

May 5, 2003

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

Re: S7-10-03 ("Possible Changes to Proxy Rules")

Dear Mr. Katz:

As Chairman of the Committee of Concerned Shareholders ("Committee"), I write this letter in support of changes to existing proxy rules with a goal toward true Shareholder democracy. (I am a private investor and semi-retired business litigation attorney.) In particular, the Committee advocates a change to Securities and Exchange Commission ("SEC") Rule 14-a(8)(i)(8) whereby the Shareholders Proposal procedure may be used to solicit proxies for ALL Director-candidates and a Company is required to include the names of those Director-candidates in its proxy materials. We anticipate that others will comment upon many related issues, e.g., whether incumbent Directors should have substantially unrestricted access to corporate funds (Shareholders' assets) to oppose outsider Director-candidates, and, thus, we do not comment on those issues at this time.

This letter is divided into six parts: "I. The Problem," "II. Committee Background," "III. Proposed Solution," "IV. Lack of Merit of Other 'Equal Access' Plans," "V. Request for Website Postings of All Written Comments" and "VI. Conclusion."

#### I. The Problem

We have entered into an age of widespread investor skepticism over nearly all aspects of corporate governance. Scandals are sapping investor confidence and sinking stock markets. Financial shenanigans at Enron, WorldCom, Global Crossing, Tyco, Adelphia, HealthSouth, Lucent, Xerox, Qwest, Ahold NV, Peregrine and other public companies permeate the news media. Many are seeking ways to improve corporate governance and, in particular, Director accountability to Shareholders. Solutions involving 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 Management and/or Directors to voluntarily abandon acts of greed and conflicts of interests miss the core issue. The last time someone voluntarily relinquished real power was in 1797 --  
- George Washington resigned from office.

The core problem with corporate governance is the lack of an effective procedure by which Directors can be held personally accountable for their actions, e.g., voted out of office and replaced by candidates nominated by Shareholders. Shareholders (the true owners of Corporate America) should have a fair and impartial opportunity to nominate truly independent Director-candidates and cause the names of those candidates to appear on the Company's ballot. The reality; however, is otherwise. "What would you call an election in which voters are presented with only one slate of candidates and informed that votes against that slate will not matter?" (NY Times, 4/4/03, "Will S.E.C. Allow Shareholder Democracy?") Until Shareholders can seek personal accountability through an economically feasible procedure, Management and Directors will continue to conduct "business as usual."

The present system to select/nominate corporate Directors is rife with conflicts of interest. It causes Directors to be beholden to Management and other Directors who brought them on board and control how long they stay. It encourages a search for consensual candidates who will not rock the boat. A Director clique has developed. Even legendary investor Warren E. Buffett was not immune to the collegiality. He recently wrote to the Shareholders of Berkshire Hathaway Inc. on the subject of Director passivity. "Warren Buffett ... confessed ... after sitting on 19 boards in the past 40 years: 'Too often I was silent when management made proposals that I judged to be counter to the interests of shareholders.' In those cases, 'collegiality trumped independence,' Buffett said. A certain social atmosphere presides in boardrooms where it becomes impolitic to challenge the chief executive, he wrote." (CBS MarketWatch, 3/8/03, "Buffett chides corporate boards") Was he admitting to passivity or breaches of his fiduciary duty to Shareholders? Mr. Buffett is reputed to be the best of the best! Shareholders have no reason to expect better representation from any other Director.

It is practically impossible for a Director-candidate, not selected by Management or members of the Board of Directors, to conduct an effective proxy fight to replace incompetent and/or corrupt Directors. Those who might say other wise simply do not have personal knowledge of what they speak. (See, Committee Background, below.)

Shareholders cannot rely upon Institutional Investors to be watchdogs of their financial interests. Recently, Ranger Governance, in substance, accepted \$10 million from Computer Associates and then folded its corporate governance based proxy fight. Further, substantially all Institutional Investors are not pro-active. Some bring non-binding Shareholder Proposals, but, in reality, accomplish

very little. Some will try to send the proverbial “message” by threatening to or withholding votes. However, their “message” of impotence comes through loud and clear. Substantially all Institutional Investors, due to perceived legal exposure or trading restrictions, have not nominated Director-candidates and, whatever proxy rule change occurs, probably will never do so.

