

to an amendment to the nominating security holder or nominating security holder group's Exchange Act Schedule 13G?

H.4. When should the notice be required to be filed with the Commission? Should it be required to be filed at the time it is provided to the company? Should it be required to be filed within a specified period of time, such as two business days, after it is provided to the company, as is proposed? Should the information in the notice that is included in the company's proxy statement instead be filed on or about the date that the company releases its proxy statement to security holders?

H.5. What should be the consequence to the nominating security holder or nominating security holder group of submitting the notice to the company after the deadline? Should such a late submission render the nominating security holder or nominating security holder group ineligible to use the nomination procedure, as is currently proposed under the rule? What should be the consequence to the nominating security holder or nominating security holder group of filing the notice with the Commission late? Should such late filing be viewed exclusively as a violation of Exchange Act Rule 14a-6 or should it affect eligibility to use the nomination procedure? Should the failure of a nominating security holder or nominating security holder group to file the notice with the Commission be viewed exclusively as a violation of Exchange Act Rule 14a-6 or should it affect eligibility to use the nomination procedure?

H.6. The proposed notice requirements address both regularly scheduled annual meetings and circumstances where a company may not have held an annual meeting in the prior year or has moved the date of the meeting more than 30 days from the prior year. Under these circumstances, what is the appropriate date by which a nominating security holder must submit their notice to the company? We have proposed a standard similar to that currently used in connection with the Exchange Act Rule 14a-8 security holder proposal process. Is such a standard appropriate? If not, what standard would be more appropriate?

H.7. As proposed, Exchange Act Rule 14a-11 includes a number of notice and other timing requirements. Should these timing requirements incorporate or otherwise address any advance notice provisions under state law or a company's governing instruments? If so, should any advance notice provisions govern? Should they instead be

provided as an alternative to the timing provisions set out in the rule?

9. What Must the Company Do After It Receives a Notice From a Nominating Security Holder or a Nominating Security Holder Group Under Proposed Exchange Act Rule 14a-11?

#### a. Proposed Procedure

We propose that a company that receives a nominee from a nominating security holder or nominating security holder group under the security holder nomination procedure in Exchange Act Rule 14a-11 would determine whether the nominating security holder or nominating security holder group has complied with proposed Exchange Act Rule 14a-11 and whether the nominee satisfies each of the requirements of the proposed procedure. Unless a company determines that it is not required to include a nominee from a nominating security holder or nominating security holder group in its proxy materials, the company would be required to include information regarding the security holder nominee in the company's proxy statement that it sends to its security holders, including the Web site address on which the nominating security holder or nominating security holder group intends to solicit in favor of its nominee, and include the name of the nominee on the company's proxy card that is included in those materials.<sup>133</sup> The proposed procedure specifies the information regarding that nominee that the company must include in its proxy materials.<sup>134</sup>

In addition to required disclosures related to each director candidate, companies may wish to include statements in the proxy statement supporting company nominees and/or opposing the nominating security holder or nominating security holder group nominee or nominees. While we believe that companies should be able to include such disclosure in the proxy statement, provided that it complies with Exchange Act Rule 14a-9, we also are of the view that nominating security holders or nominating security holder groups should be afforded the same opportunity, if the company chooses to include such a statement. Accordingly, we are proposing that if the company includes any such statement in its proxy materials, other than a mere recommendation to vote in favor of or withhold votes from specified candidates, a nominating security

holder or nominating security holder group would be given the opportunity to include in the company's proxy statement a statement of support for the security holder nominee or nominees, of a length not to exceed 500 words.<sup>135</sup> Should the company choose not to make any statement in its proxy statement supporting company nominees and/or opposing the security holder nominee or nominees, other than the mere recommendation described above, the company would not be required to include in its proxy statement the nominating security holder's supporting statement. In either case, both the company and the nominating security holder or nominating security holder group would be able to solicit in favor of their nominees outside the proxy statement, for example on a designated Web site, provided that such solicitations were made within the parameters of the applicable proxy rules.

With regard to the company's proxy card, similar to the current practice with regard to security holder proposals submitted pursuant to Exchange Act Rule 14a-8, the company could identify any security holder nominees as such and recommend that security holders vote against, or withhold votes from, those nominees and in favor of the management nominees on the form of proxy. The company must otherwise present the nominees in an impartial manner in accordance with Exchange Act Rule 14a-4. Under the current rules, a company may provide security holders with the option to vote for or withhold authority to vote for the company's nominees as a group, provided that security holders also are given a means to withhold authority for specific nominees. In our view, this option would not be appropriate where the company's proxy card includes security holder nominees, as grouping the company's nominees may make it easier to vote for all of the company's nominees than to vote for the security holder nominees in addition to some of the company nominees. Accordingly, the proposed rules would not permit a company to provide security holders the option of voting for or withholding authority to vote for the company nominees as a group, but would instead

<sup>133</sup> These requirements are set forth in proposed Exchange Act Rule 14a-11(a) and proposed amendments to Exchange Act Rule 14a-4(b)(2).

<sup>134</sup> This information is specified in proposed Item 7(i) of Exchange Act Schedule 14A.

<sup>135</sup> Under the proposed rules, inclusion of a security holder nominee in the company's proxy materials would not require the company to file a preliminary proxy statement provided that the company was otherwise qualified to file directly in definitive form. In this regard, the proposed rules make clear that inclusion of a security holder nominee would not be deemed a solicitation in opposition. See proposed revisions to Exchange Act Rule 14a-6(a)(4) and Note 3 to that rule.