

require that each candidate be voted on separately.¹³⁶

A company may determine that it is not required to include a nominee from a nominating security holder or nominating security holder group in its proxy materials if it determines any of the following:

- The security holder nomination procedure in proposed Exchange Act Rule 14a-11 is not applicable to the company;
- The nominating security holder or nominating security holder group has not complied with the requirements of the procedure;
- The nominee does not meet the requirements of the procedure;
- Any representation required to be included in the notice to the company is false in any material respect; or
- The company has received more nominees than it is required to include by proposed Exchange Act Rule 14a-11 and the nominating security holder or nominating security holder group is not entitled to have its nominee included in that situation.¹³⁷

The nominating security holder or nominating security holder group would need to be made aware of the company's determination whether or not to include the security holder nominee in sufficient time to consider the validity of any determination to exclude the nominee. As such, the company would be required to notify the nominating security holder or nominating security holder group, in writing, of its determination. As proposed, the company would have to provide this notice promptly, but in no case less than 30 calendar days before the date of the company's proxy statement released to security holders in connection with the previous year's annual meeting and, where the company did not hold an annual meeting in the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the notice must be provided a reasonable time before the company mails its proxy materials for the current year. If the company determines that it is entitled to exclude the nominee, the notice must include the following information regarding the company's determination:

- A description of the determination made by the company's board of

directors, including an affirmative statement of its determination not to include that specific nominee;

- A discussion of the specific requirement or requirements of Exchange Act Rule 14a-11 that the company's board of directors has determined permit the company not to include that specific nominee; and
- A discussion of the specific basis for the belief of the company's board of directors that the company is permitted to not include that specific nominee.

The company would be required to include in its proxy statement for the meeting for which the nominee was submitted a statement that it has made such a determination as well as disclosure of the information relating to that determination that the company included in the notice to the nominating security holder.

If the company determines that it must include the security holder nominee, it would be required to advise the nominating security holder or nominating security holder group of this determination and state whether the company intends to include in its proxy statement disclosure opposing the security holder nominee and/or supporting company nominees. If the company intends to include such a statement, it must advise the nominating security holder or nominating security holder group that it may submit a statement of not more than 500 words supporting the security holder nominee(s). The company also must advise the nominating security holder or nominating security holder group of the date by which this statement must be provided to the company, which could not be less than 10 business days from the date of the company's notice to the security holder. The nominating security holder or nominating security holder group's supporting statement would be viewed as soliciting material and would therefore be required to be filed as such by the nominating security holder in accordance with proposed Exchange Act Rule 14a-11(f)(2) and proposed Exchange Act Rule 14a-6(p), on or about the date that the company's proxy statement is first released to security holders.

b. Questions

I.1. Is it appropriate to require that the company include in its proxy statement a supporting statement by the nominating security holder or nominating security holder group? If so, is it appropriate to limit this requirement to instances where the company wishes to make a statement opposing the nominating security

holder's nominee or nominees and/or supporting company nominees? Is it appropriate to limit the supporting statement to 500 words? If not, what limit, if any, is more appropriate? Is it appropriate to require filing of the statement on the date that the company releases its proxy statement to security holders? If not, what filing requirement would be appropriate?

I.2. Is it appropriate for the company to make the specified determinations regarding the basis on which a nominee would not be included? By what means should a company's determination be subject to review? By the courts? Should there be an explicit statement by the Commission regarding this review? Should any determination by the company be subject to review by the Commission or its staff? Should there be an explicit provision for such review, as, for example, with security holder proposals under Exchange Act Rule 14a-8?

I.3. Proposed Exchange Act Rule 14a-11(a)(3) provides that a company is not required to include a security holder nominee where either: (a) 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, (b) the nominating security holder's notice is not adequate, (c) any representation in the nominating security holder's notice is false in any material respect, or (d) the nominee is not required to be included in the company's proxy materials due to the proposed limitation on the number of nominees required to be included. Instruction 4 to proposed Exchange Act Rule 14a-11(a)(3) provides that the company shall determine whether any of these events have occurred. Should the nomination procedure include a procedure for a company to gather information additional to that included in the notice that is reasonably necessary for the company to make its determination in this regard? If so, please respond to the following additional questions.

a. Should the company be provided with a maximum amount of time to request specific information (e.g., three days, five days, one week, two weeks, or one month)?

b. Should nominating security holders and/or nominees be provided with a maximum amount of time to respond to such a request (e.g., three days, five days, one week, two weeks, or one month)?

c. Should the procedure prescribe the type of information that a company may request from a nominating security holder or nominee? Should the

¹³⁶ We anticipate that companies would continue to be able to solicit discretionary authority to vote a security holder's shares for the company nominees, as well as to cumulate votes for the company nominees in accordance with applicable state law, where such state law provides for cumulative voting.

¹³⁷ See proposed Exchange Act Rule 14a-11(a).