

so, what standard would be appropriate?

C.8. We have proposed that nomination procedure triggering events could occur after January 1, 2004. Is this the proper date? Should it be an earlier date? Should it be a later date?

C.9. What are the possible consequences of the use of nomination procedure triggering events? Will there be more expense and effort related to votes on direct access security holder proposals? Will there be more campaigns seeking "withhold" votes? How will any such consequences affect the operation and governance of companies?

C.10. Should companies be exempted from the security holder nomination procedure for any election of directors in which another party commences or evidences its intent to commence a solicitation in opposition subject to Exchange Act Rule 14a-12(c) prior to the company mailing its proxy materials? If so, should the period in which security holders in such companies may use the nomination procedure be extended to the next year (assuming that a nomination procedure triggering event is required)? What should be the effect if another party commences a solicitation in opposition after the company had mailed its proxy materials?

C.11. We have discussed our consideration of and requested public comment on the appropriateness of a triggering event premised upon the company's non-implementation of a security holder proposal that receives more than 50% of the votes cast on that proposal. Should such a triggering event be included in the nomination procedure? In responding to this question, please also consider the following questions:

a. Should a security holder proposal that receives more than 50% of votes cast operate as a nomination procedure triggering event regardless of the topic of the proposal, or would it be appropriate to instead require that the proposal relate to a specified category of topics (e.g., corporate governance matters)? If so, how should that specific category of topics (e.g., corporate governance matters) be defined?

b. Should a security holder proposal result in a nomination procedure triggering event if it receives more than 50% of the votes cast with regard to that proposal? Should the standard be higher (e.g., 55%, 60%, 65%)? Should the standard be based on votes cast for the proposal as a percentage of the outstanding securities that are eligible to vote on the proposal (e.g., 50% of the outstanding securities)? Would the

described means of determining whether a security holder proposal has been implemented be sufficient? Should there be a different means for determining implementation?

Are there other or additional criteria that would be appropriate? Should the determination be made by the entire board of directors? Should the determination be made by the independent members of the board of directors? Should the board be given broader flexibility (e.g., should it be able to represent its intention to implement a proposal)? Should the Commission or its staff (for example, the Division of Corporation Finance) play a role in this process (e.g., similar to that for security holder proposals under Exchange Act Rule 14a-8)? Alternatively, what role should the courts play? What is the best record for a judicial determination?

c. Should security holders that do not agree with a company's conclusion that a proposal had been implemented have the right to contest that conclusion through a judicial proceeding? Should they have a private right of action to do so? Is there any reason to believe that security holders would not have a private right of action to contest a company's determination that a proposal has been implemented? If so, what recourse, if any, should a security holder have with regard to a company's determination?

d. Should a company be required to file an Exchange Act Form 8-K stating whether or not it implemented a security holder proposal that is eligible to trigger the rule? Is it appropriate to require that companies make such a statement on Exchange Act Form 8-K? Would this impose unnecessary liability on companies that make a determination regarding implementation of a security holder proposal with which security holders may disagree?

4. What Notice Must a Subject Company Give Regarding the Occurrence of an Event That Triggers the Operation of the Proposed Rule?

a. Disclosure on Exchange Act Forms 10-Q, 10-QSB, 10-K or 10-KSB⁸⁹

Because the proposed security holder nomination procedure would operate only upon the occurrence of specified nomination procedure triggering events,

⁸⁹In addition to the proposed additions to Exchange Act Forms 10-Q, 10-QSB, 10-K and 10-KSB that we discuss in this section, we also have proposed corrective revisions to these forms to update outdated references to Exchange Act Rule 14a-11 that currently appear in Paragraph (d) of Item 4 of Part II to Forms 10-Q and 10-QSB and Paragraph (d) of Item 4 of Part I to Forms 10-K and 10-KSB.

it would be essential that the company make security holders aware when a nomination procedure triggering event has occurred. As such, the security holder nomination procedure in proposed Exchange Act Rule 14a-11 would require additional disclosures in a company's Exchange Act Form 10-Q, 10-QSB, 10-K or 10-KSB.⁹⁰ The proposed procedure would require the following:

- Each company would be required to disclose the security holder vote with regard to either of the nomination procedure triggering events in its quarterly report on Exchange Act Form 10-Q or 10-QSB for the period in which the matter was submitted to a vote of security holders or, where the nomination procedure triggering event occurred during the fourth quarter of the fiscal year, on Exchange Act Form 10-K or 10-KSB;⁹¹ and

- Each company would be required to include in that Exchange Act Form 10-Q, 10-QSB, 10-K or 10-KSB information disclosing that it would be subject to the security holder nomination procedure as a result of such vote, if applicable.⁹²

b. Questions

D.1. Will the proposed disclosure requirements in Exchange Act Forms 10-Q, 10-QSB, 10-K and 10-KSB provide adequate notice to security holders? Should additional notices be required? If so, what form should that notice take and at what time should it be made public?

D.2. Should the company's notice be filed and/or made public in some other manner?

If so, what manner would be appropriate?

⁹⁰In lieu of Forms 10-Q, 10-QSB, 10-K or 10-KSB, registered investment companies ("funds") would provide the additional disclosure on Form N-CSR. See Section II.A.12., below.

⁹¹Item 4 of Part II to Exchange Act Forms 10-Q and 10-QSB and Item 4 of Part I to Exchange Act Forms 10-K and 10-KSB currently require that companies disclose the results of the voting on all matters submitted to a vote of security holders during the period covered by the report. We have proposed an addition to this provision that would require disclosure of specific information relating to the security holder nomination procedure in proposed Item 4(e) of Part II to Exchange Act Forms 10-Q and 10-QSB and proposed Item 4(e) of Part I to Exchange Act Forms 10-K and 10-KSB.

⁹²See proposed Item 4(e) of Part II to Exchange Act Forms 10-Q and 10-QSB and proposed Item 4(e) of Part I to Exchange Act Forms 10-K and 10-KSB.