

procedure specify those representations in the nominating security holder's notice to the company with regard to which the company may request information?

d. Should the procedure include a method for a company to obtain follow-up information after a nominating security holder or nominee submits an initial response? If so, should that follow-up method have similar time frames and informational standards to those related to the initial request and response?

e. Should the rule explicitly state that a nominee may be excluded from a company's proxy materials if the nominating security holder or nominee does not provide the requested information in the required timeframe, or if the information does not confirm the representations included in the notice to the company, or is it sufficient to rely on the proposed provision that permits the exclusion of nominees when a representation is false in any material respect? In order to facilitate reliance on this proposed provision if a nominating security holder or nominee fails to provide requested information, would it be appropriate to require that a nominating security holder represent that the nominating security holder or nominee will respond to a request by the company for information that is reasonably necessary to confirm the accuracy of representations of the nominating security holder?

f. Should this procedure be the same for operating companies, registered investment companies, and business development companies? Should there be unique procedures for different types of entities? If so, what is unique to a particular type of entity that would require a unique procedure?

1.4. As proposed, the company must provide the nominating security holder or nominating security holder group with notice of its determination whether to include in its proxy statement the security holder nominee by a date that will generally fall approximately 30 days prior to the date the company will mail its proxy statement. Does this requirement allow the nominating security holder or nominating security holder group adequate time to contest a company's determination with regard to a potential security holder nominee? If not, what timing would be more appropriate? Is the timing requirement with regard to the nominating security holder's submission of its statement of support to the company appropriate? If not, what timing would be appropriate?

1.5. As proposed, the rule would not provide a mechanism by which a nominating security holder or

nominating security holder group could "cure" a defective notice. Would such a "cure" period, similar to that currently provided under Exchange Act Rule 14a-8, be appropriate? If so, how and by what date should a company be required to notify a nominating security holder or nominating security holder group of a defect in the notice? How long should the nominating security holder or nominating security holder group have to cure any defects? Are there any defects that would not require notice by the company, for example, where a defect could not be remedied?

1.6. As proposed, 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." Is it appropriate to view the inclusion of a nominee in this manner or should the inclusion of a nominee instead be viewed as a solicitation in opposition that would require a company to file its proxy statement in preliminary form? Should we view inclusion of a security holder nominee as a solicitation in opposition for other purposes (e.g., expanded disclosure obligations)?

1.7. As proposed, the rule would prohibit companies from providing security holders the option of voting for the company's slate of nominees as a whole. Should we allow companies to provide that option to security holders? Are any other revisions to the form of proxy appropriate?

10. How Would the Liability Provisions in the Federal Securities Laws Apply to Statements Made By the Company and the Nominating Security Holder or Nominating Security Holder Group?

a. Exchange Act Liability for Statements

It is our intent that the nominating security holder or nominating security holder group be liable for any false or misleading statements included in the notice provided to the company by the nominating security holder or nominating security holder group. The proposed rules contain express language, modeled on Exchange Act Rule 14a-8(l)(2),¹³⁸ providing that the company would not be responsible for that disclosure.¹³⁹

¹³⁸ 17 CFR 240.14a-8(l)(2).

¹³⁹ See proposed Exchange Act Rule 14a-11(e). Exchange Act Rule 14a-8(l)(2) applies with respect to proposals and supporting statements that are submitted by shareholders and then required to be

b. Securities Act and Exchange Act Liability Resulting From Incorporation by Reference

As proposed, the security holder nomination procedure would provide that any information that is provided to the company in the notice from the nominating security holder or nominating security holder group (and, as required, filed with the Commission by the nominating security holder or nominating security holder group) and then included in the company's proxy materials would not be incorporated by reference into any filing under the Securities Act or the Exchange Act unless the company determines to incorporate that information by reference specifically into that filing.¹⁴⁰ However, to the extent the company does so incorporate that information by reference, we would consider the company's disclosure of that information as the company's own statement for purposes of the antifraud and civil liability provisions of the Securities Act or the Exchange Act, as applicable.

c. Questions

J.1. Is it appropriate to characterize the statements in the nominating security holder's notice as the nominating security holder's representations and not the company's? Does the proposal make clear that the nominating security holder would be responsible for the information submitted to the company? Should the proposal characterize these statements differently? If so, please explain in what manner.

J.2. Does the proposal make clear the company's responsibilities when it includes such information in its proxy materials? Should the proposal include language otherwise addressing a company's responsibility for repeating statements that it knows are not accurate?

J.3. Should information provided by nominating security holders or nominating security holder groups be deemed incorporated by reference into Securities Act or Exchange Act filings? Why?

repeated in the company's proxy materials by Exchange Act Rule 14a-8. In this regard, Exchange Act Rule 14a-8 states that "the company is not responsible for the contents of [the shareholder proponent's] proposal or supporting statement."

¹⁴⁰ See the Instruction to proposed Item 7(i) of Exchange Act Schedule 14A.