Shareholders should be allowed to use the Shareholder Proposal procedure to nominate Director-candidates and, thus, to function as their own watchdogs.

## II. Committee Background

The Committee of Concerned Shareholders ("Committee"), also known as the Committee of Concerned Luby's Shareholders, consisting of shareholders of Luby's, Inc. ("Luby's") who met on a Yahoo! Finance Message Board in 2000, is the first grass-roots shareholder group to conduct a formal proxy fight. Luby's, headquartered in San Antonio, Texas, was then a near 230-unit cafeteria chain with annual sales of approximately \$500 million. Its shares are listed for trading on the New York Stock Exchange. The Committee and/or its activities have been mentioned in numerous publications.

The Committee's Director-nominees received 24% of the votes cast and two (2) of the Shareholder Proposals that it supported (i.e., removal of all anti-takeover defenses, annual election of all Directors) received approximately 60% of the votes cast. Luby's has neither acted upon those proposals nor explained why it has failed and, thus, refused to do so.

Some have said that the Committee's efforts with Luby's caused the departure of its former Chief Executive Officer and President, the nomination of a Director-candidate with hands-on restaurant experience, the entry of a restaurant experienced white-knight/investor and the relinquishment of position by the former Chairman of the Board.

The Committee's efforts revealed the substantial difficulties that individual Shareholders would face in an attempt to hold Directors accountable. Few, if any, other Shareholders have had this experience and can inform you of the hurdles that face individual Shareholders who seek to be watchdogs of their public investments.

The web site of the Committee is located at:  
<http://www.concernedshareholders.com>. It is ranked # 1 in results with numerous Internet search engines, e.g. “Google,” when using the search phrase “concerned shareholders.” It has received over 116,000 “hits”

since it was initiated in mid-July 2002.

### III. Proposed Solution

On August 2, 2002, the Committee and James McRitchie, Editor of CorpGov.Net, jointly filed Petition for Rulemaking (SEC File No. 4-461) ("Petition") with the SEC. In essence, the Petition asks that ALL Shareholders be permitted to nominate Director-candidates through the Shareholder Proposal procedure and that the names of those persons be placed on the corporate ballot.

The content of the Petition is incorporated herein by reference. Pursuant to the provisions of SEC Rule 192, the Petition has been referred "to the appropriate division or office for consideration and recommendation." Numerous letters of support for the Petition have been posted on the SEC's website. The content of those letters is incorporated by reference.

### IV. Lack of Merit of Other "Equal Access" Plans

Recently, the news media have been replete with sketches of other plans purportedly seeking "equal access" to the corporate ballot. None has been filed as a Petition for Rulemaking with the SEC.

The supposed purpose of Shareholder Proposals is to afford a more level playing field to those owning relative small amounts of a Company's securities. As reported, proponents of those vague proposals intend to argue for "equal access" to the Company ballot, via the Shareholder Proposal process, for those holding 3% or 5% or 10% of a Company's outstanding stock. Those proposals should more properly be deemed requests for "UNequal equal access." It is purely arbitrary to allow such access to the ballot only to those holding 3% or 5% or 10% of a Company's shares. As set forth hereinafter, those proposals are without merit and are fundamentally flawed in that they require such an elevated Director-candidate nominator ownership requirement that, in effect, they surreptitiously advocate the status quo.

1. The idea behind the "equal access" concept is to encourage more persons to step forward to become Director-candidates. Persons or groups that own 3% or 5% or 10% of a Company's shares ALREADY have the knowledge and financial means to conduct a full proxy contest without the need for any SEC Rule change. Historically, very few, if any, of those persons or entities have shown any inclination to hold Directors accountable by fielding their own Director-candidates. There is a big difference between having knowledge and financial ability and having the will to exercise them. There is absolutely no assurance a 3% or 5%

or 10% nominator ownership requirement will have any positive impact on the current situation.

