

NYSE Proposed Rule Changes Relating to Shareholder Approval of Equity Compensation Plans and the Voting of Proxies

The NYSE recently filed with the SEC proposed rule changes relating to shareholder approval of equity compensation plans and voting of proxies by NYSE member firms. The SEC published the proposal for public comment (Release No. 34-46620, File No. SR-NYSE-2002-46), with a comment period ending on October 29, 2002.

Shareholder Approval Of Equity Compensation Plans

The principal change would be to require shareholder approval of the adoption of all new equity-based compensation plans, and all material revisions to the terms of all existing equity-based compensation plans, by NYSE-listed companies. This requirement significantly broadens the shareholder approval requirement, as broad-based plans are not currently required to be approved by shareholders. Plans adopted or revised before this proposal becomes effective will not be affected by the rule change. This change would be codified in a new Section 303A of the NYSE Listed Company Manual.

A “material revision” would include, but not be limited to, a revision that:

- materially increases the number of shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spinoff or similar transaction);
- changes the types of awards available under the plan;
- materially expands the class of persons eligible to receive awards under or otherwise participate in the plan;
- materially extends the term of the plan; or
- materially changes the method of determining the strike price of options under the plan.

In addition, if a plan contains a prohibition against repricing, or does not contain any language expressly permitting repricing, any change to the existing prohibition or any actual repricing (even if the plan itself is not revised) will be considered a material revision of the plan.

Exemptions would exist for three types of plans and awards:

- Awards made to induce employment, which are deemed by the NYSE to be non-recurring, time sensitive events for which shareholder approval is not appropriate.

- Awards and plans in connection with mergers or acquisitions where:
 - the awards and plans are made or adopted to convert, replace or adjust outstanding options or other equity compensation awards to reflect the transaction; and
 - shares available under plans of an unlisted company acquired in the acquisition or merger by a listed company are used for post-transaction grants so long as certain criteria are met.
- Plans addressed by the Internal Revenue Code (including, for example, ESOPs, parallel non-qualified plans (pension plans that provide benefits in excess of those permitted by ERISA) and qualified stock purchase plans) to the extent that the Code already requires either shareholder approval or tax treatment that affects a company's decision to implement such a plan.

Plans and amendments thereto that would not be subject to shareholder approval would still be subject to the approval of the listed company's compensation committee or a majority of the listed company's independent directors.

Voting of Proxies

The NYSE has also proposed to prohibit its member organizations (e.g., brokerage firms) from voting shares held in "street name" on equity compensation plans unless the beneficial owner of the shares has given voting instructions. This change would be codified in NYSE Rule 452, with conforming changes to Sections 303.00 and 312.03 of the NYSE Listed Company Manual. If approved, this rule change could make it more burdensome and more difficult for listed companies to obtain the requisite shareholder approval than has been the case in the past.