

**MEMO# 16679**

October 17, 2003

# **SEC PROPOSES, AND GRANTS ACCELERATED APPROVAL TO, AMEX PROPOSAL REQUIRING SHAREHOLDER APPROVAL OF EQUITY COMPENSATION PLANS**

[16679] October 17, 2003 TO: CLOSED-END INVESTMENT COMPANY COMMITTEE No. 54-03 SEC RULES COMMITTEE No. 84-03 RE: SEC PROPOSES, AND GRANTS ACCELERATED APPROVAL TO, AMEX PROPOSAL REQUIRING SHAREHOLDER APPROVAL OF EQUITY COMPENSATION PLANS The Securities and Exchange Commission has solicited comments on an American Stock Exchange proposed rule change and simultaneously approved that proposal on an accelerated basis. Section 711 of the Amex Company Guide, as amended, requires shareholder approval of all equity compensation plans, including stock option plans, and material amendments to such plans, subject to certain limited exceptions.<sup>1</sup> The Amex rule, which is currently effective, is very similar to NYSE and Nasdaq rule amendments recently approved by the SEC.<sup>2</sup> The Release is summarized below. Comments on the Amex rule must be submitted to the SEC by November 6th. We are considering submitting a comment letter. Please provide me any comments that you have on the Amex rule no later than October 24th by phone, (202.218-3563), fax (202.326-5827), or email (ddonohue@ici.org).

I. THE SHAREHOLDER APPROVAL REQUIREMENT The Amex rule requires shareholder approval of most equity compensation plans. The rule contains certain limited exceptions, not requiring shareholder approval of, among other things, employment inducement awards, plans involving a merger or acquisition, certain tax qualified, non-discriminatory employee benefit plans, parallel nonqualified plans, and plans that permit purchase of shares from the issuer at fair market value. The Amex rule also provides that inducement grants, tax qualified non-discriminatory employee benefit plans, and parallel nonqualified plans are subject to approval by the company's independent compensation committee or a majority of the company's independent directors. In addition, listed issuers must notify Amex in writing when they use any of the exceptions. <sup>1</sup> SEC Release No. 34-48610 (October 9, 2003); 68 FR 59650 (October 16, 2003) ("Release"). The Release is available on the SEC's website at <http://www.sec.gov/rules/sro/34-48610.htm>. <sup>2</sup> See Institute Memorandum to Closed-End Investment Company Members, No. 55-03 and SEC Rules Members, No. 87-03 [16274], dated July 8, 2003. <sup>2</sup>

II. MATERIAL AMENDMENTS TO EQUITY COMPENSATION PLANS The Amex rule requires shareholder approval of any material amendment to equity compensation plans. The commentary accompanying Section 711 of the Amex Company Guide provides that a material amendment of an equity compensation plan includes, among other things: (1) a material increase in the number of

shares available under the plan (other than an increase solely to reflect a reorganization, stock split, merger, spin-off or similar transaction); (2) any material increase in benefits to participants, including any material change to permit a repricing of outstanding options or extend the duration of a plan; and (3) any material expansion of the class of participants eligible to participate in the plan. The Release notes that this a non-exclusive list of material amendments.

**III. REPRICING OF OPTIONS IN PLANS** The Amex rule addresses the issue of shareholder approval of repricing of options. Under the Amex rule, it is considered a material amendment if a plan is amended to permit repricing. The Release also states that Amex recommends that issuers that intend to permit repricing explicitly and clearly state in their plans that repricing is permitted.

**IV. EVERGREEN PLANS** The Amex rule also addresses the issue of equity compensation plans that contain evergreen formulas, which allow for automatic increases in the number of shares available or for automatic grants pursuant to a formula in the plans. The Amex rule provides that if a plan contains a formula for automatic increases in the shares available or for automatic grants pursuant to a formula, each increase or grant requires prior shareholder approval unless the plan has a term of not more than ten years. If a plan does not contain a limit on the number of shares available and does not contain a formula, then each grant under the plan requires separate shareholder approval.

**V. GRANDFATHERED PLANS** The Amex rule provides that shareholder approval is not required for equity compensation plans adopted before the effectiveness of the rule, unless they are materially amended. Thus, in the absence of any material amendment, pre-existing plans, i.e., those adopted prior to the SEC's approval of the Amex rule, are essentially "grandfathered" and do not require shareholder approval.

**VI. BROKER VOTING ON EQUITY COMPENSATION PLANS** In the Release, the SEC urges Amex to quickly adopt a rule prohibiting broker voting on equity compensation plans unless the beneficial owner has given voting instructions. According to the Release, Amex has consented to reconsidering this issue.

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