

body has expressly approved the exception.

Commentary:

.01—.02—No Change.

Rule 5.3(e)–5.3(o) No Change.

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Rule 9

Conducting Business With the Public

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¶ 7963M Proxies Voting

Rule 9.4. No ETP Holder shall *give a proxy vote that 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 Rule 5.3(d)(1)–(7)), unless the beneficial owner of the shares has given voting instructions. This provision for equity compensation plans shall be effective for any meeting of shareholders that occurs on or after the 90th day following the date of the Securities and Exchange Commission order approving the rule change. In all other matters besides equity compensation plans, no ETP Holder shall sign or give a proxy to vote any stock registered in the name or control of such ETP Holder unless (a) the ETP Holder is the actual owner thereof, (b) pursuant to the written instructions of such actual owner, or (c) pursuant to the rules of another national securities exchange to which he or she or his or her firm is responsible.*

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In light of the recent failures of a number of significant companies due to the lack of diligence, ethics and controls, the Exchange, through PCXE, chose to review its corporate governance and disclosure policies. In September

2002, the PCXE Board of Directors formed a subcommittee to review the PCXE's current corporate governance and disclosure standards. The Exchange represents that the goal of the subcommittee was to enhance the accountability, integrity and transparency of the Exchange's listed companies. The Exchange further represents that it took its first step towards improving the corporate governance and disclosure standards for its listed companies by proposing revisions to PCXE Rule 5.3 to comply with the requirements of the Sarbanes-Oxley Act of 2002.⁴

At the request of Commission staff, the Exchange reviewed its Shareholder Approval Policy for its listed companies. The subcommittee reviewed the New York Stock Exchange, Inc. ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD")/The Nasdaq Stock Market, Inc. ("Nasdaq")'s new shareholder approval requirements for equity compensation plans.⁵ The Exchange proposes to adopt a shareholder approval requirement for equity compensation plans that is almost identical to the policy adopted by the NYSE.

The Exchange proposes to amend PCXE Rule 5.3(d) to require shareholder approval of all equity compensation plans and material revisions to such plans, subject to limited exemptions. The Exchange represents that the new standards in PCXE Rule 5.3(d) will apply to all companies listed under PCX's Tier I and Tier II designations.

Under the Exchange's proposal, an equity compensation plan is defined as 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, including a compensatory grant of options or other equity securities that is not made under a plan. The Exchange

⁴ See File No. SR-PCX-2003-35.

⁵ See Securities Exchange Act Release No. 48108 (June 30, 2003), 68 FR 39995 (July 3, 2003) (order approving File Nos. SR-NYSE-2002-46 and SR-NASD-2002-140). See also Securities Exchange Act Release No. 48627 (October 14, 2003), 68 FR 60426 (October 22, 2003) (notice of filing and order granting accelerated approval to File No. SR-NASD-2003-130, incorporating amendments to the NASD's recently approved shareholder approval rules for equity compensation plans applicable to Nasdaq quoted securities). The Commission also published a correction to the notice of File No. SR-NASD-2003-130. See Securities Exchange Act Release No. 48627A (October 22, 2003), 68 FR 61532 (October 28, 2003). The Commission notes that these additional amendments by Nasdaq make the NYSE and Nasdaq proposals more consistent and uniform. See also *infra* note 13 (regarding the Commission's recent approval of a similar proposal by the American Stock Exchange LLC ("Amex")).

is also proposing to provide clarification on certain plans that would not be considered equity compensation plans under this definition, such as plans that do not provide for delivery of equity securities of the issuer (e.g., plans that pay in cash) and deferred compensation plans under which employees pay full current market value for deferred shares.

In addition, the proposal provides for certain types of grants that are exempted from shareholder approval. These limited exemptions include: (1) Inducement awards to person's first becoming an employee of an issuer or any of its subsidiaries, to rehires following a bona fide period of employment interruption, and for grants to new employees in connection with a merger or acquisition;⁶ (2) mergers and acquisitions, when conversions, replacements or adjustments of outstanding options or other equity compensation awards are necessary to reflect the transaction, and when shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval; and (3) plans intended to meet the requirements of Section 401(a) of the Internal Revenue Code⁷ (e.g., ESOPs), plans intended to meet the requirements of Section 423 of the Internal Revenue Code,⁸ and parallel excess plans that meet certain conditions. The Exchange also proposes that, in circumstances in which equity compensation plans and amendments to plans are not subject to 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.

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 proposes 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 plans that are not

⁶ The Exchange is also proposing to include a requirement that listed companies provide prompt public disclosure following the grant of any inducement award in reliance on the exemption.

⁷ 26 U.S.C. 401(a).

⁸ 26 U.S.C. 423.