At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942–7070.

Dated: October 14, 2003.

Jonathan G. Katz,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48610; File No. SR–Amex–2003–42]

Self Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1, 2 and 3 Thereto by the American Stock Exchange LLC Relating to Shareholder Approval of Stock Option Plans and Other Equity Compensation Arrangements

October 9, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 6, 2003, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On July 24, 2003, the Amex filed Amendment No. 1 to the proposed rule change.[3] On September 10, 2003, the Amex filed Amendment No. 2 to the proposed rule change.[4] On October 1, 2003, the Amex filed Amendment No. 3 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Section 711 of the Amex *Company Guide* relating to shareholder approval of stock option and equity compensation plans.

Below is the text of the proposed rule change, as amended. Proposed new language is *italicized;* proposed deleted language is [bracketed].

* * * * *

American Stock Exchange LLC Company Guide

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Sec. 711, [Options to Officers, Directors or Key Employees]—*Shareholder Approval of Stock Option and Equity Compensation Plans*

Approval of shareholders is required in accordance with Section 705 [(unless exempted under paragraphs (a) and (b) below) as a prerequisite to approval of applications to list additional shares reserved for] *with respect to the establishment of (or material amendment to) a stock* option[s] *or purchase plan or other equity compensation arrangement pursuant to which options or stock may be acquired by officers, directors, employees, or consultants* [granted or to be granted to officers, directors or key employees], regardless of whether or not such authorization is required by law or by the company's charter*, except for*:[.]

[**Note:** This policy does not preclude the adoption of a stock option plan, or the granting of options, subject to ratification by shareholders, prior to the filing of an application for the listing of the shares reserved for such purpose.

The Exchange will not require shareholders' approval as a condition to listing shares reserved for the exercise of options when:]

(a) [such options are issued] *issuances* to an individual, not previously *an* employee[d] *or director of* [by] the company, *or following a bonafide period of non-employment,* as an inducement [essential] *material* to entering into [a contract of] employment with the company provided that *such issuances are approved by the company's independent compensation committee or a majority of the company's independent directors, and, promptly following an issuance of any employment inducement grant in reliance on this exception, the company discloses in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved* [the potential issuance of shares pursuant to such options does not exceed 5% of the company's outstanding common stock]; or

(b) [such options are to be granted:]

[(i)] [under a] *tax qualified, non-discriminatory employee benefit* plan*s* [or arrangement] (*e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the company's independent compensation committee or a majority of the company's independent directors; or plans that merely provide a convenient way to purchase shares in the open market or from the issuer at fair market value* [in which all, or substantially all, of the company's employees participate, in a fair and equitable manner]; or

(c) a plan or arrangement relating to an acquisition or merger; or

(d) warrants or rights issued generally to all security holders of the company or stock purchase plans available on equal terms to all security holders of the company (such as a typical dividend reinvestment plan).

A listed company is required to notify the Exchange in writing with respect to the use of any of the exceptions set forth in paragraphs (a) through (d).

[(ii) under a plan or arrangement for officers, directors or key employees provided such incentive arrangements do not authorize the issuance of more than 5% of outstanding common stock in any one year and provided that all arrangements adopted without shareholder approval in any five-year period do not authorize, in the aggregate, the issuance of more than 10% of such common stock. (For the purpose of calculating the percentage of stock issued in the aggregate, stock to be issued pursuant to options which have expired and/or been cancelled shall not be included.)]

[For purposes of the above policy, the term ''options'' includes not only the usual type of nontransferable options granted in consideration of continued employment, but also any other arrangement under which controlling shareholders, officers, directors or key employees may acquire (other than as part of a public offering) stock or convertible securities of a company at a price below market price at the time such stock is acquired or through the use of credit extended, directly or indirectly, by the company. Thus, the sale to such a person(s) of a common stock purchase warrant or right (not part

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated July 22, 2003 (''Amendment No. 1''). Amendment No. 1 supercedes and replaces Amex's original Rule 19b–4 filing in its entirety.

[4] *See* letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated September 9, 2003 (''Amendment No. 2''). Amendment No. 2 supercedes and replaces Amex's original Rule 19b–4 filing and Amendment No. 1 in their entirety.

[5] *See* letter from Claudia Crowley, Vice President, Listing Qualifications, Amex, to Sapna C. Patel, Special Counsel, Division, Commission, dated October 1, 2003 (''Amendment No. 3''). In Amendment No. 3, the Amex made a technical change to the proposed rule language.

of a public offering) or the sale of stock to such person who has borrowed money from the company, will normally necessitate shareholder approval.]

