

company? Should the fact that the nominee is being nominated by a security holder or security holder group, combined with the absence of any direct or indirect agreement with the company, be a sufficient independence requirement?

F.4. How should any independence standards be applied? Should the nominee and the nominating security holder or nominating security holder group have the full burden of determining the effect of the nominee's election on the company's compliance with any independence requirements, even though those consequences may depend on the outcome of any election and may relate to the outcome of the election with regard to nominees other than security holder nominees?

F.5. Are the proposed standards with regard to independence appropriate? If not, what standards would be appropriate? If these limitations generally are appropriate, are there instances where they should not apply?

F.6. Where a company is subject to an independence standard of a national securities exchange or national securities association that includes a subjective component (e.g., subjective determinations by a board of directors or a group or committee of the board of directors), should the security holder nominee be subject to those same requirements as a condition to nomination?

F.7. As proposed, a nominating security holder or nominating security holder group would be required to represent that the security holder nominee satisfies applicable standards of a national securities exchange or national securities association regarding director independence, except where a rule imposes a standard regarding independence that requires a subjective determination by the board or a group or committee of the board. What independence requirements should be used if the company is listed on more than one market with such independence requirements? Should the nominating security holder or nominating security holder group have the discretion to choose the applicable standards? Should the company have discretion to choose the applicable standards? Should all the standards of all markets on which shares are traded apply? Should the more stringent standards apply?

F.8. Should there be requirements regarding independence of the nominee from the nominating security holder, nominating security holder group, or the company? If so, are the proposed limitations appropriate? What other or additional limitations would be

appropriate? If these limitations generally are appropriate, are there instances where they should not apply?

F.9. Should there be any standards regarding separateness of the nominee and the nominating security holder or nominating security holder group? Would such a limitation unnecessarily restrict access by security holders to the proxy process? If such standards are appropriate, are the proposed standards the proper standards? Should other standards be included? Should any of the proposed standards be eliminated?

F.10. Should there be a prohibition, as is proposed, on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, are the proposed rules appropriate? For example, we have proposed a definition of "immediate family" that is consistent with the existing disclosure requirement under Item 401(d) of Regulation S-K. Is this the appropriate definition for purposes of addressing relationships between the nominee and the nominating security holder or nominating security holder group? If not, what definition would be more appropriate?

F.11. Should there be exceptions to the prohibition on any affiliation between nominees and nominating security holders or nominating security holder groups? If so, what exceptions would be appropriate?

F.12. Is the two-year prohibition on payments from nominating security holders to nominees appropriate? Should it be longer (e.g., 3 years, 4 years, or 5 years) or shorter (e.g., 1 year)? Should there be exceptions to this prohibition? If so, what exceptions would be appropriate?

F.13. Is the prohibition on direct or indirect agreements between companies and nominating security holders appropriate? Would such a prohibition inhibit desirable negotiations between security holders and boards or nominating committees regarding nominees for directors? Should the prohibition provide an exception to permit such negotiations? If so, what should the relevant limitations be?

F.14. Should there be a nominee eligibility criterion that would exclude an otherwise eligible nominee or nominating security holder or nominating security holder group where that nominee (or a nominee of that security holder or security holder group) has been included in the company's proxy materials as a candidate for election as director but received a minimal percentage of the vote? If so, what would be the appropriate standard (e.g., 5%, 15%, 25%, or 35%)?

F.15. As proposed, the rule includes a safe harbor providing that nominating security holders will not be deemed "affiliates" solely as a result of using the security holder nomination procedure. This safe harbor would apply not only to the nomination of a candidate, but also where that candidate is elected, provided that 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. Is it appropriate to provide such a safe harbor for security holder nominations? Should the safe harbor continue to apply where the nominee is elected?

7. How Many Security Holder Nominees Must the Company Include in Its Proxy Materials?

a. Proposed Limitation

We do not intend the security holder nomination procedure in proposed Exchange Act Rule 14a-11 to be available for any security holder or security holder group that is seeking control of a company. The existing procedures regarding contested elections of directors are intended to continue to fulfill that purpose.¹¹³ The elements of this aspect of the proposal insofar as they relate to eligibility to use Exchange Act Schedule 13G are discussed below.

As proposed, a company would be required to include one security holder nominee if the total number of members of the board of directors is eight or fewer, two security holder nominees if the number of members of the board of directors is greater than eight and less than 20 and three security holder nominees if the number of members of the board of directors is 20 or more. The proposal would have a separate standard for companies with classified or "staggered" boards of directors. Where a company has a director (or directors) currently serving on its board of directors who was elected as a security holder nominee, and the term of that director extends past the date of the meeting of security holders for which the company is soliciting proxies, the company would not be required to include on its proxy card more security holder nominees than could result in the total number of directors serving on the board that were elected as security holder nominees being greater than one if the total number of members of the board of directors is eight or fewer, two if the number of members of the board of directors is greater than eight and less than 20 and three if the number of

¹¹³ See, e.g., Exchange Act Rule 14a-12(c).