

directors. We also have added an instruction to clarify that a company's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed, provided that the company's process is approved by a majority of the independent directors.<sup>118</sup>

#### c. Material Actions Taken by the Board of Directors as a Result of Security Holder Communications

Many commenters expressed concern with regard to the proposal that would have required companies to describe any material action taken by the board of directors during the preceding fiscal year as a result of security holder communications.<sup>119</sup> Most of these commenters suggested deleting this disclosure requirement on the basis that it would be too difficult to tie board actions to specific security holder recommendations.<sup>120</sup> One commenter suggested that the disclosure requirement was too vague and companies would be unsure as to what actions must be disclosed.<sup>121</sup> In consideration of these concerns, the disclosure requirements we are adopting today do not include the proposed requirement related to material actions taken in response to security holder communications.

#### d. Director Attendance at Annual Meetings

In the proposing release, we asked whether there were alternative ways to achieve our objectives. We further solicited comment on whether we should provide guidance to companies or otherwise address appropriate procedures for companies to implement with regard to security holder communications with board members. We also noted that the term "communications" was meant to be broadly construed. Several commenters suggested that we require companies to disclose whether they have a policy regarding attendance by directors at annual meetings and provide information about annual meeting attendance by directors.<sup>122</sup> We believe that such a disclosure requirement

would further our broad objective to provide investors with information about a company's communications policies and general responsiveness to investors' concerns.

Directors' attendance at annual meetings can provide investors with an opportunity to communicate with directors about issues affecting the company. We are adopting a requirement that companies disclose their policy with regard to director attendance at annual meetings and the number of directors who attend the annual meetings, as that disclosure will give security holders a more complete picture of a company's policies related to opportunities for communicating with directors.

#### C. Related Disclosure in Quarterly and Annual Reports

In response to our request for comment regarding whether material changes to a company's process for security holders to submit nominees for election as director to the company should be disclosed in periodic or current reports, a number of commenters indicated the need to provide security holders with more current information regarding that process.<sup>123</sup> These commenters expressed the concern that the procedures described in a company's proxy statement could change during the course of a fiscal year, and the absence of information regarding those changes could impair significantly security holders' opportunities to submit recommended nominees.<sup>124</sup> In response to these comments, we are adopting new disclosure standards that will require companies to report any material changes to the procedures for security holder nominations in the Exchange Act Form 10-Q, 10-QSB, 10-K, or 10-KSB filed for the period in which the material change occurs.<sup>125</sup> We also are including an instruction clarifying that, for purposes of this disclosure obligation, adoption of procedures by which security holders

may recommend nominees to a company's board of directors, where the company previously disclosed that it did not have in place such procedures, will constitute a material change.<sup>126</sup>

#### D. Investment Companies

The new disclosure requirements regarding board nominating committees and security holders' communications with members of boards will apply to proxy statements of investment companies.<sup>127</sup> Investment companies currently are required to comply with Exchange Act Schedule 14A when soliciting proxies, including proxies relating to the election of directors.<sup>128</sup> Item 22(b)(14)(iv) of Exchange Act Schedule 14A requires investment companies to disclose the same information about nominating committees that currently is required for operating companies by Item 7(d)(2).<sup>129</sup> As with operating companies, the enhanced transparency provided by the amendments is intended to provide security holders with additional, specific information upon which to evaluate the boards of directors and nominating committees of the investment companies in which they invest. Commenters generally supported the application of the proposed

<sup>126</sup> See Instruction 2 to 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>127</sup> See Paragraphs (e) of Item 7 and (b) of Item 22 of Exchange Act Schedule 14A. The disclosure requirements will apply to business development companies as well as investment companies registered under the Investment Company Act of 1940 ("Investment Company Act"), except where otherwise noted. Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. See sections 2(a)(48) and 54-65 of the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53 - 64].

<sup>128</sup> See Investment Company Act Rule 20a-1 [17 CFR 270.20a-1] (requiring investment companies to comply with Regulation 14A [17 CFR 240.14a-1—240.14a-101]), Schedule 14A, and all other rules and regulations adopted pursuant to section 14(a) of the Exchange Act [15 U.S.C. 78n] that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to section 12 of the Exchange Act [15 U.S.C. 78l]).

<sup>129</sup> Investment companies are subject to Items 7 and 22(b) of Exchange Act Schedule 14A when soliciting proxies regarding the election of directors. Currently, in lieu of the disclosure required by Paragraphs (a)-(d)(2) of Item 7, investment companies must provide the information required by Paragraph (b) of Item 22. See Paragraph (e) of Item 7. We are amending Paragraph (e) of Item 7 to apply the disclosure requirements regarding nominating committees in Paragraph (d)(2) of Item 7 to investment companies, and deleting the current disclosure requirement regarding nominating committees in Paragraph (b)(14)(iv) of Item 22 as duplicative.

<sup>118</sup> See the Instruction to new Paragraph (h)(2)(ii) of Item 7 of Exchange Act Schedule 14A.

<sup>119</sup> See, e.g., ABA; ACB; ACCA; Warren J. Archer ("Archer"); BRT; DKW Law Group; Domini; Foley; Intel; Int'l Paper; Jenkins; NYCBAR; NYSBAR.

<sup>120</sup> See, e.g., ABA; BRT; Domini; Foley; Intel; Int'l Paper; Jenkins; NYCBAR; NYSBAR.

<sup>121</sup> See NYSBAR.

<sup>122</sup> See Amalgamated Bank and its Long View Funds ("Amalgamated"); Boston; CBIS; CII; Granary Foundation ("Granary"); Letter B; Maine Retirement System; McRitchie2; SERS; SIF; Walden. See also Connie Hansen.

<sup>123</sup> See, e.g., AFL-CIO; AFSCME; Amalgamated; CalPERS; CII; CIR; Cummings; IBT; Int'l Paper; McRitchie2; SERS; SIF; Smith; Trillium; UBC.

<sup>124</sup> See id.

<sup>125</sup> 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 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 the 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.