2. Plans with 3% or 5% or 10% nominator requirements forget that there are 9,000+ Companies with shares, which are publicly traded. Where is the commitment from such potential nominators that they have the interest and personnel and will expend the necessary finances, time and effort to seek Director accountability on behalf of the Shareholders of those Companies?

3. Opponents to change might argue that "equal access" to the Company ballot "might be abused by dissidents to mount a no-premium corporate takeover disguised as a boardroom coup." (Staff Report to Trustees of CalPERS.) One should not assume that Shareholders have little or no intelligence. The Director-candidates can set forth their respective positions and the Shareholders can vote. If the "dissidents" prevail, it would be because the majority of Shareholders desired that result.

4. The numbers 3% or 5% or 10% are arbitrary when the Shareholder Proposal criteria (continuously owned at least \$2,000 of the Company's stock for at least one year) have already been tested for many years and have proved to be effective.

A 3% or 5% or 10% shareholder ownership requirement may have been the result of a misplaced fear that hordes of "riffraff," "know-nothings," "crackpots" and/or "nobodies" would storm Companies' gates to seek Directorships. Such predictions of doom and gloom are not supportable. Even "riffraff," "know-nothings," "crackpots" and/or "nobodies" are aware of and would not cavalierly subject themselves to the legal exposure of serving as Directors. Further, there are many safeguards in SEC Rule 14a-8 to assure that Companies would not be harassed with frivolous Director candidacies.

Also, a 3% or 5% or 10% shareholder ownership requirement may have been based upon a misplaced political attempt to reduce anticipated protests from "Corporate America." Let "Corporate America" protest! After the wave of recent financial shenanigans, a protest against the rights of individual Shareholders by "Corporate America" would be absurd and met with public scorn.

5. 3% or 5% or 10% nominator requirements would be complex to implement. It would necessitate a substantial revision of current SEC Rules. It would not simplify the current process. Further, forming groups and holding them together for an extended period will prove to be a very onerous task.

6. There is no suggestion that members of a Company's Nominating Committee, also, need meet the 3% or 5% or 10% nominator criteria. Those persons can and often do make nominations without owning one share of a Company's stock.

7. Pursuant to general corporate law, ALL Shareholders of record have the right to nominate Director-candidates. (However, pursuant to current SEC Rules, the names of those Director-candidates need not appear on a Company's ballot.) ALL Shareholders should be able to vote on all Director-candidates, even those nominated by Shareholders with relatively small share holdings. Other plans try to impose paternalism by the wealthy. The real issue is whether a Director-candidate, if elected, is qualified to serve the collective best interests of ALL Shareholders. It is not an issue of his/her wealth or the wealth of the person(s) who nominated him/her. (Even if such were an issue, Shareholders should determine its importance.)

8. Some argue that there would be substantial monetary costs by allowing many to have access to the corporate ballot. However, the cost of continuing to deny such access, i.e., lack of Director accountability, would be substantially more.

#### V. Request for Website Postings of All Written Comments

The Committee anticipates that both those who oppose Shareholder democracy and others, e.g., AFL-CIO, AFSCME, CalPERS, CII, who have issued media reports to tout their vague unequal "equal access" concepts, but have failed to file Petitions for Rulemaking, will belatedly file non-electronic and, effectively, non-public comments to S7-10-03.

If the SEC desires to be fair and to provide full disclosure of its process to obtain comments, it is respectfully suggested that it post a copy of non-electronically received comments on its website. Website postings would provide greater assurance of the fairness in these proceedings to concerned shareholders, who are not able to travel to the SEC's Public Reference Room in Washington, D.C.

#### VI. Conclusion

Emails to the SEC, commenting upon the Petition, or to our website have well summarized the current situation. One stated, "Please consider the proposal by Committee of Concerned Shareholders as the best method of turning this situation around --- if we don't have a voice we won't invest anymore." Another stated, "Investor confidence is severely shaken. As the public becomes aware of how little control is allotted

to the actual owners of corporations, the confidence will certainly erode even further.”

Finally, a private investor in Germany wrote, "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.)

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

Very truly yours,

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