

SEC ADOPTS NEW DISCLOSURE RULES REGARDING NOMINATING COMMITTEE FUNCTIONS AND COMMUNICATIONS BETWEEN SHAREHOLDERS AND BOARDS OF DIRECTORS

The SEC has adopted amendments to existing disclosure requirements regarding board nominating committees and a new disclosure requirement concerning the means, if any, by which shareholders may communicate with directors.

Companies must comply with these disclosure requirements in proxy or information statements that are first sent or given to security holders on or after January 1, 2004, and in annual and quarterly reports for the first reporting period ending after January 1, 2004.

Disclosure regarding nominating committees

The amendments expand the current proxy statement disclosure regarding a company's nominating or similar committee to include a statement as to whether the company has a standing nominating committee or a committee performing similar functions and, if the company 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.

The proxy statement must also include the following information regarding the company's director nomination process:

- If the nominating committee has a charter, disclosure of whether a current copy of the charter is available to shareholders on the company's website and, if so, disclosure of the company's website address. If the charter is not available to shareholders on the company's website, inclusion of a copy of the charter as an appendix to the company's proxy statement at least once every three fiscal years and identification of the prior fiscal year in which the charter was so included in satisfaction of the requirement;
- If the nominating committee does not have a charter, a statement of that fact;
- If the company is listed on the NYSE, AMEX or Nasdaq, disclosure as to whether the members of the nominating committee are independent as defined in the NYSE, AMEX or Nasdaq listing standards as applicable;
- If the company is not listed on the NYSE, AMEX or Nasdaq, disclosure as to whether each of the members of the nominating committee is independent using the definition of independence of the NYSE, AMEX or Nasdaq and state which definition it used;
- If the nominating committee has a policy with regard to the consideration of any director candidates recommended by shareholders, a description of the material elements of that policy, including a statement as to whether the committee will consider director candidates recommended by shareholders;
- If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by shareholders, 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;
- If the nominating committee will consider candidates recommended by shareholders, a description of the procedures to be followed by shareholders in submitting such recommendations;
- 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

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- 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;
- A description of the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by shareholders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a shareholder;
- With regard to each new nominee approved by the nominating committee for inclusion on the company's proxy card, a statement as to which one or more of the following categories of persons or entities recommended that nominee: shareholder, non-management director, chief executive officer, other executive officer, third-party search firm, or other, specified source;
- If the company pays a fee to any third party to identify or evaluate or assist in identifying or evaluating potential nominees, disclosure of the function performed by each such third party; and
- If the company's nominating committee received, by a date not later than the 120th calendar day before the date of the company's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a shareholder that beneficially owned more than 5% of the company's voting common stock for at least one year as of the date the recommendation was made, or from a group of shareholders that beneficially owned, in the aggregate, more than 5% of the company's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identification of the candidate and the shareholder or group that recommended the candidate and disclosure as to whether the nominating committee chose to nominate the can-

didate, provided, however, that no such identification or disclosure is required without the written consent of both the shareholder or group and the candidate to be so identified.

Recently revised market listing standards

The NYSE, AMEX and Nasdaq have adopted revised listing standards that, among other requirements, require listed companies to have independent nominating committees. While the NYSE standards include a requirement that listed companies have an independent nominating committee, the AMEX and Nasdaq require that the nomination of directors may, alternatively, be determined by a majority of the independent directors

AMEX and Nasdaq require each issuer to certify that it has adopted a formal written charter or board resolution, as applicable, addressing the nominations process and such related matters as may be required under the federal securities laws. NYSE requires each listed company to have a nominating/corporate governance committee composed entirely of independent directors and that such committee have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual performance evaluation of the nominating/corporate governance committee.

Disclosure regarding shareholders communications with Boards of Directors

The SEC also adopted disclosure requirements regarding communications by shareholders with boards of directors. Companies will be required to disclose in their proxy statements their processes for shareholder communications with board members, as follows:

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

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the basis for the view of the board of directors that it is appropriate for the company not to have a such a process;

- If the company has such a process:
 - a description of the manner in which shareholders can send communications to the board and, if applicable, to specified individual directors; and
 - If all shareholder 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; 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.

Disclosure in quarterly and annual reports

Companies must now report any material changes to the procedures for shareholder nominations in the company's Form 10-Q or 10-K (or Form 10-QSB or 10-KSB for small business issuers) filed for the period in which the material change occurs. The SEC made clear that adoption of procedures by which shareholders 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.