

a limitation under this exemption that a plan would not be considered a nonqualified parallel plan under its proposal if employees who are participants in such a plan receive employer contributions under the plan in excess of 25% of the participants' cash compensation. The Commission further notes that the Exchange proposes an additional requirement that an issuer must notify it in writing when it uses this exemption, and/or any other exemption, from its shareholder approval requirement. The Commission believes that, taken together, these limitations should reduce concerns regarding abuse of this exemption from the shareholder approval requirements.

In addition, the Commission notes that, similar to the exemptions in the NYSE and Nasdaq's recently approved shareholder approval rules, the Exchange proposes to adopt an exemption from the shareholder approval requirements for an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable Section 401(a) plan, Section 423 plan or parallel excess plan that the listed company provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law. The Commission believes that this change will conform the Exchange's shareholder approval rule to that of the NYSE and Nasdaq and will provide greater clarity for issuers regarding tax qualified, non-discriminatory employee benefit plans and parallel nonqualified plans for their non-U.S. employees.

D. Material Revisions to Plans

The Commission notes that the Exchange proposes to provide a non-exclusive list, similar to lists found in the NYSE and Nasdaq's shareholder approval rules,¹⁶ as to what constitutes a material revision to a plan. As noted above, material revisions to plans will require shareholder approval under Exchange rules. A material revision under the Exchange's proposal 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); an expansion of the type of awards available under the plan; a material expansion of the class of participants eligible to participate in the 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 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 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 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 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 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 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 provides guidance for the treatment of evergreen/formula plans. More specifically, under the Exchange's proposal, 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 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 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.

¹⁶ See *supra* note 4; see also *supra* note 12.