CORPORATE GOVERNANCE ALERT: COMPLYING WITH THE SEC'S FINAL DISCLOSURE RULES REGARDING THE DIRECTOR NOMINATION PROCESS AND SHAREHOLDER-DIRECTOR COMMUNICATIONS

JANUARY 15, 2004

This memorandum is designed to provide guidance with respect to the Securities and Exchange Commission's new disclosure requirements related to the director nomination process and shareholder-director communications.[1] These new disclosure rules apply to all proxy statements first sent to shareholders on or after January 1, 2004 for meetings at which directors will be elected.

SUMMARY OF NEW RULES

Under the SEC's final amendments to the proxy rules, companies will be required to disclose, in detail, information regarding their director nominating processes and whether and how shareholders may communicate with directors. The new disclosure regarding the director nomination process must include detailed information regarding:

- the existence and independence of the board's nominating committee (if any);
- whether the nominating committee has a charter and, if so, whether the charter is available on the company's website;
- whether the company has a policy with regard to the consideration of any director candidates recommended by shareholders and, if not, it must state the reasons the board believes it is appropriate not to have such a policy;
- if the nominating committee considers candidates recommended by shareholders, the company must describe the procedures by which shareholders may submit recommendations;
- the committee's minimum qualifications for selecting nominees, as well as any specific qualities or skills that the committee believes are necessary for one or more of the directors to possess;

[1] See SEC Release No. 33-8340 (November 28, 2003). The SEC also recently proposed rules regarding the process by which companies permit large, long-term shareholders to make director nominations and include disclosure regarding those nominees in the company's annual proxy statement. We discuss these proposed rules in a separate memorandum, which is available through our website, *www.simpsonthacher.com*.

- the committee's process for identifying and evaluating director candidates generally, including nominees recommended by shareholders, and whether there are any differences based on whether the nominee is recommended by a shareholder;

- who recommended each nominee for the board, other than management directors and incumbents (e.g., a shareholder, a non-management director, the chief executive officer, another executive officer, a third-party search firm, or another, specified source);

- the role performed by any third party paid a fee for identifying or evaluating potential nominees; and

- the name of any person recommended for board membership by a large, long-term shareholder and whether the nominating committee ultimately selected such person as a board nominee.[2]

The new disclosure regarding shareholder-director communications must include detailed information regarding:

- the company's policy, if any, regarding directors' attendance at annual meetings;

- the number of directors who attended the prior year's annual meeting;

- whether the company's board has a process for shareholders to send communications to directors and, if the company has such a process:

    - how shareholders can send communications to the board and, if applicable, to specified individual directors; or

    - the process by which the company determines which communications will be relayed to board members (unless all shareholder communications are sent directly to board members); and

- if the company does not have a process for shareholders to send communications to directors, the reasons the board believes it is appropriate not to have such a process.

The foregoing disclosure must be included in proxy and information statements that are first sent to shareholders on or after January 1, 2004.

[2] This disclosure is not required if, among other reasons, the shareholder or the nominee refuses to grant their written consent to inclusion in the proxy.

**THE DIRECTOR NOMINATION PROCESS:
SEC, NYSE AND NASDAQ RULES
REGARDING
NOMINATING COMMITTEES
AND ENHANCED DISCLOSURE**

Background; Prior SEC Disclosure Requirements

Since 1978, companies subject to the SEC's proxy rules have been required to disclose in either their proxy or annual report whether they have standing audit, nominating and compensation committees of their boards. The SEC also has required companies with such committees to provide the name of each committee member, the number of committee meetings held each year and the functions performed by each committee.[3] In adopting these requirements more than 25 years ago, the SEC noted that "a nominating committee can, over time, have a significant impact on the composition of the board and also can improve the director selection process."[4]

New NYSE and Nasdaq Rules

The new NYSE and Nasdaq corporate governance rules impose various procedural requirements for the nominating committees of listed companies, including a requirement that the entire nominating committee generally be independent.[5] Neither the NYSE or Nasdaq, however, requires that nominating committees consider shareholder recommendations or that companies make specific disclosures regarding the nomination process, except that the NYSE requires that a company post its nominating committee charter on its website and disclose the company's director qualification standards.

Both the NYSE and Nasdaq's rules apply to a company after its first annual shareholder meeting after January 15, 2004 (or, if no meeting has occurred by October 31, 2004, then on such date). As a result, disclosure under these rules will not be required until the 2005 proxy season for most companies. The SEC, however, is informally encouraging companies to include similar disclosure prior to the effectiveness of the rules.

