

not be deemed an affiliate solely by virtue of having nominated that director.

4. The registrant shall determine whether any of the events permitting exclusion of a security holder nominee has occurred and shall notify the nominating security holder or nominating security holder group whether the registrant will include or exclude the security holder nominee. In the event that a registrant determines that it shall exclude the nominee, the registrant shall provide such notice promptly, but in no case less than 30 calendar days before the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting and, where the registrant 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, the notice must be provided a reasonable time before the registrant mails its proxy materials for the current year. If the registrant determines that it is entitled to exclude the nominee, the notice must include (a) A description of the determination made by the registrant's board of directors, including an affirmative statement of its determination not to include that specific nominee; (b) a discussion of the specific requirement or requirements of § 240.14a-11 that the registrant's board of directors have determined permit the registrant not to include that specific nominee; and (c) a discussion of the specific basis for the belief of the registrant's board of directors that the registrant is permitted to not include that specific nominee. The registrant also must include in its proxy statement for the meeting for which the nominee was submitted a statement that it has made such an exclusion and provide the information included in the notice to the nominating security holder with regard to the basis for its determination to exclude the nominee. The exclusion of a security holder nominee by a registrant where that exclusion is not permissible under § 240.14a-11(a)(3) shall be a violation of this section. If the registrant determines that it must include the security holder nominee, it must advise the nominating security holder or nominating security holder group of this determination and state whether the registrant intends to include in its proxy statement disclosure supporting the registrant's nominees and/or opposing the security holder nominee. If the registrant intends to include such a supporting statement and/or opposing statement, it must

advise the nominating security holder or nominating security holder group that it may submit a statement of no more than 500 words supporting the security holder nominee. The registrant also must advise the nominating security holder or nominating security holder group of the date by which this statement must be provided to the registrant, which shall be not less than 10 business days from the date of the registrant's notice to the security holder. A statement by the registrant that it recommends a vote for its nominees and/or against the nominating security holder or nominating security holder group's nominee or nominees will not be deemed an opposing or supporting statement for purposes of this requirement.

5. If any of the events described in paragraph (a)(2) of this section occur, and the registrant did not hold an annual meeting the previous year, or if the date of the current year's annual meeting has been changed by more than 30 days from the date of the previous year's annual meeting, the registrant must disclose pursuant to Item 13 of Form 8-K (§ 249.308 of this chapter) the date by which a security holder or security holder group must submit the notice required pursuant to paragraph (c) of this section, which date shall be a reasonable time prior to the date the registrant mails its proxy materials for the meeting.

(b) *Nominating security holder eligibility.* A security holder or group of security holders nominating a person or persons must satisfy the following requirements:

(1) The security holder individually, or the security holder group in the aggregate, must beneficially own more than 5% of the registrant's securities that are eligible to vote for the election of directors at that annual meeting of securities (or, in lieu of such an annual meeting, a special meeting of security holders);

(2) The security holder or each member of the security holder group must have held the securities that are used for purposes of determining the more than 5% ownership threshold required by paragraph (b)(1) of this section continuously for at least two years and intend to continue to hold those securities through the date of the subject election of directors;

(3) In the case of a registrant that is not an open-end investment company registered under the Investment Company Act of 1940, the security holder or each member of the security holder group must meet the requirements set out in § 240.13d-1(b)

or (c) to file on Schedule 13G (§ 240.13d-102); and

(4) In the case of a registrant that is not an open-end investment company registered under the Investment Company Act of 1940, the nominating security holder or the nominating security holder group must have reported its beneficial ownership on Schedule 13G (§ 240.13d-102), including the certification required by Item 10(c) of Schedule 13G, or have amended a previously filed Schedule 13G to include the certification required by Item 10(c) of Schedule 13G, before or on the date of sending the notice specified in paragraph (c) of this section. Notwithstanding the provisions of Schedule 13G, the Schedule 13G filed in satisfaction of this requirement must set forth information demonstrating compliance with the requirements of paragraphs (b)(1) and (b)(2) of this section and disclose the filing person's intention to nominate one or more directors under § 240.14a-11.

(c) *Security holder notice.* In order to have a nominee included in the registrant's proxy statement and proxy card, the nominating security holder must provide notice to the registrant of its intent to require that the registrant include that security holder's nominee on the registrant's proxy card no later than 80 days before the date that the registrant mailed its proxy materials for the prior year's annual meeting, except that, if the registrant did not hold an annual meeting during the prior year, or if the date of the meeting has changed more than 30 days from the prior year, then the nominating security holder must provide notice a reasonable time before the registrant mails its proxy materials, as specified by the registrant in a Form 8-K (§ 249.308 of this chapter) filed pursuant to Item 13 of Form 8-K. This notice must include:

(1) A representation that, to the knowledge of the nominating security holder or group, the nominee's candidacy or, if elected, board membership, would not 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);

(2) A representation that the nominating security holder or nominating security holder group satisfies the conditions in paragraph (b) of this section;

(3) A representation that:

(i) If the nominating security holder or any member of the nominating security holder group is a natural person, the