August 1, 2002

Mr. Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: **<u>Petition for Rulemaking</u>**

Dear Mr. Katz:

The Committee of Concerned Shareholders ("Committee") and James McRitchie (collectively "Petitioners") hereby jointly petition the Securities and Exchange Commission ("SEC"), under Rule 192, to modify provisions of SEC Rule 14a-8(i), as attached. Rule 14a-8 sets forth provisions for shareholder proposals to be included in proxy statements and associated ballots of corporations ("Shareholder Proposals") and the procedures to implement the given rights. The proposed modifications would, in effect, permit investors ("Shareholders") to use Shareholder Proposals for the purpose of electing Directors.

BACKGROUND

<u>Impediments to Improving Corporate Governance</u>

With ENRON, Global Crossing, WorldCom and similar issues permeating the news, many are seeking ways to improve corporate governance. Solutions, which seek better disclosure and stiffer penalties, miss the big picture. Tweaking rules and regulations at the margins will only minimally improve the quality of corporate governance. Those who ask corporate management ("Management") and/or Directors to voluntarily abandon concepts of greed and conflicts of interest miss the core issue. There is a much more effective approach whereby Shareholders can play a major role in curing corporate governance problems. Just as former President Richard M. Nixon, the anti-Communist crusader was uniquely qualified to take bold initiatives in China, George W. Bush, our first MBA president, is uniquely qualified to initiate a reform which goes to the heart of corporate governance.

What Happened To Democracy?

Nobody decided one day to remove the element of democracy from corporations. Adolf A. Berle and Gardiner C. Means pointed out in their classic 1932 book, The Modern Corporation and Private Property, simply that it had already occurred. Much has been written about this phenomenon over the past seven decades but there has been virtually no change in law or practice to reflect a shift in control from Shareholders to Management. While the corporation laws of every state, solemnly recite that the Shareholders elect the Directors, each year Shareholders of American corporations are asked to participate in an exercise which bears little resemblance to the word “election” as commonly used in any democratic country.

Shareholders generally have no real choice in the election of Directors. Even if an overwhelming majority of Shareholders oppose a Director-nominee, that person will serve as Director so long as he or she gets one vote, unless an expensive proxy contest is undertaken. The real election for Directors occurs within the boardroom, with Shareholders relegated to a rubber-stamp process of affirmation.

When intelligent, honest professionals repeatedly use a legal term in a manner contrary to its commonly accepted usage, we are entitled to ask why. When the corporation laws of 50 states indicate that Shareholders “elect” Directors; that Shareholders “vote” for their choice of “nominees”; that proxies are solicited for the “election” of Directors, we are given an impression contrary to actual practice.

The “independent” Board of Directors (“Board”) is supposed (and assumed) to hold power granted to it by the owner Shareholders. Its actual power in fact derives from the Chief Executive Officer (“CEO”) – which tends to dilute its legitimacy. It is well known that the vast majority of Board vacancies have been filled via recommendations from the Chairman of the Board (“Chairman”). Further, given that in the vast majority of companies the Chairman is also the CEO, it is clear the CEO plays a dominant role in the selection of Directors. The fact that we speak of Directors as "representing" or being "elected" by Shareholders when Shareholders play no role in their nomination is evidence of the challenges we face in corporate accountability.

Since it is the duty of a Director to supervise Management, there is little likelihood that Management will select a candidate who is inclined to ask "tough questions." A Director who does not cooperate with Management will, in all likelihood, not be asked to serve an additional term. However, while dependent on Management and/or fellow Directors for his/her longevity, a Director still has a fiduciary duty to the Shareholders to monitor Management's actions.

Until Directors can be held personally accountable, e.g., removed from office by irate Shareholders, they will not be responsive to the desires of Shareholders. However, it is almost impossible for Shareholders to replace Directors who they deem to be incompetent and/or corrupt.

