

recommendations; however, the commenters were less supportive of disclosure relating to the nominee selection process, the criteria to be applied by the nominating committee in selecting nominees, and the required qualifications of nominees.¹⁴ Those who did not support expanded nominating committee disclosure stated their concern that companies would merely make “self-serving ‘boilerplate’” disclosures.¹⁵

In the 1978 release proposing amendments to the proxy rules to include the current disclosure requirements related to nominating committees, the Commission stated generally its belief that the new disclosure requirements would facilitate improved accountability.¹⁶ Specifically, the Commission stated that:

* * * information relating to nominating committees would be important to security holders because a nominating committee can, over time, have a significant impact on the composition of the board and also can improve the director selection process by increasing the range of candidates under consideration and intensifying the scrutiny given to their qualifications. Additionally, the Commission believes that the institution of nominating committees can represent a significant step in increasing security holder participation in the corporate electoral process, a subject which the Commission will consider further in connection with its continuing proxy rule re-examination.¹⁷

The Commission ultimately adopted nominating committee disclosure standards, currently found in Item 7 of Exchange Act Schedule 14A, that, among other requirements, require a company to state whether they have a nominating committee and, if so, whether the nominating committee will consider security holder nominees.¹⁸

Following the Commission's adoption of the nominating committee disclosure requirements, a 1980 staff report to the Senate expressed the view that, due to the emerging concept of nominating committees, the Commission should not propose and adopt a security holder access rule at that time.¹⁹ The staff report recommended, however, that the staff monitor the development of

nominating committees and their consideration of security holder recommendations.²⁰

II. Proposed Disclosure Requirements

A. Enhanced Nominating Committee Disclosure

1. Necessity for the Proposal

Companies currently must disclose whether they have a nominating committee and, if so, whether the committee considers nominees recommended by security holders and how any such recommendations may be submitted.²¹ Based on the comments received in response to the Commission's solicitation of public input, it does not appear that the existing disclosure requirements have effected significant change in the transparency of, or increased security holder understanding of, the nominating process. In particular, commenters indicated that the existing disclosure requirements have resulted in mere boilerplate disclosure and, as such, have not provided investors with the information necessary to understand the nominating process at the companies in which they invest.²²

We are proposing new disclosure requirements that would expand disclosure in company proxy statements regarding the nominating committee and the nominating process. This enhanced disclosure is intended to provide security holders with additional, specific information upon which to evaluate the boards of directors and nominating committees of the companies in which they invest. Further, we intend that increased transparency of the nominating process will make that process more understandable to security holders.

In particular, we have proposed a number of specific and detailed disclosure requirements because we believe that each of these requirements may be necessary in order to assist security holders in understanding each of the processes and policies of the nominating committees and boards of directors of companies regarding the nomination of candidates for director. We request comment on whether each of these detailed requirements is appropriate for that purpose and whether there are additional specific and detailed disclosures that should be required.

2. Proposed Disclosure Requirements

The amendments we are proposing today would expand the current proxy statement disclosure regarding a company's nominating or similar committee to require:

- A statement as to whether or not the company has a standing nominating committee or a committee performing similar functions²³ and, if the company does not have such a committee, a statement of the specific basis for the view of the board of directors that it is appropriate for the company not to have such a committee and the names of those directors who participate in the consideration of director nominees;²⁴
- The following disclosure regarding the nominating process:²⁵
 - If the nominating committee has a charter, a description of the material terms of the nominating committee charter and disclosure as to where the nominating committee charter is available, which can be the company's Web site;
 - If the nominating committee does not have a charter, a statement of that fact;
 - If the company is a listed issuer²⁶ whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Exchange Act²⁷ or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act²⁸ that has independence requirements for nominating committee members, disclosure of any instance during the

²³ As noted earlier in this release, this disclosure currently is required under Paragraph (d)(1) of Item 7 of Exchange Act Schedule 14A.

²⁴ Under proposed listing standards, a company that is listed on the NYSE would be required to have an independent nominating committee. Under NASD proposed listing standards, a Nasdaq Stock Market-quoted company would be required to have an independent nominating committee or, in the alternative, have nominees determined by a majority of independent directors. See Release Nos. 34-47672 (April 11, 2003) [68 FR 19051] and 34-47516 (March 17, 2003) [68 FR 14451].

²⁵ For the remainder of our discussion of this proposed disclosure requirement, the term “nominating committee” refers to a nominating committee or similar committee or group of directors fulfilling the role of a nominating committee. That group may comprise the full board. If the company has a standing nominating committee or a committee fulfilling the role of a nominating committee, Item 7(d)(1) of Schedule 14A requires identification of the members of that committee. If the company does not have such a standing committee, the proposed amendments to Paragraph (d)(2) of Item 7 of Schedule 14A would require the identification of each director who participates in the consideration of director nominees.

²⁶ As defined in Exchange Act Rule 10A-3 [17 CFR 240.10A-3].

²⁷ 15 U.S.C. 78f(a).

²⁸ 15 U.S.C. 78o-3(a).

¹⁴ See 1978 Summary of Comments, at 75.

¹⁵ See *id.*

¹⁶ See Release No. 34-14970 (July 18, 1978) [43 FR 31945].

¹⁷ See *id.*

¹⁸ See Release No. 34-15384 (December 6, 1978) [43 FR 58522].

¹⁹ The Task Force on Corporate Accountability was formed as an outgrowth of the review of the proxy rules that began in 1977. The work of the Task Force culminated in the Staff Report on Corporate Accountability, completed and presented to the Senate Committee on Banking, Housing, and Urban Affairs. See *Staff Report on Corporate Accountability*, at A60-65.

²⁰ The *Staff Report on Corporate Accountability* states: “* * * all nominating committees should be open to suggestions of nominees from security holders.” *Id.*, at A56.

²¹ See Paragraphs (d)(1) and (d)(2) of Item 7 of Exchange Act Schedule 14A.

²² See 2003 Summary of Comments.