

Section 723. Giving Proxies By Member Organization (See Exchange Rule 577)

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.11 When member organization may not vote without customer instructions.—In the list of meetings of stockholders, after proxy material has been reviewed by the Exchange, each meeting will be designated by an appropriate symbol to indicate either (a) that members may vote a proxy without instructions of beneficial owners, (b) that members may not vote specific matters on the proxy, or (c) that members may not vote the entire proxy.

Generally speaking, a member organization may not give a proxy to vote without instructions from beneficial owners when the matter to be voted upon:

(1) through (8)—No change.

(9) involves waiver or modification of preemptive rights [(except when the company's proposal is to waive such rights with respect to shares being offered pursuant to stock option or purchase plans involving the additional issuance of not more than 5% of the company's outstanding common shares (see Item 12)]];

(10) and (11)—No change.

(12) [authorizes issuance of stock, or options to purchase stock, to directors, officers, or employees in an amount which exceeds 5% of the total amount of the class outstanding] *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 Section 711 of the Exchange's Company Guide);*

(13) through (18)—No change.

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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 Amex 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 Amex 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

According to the Amex, the Amex and the New York Stock Exchange, Inc. ("NYSE") have historically had virtually identical rules with respect to the circumstances under which a broker holding a customer's securities in "street name" may give a proxy to vote such shares on a particular issuer proposal without the beneficial owner's instructions. Amex Rule 577 and section 723 of the Amex *Company Guide* provide that the Exchange will review issuer proxy materials and designate with respect to each proposal whether Amex member organizations holding customer shares may vote without instructions from the beneficial owner (*i.e.*, the proposal is "routine") or may only vote with instructions (*i.e.*, the proposal is "non-routine").

On June 30, 2003, the Commission jointly approved NYSE and National Association of Securities Dealers, Inc. ("NASD")/The Nasdaq Stock Market, Inc. ("Nasdaq") proposals that required companies to obtain shareholder approval of all equity compensation plans, subject to limited exceptions, and approved rules in the NYSE proposal that classified such plans as "non-routine" for broker voting purposes.⁴ On

⁴ The Commission notes that NASD rules do not allow broker voting on any matters. 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) ("NYSE and Nasdaq proposals"). 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 **Federal Register** subsequently published another correction. See Securities Exchange Act Release No. 48627A, 68 FR 62161 (October 31, 2003). Most recently, on October 31, 2003, the Commission simultaneously approved similar proposals regarding shareholder approval of equity compensation plans, including a preclusion on broker voting on such plans, for the Boston Stock Exchange, Inc., the Chicago Stock Exchange, Inc., the Pacific Exchange Inc., the Philadelphia Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., and the Cincinnati Stock Exchange on an accelerated basis. See Securities Exchange Act Release Nos. 48733 (October 31, 2003), 68 FR 63143 (November 7, 2003); 48734 (October 31, 2003), 68 FR 63159 (November 7, 2003); 48735 (October 31, 2003), 68 FR 63173 (November 7, 2003); 48736 (October 31, 2003), 68 FR 63180 (November 7, 2003); 48737 (October 31, 2003), 68 FR 63150 (November 7, 2003); and 48738 (October 31, 2003), 68 FR 63166 (November 7, 2003) (collectively, "the Regional Exchange proposals").

October 9, 2003, the Commission approved a comparable Amex proposal with respect to shareholder approval of stock option and equity compensation plans.⁵ That proposal, however, did not address the proxy voting issue being addressed in this instant filing.

The Amex represents that the prior NYSE rules had provided, and that the current Amex rules do provide, that stock option plans are "routine" if all proposals included in the proxy to be voted on do not authorize the issuance of in excess of 5% of the total amount of the shares outstanding to directors, officers or employees. In order to provide greater consistency between marketplaces, the Amex proposes to amend Amex Rule 577 and section 723 of the Amex *Company Guide* to classify stock option and equity compensation plans as "non-routine" for broker voting purposes, thereby requiring instructions from the beneficial owner before a broker can give a proxy on matters related to the implementation of or material amendment to an equity compensation plan. The Amex further proposes that this proposed change become effective as of January 31, 2004.⁶

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6 of the Act⁷ in general and furthers the objectives of section 6(b)(5)⁸ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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.

⁵ See Securities Exchange Act Release No. 48610 (October 9, 2003), 68 FR 59650 (October 16, 2003) (order approving File No. SR-Amex-2003-42).

⁶ The Amex has represented that it will notify its members of the effective date of the proposed rule change on the Amex's website. Telephone conversation between Claudia Crowley, Vice President, Listing Qualifications, Amex, and Sapna C. Patel, Special Counsel, Division of Market Regulation, Commission, on November 20, 2003.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).