

election of directors, we have become increasingly aware of investors' desire for a means by which to communicate with the directors of the companies in which they invest.⁴¹ Although Exchange Act Rule 14a-8 already creates a possible mechanism for security holders to seek further access to communicate with the board, investors and investor advocacy groups have indicated that this mechanism would be enhanced meaningfully by a process that allows security holders to communicate directly with board members.⁴²

Providing security holders with disclosure about the process for communicating with board members would improve the transparency of board operations, as well as security holder understanding of the companies in which they invest. The Commission has published a NYSE listing standard proposal that states: "In order that interested parties may be able to make their concerns known to non-management directors, a company must disclose a method for such parties to communicate directly and confidentially with the presiding director [of the non-management directors] or with non-management directors as a group."⁴³ This method could be analogous to the method in the NYSE listing standards that will be required by Exchange Act Rule 10A-3 regarding audit committees. These standards would require that "[e]ach audit committee * * * establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."⁴⁴

In response to our solicitation of input into the proxy review by the Division of Corporation Finance, representatives of

the business community commented that disclosure regarding the means by which security holders may communicate directly with the board of directors would address issues of accountability and responsiveness without extensive disruption or costs.⁴⁵ Comments from investors and investor advocacy groups also indicated the view that this disclosure would be helpful;⁴⁶ however, these commenters also noted that disclosure alone would not address all issues, as, for example, a process for security holders to communicate with board members would not ensure that board members would be responsive to security holder concerns.⁴⁷

2. Proposed Disclosure Requirements

In making investment decisions, investors may wish to consider the corporate governance practices of companies. Further, disclosure regarding whether a company has a process for security holders to send communications to the board of directors will increase the transparency for security holders of this important aspect of board processes at the companies in which they invest. We have proposed a number of specific and detailed disclosure requirements regarding communications by security holders with the board of directors because we believe that each of these requirements may be necessary in order to give security holders a better understanding of the manner in which security holders can engage in these communications. We request comment on whether each of these detailed requirements is appropriate for that purpose and whether there are additional specific, detailed disclosure requirements that should also be included in these disclosure requirements.

We are proposing that companies include the following information in their proxy materials where action is to be taken with respect to the election of directors:

- A statement as to whether or not the company's board of directors provides a process for security holders to send communications to the board of directors and, if the company does not have a process for security holders to send communications to the board of directors, 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 process;
- If the company has a process for security holders to send

communications to the board of directors:

- A description of the manner in which security holders can send such communications to the board;
- Identification of those board members to whom security holders can send communications;
- If all security holder communications are not sent directly to board members, a description of the company's process for determining which communications will be relayed to board members, including disclosure of the department or other group within the company that is responsible for making this determination; and
- A description of any material action taken by the board during the preceding fiscal year as a result of communications from security holders.

We believe that the proposed specific disclosure requirement regarding whether a board has a process by which security holders can communicate with it is necessary to give security holders a better picture of a critical component of the board's interaction with security holders. Specific, detailed disclosure regarding that process, if it exists, is important to security holders in evaluating the nature and quality of the communications process. We believe that information regarding material actions taken by the board as a result of communications with security holders is significant to security holders in evaluating the quality and responsiveness of the communications process. In the absence of these proposed specific disclosure requirements, we believe that disclosure could be at a level of generality that may not be sufficiently helpful to security holders in understanding and evaluating the communications process.

3. Questions Regarding Disclosure of the Ability of Security Holders To Communicate With the Board of Directors

1. Would increased disclosure relating to security holder communications with board members be an effective means to improve board accountability, board responsiveness, and corporate governance policies? Would this disclosure be useful to security holders?

2. If so, do the proposed specific disclosure standards, including those in each of the following areas, provide security holders with important information that provides an understanding of a company's process for communications with the board:

- The existence of such a process;
- A description of the manner in which security holders can communicate with the board;

⁴¹ For example, two pension funds submitted proposals seeking greater security holder access to corporate boards. The AFSCME Employees Pension Plan submitted a security holder proposal to The Kroger Co. to amend Kroger's bylaws to provide for the creation of a security holder committee to communicate with the board regarding security holder proposals under Exchange Act Rule 14a-8 that were approved but not adopted. *The Kroger Co.* (April 11, 2003). In addition, several New York City employee pension funds submitted security holder proposals to Advanced Fibre Communications, Inc. and PeopleSoft, Inc. requesting that these Nasdaq-listed companies establish an "Office of the Board of Directors" to facilitate communications between non-management directors and security holders, including meetings, based on the proposed NYSE standard. *Advanced Fibre Communications, Inc.* (March 10, 2003); *PeopleSoft, Inc.* (March 14, 2003).

⁴² See 2003 Summary of Comments.

⁴³ Release No. 34-47672 (April 11, 2003).

⁴⁴ Exchange Act Rule 10A-3.

⁴⁵ See 2003 Summary of Comments.

⁴⁶ See *id.*

⁴⁷ See *id.*