

- If the nominating security holder or any member of the nominating security holder group is a natural person, the nominee is not the nominating security holder, a member of the nominating security holder group, or a member of the immediate family of the nominating security holder or any member of the nominating security holder group;¹⁰⁸

- If the nominating security holder or any member of the nominating security holder group is an entity, neither the nominee nor any immediate family member of the nominee has been an employee of the nominating security holder or any member of the nominating security holder group during the then-current calendar year nor during the immediately preceding calendar year;

- Neither the nominee nor any immediate family member of the nominee has, during the year of the nomination or the immediately preceding calendar year, accepted directly or indirectly any consulting, advisory, or other compensatory fee from the nominating security holder or any member of the group of nominating security holders or any affiliate of any such holder or member, provided that compensatory fees would not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with such holder or any such member (provided that such compensation is not contingent in any way on continued service);

- The nominee is not an executive officer, director (or person fulfilling similar functions) of the nominating security holder or any member of the nominating security holder group, or of an affiliate of the nominating security holder or any such member of the nominating security holder group; and

- The nominee does not control the nominating security holder or any member of the nominating security holder group (or in the case of a holder or member that is a fund, an interested person of such holder or any such member as defined in Section 2(a)(19) of the Investment Company Act).

c. Relationships Between the Nominee, the Nominating Security Holder or Group, and the Company

A number of commenters expressed concerns regarding the effect of a nomination procedure on a company's compliance with requirements that certain of its directors be "independent." Other commenters

addressed the potential use of the process by nominating security holders that were acting merely as a surrogate for the company. To balance the benefits of a security holder nomination procedure against these concerns, we propose that the nominating security holder or nominating security holder group be required to include a representation regarding relationships between the nominee and the company and between the nominating security holder or nominating security holder group and the company.¹⁰⁹ Specifically, as proposed, each nominating security holder or each member of the group of nominating security holders would be required to represent to the company that:

- The nominee submitted under the proposed rule by that nominating security holder or group of nominating security holders satisfies the applicable standards of a national securities exchange or national securities association regarding director independence, if any, except that, where 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;¹¹⁰ and

¹⁰⁹ This representation would be required in the nominating security holder's notice to the company, pursuant to proposed Exchange Act Rule 14a-11(c)(5). Instruction 1 to proposed Exchange Act Rule 14a-11(d) clarifies that any nominee about which the nominating security holder is not able to make this representation shall not be counted in calculating the number of security holder nominees for purposes of proposed Exchange Act Rule 14a-11(d).

¹¹⁰ For example, the NYSE proposed listing standards include both subjective and objective components in defining an "independent director." Section 303A(2)(a) provides that no director will qualify as "independent" unless the board of directors "affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company)." Section 303A(2)(b) provides that "a director who receives, or whose immediate family member receives, more than \$100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), is presumed not to be independent until five years after he or she ceases to receive more than \$100,000 per year in such compensation." See Release No. 34-47672 (April 11, 2003). 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)

- Neither the nominee nor the nominating security holder (or any member of the nominating security holder group, if applicable) has a direct or indirect agreement with the company regarding the nomination of the nominee.

Commenters have expressed concern that the use of the proposed security holder nomination procedure, by itself, may be deemed to establish a relationship between the nominating security holder or nominating security holder group and the company that would result in that holder or group being deemed an "affiliate" of the company for purposes of the federal securities laws. It is our view that the mere use of the proposed procedure should not have such an effect. Accordingly, proposed Exchange Act Rule 14a-11(a) would include an instruction making clear that a nominating security holder will not be deemed an "affiliate" of the company under the Securities Act of 1933¹¹¹ or the Exchange Act solely as a result of nominating a director or soliciting for the election of such a director nominee or against a company nominee pursuant to the security holder nomination procedure.¹¹² In addition, where a security holder nominee is elected, and the nominating security holder or nominating security holder group does not have an agreement or relationship with that director, otherwise than relating to the nomination, the nominating security holder or nominating security holder group would not be deemed an affiliate solely by virtue of having nominated that director under the proposed rules.

d. Questions

F.1. Should there be any other or additional limitations regarding nominee eligibility? Would any such limitations undercut the stated purposes of the proposed process? Are any such limitations necessary? If so, why?

F.2. Is it appropriate to use compliance with state law, federal law, and listing standards as a condition for eligibility?

F.3. Should there be requirements regarding independence from the

of the Investment Company Act. See Section II.A.12., below.

¹¹¹ 15 USC 77a *et seq.*

¹¹² This safe harbor is set forth in Instruction 3 to proposed Exchange Act Rule 14a-11(a). The safe harbor is intended to operate such that the determination of whether a holder or group is an "affiliate" of the company would continue to be made based upon all of the facts and circumstances regarding the relationship of the holder or group to the company, other than such holder's or group's activities under the proposed security holder nomination procedure.

¹⁰⁸ For these purposes, "immediate family" would be defined in a manner that is consistent with the definition of "family member" that requires disclosure under Item 401(d) of Regulation S-K [17 CFR 228401(d)].