

Client Alert

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

A. Introduction

On November 24, 2003, the SEC adopted amendments to the proxy disclosure rules under the Securities Exchange Act of 1934 that will require companies to expand significantly their disclosure regarding the operation of board nominating committees. The SEC also adopted new proxy disclosure requirements concerning the means, if any, by which shareholders may communicate with board members.¹

Companies must comply with these disclosure requirements in proxy or information statements that are first sent or given to shareholders on or after January 1, 2004.

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 has expanded these disclosure rules by requiring a company's proxy statement to include disclosure of the following items:

- Whether the company has a standing nominating committee and, if not, a statement why the company believes it is appropriate 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, whether a current copy of the charter is available on the company's website and the website

¹ Securities and Exchange Commission Release Nos. 33-8340; 34-48825; IC-26262; File No. S7-14-03. A copy of the Release is available on the SEC website at www.sec.gov/rules/final/33-8340.htm

address. If the nominating committee has a charter and a current copy of the charter is not available on the company's website, the company must include a copy of the charter as an appendix to the company's proxy statement at least once every three years. If a current copy of the charter is not available on the company's website, and is not included as an appendix to the company's current proxy statement, the company should identify the prior proxy statement with which the charter was included. If the committee does not have a charter, the company should so state;

- If the company's securities are listed on a national securities exchange or an automated inter-dealer quotation system of a national securities association (*e.g.*, the New York Stock Exchange, Nasdaq or the American Stock Exchange) that has independence requirements for nominating committee members, whether the members of the committee are independent, as defined in applicable listing standards;
- If the company is not a listed issuer, 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, or if not, a statement of that fact and why the company believes it is appropriate not to have such a 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 and any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess;
- 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 nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or who are directors standing for re-election), 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;

- 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
- Whether the nominating committee received, by a date not later than the 120th calendar day before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting, a recommended nominee from a shareholder or group of shareholders who individually, or in the aggregate, beneficially owned more than 5% of the company's voting common stock for at least one year as of the date of the recommendation (with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made) and, if so, identification of the candidate and the shareholder or shareholder group that recommended the candidate and whether the nominating committee chose to nominate the candidate.

Any material changes to the procedures for shareholder nominations of directors should be disclosed in the Form 10-Q or 10-K filed for the period in which the material change occurs.

C. Disclosure Regarding Shareholder Communications 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 adopted rules requiring 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 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, 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.

* * * * *

December 23, 2003

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at www.chadbourne.com/publications/sub_Publications.html. If you have any questions regarding these new disclosure requirements, please contact any of the following:

New York

Marc A. Alpert	(212) 408-5491	malpert@chadbourne.com
Philip L. Colbran	(212) 408-1122	pcolbran@chadbourne.com
A. Robert Colby	(212) 408-5571	rcolby@chadbourne.com
Barry S. Eisler	(212) 408-1073	beisler@chadbourne.com
Morton E. Grosz	(212) 408-5592	mgrosz@chadbourne.com
Charles E. Hord, III	(212) 408-5353	chord@chadbourne.com
Peter K. Ingerman	(212) 408-5422	pingerman@chadbourne.com
Peter R. Kolyer	(212) 408-5564	pkolyer@chadbourne.com
Rachel C. Lee	(212) 408-5176	rlee@chadbourne.com
Sey-Hyo Lee	(212) 408-5122	shlee@chadbourne.com
J. Allen Miller	(212) 408-5454	amiller@chadbourne.com
John G. Moon	(212) 408-1117	jmoon@chadbourne.com
Anne-Marie F. Shelley	(212) 408-5272	ashelley@chadbourne.com
Edward P. Smith	(212) 408-5371	esmith@chadbourne.com
Kevin C. Smith	(212) 408-1092	ksmith@chadbourne.com

Washington, D.C.

Thomas V. Sjoblom	(202) 974-5636	tsjoblom@chadbourne.com
-------------------	----------------	-------------------------

London

William Greason	(44-20) 7337-8010	wgreason@chadbourne.com
David Levin	(44-20) 7337-8048	dlevin@chadbourne.com
Claude S. Serfilippi	(44-20) 7337-8030	cserfilippi@chadbourne.com