

14a–11 would make these instructions inapplicable.

To enable the functioning of the proposed procedure, we also propose to amend Exchange Act Schedule 13G to require that the security holder or group certify that they have owned at least the required more than 5% amount of the securities for the minimum time period of two years required in proposed Exchange Act Rule 14a–11. A security holder or group of security holders that previously had filed an Exchange Act Schedule 13G would be required to amend that Schedule to provide the required certification to make a nomination under proposed Exchange Act Rule 14a–11.¹⁶⁸ Upon termination of the nominating security holder group, the group would file a final amendment to the Exchange Act Schedule 13G disclosing termination of the group and, therefore, the group's filing obligation on Exchange Act Schedule 13G.¹⁶⁹ As is currently the case in determining that a group has been formed and a group filing is therefore required, the group would be required to file as such only so long as the security holders comprising that group continue to have an agreement to act together for the purpose of acquiring, holding, voting or disposing of the company's equity securities.¹⁷⁰

b. Questions

M.1. The proposal would provide that a security holder or security holder group would not, solely by virtue of nominating a director under proposed Exchange Act Rule 14a–11, soliciting on behalf of that candidate, or having that candidate elected, be viewed as having acquired securities for the purpose or effect of changing or influencing the control of the company. This provision would then permit those holders or groups of holders to report their ownership on Exchange Act Schedule 13G, rather than Exchange Act Schedule 13D. Is this approach appropriate? Should other conditions be required to

be satisfied? If so, what other conditions?

M.2. Should nominating security holders, including groups, be deemed to have a "control" purpose that would create additional filing and disclosure requirements under the Exchange Act beneficial ownership reporting standards?

M.3. As proposed, security holders that intend to nominate a director pursuant to Exchange Act Rule 14a–11 would be required to disclose this intent on Exchange Act Schedule 13G. Those filers who originally filed an Exchange Act Schedule 13G without an Exchange Act Rule 14a–11 intent would be required to amend their Exchange Act Schedule 13G to disclose such intent if it exists. Is it appropriate to require such an amendment by existing filers? If not, how should such filers indicate their intent to make a nomination pursuant to Exchange Act Rule 14a–11? Are the security holder notice requirements of Exchange Act Rule 14a–11(c) sufficient for this purpose? Intent to use the nomination procedure would be evidenced in both new filings and amendments to already-filed Schedules by the beneficial owner checking the box on the cover page of the Schedule to identify the filing as having been made in connection with a nomination under the procedure and by making the proposed new certification regarding ownership of the required amount of company securities. Is this sufficient notice of the beneficial owner's intent to use the nomination procedure? Should we also require new disclosure related to such intent in a new item requirement to the Schedule? Would this be appropriate in light of the fact that Exchange Act Schedule 13G currently does not require such "purpose" disclosure?

M.4. As proposed, nominating security holders and nominating security holder groups would be required to amend their Exchange Act Schedule 13G filings in accordance with the existing timing requirements for qualified institutional investors and passive investors. Should we instead require that such filers amend on a more expedited basis? For example, should such filers be required to report changes in the information reported previously promptly after such change or within another, specified period of time? Should amendments be limited to material changes in the information reported if such an expedited requirement is used? Should the election as director of a nominating security holder group's nominee be deemed the termination of that group (provided that the group does not have

an agreement to act together for some other purpose)? Should such an election require an amendment to the nominating security holder or nominating security holder group's Exchange Act Schedule 13G?

M.5. Are there any qualified institutional investors under Exchange Act Rule 13d–1(b) that would be qualified to file on Exchange Act Schedule 13G but should not be included in the category of filers who may nominate a director using the proposed procedure? If so, please explain why.

M.6. A related issue with regard to beneficial ownership reporting is whether the withhold votes nomination procedure trigger may result in increased numbers of "vote no" campaigns by security holders who are attempting to trigger the nomination procedure. The possibility of triggering Exchange Act Schedule 13D reporting requirements currently may have a chilling effect on security holders who otherwise would organize such an effort. With regard to this concern, do the current rules under Exchange Act Regulation 13D have such a chilling effect?

Are the current rules sufficient to determine when such activities should require additional security holder filings? Should security holders who organize such a campaign be deemed to have a control purpose or effect that would necessitate filing on Exchange Act Schedule 13D rather than Exchange Act Schedule 13G? Should we issue specific guidance with regard to these "vote no" campaigns and the beneficial ownership reporting requirements generally? Should any such guidance be limited to circumstances where the security holder engaging in the "vote no" campaign does so solely to trigger the security holder nomination procedure?

2. Exchange Act Section 16

a. Proposed Amendments to Rules Under Exchange Act Section 16

Eligible security holder groups under proposed Exchange Act Rule 14a–11 may be concerned that using the proposed nomination procedure will subject them to Section 16 of the Exchange Act.¹⁷¹ Exchange Act Section 16 applies to every person who is the beneficial owner of more than 10% of any class of equity security registered under Section 12 of the Exchange Act ("10% owners"), and each officer and director (collectively with 10% owners,

¹⁶⁸ The percentage of securities listed in such certification will be used not only to determine eligibility to submit a security holder nomination pursuant to proposed Exchange Act Rule 14a–11, but also to determine the security holder or security holder group with the largest percentage of eligible subject securities where more than one security holder or security holder group provides notice of its intention to submit a nomination pursuant to proposed Exchange Act Rule 14a–11 and is otherwise eligible to do so.

¹⁶⁹ This and other amendments would be filed in accordance with the existing timing requirements for beneficial holders who qualify as either qualified institutional investors or passive investors.

¹⁷⁰ See Exchange Act Rule 13d–5(b)(1) [17 CFR 240.13d–5(b)(1)].

¹⁷¹ 15 U.S.C. 78p.