Other potential means to achieve accountability of Directors are ineffective. The threat of potential litigation, through class-action lawsuits and/or derivative actions brought by Shareholders, is highly overrated as a deterrent to corporate malfeasance and waste corporate assets. Corporations themselves and/or the SEC generally reveal corporate improper acts before civil litigation is commenced. Shareholder lawsuits rarely result in the perpetrators, themselves, paying damages. If damages are recovered, it is paid out of insurance policies and out of corporate assets. Shareholders end up paying themselves from corporate assets after plaintiffs' attorneys recover substantial sums. Such does not even consider exorbitant legal fees generated by defense attorneys before an inevitable settlement is reached.

The Petitioners know, from personal experience, that, under present SEC Rules, it is practically impossible for a candidate NOT selected by Management and/or incumbent Directors (an outside candidate) to mount an effective proxy contest to replace Directors.

1991 Nomination of Robert A. G. Monks to the Board of Directors of Sears

In 1991 business leaders surveyed by Fortune magazine rated Sears at 487th out of 500 companies for the reputation of its Management. Dale Hanson, then chief of the California Public Employees Retirement System

(CalPERS) a large Sears shareholder said, "from 1984 on, Sears went to hell in a handbag."

In May of 1991, Robert A. G. Monks ("Monks") indicated he would engage in a proxy contest for one seat on the Board of a public company, something no one had ever done before at any company; his target was Sears. Sears hired renowned takeover lawyer Marty Lipton, brought a lawsuit to stop Monks and budgeted $5.5 million dollars over and above Sears' usual solicitation expenses, just to defeat him (as *Crain's Chicago Business* pointed out, one out of every seven dollars made by the retail operation during the previous year). Sears also assigned 30 of its employees to spend their time working to defeat his candidacy.

With cumulative voting and five Directors up for election, Monks could have won a seat; he needed only 16 percent of the vote. But Sears shrunk its board by eliminating three Director seats, which meant that he needed 21 percent of the vote to win a seat. That was virtually impossible since 25 percent of the vote was held by Sears employees (and voted by Sears trustees) and much of the rest was held by individuals, who were impossible to solicit without spending millions of dollars.

The myth is that the Management reports to the Board. The reality is that the Board reports to the CEO, at least that was the case at Sears. When the CEO (who is also Chairman and head of the Board's nominating committee) tells three Directors they are off, they are off, especially, as in this case, when they were inside directors, full-time employees of the corporation.

<u>Committee of Concerned Luby's Shareholders</u>

The Committee of Concerned Luby's Shareholders, predecessor to the Committee, consisting of shareholders of Luby's, Inc. ("Luby's"), who met on an Internet Yahoo! Finance Message Board, were the first <u>and</u> <u>only</u> grass-roots Shareholders to conduct a formal proxy contest under present SEC Rules. Luby's, headquartered in San Antonio, Texas, is a 200-unit cafeteria chain with annual sales of approximately $400 million. The Committee's efforts revealed the true difficulties which current SEC Rules cause to private investors seeking to implement corporate change by replacing Directors.

The Committee's Director-nominees (Les Greenberg [a semi-retired attorney and private investor in Culver City, CA], Thomas C. Palmer [an investment advisor in Tyler, Texas] and Elisse Jones Freeman [daughter of one of the founders of Luby's]) received 24% of the votes cast and two of the Shareholder Proposals which it supported (i.e., removal of all anti-takeover defenses, annual election of all Directors) received approximately 60% of votes cast. The relevant Annual Meeting of Shareholders was held in January 2001. Luby's has neither implemented those Shareholder Proposals nor explained why it has refused to do so.

Near Insurmountable Hurdles to Shareholders Who Wish to Elect Directors

In essence, most hurdles to engaging in an effective proxy solicitation effort occur because the name of Shareholders' Director-nominees will NOT appear on a corporation's ballot. Under applicable state corporate law, Shareholders can easily nominate a candidate for a corporate Directorship, but, under present SEC Rules, only the names of those persons nominated by the corporation need appear on the corporation's ballot. The assets of all Shareholders are expended by Management to distribute those ballots.

