

accomplishing the goals of the proposal? Would it instead be more appropriate to apply the procedure only to “accelerated filers” and funds? Would it be more appropriate to apply the procedure only to “accelerated filers” and funds as an initial step? If so, are there any special provisions that would be necessary for companies transitioning to “accelerated filer” status with respect to the nomination procedure in proposed Exchange Act Rule 14a–11, such as the timing of nomination procedure triggering events or the proposed disclosure requirements? Would other limitations be more appropriate, such as applying the proposed rules to all companies other than small business issuers or all companies other than those that have been subject to the proxy rules for less than a specified period of time (e.g., 3 years)?

B.2. Should companies be able to take specified steps or actions that would prevent application of the proposed nomination procedure where such procedure would otherwise apply? If so, what such steps or actions would be appropriate? For example, should companies that agree not to exclude any security holder proposal submitted by an eligible security holder pursuant to Exchange Act Rule 14a–8 be exempted from application of the proposed nomination procedure for a specified period of time? Should a company that implements all security holder proposals that receive passing votes in a given year be exempted? Conversely, should companies subject to Exchange Act Rule 14a–11 be permitted to exclude certain security holder proposals that they would otherwise be required to include? If so, what categories of proposals? For example, should the company be able to exclude proposals that are precatory, proposals that relate to corporate governance matters generally, proposals that relate to the structure or composition of boards of directors, or other proposals?

B.3. Would adoption of this procedure conflict with any state law, Federal law, or rule of a national securities exchange or national securities association? To the extent you indicate that the procedure would conflict with any of these provisions, please be specific in your discussion of those provisions that you believe would be violated.

B.4. Is it appropriate to limit the availability of the proposed nomination procedure to those situations where state law permits security holders to nominate candidates for director? Is it appropriate to permit companies to limit the availability of the proposed procedure by limiting the right to

nominate directors, when allowed by state law? Will the proposed procedure’s reliance on the pre-existence of a state law right, combined with the possibility that companies may limit security holders’ rights in this regard, adversely affect the effectiveness of the procedure? Is the proposed procedure’s reliance on the pre-existence of a state law right of nomination a proper balance between federal law and state law? Regardless of the existence of a state law right to nominate candidates for director, should companies be subject to the proposed procedure?

B.5. Most companies currently use plurality voting in the election of directors; accordingly, proposed Exchange Act Rule 14a–11 is drafted assuming that in most cases plurality voting would apply to an election of directors in which the inclusion of a security holder nominee resulted in more nominees than available seats on the board of directors. What specific issues would arise in an election where state law or the company’s governing instruments provided for other than plurality voting, (e.g., majority voting)? Would these issues need to be addressed in revisions to the proposed rule text? If so, how?

3. What Events Must Occur Before a Company Would Be Required To Include a Security Holder Nominee in Its Proxy Materials?

a. Nomination Procedure Triggering Events

In order to focus the impact of the proposed security holder nomination procedure on those companies where there are criteria showing that the proxy process may be ineffective, the procedure would become operative for a company only after the occurrence of one or both of the nomination procedure triggering events described below. The procedure would then remain operative for any annual meetings or special meetings held during:

- The remainder of the calendar year in which the triggering event occurs;
- The calendar year following the calendar year in which the triggering event occurs; and
- The portion of the second calendar year following the calendar year in which the triggering event occurs, up to and including the annual meeting (or special meeting in lieu of an annual meeting) held during that calendar year.⁷¹

⁷¹ It is our intention that the procedure would remain available for the two annual meetings following the occurrence of a nomination procedure triggering event. Because there are a number of

As proposed, the following events would trigger the nomination procedure:

- At least one of the company’s nominees for the board of directors for whom the company solicited proxies received “withhold” votes⁷² from more than 35% of the votes cast at an annual meeting of security holders held after January 1, 2004 at which directors were elected (provided, that this event may not occur in the case of a contested election to which Exchange Act Rule 14a–12(c)⁷³ applies or an election to which the proposed security holder nomination procedure in Exchange Act Rule 14a–11 applies); or

- A security holder proposal submitted pursuant to Exchange Act Rule 14a–8 providing that the company become subject to the security holder nomination procedure in proposed Exchange Act Rule 14a–11(a) was submitted for a vote of security holders at an annual meeting of security holders held after January 1, 2004 by a security holder or group of security holders that held more than 1% of the company’s securities entitled to vote on the proposal for one year as of the date the proposal was submitted and provided evidence of such holding to the company;⁷⁴ and (b) that “direct access” proposal received more than 50% of the

variables that could impact this application, such as special meetings being held instead of annual meetings or a delay in the date of a later annual meeting, we have proposed that the procedure be operative during the period described.

⁷² Because of plurality voting, in the election of directors security holders may vote for or withhold authority to vote for each nominee rather than vote for, against or abstain, as is the case for other matters to be voted on by security holders. See Exchange Act Rule 14a–4(b)(2).

⁷³ 17 CFR 240.14a–12(c).

⁷⁴ The staff has informed us that it intends to take the position that such a proposal is not excludable under Exchange Act Rule 14a–8(i)(8) [17 CFR 240.14a–8(i)(8)]. To clarify the applicability of this provision in the context of proposed Exchange Act Rule 14a–11, we are proposing an amendment to Exchange Act Rule 14a–8(i)(8) that would, if adopted, make clear that a company may not rely on the exclusion permitted by that paragraph (i.e., the exclusion for proposals relating to the election of directors) to exclude a proposal that the company become subject to the procedure in proposed Exchange Act Rule 14a–11. The requirements and exclusions in the remainder of Exchange Act Rule 14a–8 would, of course, continue to apply to any such security holder proposal. Although we are proposing a security holder nomination procedure in this release, we are not reviewing or revising the position taken by the Division of Corporation Finance regarding the application of Exchange Act Rule 14a–8(i)(8) to security holder proposals that would have the effect of creating a security holder nomination procedure, other than a direct access proposal (as described above). See, e.g., Division of Corporation Finance no-action letters to Citigroup, Inc. (January 31, 2003) and AOL Time Warner (February 29, 2003).