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**Disclosure of Nominating Committee Functions and
Communications between Security Holders and Boards of Directors**

The Securities and Exchange Commission recently adopted new rules that expand existing disclosure requirements of the operations of board nominating committees and that add a new disclosure requirement concerning the process by which security holders are able to communicate with a company's board of directors. These rules do not require substantive changes by a company with respect to its nomination or security holder communication processes; rather the new disclosure requirements are designed to enhance the transparency of the operations of boards of directors.

Enhanced Nominating Committee Disclosure

The current proxy rules require a public company to state whether it has a nominating committee of the board of directors and, if so, to identify its members, state the number of committee meetings held during the last fiscal year, and briefly describe the functions performed by the committee. The company must state whether the committee considers nominees recommended by security holders, and, if so, the proxy statement must describe how security holders may submit nominee recommendations.

The new rules are designed to increase the transparency of that process by requiring the following additional disclosure in a company's proxy materials with respect to the election of directors:

Nominating Committees. If the company does not have a nominating committee, the company would be required to provide a statement setting forth the reason why the board of directors believes this is appropriate, and identify the directors who consider director nominees.¹

Committee Charter. A statement whether the nominating committee has a charter and if so, whether a current copy of the charter is available on the company's website. If the

¹ The NYSE listing standards include a requirement that listed companies have a nominating committee composed solely of independent directors. The NASDAQ marketplace rules provide that the nomination of directors may, alternatively, be determined by a majority of the independent directors.

charter is not available on the company's website, the charter must be included as an appendix to the company's proxy statement at least once every three fiscal years.

Independence. If the company is listed on a national stock exchange or NASDAQ, it would be required to disclose whether the members of the nominating committee are independent, as defined under the applicable listing standards during the preceding fiscal year.²

Security Holder Recommendations. A statement whether the nominating committee has a policy regarding consideration of nominees recommended by security holders and a description of the material terms of such policy, including a statement whether the committee will consider such nominees and procedures for security holders to follow to submit recommended nominees to the committee.

Nominee Qualifications. A description of any specific, minimum qualifications for nominees recommended by the nominating committee, and 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.

Identification/Evaluation of Nominees. A description of the nominating committee's process for identifying and evaluating nominees for director, including any differences in how the committee evaluates security holder nominees as opposed to the committee's own nominees.

Source of Nominees. 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 the nominees included on the company's proxy card: security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other, specified source.

Search Firms. Disclosure of the functions performed by executive search firms, or any third parties who receive a fee for identifying or evaluating nominees.

Nominees Recommended by Large, Long-Term Security Holders. If a candidate is recommended by a security holder, or group of security holders owning more than 5% of the company's voting common stock for at least one year as of the date of any recommendation, disclosure of the candidate and the security holder or security holder group that recommended the candidate and disclosure as to whether the nominating committee chose to nominate the candidate. No such disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

² If the company is not listed on an exchange or NASDAQ, it would be required to disclose whether the nominating committee members are "independent" as defined by any of the exchanges or NASDAQ and identify which definition was used.

Related Disclosure in Quarterly and Annual Reports

The SEC 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. As such, the SEC has adopted new disclosure standards that will require companies to report any material changes to the procedures for security holder nominations in the Form 10-Q/10-QSB or 10-K/10-KSB filed for the period in which the material change occurs.

New Disclosure Regarding Security Holder Communications with the Board of Directors

The new disclosure standards with regard to security holder communications with board members are designed to improve the transparency of board operations, as well as security holder understanding of the companies in which they invest. The new rules require a company to disclose the following information in its proxy statement:

Security Holder Communications. Whether the board of directors has a process by which security holders may send communications to it, and if not, why not. If there is such a process, (i) a description of the manner in which security holders can send communications to the board and, if applicable, to specified individual directors, and (ii) if the communications are not sent directly to the board of directors, then describe the process by which the company determines which communications will be relayed to the board.³

Attendance at Annual Meeting. 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.

In lieu of describing in the proxy statement the manner in which security holders may communicate with board members, a company may use its website to disclose the manner in which it determines those communications that will be forwarded to board members, the company's policy regarding director attendance at annual meetings, and the number of directors who attended the prior year's annual meeting, provided that the company discloses in its proxy statement the website address where such information may be found.

Effective and Compliance Dates

The new rules become effective January 1, 2004. Companies must comply with the disclosure requirements in proxy and information statements that are first sent or given to security holders on or after January 1, 2004 and in Forms 10-Q/10-QSB and 10-K/10-KSB for the first reporting period ending after January 1, 2004.

³ The SEC has indicated 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.

Proposed Director Nomination and Election Rules

Companies also should be aware that the SEC has a separate set of proposed rules that would, under certain circumstances, require shareholder nominees for the board of directors to be included in a company's proxy statement and on a company's proxy card. Comments on these proposed rules are due on December 22, 2003. Given the controversy associated with this SEC proposal as well as the extensive questions posed for comment by the SEC, it may be some time before these rules are adopted (if they are adopted) and it is possible that there will be significant changes prior to final adoption. We will issue a comprehensive summary of these rules when they are finalized. The full text of the SEC proposal is available on the SEC's web site at <http://www.sec.gov/rules/proposed/34-48626.htm>

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This information is intended for general information purposes only and should not be considered legal advice or opinion on any specific facts or circumstances. You are urged to contact a professional advisor concerning any specific question you may have relating to your own situation.

If you have any questions or require further information regarding these or other matters, feel free to contact one of the attorneys in our Securities practice group listed below:

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