

evaluating potential nominees, disclosure of the function performed by each such third party;<sup>46</sup> and

- If the company's nominating committee received, by a date not later than the 120th calendar day before the date of the company's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the company's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the company's voting common stock,<sup>47</sup> with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made,<sup>48</sup> identification of the candidate

<sup>46</sup> See new Paragraph (d)(2)(ii)(K) of Item 7 of Exchange Act Schedule 14A.

<sup>47</sup> Our use of a more than 5% beneficial ownership threshold to trigger this additional disclosure obligation means that recommendations generally will be made by security holders or groups that have a reporting obligation under Exchange Act Regulation 13D [17 CFR 240.13d-240.13d-102]. Recommending security holders, like other beneficial owners, will continue to report on Exchange Act Schedule 13G [17 CFR 240.13d-102] or Exchange Act Schedule 13D [17 CFR 240.13d-101] based on their purpose or effect in acquiring or holding the company's securities. That determination is not intended to be affected by our adoption of this new disclosure obligation. In addition, we anticipate that security holders may communicate with each other in an effort to aggregate more than 5% of a company's securities before submitting a recommended candidate to a company's nominating committee. The determination as to what communications may be deemed solicitations, either subject to or exempt from the proxy rules, is based on facts and circumstances and is not intended to be affected by our adoption of this new disclosure obligation.

<sup>48</sup> Similar to the method used in Exchange Act Rule 14a-8 [17 CFR 240.14a-8] with regard to security holder proponents, the percentage of securities held by a recommending security holder, as well as the holding period of those securities may be determined by the company, on its own, if the security holder is the registered holder of the securities. If not, the security holder can submit one of the following to the company to evidence the required ownership and holding period:

(1) a written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

(2) if the security holder has filed a Schedule 13D, Schedule 13G, Form 3 [17 CFR 249.103], Form 4 [17 CFR 249.104], and/or Form 5 [17 CFR 249.105], or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the required securities for the one-year period as of the date of the recommendation.

See Instruction 3 to new Paragraph (d)(2)(ii)(L) of Item 7 of Item 7 of Exchange Act Schedule 14A.

and the security holder or security holder group that recommended the candidate and disclosure as to whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.<sup>49</sup>

### 3. Comments Regarding, and Revisions to, the Proposed Disclosure Requirements

In response to our request for comment on the proposed nominating committee disclosure requirements, a majority of commenters who supported the proposed rules believed that increased disclosure about nominating committee processes would be effective in increasing security holder understanding of the nomination process,<sup>50</sup> board accountability,<sup>51</sup> board responsiveness,<sup>52</sup> and a company's corporate governance policies.<sup>53</sup> With regard to the particular components of the proposed disclosure standards, commenters provided more specific input, which we considered carefully in revising certain of the disclosure standards that we are adopting today.

#### a. Nominating Committee Charter

Commenters generally were of the view that summary disclosure of the material terms of the nominating committee's charter within a company's proxy statement was unnecessary and would lead to excessively lengthy proxy statements.<sup>54</sup> These commenters suggested that it would be adequate to identify where the charter could be found, provide the charter to security holders upon request, and/or attach the charter to the proxy statement once

<sup>49</sup> See new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A.

<sup>50</sup> See, e.g., American Federation of State, County, and Municipal Employees ("AFSCME"); Council of Institutional Investors ("CII"); Creative Investment Research, Inc. ("CIR"); Andrew Randall; Pennsylvania State Employees' Retirement System ("SERS").

<sup>51</sup> See, e.g., J.A. Glynn & Co. ("J.A. Glynn"); Robert Schneeweiss.

<sup>52</sup> See, e.g., CII; CIR.

<sup>53</sup> See, e.g., American Community Bankers ("ACB"); California Public Employees' Retirement System ("CalPERS"); CIR; United Brotherhood of Carpenters and Joiners of America ("UBC").

<sup>54</sup> See, e.g., The Business Roundtable ("BRT"); Foley & Lardner ("Foley"); Independent Community Bankers Association ("ICBA"); International Paper Company ("Int'l Paper"); Jenkins & Gilchrist ("Jenkins"); McGuireWoods LLP ("McGuireWoods"); Committee on Securities Regulation of the Business Section of the New York State Bar Association ("NYSBAR"); Sullivan & Cromwell, LLP ("Sullivan"); Wells Fargo & Company ("Wells Fargo").

every three years (as is the case for audit committee charters).<sup>55</sup>

The disclosure standard that we are adopting today does not include the proposed requirement that companies describe the material terms of the nominating committee charter. Companies will, instead, be required to disclose whether a current copy of the charter is available to security holders on the company's Web site. Where a company does not make the charter available on its Web site, the company would be required to include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years and, in those proxy statements that do not include the charter as an appendix, the company would be required to identify in which of the prior years the charter was so included. We believe that this disclosure standard will provide security holders with the information regarding a company's nominating committee that was sought in the proposal, without unduly burdening companies.

#### b. Independence of Nominating Committee Members

In response to the proposed disclosure requirement that listed issuers disclose any instance during the prior fiscal year in which any member of the nominating committee did not satisfy the definition of independence included in the listing standards to which the company is subject, a number of commenters suggested that we revise or delete this requirement.<sup>56</sup> At least one of these commenters believed that independence determinations are interpretive matters and that board members could be unaware of developments that would impact independence.<sup>57</sup> Another commenter suggested that we revise the disclosure requirement to conform to the recently adopted provision that requires companies to state whether members of their audit committees are independent, as defined in applicable listing standards.<sup>58</sup> We believe that it is appropriate to use an approach consistent with the audit committee disclosure standards. Accordingly, the disclosure standard we are adopting will require companies to disclose whether each member of the nominating committee is independent, as independence for nominating committee members is defined in the

<sup>55</sup> See, e.g., ICBA; Int'l Paper; McGuireWoods; NYSBAR.

<sup>56</sup> See, e.g., ABA; Sullivan.

<sup>57</sup> See ABA.

<sup>58</sup> See Sullivan. This disclosure requirement is set forth in Paragraph (d)(3)(iv) of Item 7 of Exchange Act Schedule 14A.