

(4) The name of a security holder nominee is included pursuant to § 240.14a-11.

\* \* \* \* \*

*Note 3. Solicitation in Opposition.*

\* \* \* The inclusion of a security holder nominee in the registrant's proxy materials pursuant to § 240.14a-11 does not constitute a "solicitation in opposition," even if the registrant opposes the security holder nominee and solicits against the security holder nominee and in favor of a registrant nominee.

\* \* \* \* \*

(p) *Solicitations subject to § 240.14a-11.* Solicitations that are published or sent or given to security holders in connection with § 240.14a-11 must be filed with the Commission as specified in that section.

(q) *Security holder notice of intent to nominate a candidate for director under § 240.14a-11.* Any notice sent to a registrant by a security holder or group of security holders indicating an intent to nominate a candidate for director in accordance with the procedure set forth in § 240.14a-11 must be filed with the Commission no later than two business days after it is first provided to the registrant. For purposes of Regulation 14A (§ 240.14a-1—103), the notice filed pursuant to this requirement shall be deemed a solicitation.

9. By amending § 240.14a-8 to:

a. Revise paragraph (i)(8); and

b. Add an Instruction to paragraph (i)(11).

The revision and addition read as follows:

**§ 240.14a-8 Security holder proposals.**

\* \* \* \* \*

(i) \* \* \*

(8) *Relates to election:* If the proposal relates to an election for membership on the company's board of directors or analogous governing body, except that a company may not exclude a proposal that would subject the company to § 240.14a-11 on the basis of this paragraph;

\* \* \* \* \*

(11) \* \* \*

*Instruction to paragraph (i)(11):* For purposes of this paragraph, a proposal requesting that the company become subject to the security holder nomination procedure set out in § 240.14a-11 that is submitted by a more than 1% security holder may not be excluded on the basis that it duplicates a previously submitted proposal by a security holder that holds 1% or less of the registrant's securities. In this instance, the earlier submitted proposal by a security holder that holds

1% or less of the registrant's securities may be excluded under this paragraph.

\* \* \* \* \*

10. By adding § 240.14a-11 to read as follows:

**§ 240.14a-11 Security holder nominations.**

(a) *Applicability.* In connection with an annual meeting of security holders (or, in lieu of an annual meeting, a special meeting) at which directors are elected, a registrant will be required to include in its proxy statement and form of proxy the name of a person or persons nominated by a security holder or group of security holders for election to the board of directors and include in its proxy statement the disclosure about such nominee or nominees and the nominating security holder or holders that is specified in paragraphs (c)(7), (c)(8), (c)(9) and (c)(10) of this section and, if the registrant includes a statement supporting the registrant's nominee(s) and/or opposing the security holder nominee or nominees, at the election of the nominating security holder or nominating security holder group, a statement of support for the security holder nominee or nominees, of a length not to exceed 500 words, provided that:

(1) Applicable state law does not prohibit the registrant's security holders from nominating a candidate or candidates for election as a director;

(2) One or more of the following events has occurred during the calendar year in which the meeting that is the subject of the proxy statement is being held or during either of the preceding two calendar years:

(i) At least one of the registrant's nominees for the board of directors for whom the registrant solicited proxies received "withhold" votes from more than 35% of the votes cast at an annual meeting of security holders (or, in lieu of an annual meeting, a special meeting) held after January 1, 2004, at which directors were elected (provided, that this event will be deemed not to occur with regard to any contested election to which § 240.14a-12(c) applies or an election to which this section applies); or

(ii) A security holder proposal providing that the registrant become subject to § 240.14a-11 that was submitted pursuant to § 240.14a-8 by a security holder or group of security holders that held more than 1% of the securities entitled to vote on that proposal for at least one year as of the date the proposal was submitted and provided evidence of such holding to the registrant, received more than 50% of the votes cast on that proposal at an annual meeting of security holders (or,

in lieu of an annual meeting, a special meeting) held after January 1, 2004; and

(3) No security holder nominee is required to be included on the registrant's proxy card, and no disclosure regarding such nominee is required to be included in the registrant's proxy statement, in the event of one or more of the following:

(i) The nominee's candidacy or, if elected, board membership, would violate controlling state law or federal law or rules of a national securities exchange or national securities association applicable to the registrant (other than rules of a national securities exchange or national securities association regarding director independence);

(ii) Any information required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is not so included;

(iii) Any representation required to be included in the notice to the registrant required pursuant to paragraph (c) of this section is false in any material respect; or

(iv) A nominee is not required to be included pursuant to the provisions of paragraph (d) of this section limiting the number of nominees required to be included.

*Instructions to paragraph (a).*

1. For purposes of paragraph (a)(2)(ii) of this section, the amount of a person's security ownership and the duration of that ownership shall be calculated as of the date that person submits the proposal to the registrant.

2. For purposes of paragraph (a)(2)(ii) of this section, only votes for and against a proposal shall be included in the calculation of the security holder vote on that proposal. Accordingly, abstentions and broker non-votes will not be included in this calculation.

3. A nominating security holder will not be deemed an "affiliate" of the registrant under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) or the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) solely as a result of nominating a director or soliciting for the election of such a director nominee or against a registrant nominee pursuant to this section. Where a security holder nominee is elected, and the nominating security holder or nominating security holder group does not have an agreement or relationship with that director, otherwise than relating to the director's nomination pursuant to § 240.14a-11, solicitation for the election of the director nominee or against a registrant nominee, or the election of the director nominee, the nominating security holder or nominating security holder group will