Commentary * * *

.01 Section 711 requires shareholder approval when a plan or other equity compensation arrangement is established or materially amended. For these purposes, a material amendment would include, but not be limited to, the following:

(a) any 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);

(b) any material increase in benefits to participants, including any material change to: (i) permit a repricing (or decrease in exercise price) of outstanding options, (ii) reduce the price at which shares or options to purchase shares may be offered, or (iii) extend the duration of a plan;

(c) any material expansion of the class of participants eligible to participate in the plan; and

(d) any expansion in the types of options or awards provided under the plan.

While general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would generally be required. However, if a plan contains a formula for automatic increases in the shares available (sometimes called an ''evergreen formula''), or for automatic grants pursuant to a dollar-based formula (such as annual grants based on a certain dollar value, or matching contributions based upon the amount of compensation the participant elects to defer), such plans cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. Plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements.

As a general matter, when preparing plans and presenting them for shareholder approval, issuers should strive to make plan terms easy to understand. In that regard, it is recommended that plans meant to permit repricing use explicit terminology to make this clear.

Section 711 provides an exception to the requirement for shareholder approval for shareholder approval for warrants or rights offered generally to all shareholders. In addition, an exception is provided for tax qualified, non-discriminatory employee benefit plans as well as parallel nonqualified plans[1] as these plans are regulated under the Internal Revenue Code and Treasury Department regulations. An equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax-qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from shareholder approval under this section.

Further, there is an exception for inducement grants to new employees because in these cases a company has an arm's length relationship with the new employees. Inducement grants for these purposes include grants of options or stock to new employees in connection with a merger or acquisition. Section 711 requires that such issuances must be approved by the issuer's independent compensation committee or a majority of the issuer's independent directors. Also, promptly following an issuance of any employment inducement grant in reliance on this exception, the listed company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, plans or arrangements involving a merger or acquisition do not require shareholder approval in two situations. First, shareholder approval will not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of this Section 711. These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or arrangement or another plan or arrangement, without further shareholder approval, provided: (1) The time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company or its subsidiaries at the time the merger or acquisition was consummated. A plan or arrangement adopted in contemplation of the merger or acquisition transaction would not be viewed as pre-existing for purposes of this exception. This exception is appropriate because it will not result in any increase in the aggregate potential dilution of the combined enterprise. In this regard, any additional shares available for issuance under a plan or arrangement acquired in connection with a merger or acquisition would be counted in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thus triggering the shareholder approval requirements of Section 712(b).

Inducement grants, tax qualified non-discriminatory benefit plans, and parallel nonqualified plans are subject to approval by either the issuer's independent compensation committee, or a majority of the issuer's independent directors. A listed company is not permitted to use repurchased shares to fund option plans or grants without prior shareholder approval. In addition, the issuer must notify the Exchange in writing when it uses any of these exceptions (see also Part 3 with respect to the requirements applicable to additional listing of the underlying shares).

* * * * *

[1] The term ''parallel nonqualified plan'' means a plan that is a ''pension plan'' within the meaning of the Employee Retirement Income Security Act (''ERISA''), 29 U.S.C. § 1002 (1999), that is designed to work in parallel with a plan intended to be qualified under Internal Revenue Code Section 401(a), to provide benefits that exceed the limits set forth in Internal Revenue Code Section 402(g) (the section that limits an employee's annual pre-tax contributions to a 401(k) plan), Internal Revenue Code Section 401(a)(17) (the section that limits the amount of an employee's compensation that can be taken into account for plan purposes) and/or Internal Revenue Code Section 415 (the section that limits the contributions and benefits under qualified plans) and/or any successor or similar limitations that may thereafter be enacted. However, a plan will not be considered a parallel nonqualified plan unless (i) it covers all or substantially all employees of an employer who are participants in the related qualified plan whose annual compensation is in excess of the limit of Code Section 401(a)(17) (or any successor or similar limitation that may hereafter be enacted) and (ii) its terms are substantially the same as the qualified plan that it parallels except for the elimination of

the limitations described in the preceding sentence; and (iii) no participant receives employer equity contributions under the plan in excess of 25% of the participant's cash compensation.

See also Section 806.