To overcome the hurdles, a Shareholder can expect to expend about $250,000 to purchase the expertise to accomplish the task or needs to develop that expertise. Normally, Shareholders must:

- locate other potential Director nominees and conduct related due diligence;
- draft a charter for a committee;
- decide how to finance/allocate the out-of-pocket expenses, e.g., legal document drafting, printing and distribution costs;
- obtain a copy of the corporation's Bylaw and Articles of Incorporation;
- learn details of state corporate law, federal securities laws and various SEC Rules;
- learn how to use the SEC's EDGAR electronic filing system (as there is no paper filing);
- deal with the corporation and its transfer agent which stall and request thousands of dollars for a copy of the Shareholders list which costs them little to produce;

- be willing to file a legal action in Delaware or other state courts to get the Shareholders list;
- be prepared to expend funds and effort in defense of a frivolous legal action by the corporation used to exhaust funds and energies;
- deal with the SEC's responses to draft filings;
- make sure that the appropriate parties are notified that the election is "contested";
- verify that proxy statements have actually been mailed to "beneficial holders" of the stock and that votes have been counted properly;
- locate and attempt to communicate with the Proxy Voter at large Institutional Investors;
- learn the rules to be employed at the Annual Meeting without the cooperation of the corporation.

The SEC is well aware of the aforesaid hurdles. The Division of Corporation Finance, responded to recent correspondence from Les Greenberg by stating, "[W]e remain sensitive to the importance of this issue to shareholders, particularly in view of the difficulty minority shareholders may have in seeking the election of their nominees to the board of directors." Yet, the SEC has done little to demonstrate any such sensitivity.

Public Investor Reaction to Learning of Difficulties of Shareholder Selection/Election of Directors

Through Internet message boards and other means, the Committee has discussed hurdles of nominating/electing truly "independent" Directors --- those not beholden to Management or fellow Directors for their selection, nomination and/or the financing of their proxy solicitation efforts. Most public investors were shocked to learn how Directors are selected/elected. The general investing public does not think about such issues. However, when awakened to the issue, investor confidence in corporate governance tends to decline. Many written responses have been received.

The following, from an investor in Germany, is a sample response. "When I have started to invest in the USA about 3 years ago I was sure that elections of directors are fair. ... So when I have discovered that elections of directors of USA public companies are not democratic I was very surprised and disappointed. ... This is EXACTLY how voting in communist countries worked. Everyone could vote, but there was just NO CHOICE of candidates. The point was not how to be elected, but how to get on the election list. With this system no changes were possible, so there was no motivation to improve the governance." (Emphasis in original.)

CONCLUSION

The Wall Street Journal (7/16/02), in an article entitled, "Wall Street Rushes Toward Washington, Flees Responsibility," stated, "Ms. Teslik [Council of Institutional Investors] cites how difficult it is for shareholders to elect a director other than those hand-picked by management --- even though the directors, in theory, represent the shareholders. 'Our system allows executives to pick the boards who are supposed to police them,' she says."

The Los Angeles Times (7/22/02), in a series entitled, "Crisis In Corporate America," stated, "'The biggest obstacle to a good board is arrogance,' Raber [Roger Raber, president of the National Assn. of Corporate Directors] said. 'With some directors, there is a sense of entitlement. ... "I'm here as long as I want to be."'"

TIME Magazine (7/22/02), in an article entitled, "More Reform and Less Hot Air," stated, "Get Rid of Pet-Rock Boards ... [T]oo many corporate boards of directors still serve as little more than puppets of management. ... Companies should be required to give shareholders election materials about rival candidates; as it stands, small investors who want to wage upstart campaigns don't stand a chance."

