

does not have a standing nominating committee or committee performing similar functions, 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 committee and identification of each director who participates in the consideration of director nominees;<sup>30</sup>

- The following information regarding the company's director nomination process;<sup>31</sup>

- If the nominating committee has a charter, disclosure of whether a current copy of the charter is available to security holders on the company's Web site. If the nominating committee has a charter and a current copy of the charter is available to security holders on the company's Web site, disclosure of the company's Web site address. If the nominating committee has a charter and a current copy of the charter is not available to security holders on the company's Web site, inclusion of a copy of the charter as an appendix to the company's proxy statement at least once every three fiscal years. If a current copy of the charter is not available to security holders on the company's Web site, and is not included as an appendix to the company's proxy statement, identification of the prior fiscal year in which the charter was so included in satisfaction of the requirement;<sup>32</sup>

- If the nominating committee does not have a charter, a statement of that fact;<sup>33</sup>

- If the company is a listed issuer<sup>34</sup> whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Exchange Act<sup>35</sup> or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act<sup>36</sup>

that has independence requirements for nominating committee members, disclosure as to whether the members of the nominating committee are independent, as independence for nominating committee members is defined in the listing standards applicable to the listed issuer;<sup>37</sup>

- If the company is not a listed issuer,<sup>38</sup> disclosure as to whether each of the members of the nominating committee is independent. In determining whether a member is independent, the company must use a definition of independence of a national securities exchange registered pursuant to section 6(a) of the Exchange Act or a national securities association registered pursuant to section 15A(a) of the Exchange Act that has been approved by the Commission (as that definition may be modified or supplemented), and state which definition it used. Whatever definition the company chooses, it must apply that definition consistently to all members of the nominating committee and use the independence standards of the same national securities exchange or national securities association for purposes of nominating committee disclosure under this requirement and audit committee disclosure required under Item 7(d)(3)(iv) of Exchange Act Schedule 14A;<sup>39</sup>

- If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;<sup>40</sup>

- If the nominating committee does not have a policy with regard to the consideration of any director candidates

recommended by security holders, a statement of that fact and 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 policy;<sup>41</sup>

- If the nominating committee will consider candidates recommended by security holders, a description of the procedures to be followed by security holders in submitting such recommendations;<sup>42</sup>

- A description of any specific, minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the company's board of directors, and a description of any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess;<sup>43</sup>

- A description of the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;<sup>44</sup>

- With regard to each nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or who are directors standing for re-election), a statement as to which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive

<sup>41</sup> See new Paragraph (d)(2)(ii)(F) of Item 7 of Exchange Act Schedule 14A.

<sup>42</sup> Prior to the effectiveness of these amendments, this disclosure is required under Paragraph (d)(2) of Item 7 of Exchange Act Schedule 14A. As a result of the amendments to Item 7 of Exchange Act Schedule 14A that we are adopting today, this requirement will be moved to new Paragraph (d)(2)(ii)(G) of Item 7 of Exchange Act Schedule 14A. In addition, we are adopting a new requirement in Regulations S-B and S-K, and a new reference to that requirement in Exchange Act Forms 10-Q and 10-QSB, that will require companies to disclose any material changes to the procedures that were previously disclosed pursuant to this item. See new Paragraph (b) of Item 5 of Part II to Exchange Act Forms 10-Q and 10-QSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S-B, and new Paragraph (j) of Item 401 of Exchange Act Regulation S-K. In those instances where a material change is implemented during the last quarter of a company's fiscal year, companies will be required to include disclosure of such change in their Exchange Act Form 10-K or 10-KSB. See Item 10 of Part III of Exchange Act Form 10-K, Item 9 of Part III of Exchange Act Form 10-KSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S-B, and new Paragraph (j) of Item 401 of Exchange Act Regulation S-K.

<sup>43</sup> See new Paragraph (d)(2)(ii)(H) of Item 7 of Exchange Act Schedule 14A.

<sup>44</sup> See new Paragraph (d)(2)(ii)(I) of Item 7 of Exchange Act Schedule 14A.

<sup>30</sup> See new Paragraph (d)(2)(i) of Item 7 of Exchange Act Schedule 14A.

<sup>31</sup> For the remainder of our discussion of this disclosure requirement, the term "nominating committee" refers to a nominating committee or similar committee or group of directors fulfilling the role of a nominating committee. That group may comprise the full board. See the Instruction to new Paragraph (d)(2)(ii) of Item 7 of Exchange Act Schedule 14A. If the company has a standing nominating committee or a committee fulfilling the role of a nominating committee, Item 7(d)(1) of Exchange Act Schedule 14A requires identification of the members of that committee. If the company does not have such a standing committee, new Paragraph (d)(2)(i) of Item 7 of Exchange Act Schedule 14A will require identification of each director who participates in the consideration of director nominees.

<sup>32</sup> See new Paragraph (d)(2)(ii)(A) of Item 7 of Exchange Act Schedule 14A.

<sup>33</sup> See new Paragraph (d)(2)(ii)(B) of Item 7 of Exchange Act Schedule 14A.

<sup>34</sup> As defined in Exchange Act Rule 10A-3 [17 CFR 240.10A-3].

<sup>35</sup> 15 U.S.C. 78f(a).

<sup>36</sup> 15 U.S.C. 78o-3(a).

<sup>37</sup> See new Paragraph (d)(2)(ii)(C) of Item 7 of Exchange Act Schedule 14A.

<sup>38</sup> As defined in Exchange Act Rule 10A-3.

<sup>39</sup> See new Paragraph (d)(2)(ii)(D) of Item 7 of Exchange Act Schedule 14A.

<sup>40</sup> See new Paragraph (d)(2)(ii)(E) of Item 7 of Exchange Act Schedule 14A. As adopted, this disclosure requirement specifies that the company's description of the material elements of its policy with regard to consideration of security holder candidates "need not" be limited to a statement as to whether the nominating committee will consider security holder-recommended candidates. This revision was made in response to a commenter's concern that the proposed requirement (that the disclosure "shall not" be limited to a statement as to whether the committee will consider security holder recommended candidates) implied that a company could not merely have a policy of considering security holder recommended candidates, but instead was required to put in place a more detailed policy with respect to consideration of such candidates. See Committee on Federal Regulation of Securities of the American Bar Association's section of Business Law ("ABA").