

be calculated.⁸⁷ In this regard we have clarified that the percentage of securities held by a recommending security holder may be determined by reference to the company's most recently filed quarterly or annual report (or any subsequent current report), unless the party relying on such report knows or has reason to believe that the information included in the report is inaccurate.⁸⁸

4. Interaction of the Disclosure Requirements With Recently Revised Market Listing Standards

The New York Stock Exchange and the Nasdaq Stock Market have adopted revised listing standards that, among other requirements, require listed companies to have independent nominating committees.⁸⁹ While these listing standard changes demonstrate the importance of the nomination process and the nominating committee, and represent a strengthening of the role and independence of the nominating committee, they do not require nominating committees to consider security holder nominees or companies to make the disclosures described in this release. The disclosure requirements we are adopting today will provide useful information to security holders regarding the nomination process, the manner of evaluating nominees, and the extent to which the boards of directors of the companies in which they invest have a process for considering, and do in fact consider, security holder recommendations. Accordingly, the disclosure requirements we are adopting today will operate in conjunction with the revised listing standards regarding nominating committees.

A number of commenters from the business and legal communities recommended that we delay adoption of the proposed disclosure standards in order to allow the new listing standards regarding nominating committees to take effect.⁹⁰ We agree with these

commenters that the new listing standards represent a significant strengthening of the nomination process; however, we believe that the disclosure standards that we adopt today are a necessary complement to those listing standards and, accordingly, do not believe such a delay is necessary or appropriate.

B. Disclosure Regarding the Ability of Security Holders To Communicate With Boards of Directors

1. Discussion

We are adopting new disclosure standards with regard to security holder communications with board members. These disclosure standards are intended to improve the transparency of board operations, as well as security holder understanding of the companies in which they invest.⁹¹

In response to our May 1, 2003 solicitation of input into the proxy process review by the Division of Corporation Finance, representatives of the business community commented that disclosure regarding the means by which security holders may communicate directly with the board of directors would address issues of accountability and responsiveness without extensive disruption or costs.⁹² Comments from investors and investor advocacy groups also indicated the view that this disclosure would be helpful;⁹³ however, these commenters also noted that disclosure alone would not address all issues related to accountability and responsiveness.⁹⁴

We received similar comment with regard to the proposed disclosure requirements, with no clear consensus as to whether the proposed rules would

be an effective means to improve board accountability, board responsiveness, and corporate governance policies.⁹⁵ Some commenters believed the disclosure would be useful to security holders, including one commenter who expressed the view that the proposed disclosure would provide security holders with important information that provides an understanding of a company's process for communications with the board.⁹⁶ Conversely, other commenters did not believe that the proposed rules would be an effective means to improve board accountability, board responsiveness, and corporate governance policies and expressed the view that the disclosure would not be useful to security holders.⁹⁷ Overall, we continue to believe that the disclosure will provide security holders with useful information about their ability to communicate with board members. Accordingly, we are adopting, substantially as proposed, the disclosure standards related to security holder communications with board members.

2. Disclosure Requirements

We are adopting a number of specific and detailed disclosure requirements regarding communications by security holders with boards of directors because we believe that these requirements will provide security holders with a better understanding of the manner in which security holders can engage in these communications. In particular, we believe that the disclosure requirements, including whether a board has a process by which security holders can communicate with it, are necessary to give security holders a better picture of a critical component of the board's interaction with security holders. Detailed disclosure regarding that process at a company, if it exists, will be important to security holders in evaluating the nature and quality of the communications process. Further, we believe that the level of specificity in the new disclosure standards will discourage boilerplate disclosure.

Companies will be required to provide the following disclosure with regard to their processes for security holder communications with board members:

- A statement as to whether or not the company's board of directors provides a process for security holders to send communications to the board of directors and, if the company does not

⁸⁷ See, e.g., ABA.

⁸⁸ See Instruction 1 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A. The new instruction is modeled after Exchange Act Rule 13d-1(j) [17 CFR 240.13d-1(j)], which specifies on what basis beneficial holders may calculate the percentage of subject securities they hold for purposes of Exchange Act Regulation 13D.

⁸⁹ See Release No. 34-48745 (November 4, 2003) [68 FR 64154]. While the NYSE standards include a requirement that listed companies have an independent nominating committee (NYSE section 303A(4)(a)), the Nasdaq standards provide that the nomination of directors may, alternatively, be determined by a majority of the independent directors (NASD Rule 4350(c)). In discussing the NYSE and Nasdaq standards, our references to independent nominating committees encompass this alternative under the Nasdaq standards.

⁹⁰ See, e.g., ABA; ACB; ACCA; BRT; CSX Corporation; Foley; ICBA; Jenkins; Valero.

⁹¹ In Exchange Act Release No. 34-48745 (November 4, 2003), the Commission approved a new NYSE listing standard that addresses security holder communications with board members. This standard provides that: "In order that interested parties may be able to make their concerns known to non-management directors, a company must disclose a method for such parties to communicate directly and confidentially with the presiding director [of the non-management directors] or with non-management directors as a group." See NYSE Section 303A(3). This method could be analogous to the method in the NYSE listing standards required by Exchange Act Rule 10A-3 regarding audit committees. See Commentary to NYSE Section 303A(3). Exchange Act Rule 10A-3(b)(2) requires listing standards relating to audit committees to require that "[e]ach audit committee * * * establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

⁹² See Summary of Comments—File No. S7-10-03.

⁹³ See id.

⁹⁴ See id.

⁹⁵ See Summary of Comments—File No. S7-14-03.

⁹⁶ See CIR.

⁹⁷ See, e.g., ABA; BRT; Les Greenberg, Chairman, Committee of Concerned Shareholders, Letter dated August 9, 2003 ("CCS1"); Valero.