

## Client Alert

# SEC Proposes New Proxy Disclosure Rules Regarding Board Nominating Committees and Shareholder Communications With Boards of Directors

### A. Introduction

On August 8, 2003, the SEC published for comment proposed amendments to the proxy disclosure rules under the Securities Exchange Act of 1934 that would require companies to expand significantly their disclosure regarding the operation of board nominating committees. The SEC also proposed new proxy disclosure requirements concerning the means, if any, by which shareholders may communicate with board members.<sup>1</sup> The proposals follow the recommendations made by the Division of Corporation Finance to the SEC in its July 2003 staff report.<sup>2</sup> The SEC also stated that it expects to issue another proposing release in the fall regarding enhanced shareholder access to an issuer's proxy materials for nomination of directors, a topic that was also addressed in the July report.

### B. Enhanced Nominating Committee Disclosure

Under existing proxy rules, a public company must disclose whether its board of directors has a nominating committee and, if so, whether the committee considers board nominee recommendations by shareholders and the procedures to be followed by shareholders in submitting such recommendations. The SEC proposes to expand significantly these disclosure rules and increase the transparency of the nominating process by requiring a company's proxy statement to include disclosure of the following items:

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<sup>1</sup> Securities and Exchange Commission Release Nos. 34-48301; IC-26145; File No. S7-14-03. A copy of the Release is available on the SEC website at <http://www.sec.gov/rules/proposed/34-38201.htm>.

<sup>2</sup> Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003). A copy of the Report is available on the SEC website at <http://www.sec.gov>.

- Whether the company has a standing nominating committee and, if not, a statement why the company believes it is appropriate for the company not to have such a committee and the names of those directors who participate in the consideration of director nominees;
- Whether the nominating committee has a charter and, if so, a description of the material terms of the charter and where the charter is available (which can be the company's website), or if the committee does not have a charter, a statement of that fact;
- Any instance during the last fiscal year where any member of the nominating committee did not satisfy the definition of independence set forth in the listing standards of the market on which the company's shares are listed or quoted (*e.g.*, New York Stock Exchange, Nasdaq or American Stock Exchange). If the company is not a listed issuer, the company must disclose whether each member of the nominating committee is independent as defined under a listing standard chosen by the company;
- Whether the nominating committee has a policy on the consideration of any director candidates recommended by shareholders and, if so, a description of the material elements of that policy;
- Whether the nominating committee will consider director candidates recommended by shareholders and, if so, the procedures to be followed by shareholders in submitting recommendations;
- Any minimum qualifications for a director nominee, any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess, and any specific standards for the overall structure and composition of the company's board of directors;
- 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;
- The specific source, such as the name of an executive officer, director or other individual, recommending each nominee (other than nominees who are executive officers or directors standing for re-election) approved by the nominating committee for inclusion on the company's proxy card;

- Whether the company pays a fee to any third party to identify or assist in identifying or evaluating potential nominees and the functions performed by such third party; and
- If the nominating committee received a recommendation for a nominee from a shareholder or group of shareholders who individually, or in the aggregate, beneficially owned greater than 3% of the company's voting common stock for at least one year as of the date of the recommendation and the nominating committee decided not to nominate the candidate, the committee must also disclose (a) the name or names of the shareholders who recommended the candidate and (b) the specific reasons for the committee's determination not to include the candidate as a nominee; disclosure of the name of the candidate would be permitted but not required by the proposed rules.

The SEC's proposed rules would effectively supplement the listing standards regarding independent nominating committees proposed by the New York Stock Exchange, Nasdaq and the American Stock Exchange.

#### C. Disclosure Regarding Shareholder Communication with Directors

Citing the importance to shareholders of a means by which to communicate with the directors of the companies in which they invest, the SEC also proposed that companies include the following information in their proxy materials where action is to be taken with respect to the election of directors:

- Whether the company's board of directors has a process for shareholders to send communications to the board and, if not, a statement why the company believes it is appropriate for the company not to have such a process;
- If the company has a process for shareholders to send communications to directors:
  - A description of the manner in which shareholders can send communications to the board and the identity of board members to whom shareholders can send communications;
  - 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, including disclosure of the department or other group within the company responsible for making this determination; and

- A description of any material action taken by the board during the preceding fiscal year as a result of communications from shareholders.

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The SEC's release includes a long series of questions intended to focus public comments on specific aspects of the proposals, and in particular on whether they are necessary or appropriate to accomplish the SEC's stated objectives.

The SEC requests that comments on the proposed rules be received by September 15, 2003. Comments may be submitted electronically to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. S7-14-03 (in the subject line if sent electronically) and will be made publicly available by the SEC.

August 18, 2003

## For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at [http://www.chadbourne.com/publications/sub\\_Publications.html](http://www.chadbourne.com/publications/sub_Publications.html). If you have any questions regarding these proposals, please contact any of the following:

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