

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-Amex-2003-100. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hard copy or by e-mail, but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-Amex-2003-100 and should be submitted by January 2, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the Amex's proposal is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act.⁹ Specifically, the Commission finds that approval of the Amex's proposal is consistent with section 6(b)(5) of the Act¹⁰ in that it is designed to, among

other things, facilitate transactions in securities; to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

When it approved Amex's proposal relating to shareholder approval of equity compensation plans,¹¹ the Commission had urged the Amex to adopt a rule similar to the NYSE's rules prohibiting members and member organizations from giving a proxy to vote without explicit instructions from beneficial owners when the matter to be voted on authorizes the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan.¹²

The Commission believes that the Amex's amended provision precluding 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 such issuances, shareholders should be making the determination rather than brokers on their behalf. The Commission further notes that, generally under Amex rules, only matters that are considered routine are allowed to be voted on by a broker on behalf of a beneficial owner. Because of the recent significance and concern about equity compensation plans, the Commission believes that it is appropriate for the Amex to decide that shareholder approval of equity compensation plans is not a routine matter and must be voted on by the beneficial owner. As noted above, NASD rules do not provide for broker voting on any matters, and NYSE rules prohibit broker voting on equity compensation plans.¹³ Most recently, the Commission approved similar broker voting prohibitions for all of the regional exchanges.¹⁴ Therefore, the Exchange's proposed provision would be consistent with NASD and NYSE rules regarding broker voting on equity compensation plans, as well as with the rules of the regional exchanges. In its approval of the NYSE and Nasdaq proposals, the Commission had

considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments received on this issue.¹⁵ 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.

The Commission notes that the Amex has implemented a transition period that would make the proposed new preclusion on broker voting on equity compensation plans effective as of January 31, 2004. The Commission further notes that this transition period is consistent with the transition periods recently approved for the regional exchanges and should ensure that the Amex's broker voting prohibition is in place for the upcoming proxy season and will be implemented by the same time as the other marketplaces.

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

The Commission finds good cause for approving the Amex's proposal and Amendment No. 1 prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Commission notes that the Amex's proposal is similar to rules that it has recently approved for the NYSE and the regional exchanges on this issue, and is consistent with current NASD rules.¹⁶ The Commission believes that it has already considered and addressed issues that may be raised by the Amex's proposal when it approved the NYSE and Nasdaq proposals.¹⁷ The Commission believes that accelerated approval of the Amex's proposal will allow for immediate harmonization of, and consistency in, the broker voting requirements on equity compensation plans among all of the exchanges and the NASD/Nasdaq. The Commission further believes that making the Amex's rule change effective as of January 31, 2004, is consistent with the transition periods that the Commission has recently approved for the regional exchanges, and will allow the Amex's new broker voting prohibition to be in place for this upcoming proxy season. Further, accelerated approval should allow sufficient time for Amex members to make any necessary adjustments to implement the change by the transition date. Finally, accelerated approval of the Amex proposal will immediately

⁹ 15 U.S.C. 78f(b). In approving the Amex's proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ See *supra* note 5.

¹² See NYSE Rule 452 and section 402.08 of the NYSE's *Listed Company Manual*.

¹³ See NASD Rule 2260 and *supra* note 12.

¹⁴ See the Regional Exchange proposals, *supra* note 4.

¹⁵ See also *supra* notes 4, 12, and 13.

¹⁶ See *supra* note 4. See also section 303A(8) of the NYSE's *Listed Company Manual*; NASD Rule 4350(i) and IM-4350-5. See also *supra* notes 12 and 13.

¹⁷ See *supra* note 4.