

(e.g. 6%, 7%, 8%, 9%, 10%, 15%, 20%, or 25%)?

E.3. Should there be a restriction on security holder eligibility that is based on the length of time securities have been held? If so, is two years the proper standard? Should the standard be shorter (e.g., 1 year) or longer (e.g., 3 years, 4 years, or 5 years)? Should the standard be measured by a different date (e.g., 2 years as of the date of the meeting, rather than the date of nomination)?

E.4. As proposed, a nominating security holder would be required to represent its intent to hold the securities until the date of the election of directors. Is it appropriate to include such a requirement? Would it be appropriate to require the security holder to intend to hold the securities beyond the election of directors (e.g., for six months after the election, one year after the election, or two years after the election) and to so represent?

E.5. Is the eligibility requirement that a security holder or security holder group must file an Exchange Act Schedule 13G appropriate? Should there be a different mechanism for putting companies and other security holders on notice that a security holder or security holder group has ownership of more than 5% of the company's securities and intends to nominate a security holder? Is it appropriate to permit the filing to be on Exchange Act Schedule 13G rather than Exchange Act Schedule 13D? If not, why not?

E.6. Should the procedure include a provision that would deny eligibility for any nominating security holder or nominating security holder group that has had a nominee included in the company materials where that nominee did not receive a sufficient number of votes (e.g., 5%, 15%, 25%, or 35%) within a specified period of time in the past? If there should be such an eligibility standard, how long should the prohibition last?

E.7. Should security holders be allowed to aggregate their holdings in order to meet the ownership eligibility requirement to nominate directors? If so, is it appropriate to require that all members of a nominating security holder group individually meet the minimum holding period? Is it appropriate to require that all members of the group be eligible to file on Exchange Act Schedule 13G?

E.8. As proposed, the beneficial ownership level of a nominating security holder or nominating security holder group would be established by the Exchange Act Schedule 13G filed by that security holder or security holder group, for companies other than open-

end management investment companies ("mutual funds"). Is the filing of the Exchange Act Schedule 13G sufficient evidence of ownership? If not, what additional evidence would be appropriate? Should there be an additional procedure by which disputes regarding ownership levels are resolved?

6. What Are the Requirements for the Person Whom the Eligible Security Holder or Security Holder Group May Nominate?

a. The Nomination Must Be Consistent With Applicable Law and Regulation

A company would not be required to include a security holder nominee in its proxy materials if the nominee's candidacy or, if elected, board membership, would violate:

- Controlling state law;
- Federal law; or
- Rules of a national securities

exchange or national securities association (other than rules of a national securities exchange or national securities association that set forth requirements regarding the independence of directors).<sup>105</sup>

Because compliance with independence standards can depend on the overall make-up of a board, we have excluded independence standards from this requirement and have, instead, proposed a separate requirement regarding independence standards.<sup>106</sup> Pursuant to that separate requirement, a nominating security holder or nominating security holder group would be required to represent that the nominee meets the objective criteria for "independence" in any applicable national securities exchange or national securities association rules. For this purpose, the nominee would be

<sup>105</sup> This requirement is set forth in proposed Exchange Act Rule 14a-11(a)(3)(i). Pursuant to proposed Exchange Act Rule 14a-11(c)(1), the notice to the company by the nominating security holder or nominating security holder group would be required to include a representation that the nominee's candidacy or, if elected, board membership, would not violate any of the specified provisions.

<sup>106</sup> As proposed, there would not be a separate standard regarding the security holder nominee's compliance with the applicable independence requirements of a national securities exchange or national securities association. Rather, compliance with these existing independence standards would be established through the inclusion in the notice to the company by the nominating security holder or nominating security holder group of a representation that the nominee satisfies the existing standard. This representation is required in proposed Exchange Act Rule 14a-11(c)(4). In the case of a fund, a nominating security holder or group would be required to represent that its nominee is not an "interested person" of the fund as defined in Section 2(a)(19) of the Investment Company Act. [15 U.S.C. 80a-2(a)(19)]. See Section II.A.12., below.

required to meet the definition of "independence" that is generally applicable to directors of the company and not any particular definition of independence applicable to members of the audit committee of the company's board of directors. To the extent a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board (for example, requiring that the board of directors or any group or committee of the board of directors make a determination regarding the existence of factors material to a determination of a nominee's independence), this element of an independence standard would not have to be satisfied.<sup>107</sup>

b. Prohibited Relationships Between the Nominee and the Nominating Security Holder or Group

A number of commenters expressed concerns regarding the disruptive effect a security holder nomination procedure could have on board dynamics and board operation. A number of these comments related to the potential for "special interest" or "single issue" directors that would advance the interests of the nominating security holder over the interests of security holders as a group. While we recognize this concern, we believe that the procedure we propose today under Exchange Act Rule 14a-11 should afford a security holder or group meeting the proposed standards the ability to propose a candidate for director that, in the nominating security holder's view, is more qualified than those put forward by a nominating committee, board, management, or company. We therefore propose that, to be eligible to nominate a candidate under the proposal, a nominating security holder or nominating security holder group may not have specified relationships with the nominee. We believe that the proper procedures for nomination and solicitation of proxies for a candidate that would be an interested representative of a security holder, including a security holder meeting the proposed standards under Exchange Act Rule 14a-11, are those that otherwise exist under our current proxy rules. Therefore, as proposed, each person that is a security holder nominee would be required to meet the following standards of independence from the security holder or each member of the security holder group that has nominated such person:

<sup>107</sup> See the Instruction to proposed Exchange Act Rule 14a-11(c)(4). This proposed standard is discussed further in Section II.A.6.c., below.