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[3] See Item 7(d)(1) of Schedule 14A, which remains unchanged by the new SEC rules.

[4] See SEC Release No. 34-14970 (July 18, 1978).

[5] The NYSE, subject to specified exceptions, requires all listed companies to have a nominating committee. Nasdaq, in contrast, permits director nominee recommendations to be approved by a majority of independent directors if a board does not have a nominating committee.

NYSE Rules

New Section 303A(4) of the NYSE's Listed Company Manual requires companies with listed common equity to have a nominating/governance committee composed entirely of independent directors.[6] The committee must have a written charter[7] available on its website and the charter must address:

- the committee's purpose and responsibilities, including, at a minimum:
  - to identify individuals qualified to become board members, consistent with criteria approved by the board,
  - to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders;
  - to develop and recommend to the board a set of corporate governance principles applicable to the company; and
  - to oversee the evaluation of the board and management; and
- an annual performance evaluation of the nominating committee.

Commentary to Section 303A(4) of the NYSE's Listed Company Manual provides that the charter should[8] address the following items:

- committee member qualifications;
- committee member appointment and removal;
- committee structure and operations (including authority to delegate to subcommittees); and
- committee reporting to the board.

The NYSE also indicates that the nominating/governance committee charter should vest in the committee exclusive authority to engage and terminate candidate search firms.

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[6] The NYSE rules contain various exceptions for majority-controlled companies, foreign private issuers, limited partnerships and other unique companies. In addition, the NYSE rules permit companies to bypass the nominating committee for directors that the company is contractually required to nominate.

[7] A sample form of nominating committee charter for NYSE-listed U.S. companies is available on our website, *www.simpsonthacher.com*.

[8] The NYSE has indicated that, in its corporate governance rules, the words "must" and "should" have been chosen with care. The use of "must" in the rules indicates that compliance with the rule is mandatory. The term "should" indicates that the NYSE believes compliance is appropriate for most if not all companies, but that failure to comply will not constitute a violation of the NYSE standards.

New Section 303A(9) mandates that companies adopt and disclose corporate governance guidelines. These guidelines may be posted on a company's website, but only if the company's annual report filed on Form 10-K states that the guidelines are available on the website and available in print to any shareholder who requests them. The guidelines must include, among other things, director qualification standards that, at a minimum, reflect the NYSE's independence requirements and any substantive qualification requirements, including policies limiting the number of boards on which a director may sit and director tenure, retirement and succession.

Nasdaq Rules

New NASD Rule 4350(c)(4) provides that director nominees for companies with Nasdaq-listed common stock must be selected, or recommended for the board's selection, either by:

- a majority of independent directors; or
- a nominations committee comprised solely[9] of independent directors. [10]

The Nasdaq rules also require that companies adopt a formal written charter for the nominations committee or a board resolution, in each case addressing the nominations process and related matters as may be required under the federal securities laws. The rules do not specify what information must be included in the charter or board resolution, except that it must address the nomination process.

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[9] Under "exceptional and limited circumstances," a committee of at least three members may have one director that is not independent, so long as:

(1) neither such director nor his or her immediate family members is part of management;

(2) the board of directors determines that such director's participation on the committee is required by the best interests of the company and its shareholders;

(3) the company discloses the participation of such director; and

(4) such director participates for no longer than two years.

[10] The Nasdaq rules contain various exceptions for majority-controlled companies. In addition, foreign private issuers may apply for exemption from some of the governance rules. The Nasdaq rules also permit companies to bypass the nominating rules for directors that the company is contractually required to nominate.

New SEC Rules: Enhanced Disclosure Regarding the Director Nomination Process

Under the SEC's final amendments to the proxy forms, companies will be required to significantly expand prior disclosure regarding the legal authority and efficacy of their nomination committees, as well as its procedures. In particular, the SEC is seeking to use its disclosure mandates to encourage companies into giving shareholder-recommended candidates thoughtful consideration through independent nominating committees with formal evaluation standards (or face potentially difficult disclosure). Companies will even be required, under certain circumstances, to disclose the rejection of nominees recommended by large, long-term shareholders.

Each of the new disclosure provisions is contained in new Item 7(d)(2) of Schedule 14A and must be included in any proxy statement for a meeting at which directors will be elected. We discuss each of the specific topics below under separate headings, together with suggestions regarding potential disclosure.[11]

Existence of a Nominating Committee

If the company does not have a standing nominating committee or a committee performing similar functions, it must state the reasons the board believes it is appropriate not to have such a committee, as well as the identity of each director who participates in the nomination process. For companies with NYSE-listed equity, this disclosure will not present an issue since those companies must have independent nominating committees, subject to the exceptions described above.