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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

The Exchange represents that Section 711 of the Amex *Company Guide* currently requires listed companies to obtain shareholder approval for many stock option plans and other arrangements in which officers, directors and key employees participate, to address concerns about the possibility of self-dealing and dilution to the detriment of shareholders. The Exchange further states that under Section 711(b)(i) of the Amex *Company Guide* there is an exception for ''broadly based'' plans in which all, or substantially all, of the company's employees participate in a fair and equitable manner, even if officers, directors and key employees receive option grants under the plan, as well as for *de minimus* grants.

The Exchange represents that, in order to enhance investor confidence and provide consistency across marketplaces, it is proposing to eliminate the existing exceptions to the shareholder approval requirements under current Section 711 of the Amex *Company Guide* and to require shareholder approval of all stock option and equity compensation plans, subject to limited exceptions.[6] The proposed amendments to Section 711 of the Amex *Company Guide* will become effective upon SEC approval.

The Exchange represents that existing plans will not require shareholder approval unless there is a material amendment to the plan. Proposed Commentary .01 to Section 711 of the Amex *Company Guide* specifies a non-exclusive list of plan amendments that would be considered material, and also clarifies that while broad general authority to amend a plan would not obviate the need for shareholder approval, if a plan permits a specific action without further shareholder approval, then no such approval would be required. Certain provisions in a plan, however, cannot be amended without shareholder approval. For example, plans that contains a formula for automatic increases in the shares available (sometimes called an ''evergreen plan'') or for automatic grants pursuant to a dollar-based formula cannot have a term in excess of ten years unless shareholder approval is obtained every ten years. In addition, plans that do not contain a formula and do not impose a limit on the number of shares available for grant would require shareholder approval of each grant under the plan. A requirement that grants be made out of treasury shares or repurchased shares will not alleviate these additional shareholder approval requirements. The proposed Commentary also provides that issuers should strive to make plan terms easily understandable and that plans meant to permit repricing should use explicit terminology in this regard.

With respect to plans involving a merger or acquisition, shareholder approval would not be required in two situations. First, shareholder approval would not be required to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction. Second, shares available under certain plans acquired in corporate acquisitions and mergers may be used for certain post-transaction grants without further shareholder approval. This exception applies to situations where the party which is not a listed company following the transaction has shares available for grant under pre-existing plans that meet the requirements of revised Section 711 of the Amex *Company Guide*.[7] These shares may be used for post-transaction grants of options and other equity awards by the listed company (after appropriate adjustment of the number of shares to reflect the transaction), either under the pre-existing plan or another plan, without further shareholder approval, so long as (1) the time during which those shares are available for grants is not extended beyond the period when they would have been available under the pre-existing plan, absent the transaction, and (2) such options and other awards are not granted to individuals who were employed by the granting company at the time the merger or acquisition was consummated. The Exchange would view a plan adopted in contemplation of the merger or acquisition as not pre-existing for purposes of this exception. This exception is appropriate because it would not result in any increase in the aggregate potential dilution of the combined enterprise.[8]

The adoption of tax-qualified, non-discriminatory benefit plans (pursuant to Internal Revenue Code and Treasury Department regulations) or parallel nonqualified plans, will not require shareholder approval, but must be approved by either the issuer's independent compensation committee or a majority of its independent directors. In addition, an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax-qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer provides to its U.S. employees, but for features necessary to comply with applicable foreign tax law, is also exempt from shareholder approval under Section 711 of the Amex *Company Guide*. However, the proposed rule addresses only the issue of whether shareholder approval is required pursuant to Amex rules, and would not impact any shareholder approval or other requirements under the Internal Revenue Code or other applicable laws or requirements with respect to such plans.

The Exchange is also proposing to retain its existing exception for inducement grants to new employees (including a previous employee following a bonafide period of non-employment by the listed company), including grants to new employees in connection with a merger or acquisition. The Exchange is also proposing to remove the existing restriction which

[6] Section 302 of the Amex *Company Guide* provides that listed companies may not reissue treasury shares without first obtaining shareholder approval, for any purpose where the rules or policies of the Exchange would require such approval had the shares to be issued been previously authorized but unissued. This requirement is unchanged by the current proposal.

[7] The Amex represents that such post-transaction grants can only be made under pre-existing plans that were previously approved by shareholders. Telephone conversation between Claudia Crowley, Vice President, Listing Qualifications, Amex, and Sapna C. Patel, Attorney, Division, Commission, on July 23, 2003.

