposal and Amendment No. 1

The Commission finds good cause for approving the Exchange's proposal and Amendment No. 1 thereto prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Exchange has requested that the Commission approve the proposed rule change on an accelerated basis so that the proposed corporate governance listing standards relating to shareholder approval of equity compensation plans may be implemented as soon as possible. The Commission notes that the Exchange's

¹⁷ See NASD Rule 2260; NYSE Rule 452; and Section 402.08 of the NYSE's *Listed Company Manual*.

¹⁸ See *supra* notes 5 and 17.

¹⁹ The Commission notes that the Exchange did not propose to implement a transition period on the elimination of the broker vote, similar to the NYSE's 90-day transition period, because the proposed amendment will not impact any issuers currently listed on the Exchange. Telephone conversation between David Doherty, Attorney, Legal Division, CBOE, and Sapna C. Patel, Special Counsel, Division, Commission, on October 28, 2003.

²⁰ See *supra* note 5; see also *supra* note 11.

²¹ See also *supra* note 13 and accompanying text.

²² See *supra* note 5; see also *supra* note 11.

²³ 15 U.S.C. 78f(b)(5).

¹⁶ See *supra* note 5; see also *supra* note 11.