We would suggest that all companies that do not fall within the applicable NYSE or Nasdaq exceptions strongly consider adopting a nominating committee.[12] This is particularly important in light of the SEC's recent proposal to permit, under certain circumstances, large, long-term shareholders to nominate independent candidates to challenge the board's nominees. Shareholder activists may seek to make an example of companies without a committee and may use the lack of a committee (and the required disclosure about the reasons for not having a committee) as arguments in favor of the shareholders' nominees.

Nominating Committee Charter

If a company has a nominating committee, it must state whether the nominating committee has a charter and, if so, whether the charter is available on the company's website. If the charter were available on its website, the company must provide the website address. If the

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[11] A reference to a "nominating committee" in this section includes a formal nominating committee, any other committee performing similar functions and any group of directors fulfilling the role of a nominating committee, including the entire board of directors.

[12] While controlled companies are not obligated to have a nominating committee, some might choose to do so based upon facts and circumstances, including the nature and extent of public ownership, the likelihood of dropping below the majority-ownership threshold for the NYSE and Nasdaq exceptions and the visibility of the company. We would not expect, however, that most majority-controlled companies would relinquish control of the nominating committee.

charter were not available on its website, the company must include a copy of the charter as an appendix to its proxy statement at least once every three years. [13] In contrast to its original proposal, the SEC will not require companies to summarize the charter in their proxy statements (although there is an overlap between provisions in the charter and the required disclosure (e.g., director qualifications)).

We would expect most companies subject to the proxy rules to have a nominating committee charter in place this proxy season, particularly in light of the impending NYSE and Nasdaq rules applicable to the 2005 proxy season.[14] For companies that already have charters, we would suggest that they review the charters to ensure compliance with new listing standards and to ensure that the charter accurately reflects the committee's existing practices.

Independence

If a company has a nominating committee, it must state whether its nominating committee members are independent. For companies with listed securities, the company should use the "independence" test in the listing standards to which it is subject. [15]

This approach to disclosure is consistent with the SEC's disclosure requirements with respect to whether audit committee members are independent. An unlisted company may not "cherry-pick" from the various standards – it must use the same "independence" standard for each of its nominating committee members and audit committee members.

Shareholder Recommendations: Existence and Description of Policies

The company must state whether it has a policy with regard to the consideration of any director candidates recommended by shareholders and, if not, it must state the reasons the board believes it is appropriate not to have such a policy. If the company does have a policy, it must disclose the "material elements of that policy" and whether the committee will consider candidates recommended by shareholders.[16]

This new disclosure requirement will present an issue of first impression for many companies. Although most listed companies already have nominating committees and charters, we understand that few nominating committees give more than passing consideration to shareholder recommendations absent special circumstances.

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[13] This approach is consistent with the SEC's disclosure requirements with respect to audit committee charters, which must be attached to the proxy statement once every three years.

[14] As noted earlier, a sample form of nominating committee charter for NYSE-listed U.S. companies is available on our website, *www.simpsonthacher.com*.

[15] For companies that are subject to the SEC's proxy rules, but not listed on an exchange, the company may use the definition of "independent" adopted by any exchange or national securities association and approved by the SEC (e.g., NYSE or Nasdaq).

[16] There is no exception for controlled companies with respect to disclosure as to whether the company will consider nominees from all shareholders. Nonetheless, the practical consequences of either adopting or rejecting such a policy is of less significance for controlled companies.

We would suggest that companies consider adopting a policy that the board will consider all bona fide nominees from shareholders, if such a policy is not already in place. While there may be good reasons that certain persons recommended by shareholders may be inappropriate for inclusion on the board of directors, the rationale for a per se rule against consideration of such nominees may be difficult to articulate. The SEC's adopting release states that the description of the policy in the company's proxy need not be detailed, but instead may be limited to a statement that the nominating committee considers shareholder-recommended nominees.