[8] The Amex notes that any such shares reserved for listing in connection with the transaction would be counted by the Amex in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock and thus required shareholder approval under Section 712(b) of the Amex *Company Guide*.

limits such grants to five percent of the company's outstanding common stock, which is in conformance with recently approved New York Stock Exchange, Inc. (''NYSE'') and The Nasdaq Stock Market, Inc. (''Nasdaq'') proposals.[9] The Exchange does not believe that shareholder approval is necessary in these circumstances for several reasons. The Exchange believes that inducement grants are often subject to some urgency and the need to obtain shareholder approval could thus be impracticable. Furthermore, the Exchange believes that such grants are negotiated at ''arms'' length'' and do not involve the potential for self-dealing on the part of existing officers and directors. However, the Exchange represents that all inducement grants will be subject to approval by either the issuer's independent compensation committee or a majority of its independent directors. Additionally, the Exchange represents that promptly following an issuance of any employment inducement grant in reliance on this exception, a company must disclose in a press release the material terms of the grant, including the recipient(s) of the grant and the number of shares involved.

In addition, rights and warrants issued generally to all shareholders will not require shareholder approval, nor would plans that merely provide a convenient way for all security holders to purchase shares on the open market or from the issuer at fair market value on equal terms. The Amex believes that such issuances do not raise the same concerns regarding self-dealing and dilution as stock option plans.

Further, the Exchange proposes to require the issuer to notify the Exchange in writing when it uses any of the exceptions to the shareholder approval requirement contained in Section 711 of the Amex *Company Guide*, and such grants are also subject to Part 3 of the Amex *Company Guide* with respect to the requirements applicable to the additional listing of the underlying shares.

The Exchange also proposes to delete the existing provision of Section 711 of the Amex *Company Guide*, which contains an exception from the shareholder approval requirement for an option plan that does not authorize the issuance to officers, directors or key employees of more than five percent of outstanding common stock in any one year (provided all such arrangements adopted without shareholder approval in any five year period do not authorize the issuance of more than ten percent of outstanding common stock), and which governs participation by controlling shareholders, officers, directors and key employees in discounted private placements.[10]

Finally, the Exchange notes that the Commission has asked the Amex to adopt a rule similar to the NYSE's rule prohibiting members and member organizations from giving a proxy to vote without 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.[11] The Amex has consented to reconsidering this issue.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6 of the Act[13] in general and furthers the objectives of Section 6(b)(5)[14] 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.

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, as amended, 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. 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–2003–42 and should be submitted by November 6, 2003.

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

After careful review, the Commission finds that the Amex's proposal, as amended, 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.[15] Specifically, the Commission finds that approval of the Amex's proposal, as amended, is consistent with Section 6(b)(5) of the Act[16] 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

[9] *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 Section 303A(8) of the NYSE's Listed *Company Manual*; NASD Rule 4350(i) and IM–4350–5; and File No. SR–NASD–2003–130.

[10] The Exchange has submitted a separate rule change proposal (SR–Amex–2003–70) to amend Section 713 of the Amex *Company Guide* to reincorporate this policy solely in the context of discounted private placements. The Commission notes that this separate proposed rule change filed by the Amex is currently pending before the Commission and has not been approved.

[11] *See* NYSE Rule 452 and Section 402.08 of the NYSE's *Listed Company Manual*.

[12] Telephone conversation between Claudia Crowley, Vice President, Listing Qualifications, Amex, and Sapna C. Patel, Special Counsel, Division, Commission, on October 2, 2003. The Commission notes that equity compensation plans have become an important issue for shareholders. Because of the potential for dilution from such issuances, the Commission believes that 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 strongly urges the Amex to designate that shareholder approval of equity compensation plans is not a routine matter and must be voted on by the beneficial owner.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

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

[16] 15 U.S.C. 78f(b)(5).

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.

The Commission has long encouraged exchanges to adopt and strengthen their corporate governance listing standards in order to, among other things, restore investor confidence in the national marketplace. The Commission believes that the Amex's amended proposal, which requires shareholder approval of equity compensation plans and which follows the Commission's approval of similar proposals by the NYSE and Nasdaq,[17] is the first step under this directive because it should have the effect of safeguarding the interests of shareholders, while placing certain restrictions on Amex-listed companies.

