

directors, a statement of the basis for the view of the board of directors that it is appropriate for the company not to have such a process;<sup>98</sup>

- If the company has a process for security holders to send communications to the board of directors:
- a description of the manner in which security holders can send communications to the board and, if applicable, to specified individual directors;<sup>99</sup> and
- If all security holder communications are not sent directly to board members, a description of the company's process for determining which communications will be relayed to board members;<sup>100</sup> and
- A description of the company's policy, if any, with regard to board members' attendance at annual meetings and a statement of the number of board members who attended the prior year's annual meeting.<sup>101</sup>

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

#### a. Scope of the Disclosure Requirement

We received a number of comments suggesting that we clarify the application of the disclosure requirements to communications with the board by officers, directors, employees, and agents of the company who also own company securities.<sup>102</sup> We do not believe that all communications from officers, directors, employees, and agents of the company are the types of communications that the disclosure standards should capture. We have, therefore, added a general instruction to the new disclosure requirements clarifying that:

- Communications from an officer or director of the company will not be viewed as security holder communications for purposes of the disclosure requirement;<sup>103</sup> and
- Communications from an employee or agent of the company will be viewed as security holder communications for purposes of the disclosure requirement only if those communications are made solely in such employee's or agent's capacity as a security holder.<sup>104</sup>

In response to our request for comment as to whether the new disclosure standard should apply to communications made in connection with security holder proposals submitted pursuant to Exchange Act Rule 14a-8, one commenter suggested that it would be "inappropriate" to exclude Exchange Act Rule 14a-8 proposals from the new disclosure standard;<sup>105</sup> however, other commenters suggested that Exchange Act Rule 14a-8 communications should be expressly excluded.<sup>106</sup> In particular, one commenter noted that, "[b]oth the security holder proponent and the company are subject to specific, detailed requirements, conditions and deadlines, including regulation of the content of statements about the proposal \* \* \* There is no need to impose another disclosure requirement on this process."<sup>107</sup> We agree that the current disclosure requirements with regard to security holder proposals are adequate to inform security holders of how they may communicate with boards via that mechanism. Accordingly, we have expressly excluded security holder proposals submitted pursuant to Exchange Act Rule 14a-8, and communications made in connection with such proposals, from the definition of "security holder communications" for purposes of the new disclosure standard.<sup>108</sup>

#### b. Process for Communicating With Board Members

We proposed a standard that would have required companies to identify those directors to whom security holders could send communications. Commenters noted that they did not believe that it would be appropriate to include such a requirement on the basis that named directors could then be targeted for inappropriate correspondence and that some companies may not include specified recipients of security holder communications in their communications procedures.<sup>109</sup>

In consideration of these concerns, we have revised the disclosure requirement to specify that companies should describe how security holders can send communications to the board and, if applicable, to specified individual directors.<sup>110</sup> We also have added a new instruction providing that, in lieu of

describing in the proxy statement the manner in which security holders may communicate with board members, the manner in which the company determines those communications that will be forwarded to board members, the company's policy regarding director attendance at annual meetings, and the number of directors who attended the prior year's annual meeting, such information may instead be placed on the company's Web site, provided that the company discloses in its proxy statement the Web site address where such information may be found.<sup>111</sup>

Commenters also expressed concern about the proposed disclosure item related to companies' policies with regard to "filtering" communications.<sup>112</sup> Some commenters suggested that extensive disclosure of a company's process for determining which communications are forwarded to board members would imply that a company was improperly blocking communications from security holders.<sup>113</sup> Such a filtering process is necessary, in the opinion of these commenters, because many security holder communications are related to company products and services, are solicitations, or otherwise relate to improper or irrelevant topics.<sup>114</sup> At least one commenter posited that the proposed disclosure item does not relate directly to company processes to facilitate communications with directors and should be deleted as unnecessary.<sup>115</sup> Another commenter suggested that we revise the disclosure requirement to clarify that purely ministerial activities, such as organizing and collating security holder communications, need not be disclosed.<sup>116</sup> Other commenters noted that, should we retain the disclosure requirement, we should not expand it to include the identity of the party that is responsible for filtering communications.<sup>117</sup>

In consideration of these comments, the disclosure item we are adopting today does not include the requirement that companies identify the department or other group within the company that is responsible for determining which communications are forwarded to directors. We also have added an instruction to clarify that a company's process for collecting and organizing security holder communications, as well

<sup>98</sup> See new Paragraph (h)(1) of Item 7 of Exchange Act Schedule 14A.

<sup>99</sup> See new Paragraph (h)(2)(i) of Item 7 of Exchange Act Schedule 14A.

<sup>100</sup> See new Paragraph (h)(2)(ii) of Item 7 of Exchange Act Schedule 14A.

<sup>101</sup> See new Paragraph (h)(3) of Item 7 of Exchange Act Schedule 14A.

<sup>102</sup> See, e.g., Wells Fargo.

<sup>103</sup> See Instruction 1 to new Paragraph (h) of Item 7 of Exchange Act Schedule 14A.

<sup>104</sup> See id.

<sup>105</sup> AFSCME.

<sup>106</sup> See NYSBAR; Valero.

<sup>107</sup> NYSBAR.

<sup>108</sup> See Instruction 2 to new Paragraph (h) of Item 7 of Exchange Act Schedule 14A.

<sup>109</sup> See NYSBAR.

<sup>110</sup> See new Paragraph (h)(2)(i) of Item 7 of Exchange Act Schedule 14A.

<sup>111</sup> See the Instruction to new Paragraphs (h)(2) and (h)(3) of Item 7 of Exchange Act Schedule 14A.

<sup>112</sup> See, e.g., ABA; BRT; Intel; NYSBAR; Sullivan.

<sup>113</sup> See Sullivan. See also ABA.

<sup>114</sup> See, e.g., Wells Fargo.

<sup>115</sup> See ABA.

<sup>116</sup> See Sullivan.

<sup>117</sup> See, e.g., NYSBAR; Wells Fargo.