

last fiscal year where any member of the nominating committee did not satisfy the definition of independence in the listing standards of the market on which they are listed or quoted;²⁹

- If the company is not a listed issuer,³⁰ disclosure of whether each of the members of the nominating committee are independent. In determining whether a member is independent, the company must use a definition of independence of a national securities exchange registered pursuant to Section 6(a) of the Exchange Act or a national securities association registered pursuant to Section 15A(a) of the Exchange Act that has been approved by the Commission (as that definition may be modified or supplemented), and state which definition it used. Whatever definition the company chooses, it would have to apply that definition consistently to all members of the nominating committee and use the independence standards of the same national securities exchange or national securities association for purposes of nominating committee disclosure under this requirement and audit committee disclosure under Exchange Act Rule 10A-3;

- If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, a description of the material elements of that policy, which shall include, but not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

- If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, a statement of that fact;

- If the nominating committee will consider candidates recommended by security holders, a description of the procedures to be followed by security holders in submitting such recommendations;³¹

- A description of any specific, minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the company's board of directors, any

specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess, and any specific standards for the overall structure and composition of the company's board of directors;

- A description of the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether or not the nominee is recommended by a security holder;

- A statement of the specific source, such as the name of an executive officer, director, or other individual, of each nominee (other than nominees who are executive officers or directors standing for re-election) approved by the nominating committee for inclusion on the company's proxy card;

- If the company pays a fee to any third party or parties to identify or assist in identifying or evaluating potential nominees, disclosure of the function performed by each such third party; and

- If the nominating committee (a) receives a recommended nominee from a security holder or group of security holders who individually, or in the aggregate, beneficially owned greater than 3%³² of the company's voting common stock for at least one year as of the date of the recommendation,³³ and

³² In addition to the disclosure proposed today, the Division of Corporation Finance Staff Report, dated July 15, 2003, also recommended new rules to require enhanced security holder access to the nomination process. The issue of the appropriate ownership threshold, if any, for any such enhanced access is a separate issue from the appropriate ownership threshold for the disclosure we are proposing today and is not addressed in this release.

³³ Similar to the method used in Exchange Act Rule 14a-8 [17 CFR 240.14a-8] with regard to shareholder proponents, the percentage of securities held by a nominating security holder, as well as the holding period of those securities may be determined by the company, on its own, if the security holder is the registered holder of the securities. If not, the security holder can submit one of the following to the company to evidence the required ownership and holding period:

(1) a written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

(2) if the security holder has filed a Schedule 13D (§ 240.13d-101), Schedule 13G (§ 240.13d-102), Form 3 (§ 249.103), Form 4 (§ 249.104), and/or Form 5 (§ 249.105), or amendments to those documents or updated forms, reflecting ownership of the shares as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the required securities for the one-year period as of the date of the recommendation.

(b) the nominating committee decides not to nominate that candidate, disclosure of:³⁴

- The name or names of the security holders who recommended the candidate; and

- The specific reasons for the nominating committee's determination not to include the candidate as a nominee.³⁵

As previously discussed, the disclosure that would be required by each of the proposed disclosure standards described above would provide security holders with important information regarding the management of the companies in which they invest. Commenters who responded to the Commission's solicitation of public views indicated the necessity for increased specific disclosure regarding the functioning of the nominating committees of public companies.³⁶ The disclosure standard we propose today would build upon existing disclosure requirements to require a number of specific disclosures.

We believe that the proposed detailed disclosure requirements regarding the decision to have a nominating committee or not, the nominating committee's charter, if any, its processes for identifying and evaluating candidates, and the minimum qualifications and qualities, skills and standards that the nominating committee believes are necessary or desirable for nominees and the board, are necessary to give security holders a more complete overview of the nominating process for directors of the companies in which they invest. We believe that information as to whether nominating committee members are independent within the requirements of proposed listing standards applicable to a company is meaningful to a security holder in evaluating the nominating process of that company, how that process works, and the seriousness with which it is considered by the company. We believe that identification of the source of each nominee and disclosure as to whether there are third parties that receive compensation related to

³⁴ Information available to our Office of Economic Analysis indicates that, of the companies listed on the New York Stock Exchange, Nasdaq Stock Market and American Stock Exchange as of December 31, 2002, more than 70% had at least one institutional security holder that beneficially owned more than 3% of the common equity or similar securities and 13% had five or more such security holders. This information was derived from filings on Exchange Act Form 13F (17 CFR 249.325), that indicated that the filing security holder had held their securities for at least one year.

³⁵ Disclosure of the names of any recommended candidates would not be required.

³⁶ See 2003 Summary of Comments.

²⁹ For purposes of this disclosure requirement, to the extent the market on which the company is listed permits a member of a nominating committee to rely on an exclusion from applicable independence standards, and a member of a nominating committee is not independent in reliance on that exclusion, this disclosure would not be required.

³⁰ As defined in Exchange Act Rule 10A-3.

³¹ This disclosure currently is required under Paragraph (d)(2) of Item 7 of Exchange Act Schedule 14A.