In addition, the Commission notes that the Amex's proposal, as amended, is similar and almost identical to proposals by NYSE and Nasdaq requiring shareholder approval of equity compensation plans that have previously been approved by the Commission.[18] The Commission believes that it has already considered and addressed the issues that may be raised by the Amex's proposal when it approved the NYSE and Nasdaq's proposals. The Commission notes that approval of the Amex's proposal, as amended, will conform Amex's shareholder approval requirements for equity compensation plans with those of the NYSE and Nasdaq, and will immediately impose the same requirements on Amex issuers as those imposed upon NYSE and Nasdaq issuers. The adoption of these standards by the Amex is an important step to ensure that issuers will not be able to avoid shareholder approval requirements for equity compensation plans based on their listed marketplace.

A. Exception From Shareholder Approval for Inducement Grants

The Commission believes that the requirement that the issuance of all inducement grants be subject to review by either the issuer's independent compensation committee or a majority of the board's independent directors, under the Amex's amended proposal, should prevent abuse of this exception from shareholder approval. The Commission notes that the Amex is proposing to include a requirement, similar to the requirement under NYSE's recently approved shareholder approval rule, that, promptly following the grant of any inducement award, companies must disclose in a press release the material terms of the award, including the recipient(s) of the award and the number of shares involved.[19] The Commission notes that the Amex is also proposing a requirement, similar to the requirements under the NYSE and Nasdaq's recently approved shareholder approval rules,[20] that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that these disclosure and notification requirements will provide transparency to investors and should reduce the potential for abuse of this exception for inducement grants.

In addition, the Amex proposes to limit its exception for inducement grants to new employees or to previous employees being rehired after a bona fide period of interruption of employment, and to new employees in connection with an acquisition or merger. The Commission believes that these limitations should help to prevent the inducement exception from being used inappropriately.

B. Exception From Shareholder Approval for Mergers and Acquisitions

The Commission notes that the Amex's exception from shareholder approval for mergers and acquisitions contains safeguards that should prevent abuse in this area. First, only pre-existing plans that were previously approved by the acquired company's shareholders would be available to the listed company for post-transactional grants. In addition, shares under those previously approved plans could not be granted to individuals who were employed, immediately before the transaction, by the post-transaction listed company or its subsidiaries. The Commission also notes that, under both the Amex's proposal, as amended, any shares reserved for listing in connection with a merger or acquisition pursuant to this exception would be counted by the Amex in determining whether the transaction involved the issuance of 20% or more of the company's outstanding common stock, thereby requiring shareholder approval under Section 712(b) of the Amex *Company Guide*. Finally, the Commission notes that the Amex proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. Based on the above, the Commission believes that the Amex has provided measures to ensure that the exception for mergers and acquisitions is only used in limited circumstances, which should help reduce the potential for dilution of shareholder interests.

C. Exception From Shareholder Approval for Tax Qualified and Parallel Nonqualified Plans

The Commission believes that, given the extensive government regulation—the Internal Revenue Code and Treasury regulations—for tax qualified plans and the general limitations associated with parallel nonqualified plans, shareholders should not experience significant dilution as a result of this exception. In addition, the Commission notes that the Amex proposes to add a limitation under this exception that a plan would not be considered a nonqualified parallel under its proposal if employees who are participants in such plans receive employer contributions under the plans in excess of 25% of the participants' cash compensation. The Commission further notes that the Amex proposes an additional requirement that an issuer must notify it in writing when it uses this exception, and/or any other exception, from its shareholder approval requirement. The Commission believes that, taken together, these limitations should reduce concerns regarding abuse of this exception from the shareholder approval requirements.

In addition, the Commission notes that, similar to the exemption under Section 303A(8) of the NYSE's *Listed Company Manual*, the Amex proposes to adopt an exception from the shareholder approval requirements for an equity compensation plan that provides non-U.S. employees with substantially the same benefits as a comparable tax qualified, non-discriminatory employee benefit plan or parallel nonqualified plan that the issuer 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 Amex's shareholder approval rule to that of the NYSE and will provide greater clarity for issuers regarding tax qualified, non-

[17] *See supra* note 9.

[18] *See supra* note 9.

[19] This disclosure would, of course, be in addition to any information that is required to be disclosed in annual reports filed with the Commission. For example, Item 201(d) of Regulation S–K [17 CFR 229.201(d)] and Item 201(d) of Regulation S–B [17 CFR 228.201(d)] require issuers to present—in their annual reports on Form 10–K or Form 10–KSB—separate, tabular disclosure concerning equity compensation plans that have been approved by shareholders and equity compensation plans that have not been approved by shareholders.