We would not expect most companies to place restrictions on their consideration of shareholder nominees, such as minimum long-term ownership positions for the nominating shareholder. Such restrictions could attract unwelcome attention from shareholder activists who could contend that restrictions on shareholder nominations are inconsistent with the purpose of the SEC's new rules. While the SEC has adopted minimum ownership and holding thresholds for shareholder nominations and proposals, these thresholds have been established in connection with shareholder entitlements to use the company's proxy materials. To be sure, a committee would be most interested in the views of shareholders who are demonstrably familiar with, and have a meaningful long-term stake in, the company. Moreover, a minimum threshold similar to that used to determine eligibility for making securityholder proposals under Exchange Act Rule 14a-8 (e.g., the $2,000 market value/one-year ownership test) could facilitate the consideration of only bona fide nominations. Nonetheless, companies may be reluctant to set a threshold in the absence of either market precedent developing for such thresholds or negative experience with shareholder nominations.

There is no requirement that these policies be set forth in the nominating committee charter, although issuers may find the charter a convenient vehicle to document these policies.

Shareholder Recommendations: Procedures

If the nominating committee considers candidates recommended by shareholders, the company must describe the procedures by which shareholders may submit recommendations. In addition, new Item 401(j) of Regulation S-K further requires disclosure in each annual and quarterly report on Forms 10-K and 10-Q, respectively, of any material changes to the procedures by which shareholders may recommend nominees to the board.

Given that the committee retains discretion to reject candidates, the procedures need not be elaborate. There is no requirement that issuers address the timeliness of a recommendation, and issuers could simply consider shareholder recommendations on the same time frame as non-shareholder recommendations.[17] The procedures could fairly provide for the committee to receive basic information concerning the nominee and the recommending shareholders. The type of information a company may wish to consider includes the following:

[17] In addressing the timeliness of a recommendation, one should note that the SEC permits companies to omit disclosure of a securityholder proposal if the resolution was not made 120 days before the anniversary of the mailing of the company's proxy statement for the prior year. Candidates recommended by shareholders in an untimely fashion for one shareholder meeting may, however, still be considered the next time a board seat needs to be filled.

- a statement from the nominee consenting (i) to be named in the proxy and proxy card if selected and (ii) to serve on the board if elected;

- whether the candidate qualifies as "independent" under the objective listing standards applicable to the company;

- the nominee's biographical data (including other boards on which the nominee serves), business experience and involvement in certain legal proceedings, including any involving the company;

- transactions and relationships between the nominee and the recommending shareholder, on the one hand, and the company or management, on the other hand;

- the nominee's company stock trading history and current ownership information;

- any material proceedings to which the nominee or its associates is a party that are adverse to the company;

- information regarding whether the recommending shareholders or nominee (or their affiliates) have any plans or proposals for the company; and

- whether the nominating shareholders and nominee seek to use the nomination to redress personal claims or grievances against the company or others or to further personal interests or special interests not shared by shareholders at large.[18]

The committee also should be entitled to request such additional information as it deems appropriate.

In designing procedures, one should seek to ensure that the procedures do not, both in perception and in reality, impede legitimate shareholder recommendations.

Minimum Qualifications

The company must disclose any specific, minimum qualifications that the nominating committee believes must be met by its director nominees. The company also must describe any specific qualities or skills that the committee believes are necessary for one or more of the company's directors to possess.

The skills and experience preferred in a particular board member likely will vary not only among companies but also among directors. We expect that companies may wish to identify the qualities or skills that the members of its board, as a whole, should possess (e.g., various and relevant career experience, relevant technical skills, diversity, industry knowledge and experience, financial expertise (including expertise that could qualify a director as a "financial expert," as that term is defined by the rules of the SEC) and local or community ties). The company should also identify the minimum qualifications and skills that each director

[18] See Exchange Act Rule 14a-8(a)(i)(4).

should possess (e.g., strength of character, mature judgment, familiarity with the company's business and industry, independence of thought, financial literacy, minimum stock ownership, age limits, the maximum number of boards upon which each director may serve and ability to work collegially with others[19]). Many of these characteristics or standards would typically be reflected in the nominating committee charter.

The SEC did not specifically require disclosure regarding whether the nominating committee considers diversity as a factor in the selection process, notwithstanding public comments encouraging making such disclosure mandatory. We, however, expect many companies to have an express policy acknowledging the benefits of a diversity of viewpoints and experience. This is also often reflected in the nominating committee charter.

