

will require companies to disclose whether each member of the nominating committee is independent, as independence for nominating committee members is defined in the listing standards applicable to the listed issuer.

c. Qualifications and Skills of Candidates and Overall Board Composition

Commenters provided input with regard to the proposed requirement that companies describe the qualifications, qualities, skills, and overall composition that companies are seeking with regard to board membership. In this regard, some commenters noted that nominating committees' selection processes do not tend to be precise, and that the characteristics a nominating committee looks for may change as the composition of the board changes.⁵⁹ In consideration of these comments, the disclosure requirements we are adopting today do not include the proposed requirement that companies describe "any specific standards for the overall structure and composition of the company's board of directors."⁶⁰ We are adopting the remaining disclosure items substantially as proposed, as we believe that they will provide valuable information to security holders regarding the nomination process, without resulting in boilerplate disclosures.

Many commenters that supported the disclosure requirements suggested that we expand the requirements to require companies to disclose the extent to which they take into consideration diversity, in particular race and gender, in nominating candidates.⁶¹ We have not included such a requirement in the standards we are adopting today, as we believe this particular consideration, as

well as other considerations made by a company, will likely be addressed adequately by the new disclosure item requiring companies to disclose their criteria for considering board candidates. Further, we do not view it as appropriate to identify any specific criteria that a company must address in describing the qualities it looks for in board candidates.

d. Sources of Nominees

Some of the most extensive comment, particularly from the business and legal communities, arose from the proposal to require companies to identify the source of all director nominees, other than incumbent directors and executive officers.⁶² Generally speaking, these commenters were of the view that, as proposed, the required disclosure would be difficult to make in a clear and accurate manner because there are multiple "sources" for most nominees.⁶³ In addition, these commenters objected to naming the specific source on the basis that this disclosure could have a "chilling effect on the search process,"⁶⁴ would be immaterial,⁶⁵ and could imply that a nominee was unqualified to serve on the board based solely on the position held by the individual (e.g., the chief executive officer) who originally recommended the nominee.⁶⁶ While some commenters recommended that we delete this provision, others recommended that we instead require disclosure of the general category of persons who recommended the nominee (e.g., management or security holders).⁶⁷ Another commenter recommended that we, instead, require companies to disclose whether nominees are independent from the company and, in the case of nominees proposed by security holders, from the recommending security holders.⁶⁸

We continue to believe that information regarding the sources of company nominees is important for security holders; however, we have revised the disclosure standard to require companies to identify the category or categories of persons or entities that recommended each nominee. In this regard, we have retained the requirement that companies

specifically note those instances where a nominee was recommended by the chief executive officer of the company. In providing the required disclosure, companies should consider what category of person initially recommended, or otherwise brought to the attention of the nominating committee, each candidate. In disclosing the category of persons or entities that initially recommended a candidate to the nominating committee, companies should ensure that they identify also any person or entity that caused a particular candidate to be recommended. For example, if the chief executive officer asks a third party to evaluate a potential candidate, and that third party ultimately recommends the candidate to the nominating committee, both the chief executive officer and the third party should be identified as recommending parties in the company's disclosure. We have provided for disclosure of more than one type of source for a nominee to address the possibility of multiple sources.

e. Additional Disclosure Regarding Nominees of Large, Long-Term Security Holders

The additional disclosure requirement with regard to nominees recommended by large, long-term security holders elicited a great deal of comment from most categories of commenters. Generally, commenters from the business and legal communities recommended either deleting the disclosure requirement related to security holder recommendations altogether or increasing the beneficial ownership requirement to 5% or 10% and/or increasing the holding period to two or more years.⁶⁹ With regard to the 5% and 10% recommendations, at least one commenter noted that those recommending security holders would be required to report their beneficial ownership under Exchange Act Regulation 13D.⁷⁰

Some of the reasons given by commenters for deleting the requirement were:

- The requirement would give special status to larger security holders;⁷¹
- 3% security holders could use the disclosure requirement for their own "special interests";⁷²
- There could be more than one triggering nomination, thus resulting in complex and confusing disclosure;⁷³

⁵⁹ See, e.g., Foley; Jenkins; McGuireWoods; NYSBAR; Wells Fargo.

⁶⁰ Release No. 34-48301 (August 8, 2003).

⁶¹ See, e.g., Boston Common Asset Management ("Boston"); Calvert Group Ltd. ("Calvert"); Christian Brothers Investment Services ("CBIS"); Nathan Cummings Foundation ("Cummings"); Domini Social Investments LLC ("Domini"); ISIS Asset Management ("ISIS"); J.A. Glynn; James McRitchie, Editor, CorpGov.net and PERSWatch.net, Letter dated September 13, 2003 ("McRitchie2"); Mehri & Skalet PLLC ("Mehri & Skalet"); Denise L. Nappier, Connecticut State Treasurer ("Nappier"); Social Investment Forum Ltd. ("SIF"); Socially Responsible Investment Coalition ("SRIC"); William C. Thompson, Jr., Controller of the City of New York ("Thompson"); The General Board of Pension and Health Benefits of the United Methodist Church ("UMC"); Walden Asset Management ("Walden"). See also Jesse Smith Noyes Foundation ("Noyes"). We also received a number of letters that are substantially similar in content that supported additional disclosure describing board consideration of diversity. See Letter Type A ("Letter A"); Letter Type B ("Letter B").

⁶² See, e.g., ABA; BRT; Intel Corporation ("Intel"); Leggett & Platt Inc. ("Leggett"); NYSBAR; Valero Energy Corporation ("Valero"); Wells Fargo.

⁶³ See *id.*

⁶⁴ American Society of Corporate Secretaries. See also, American Corporate Counsel Association ("ACCA"); Valero.

⁶⁵ See, e.g., BRT.

⁶⁶ See Sullivan.

⁶⁷ See Boston; Intel; Walden.

⁶⁸ See ABA.

⁶⁹ See, e.g., ACB; ACCA; Compass Bancshares, Inc. ("Compass"); Foley; ICBA; Intel; Int'l Paper; Jenkins; Leggett; NYSBAR; Sullivan; Wells Fargo.

⁷⁰ See Sullivan.

⁷¹ See *id.*

⁷² *Id.* See also ABA.

⁷³ See ABA.