[20] *See* Section 303A(8) of the NYSE's *Listed Company Manual* and NASD Rules 4310(c)(17)(A) and 4320(e)(15)(A) .

discriminatory employee benefit plans and parallel nonqualified plans for their non-U.S. employees.

D. Material Amendments to Plans

The Commission notes that the Amex proposes to provide a non-exclusive list, similar to lists found in the NYSE and Nasdaq's shareholder approval rules,[21] as to what constitutes a material amendment to a plan. As noted above, material amendments to plans will require shareholder approval under Amex rules. A material amendment under the Amex proposal, as amended, 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); a material increase in benefits to participants, including any material change to (1) permit a repricing (or decrease in exercise price) of outstanding options, (2) reduce the price at which shares or options to purchase shares may be offered, or (3) extend the duration of the plan; a material expansion of the class of participants eligible to participate in the plan; an expansion of the type of options or awards available under the plan. The Amex's proposal, as amended, also describes what would constitute a material amendment for plans containing a formula for automatic increases (such as evergreen plans) and automatic grants requiring shareholder approval.

The Commission believes that the Amex's non-exclusive list of what would constitute a material amendment to a plan provides companies with clarity and guidance for when certain amendments to plans would require shareholder approval. The Commission also believes that the Amex'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 is consistent among the markets so that differences between the markets cannot be abused.

E. Repricing of Plans

The Commission notes that, under the Amex's proposal, as amended, if a plan is amended to permit repricing, such an amendment would be considered a material amendment to a plan requiring shareholder approval. In addition, the Amex recommended in its proposal that plans meant to permit repricing should explicitly and clearly state that repricing is permitted.

The Commission believes that the Amex's proposal, as amended, 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 Amex'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 Amex's proposal, as amended, provides guidance for the treatment of evergreen/formula plans. More specifically, under the Amex's proposal, as amended, 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 Amex's proposal, as amended, 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 Amex's proposal, as amended, 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.[22]

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 Amex'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.

G. Miscellaneous Provisions and Other Items

The Commission notes that the Amex's amended proposal—similar to the NYSE and Nasdaq's recently approved shareholder approval rules[23]—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 Amex's proposal, as amended, 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 Amex's proposal, as amended, provides that pre-existing plans, which were adopted prior to the SEC's approval of the Amex's proposal, would essentially be ''grandfathered'' and would not require shareholder approval unless the plans were materially amended. The Commission believes that this clarification should provide companies with guidance as to which plans would be subject to the new Amex shareholder approval requirements.

Finally, the Commission urges the Amex to quickly adopt a standard prohibiting discretionary broker voting of equity compensation plans. NASD rules do not provide for broker voting on any matters, and NYSE rules prohibit broker voting on equity compensation plans. In its approval of the NYSE and Nasdaq proposals, the Commission considered the impact on smaller issuers, such as those listed on Nasdaq and the Amex, in response to the comments received on this issue.[24] 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, and, therefore, strongly recommends that the Amex quickly adopt a prohibition on broker voting of equity compensation plans.[25]

H. Summary

Overall, the Commission believes that the Amex's proposal, as amended, is similar to the NYSE and Nasdaq's recently approved shareholder approval rules.[26] The Commission therefore believes that the Amex's proposal, as amended, should provide for more clear

[21] *See supra* note 9.

[22] *See also supra* note 8.

[23] *See supra* note 9.

[24] *See also supra* notes 9 and 11.

[25] *See also supra* note 12 and accompanying text.

[26] *See supra* note 9.

and uniform standards for shareholder approval of equity compensation plans. The Commission notes that, even with the availability of the proposed limited exceptions to shareholder approval under the Amex's proposal, as amended, shareholder approval under the new standards would be required in more circumstances than under existing Amex rules. The Commission further notes that the Amex 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.[27]

The Commission believes that the Amex's proposal, as amended, which is similar to the NYSE's shareholder approval rule and almost identical to Nasdaq's shareholder approval rule,[28] sets a consistent, minimum standard for shareholder approval of equity compensation plans. The Commission believes that the Amex's proposal, as amended, 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 Amex's proposal, as amended, should help to protect investors, are in the public interest, and do not unfairly discriminate among issuers, consistent with Sections 6(b) of the Act.[29] The Commission therefore finds the Amex's proposal, as amended, to be consistent with the Act and the rules and regulations thereunder.