Identification and Evaluation Process

The company must disclose the committee's process for identifying and evaluating nominees, including those recommended by shareholders. If there are differences in the evaluation process applicable to shareholder-recommended candidates, then the company must describe those differences.[20]

Companies should evaluate the existing practices of their nominating committees to determine what formal and informal processes exist to identify and evaluate nominees. The documentation of these procedures may highlight shortcomings or potential improvements. We would expect that the process may typically involve the following steps, among others:

- collection of a list of potential candidates from, among others, management, board members and shareholder recommendations (either in advance of the annual meeting or from time to time);
- engagement of a search firm,
- communications with board members and management, particularly the chief executive officer, to identify possible nominees;
- evaluation of potential conflicts, including financial relationships and plans or proposals to acquire control of the company;
- evaluation of whether the candidate would be a "special interest" or "single issue" director to an extent that would impair such director's ability to represent the interests of all shareholders;

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[19] While independent thought is a valuable attribute, this might be balanced against the extent to which a candidate is capable of functioning in, and fostering, a collegial board atmosphere.

[20] The rules do not specify whether, if there is no difference in the process, a statement to that effect is necessary. We expect that, if there is no difference, many companies may wish to state that the nominating committee uses the same process to evaluate candidates recommended by shareholders, management and board members, as well as those identified through search firms.

- committee meetings to narrow the list of potential candidates;
- interviews with a select group of candidates[21]; and
- selection of a candidate most likely to advance the best interests of shareholders.

Source of Nominees

For each of the director nominees selected by the nominating committee (other than incumbent directors and executive officers), the company must state the category of person(s) who recommended the nominee (e.g., a shareholder, a non-management director, the chief executive officer, another executive officer, a third-party search firm, or another, specified source).[22] The SEC notes that companies should ensure that they identify each category of persons, even if multiple sources exist (i.e., if the chief executive officer asks a shareholder to evaluate a potential candidate and the shareholder recommends such person, then both the CEO and the shareholder are sources).[23]

Third Party Evaluations

If a company pays a fee to any third party to identify or evaluate or assist in identifying or evaluating potential nominees, the company must disclose the function performed by the third party.

Rejections of Shareholder Recommendations

The company must disclose the names of certain persons recommended for board membership by a significant long-term shareholder or group and whether the nominating committee selected or rejected those persons as director candidates. This SEC does not, however, require disclosure of the reasons for rejecting a particular candidate.

The SEC permits companies to omit this disclosure regarding shareholder recommendations if:

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[21] We would expect that interviews of any type of candidate – whether recommended by shareholders or not – generally would be restricted to those individuals with a reasonable likelihood of selection by the nominating committee. There is no need for the committee to meet with every individual recommended by shareholders.

[22] For investment companies, these categories are expanded to include any employee of the investment company's investment adviser, principal underwriter, or any affiliated person of the investment adviser or principal underwriter.

[23] In particular, the SEC's adopting release indicates that companies should consider who *initially* recommended, or otherwise *brought to the attention* of the nominating committee, a candidate.

- the significant shareholder or group did not own more than 5%[24] of the company's voting common stock for at least one year when the recommendation was made[25],

- the recommendation was not made at least 120 days before the anniversary of the mailing of the company's proxy statement for the prior year[26], or

- the shareholder, group or candidate fail to provide their written consent to be identified in the proxy.[27]

This disclosure item has the potential for being disruptive to the preparation of the proxy statement and potentially awkward to the company. As a practical matter, depending on the context, a company may feel obliged to defend each decision not to select a shareholder recommendation, notwithstanding the absence of a specific requirement to disclose the reasons for a rejection. As a result, nominating committees should take great care to document the process by which they evaluate shareholder recommended candidates. The process of selecting director nominees often will become a public one, scrutinized in hindsight by shareholders. As such, the process should be closely monitored by the chairman of the nominating committee and involve, if conflicts arise or when otherwise appropriate, outside counsel.

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[24] Shareholders and groups owning more than 5% of a company's voting securities and making recommendations that trigger disclosure generally have reporting and disclosure obligations under Regulation 13D. In the adopting release, however, the SEC has stated that the making of a director recommendation, will not in and of itself escalate a Schedule 13G filer to the level of a Schedule 13D filer. In addition, the SEC has indicated that shareholders may communicate with each other, without complying with the requirements of Section 14(a), subject to certain conditions, in order to facilitate the formation of a group that holds more than 5% of a company's securities before submitting a recommendation.

[25] The percentage of securities held by a shareholder and the holding period may be calculated by the company if the shareholder is a registered holder. If the shareholder is not the registered holder, then such shareholder must submit, at the time of its recommendation, one of the following to the company as evidence of its ownership:

- a written statement from the record holder verifying the necessary information; or

- if the shareholder has filed a Schedule 13D, Schedule 13G or a Form 3, 4 or 5 reflecting ownership at or before the recommendation, a copy of the schedule of such form, as well as a written statement that the shareholder continuously held the securities for the one-year period as of the date of the recommendation.