The New York Times (7/30/02), in an article entitled, "Labor to Press for Changes in Corporate Governance," stated, "He [John J. Sweeney, President of the A.F.L.-C.I.O.] will also call for changes to give pension funds more power to choose directors who do not rubber-stamp the decisions of company executives."

TIME Magazine (8/5/02), in an article entitled, "Interview - 10 Questions for Ralph Nader," states, "Congress passed a corporate accountability act last week. Was that enough? ... The election of corporate board members is a Kremlin type of election. It's a self-perpetuating system, with shareholders having no real power. That has not been touched."

Entrenched Managers and Directors will only improve corporate governance when they can be held personally accountable, e.g. voted out of office and replaced by candidates nominated by Shareholders.

We urge the SEC to consider taking the steps proposed herein as soon as possible.

Please communicate with us in the event that further information is desired.

Respectfully submitted,

Committee of Concerned
Shareholders

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Attachment

Petition by Greenberg and McRitchie
August 1, 2002

DESCRIPTION OF PROPOSED AMENDMENTS

Rule 14a-8 provides an opportunity for a Shareholder owning a relatively small amount of a Company's securities to have his/her proposal placed alongside Management's proposals in the Company's proxy materials for presentation to a vote at an annual or special meeting of Shareholders. It has become increasingly popular because it provides an avenue for communication between Shareholders and Companies, as well as among Shareholders themselves. Rule 14a-8 generally requires the Company to include the proposal unless the Shareholder has not complied with Rule14a-8's procedural requirements or the proposal falls within one of 13 bases for exclusion. Rule 14a-(8)(i)(8) excludes proposals, which relate to an election for membership on the Company's Board of Directors or analogous governing body. The Committee petitions that that exclusion be replaced with certain content requirements and amendments to potentially contradicting sections when proposals relate to an election for membership on the Company's Board of Directors or analogous governing body.

The intended effect of the suggested modifications is that the solicitation of proxies for ALL nominees for Director positions, who meet the other legal requirements, be required to be included in the Company's proxy materials.

Rule 14a-(8)(i) should be modified as follows:

8. Relates to election: If the proposal relates to an election for membership on the company's board of directors or analogous governing body~~;~~ provided, however, the aforesaid exclusion shall not apply if each of the following conditions are met:

- (A) The letter of nomination:
  - (1) complies with the relevant state law and the company's bylaws requirements
  - (2) contains a statement, signed by the nominee, that the nominee will serve as a Director, if elected;
- (B) The proposal includes:
  - (1) name of the nominee;
  - (2) age of the nominee;
  - (3) business address of the nominee;
  - (4) nominee's securities holding in the company;
  - (5) nominee's transactions within the past two (2) years in the securities of the company;
  - (6) the past five (5) year's work experience of the nominee;
  - (7) whether the nominee is party to a slate of candidates, and, if so, the name(s) of the other members of the slate; and,
  - (8) whether the nominee has any agreement with other nominees, if any, his/her nominator and/or with the company;

(C) The proposal may be excluded if, during the past ten (10) years, the nominee has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and failed to set forth details of the matter in the proposal.

Additionally, Rule 14a-8(i) should be added as follows:

8.1 If my proposal for nomination of a Director-candidate is not excluded under 8 and the beneficial owner of stock does not instruct the proxy holder on the ballot as to which Director-candidate(s) to vote for, will the proxy holder be permitted to vote those shares in favor of any non-designated Director-candidate? No.

Additionally, Rule 14a-8(i) should be added as follows:

8.2 If my proposal for nomination of a Director-candidate is not excluded under 8 and the beneficial owner of stock does not instruct his/her stock brokerage firm or similar fiduciary in whose account the stock is held as to how to vote for Director-candidates, will the stock brokerage firm or similar fiduciary be permitted to vote those shares in favor of any non-designated Director-candidate? No.

Additionally, Rule 14a-8(i) should be amended as follows:

9. Conflicts with company's proposal: If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting, except those related to the nomination for election for membership on the company's board of directors or analogous governing body.