V. Accelerated Approval of the Amex's Proposal and Amendment Nos. 1, 2 and 3

The Commission finds good cause for approving the Amex's proposal, as amended, 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, as amended, is similar to the NYSE's proposal and almost identical to the Nasdaq's proposal requiring shareholder approval of equity compensation plans. Both the NYSE and Nasdaq proposals were published for comment in the **Federal Register** and recently approved by the Commission.[30] The Commission believes that it already considered and addressed the issues that may be raised by the Amex's proposal in its approval of the NYSE and Nasdaq's proposals.[31]

The Commission believes that accelerated approval of the Amex's proposal, as amended, is essential to allow for immediate harmonization of, and consistency in, the shareholder approval requirements for equity compensation plans between the Amex, the NYSE, and Nasdaq. This will prevent issuers from making listing decisions based on differences in self-regulatory organization shareholder approval requirements and should provide equal investor protection to shareholders on the dilutive effects of plans irrespective of where the security trades. The Commission further believes that making the Amex's new shareholder approval rules effective upon Commission approval will immediately impose the same requirements on Amex issuers as those imposed upon NYSE and Nasdaq issuers. Based on the above, the Commission finds good cause, consistent with Sections 6(b)(5) and 19(b)(2) of the Act [32] to approve the Amex's proposal, as amended, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[33] that the proposed rule change (SR–Amex–2003–42) and Amendment Nos. 1, 2 and 3 are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

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[27] *See also supra* note 19 and accompanying text.

[28] *See supra* note 9.

[29] 15 U.S.C. 78f(b)(5).

[30] *See* Securities Exchange Act Release No. 46620 (October 8, 2002), 67 FR 63486 (notice of the NYSE's proposal). The Commission also published a correction to the notice of the NYSE's proposal. *See* Securities Exchange Act Release No. 44620A (October 21, 2002), 67 FR 65617 (October 25, 2002). *See* Securities Exchange Act Release No. 46649 (October 11, 2002), 67 FR 64173 (notice of Nasdaq's proposal). *See supra* note 9.

[31] Some of the substantive provisions ultimately adopted by the NYSE and Nasdaq, and now being proposed for adoption by the Amex, were in response to these comments. The comments on the NYSE and Nasdaq proposals were also discussed in detail in the Commission's approval order of the NYSE and Nasdaq proposals. *See supra* note 9.

[32] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[33] 15 U.S.C. 78s(b)(2).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48609; File No. SR–CBOE–2003–22]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 Relating to the Limitation of Liability of the Options Clearing Corporation to Exchange Members

October 9, 2003.

I. Introduction

On May 22, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to add an interpretation to its Rule 6.7. On August 12, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on August 19, 2003.[4] On September 10, 2003, the CBOE submitted Amendment No. 2 to the proposed rule change.[5] On October 6, 2003, the CBOE submitted Amendment No. 3 to the proposed rule change.[6]

The Commission received no comments on the proposed rule change,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from David Doherty, Attorney, Legal Division, CBOE to Timothy Fox, Attorney, Division of Market Regulation (''Division''), Commission, dated August 11, 2003 (''Amendment No. 1''). In Amendment No. 1, the CBOE replaced the phrase ''persons associated therewith'' with the phrase ''associated persons'' in proposed Interpretation .04 to CBOE Rule 6.7.

[4] Securities Exchange Act Release No. 48320 (August 12, 2003), 68 FR 49827.

[5] *See* letter from David Doherty, Attorney, Legal Division, CBOE to Timothy Fox, Attorney, Division, Commission, dated September 9, 2003 (''Amendment No. 2''). In Amendment No. 2, the CBOE deleted the provisions of proposed Interpretation .04 to CBOE Rule 6.7 that provided that the Options Intermarket Linkage (''Linkage'') is a facility or service afforded by the Exchange for the purposes of CBOE Rule 6.7. Further, the CBOE proposed that the Exchange would have no liability to its members with respect to the use, non-use or inability to use the Linkage.

[6] *See* letter from David Doherty, Attorney, Legal Division, CBOE to Jennifer Colihan, Special Counsel, Division, Commission, dated October 3, 2003 (''Amendment No. 3''). In Amendment No. 3, which superseded and replaced Amendment No. 2 in its entirety, CBOE deleted the provisions of proposed Interpretation .04 to CBOE Rule 6.7 that provided that Linkage is a facility or service afforded by the Exchange for the purposes of CBOE Rule 6.7.