The foregoing provisions generally mirror the mechanics for verification of shareholder eligibility under Exchange Act Rule 14a-8.

[26] This timing corresponds to the process under Exchange Act Rule 14a-8. If the date of the annual meeting has been changed by more than 30 days from the prior year's meeting, then the company must include this disclosure if its receives the shareholder recommendation a reasonable time before printing and mailing its proxy materials.

[27] The shareholder or group should provide these written consents at the time of the recommendation if they desire disclosure in the proxy statement.

SHAREHOLDER-DIRECTOR COMMUNICATIONS

Background; Prior SEC Requirements

Pursuant to the Sarbanes-Oxley Act of 2002, the SEC has adopted rules requiring each audit committee to establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters.[28] The SEC has not otherwise previously adopted any rule mandating a communications link between directors (individually or as a group) and shareholders.

New NYSE and Nasdaq Rules

The new NYSE corporate governance rules require that a listed company disclose in its annual proxy statement a method for interested parties to communicate directly with the presiding director of regularly scheduled non-management executive sessions or with the non-management directors as a group. Nasdaq does not have a similar requirement.

New SEC Rules: Enhanced Disclosure Regarding Shareholder-Director Communications

The SEC's amendments to the proxy forms require companies to describe the extent to which shareholders have the ability to communicate with directors. These new requirements are contained in new Item 7(h) of Schedule 14A and must be included in any proxy statement for a meeting at which directors will be elected. We discuss each of the specific topics below under separate headings, together with suggestions regarding potential disclosure.

Existence of a Communications Process

The company must disclose whether 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, it must state the reasons the board believes it is appropriate not to have such a process.

Means of Communication

If the company has a process for shareholders to send communications to the board, the company must describe the process for sending such communications (i) to the board generally and (ii) if applicable, to specified individual directors.[29]

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[28] See Exchange Act Rule 10A-3(b)(2).

[29] A company may disclose this information on its website instead of its proxy statement, so long as the website where such information appears is disclosed in the proxy.

Communications from an officer or director of the company to a director are not subject to these disclosure rules. Communications from employees are subject to the rules if those communications are made solely in such employee's capacity as a shareholder. Similarly, communications made pursuant to Exchange Act Rule 14a-8 are not subject to these disclosure rules.[30]

Screening Communications

If the company has a process for shareholders to send communications to the board, the company must disclose the process for determining which communications will be relayed to board members.[31] We anticipate that many companies will screen out communications that are merely solicitations for products and services, items of a personal nature not relevant to shareholders and other matters that are of a type which render them improper or irrelevant to the functioning of the board and the company.

We would suggest that a company's general counsel's office be involved in any screening process and apply the policies in consultation with appropriate members of management and the chairman of the company's audit committee, nominating/governance committee, compensation committee or other committee, as applicable. Companies may want to provide that no communication be screened out without the approval of the appropriate committee chairman, unless the communication falls within a general category (e.g., solicitation) that has been identified by the board of directors as improper or irrelevant.

Director Attendance

The company must disclose its policy, if any, with regard to board members' attendance at annual meetings. The company also must disclose the number of board members who attended the prior year's meeting.[32]

EFFECTIVE DATE; APPLICABILITY

The SEC's new proxy disclosure rules apply to all proxy and information statements first mailed to shareholders on or after January 1, 2004. The annual and quarterly report disclosure

[30] As a result, no disclosure is necessary regarding the procedures for making, screening and evaluating these types of communications.

[31] A company may disclose this information on its website instead of its proxy statement, so long as the website where such information appears is disclosed in the proxy. Furthermore, a company's process for "collecting and organizing" communications need not be disclosed in any format, so long as a such process is approved by a majority of the company's independent directors (or, in the case of an investment company, a majority of its directors who are not "interested persons" under Section 2(a)(19) of the Investment Company Act of 1940).

[32] A company may disclose this information on its website instead of its proxy statement, so long as the website where such information appears is disclosed in the proxy.

regarding material changes applies to all annual and quarterly reports for fiscal periods ending after January 1, 2004.

These rules apply to all companies that are subject to the SEC's proxy rules, including small business issuers. Foreign private issuers, foreign governments, issuers of only American Depositary Receipts and companies with only non-voting securities outstanding are not subject to the proxy rules.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

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