

## COMMITTEE OF CONCERNED SHAREHOLDERS

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VIA EMAIL

May 22, 2003

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549-0609

Re: File No. S7-10-03 (“Possible Changes to Proxy Rules”)  
Letter of Comment of AFL-CIO dated May 15, 2003

Dear Mr. Katz:

On August 1, 2002, the Committee of Concerned Shareholders (“Committee”) and James McRitchie, Editor of CorpGov.Net, jointly filed Petition for Rulemaking (SEC File No. 4-461)(“Petition”) with the Securities and Exchange Commission (“SEC”). The Petition seeks “equal access” to the corporate ballot for ALL Shareholders by using the Shareholder Proposal procedure. It has received comments of support from numerous individual Shareholders and some Institutional Investors.

On or about May 15, 2003, the American Federation of Labor and Congress of Industrial Organizations (the “AFL-CIO”) filed its letter of comment with respect to S7-10-03. This letter is written to comment upon the statements in that letter and supplement our prior comments to S7-10-03.

We concur with the AFL-CIO’s statements, “Shareholders need a way to hold boards of directors accountable, both for their actions and their failure to act.” and “We urge the Commission to use this opportunity to adopt comprehensive new rules that will give shareholders equal access to the proxy for their director nominees.” However, as someone once said, “The devil is in the details.”

The AFL-CIO states, in substance, that public confidence in the securities markets can be restored only by trusting Institutional Investors to be watchdogs of corporate Directors. The Committee feels that public confidence in the securities markets will only be restored when individual Shareholders, using the Shareholder Proposal procedure, can act as their

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own watchdogs to seek Director accountability at the 9,000+ corporations that have publicly traded securities.

#### I. A 3% Or More Nominator Threshold Is Unrealistically High

The AFL-CIO recommends a “Minimum Ownership Threshold: Nominating shareholder group should own a substantial block of shares (e.g. 3% minimum).” The number is purely arbitrary. The AFL-CIO has not set forth any information as to whether: (a) it has had any prior experience in organizing or maintaining investor groups for the purpose of nominating Director-candidates; (b) any such group has ever been formed; or, (c) whether there is a realistic probability that such groups could be formed. The issue of feasibility was ignored.

The Committee has had experience in forming and attempting to maintain an investor group for the purpose of nominating Director-candidates. We found that, even if such a group could be formed, it is very difficult to maintain when the targeted corporation causes desertions by partially satisfying the particular interest(s) of some members.

The recent example involving ten (10) major pension funds demonstrates the difficulty of forming an investor group to attain a 3% stock ownership threshold. They formed an investor group to sign a letter dealing with one policy issue, a much simpler task than forming a group to nominate Director-candidates.

A group of major pension funds Monday called on Unocal to reconsider its role ... in Myanmar... The group, led by New York State Comptroller Alan G. Hevesi and joined by California’s treasurer and the state’s two largest pension funds... In all, representatives from 10 investment funds owning more than 4.5 million Unocal shares, or 1.6% of the stock, signed the letter and requested a meeting on the matter.... The 10 funds include the California Public Employees’ Retirement System and the California State Teachers’ Retirement System. (5/20/03, Los Angeles Times, “Shareholders Press Unocal on Myanmar”)

If a major investor group with ten (10) members, formed to pursue an issue that is much less complex than Director-candidate nominations, can, at best, muster 1.6% of the stock, it is unlikely that many investor groups could be formed with at least 3% stock ownership to pursue the complex issue of Director-candidate nominations.

The AFL-CIO has previously conceded that Mutual Funds, one of the most powerful forces in deciding who sits on corporate boards, would be unlikely to participate in such

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efforts. On December 12, 2002, John J. Sweeny, President of the AFL-CIO, condemned Mutual Fund proxy voting practices by stating:

[A]nother conflict of interest in our financial markets—the conflict that encourages mutual fund companies to use our money to be ‘yes-men’ for corporate management in proxy votes. Using our money, mutual funds have bought up more than one-fifth of U.S. corporate stocks. Their sheer size makes mutual funds one of the most powerful forces in deciding who sits on corporate boards.... [W]e suspect that mutual funds vote with management at the expense of our jobs and savings to win profitable deals on retirement accounts and selling other services. ... Take Fidelity Investments, for example, the world's largest mutual fund company and one of the most influential investors in the global capital markets. Fidelity earned \$2 million in 401(k) management fees in 1999 from Tyco. ... [W]ill Fidelity or any other mutual fund company, ever vote against management and risk a contract worth millions? (Emphasis added.)

In the 2003 AFL-CIO Proxy Voting Guidelines, Mr. Sweeney stated, “[C]onflicted mutual fund companies use their tremendous proxy voting power as rubberstamps for corporate management rather than to promote their investors’ best interests.” In substance, the AFL-CIO has conceded that Mutual Funds will not participate.

It would be a travesty on the investing public to enact Rules with Director-nominating criteria that are unlikely to be met except in extremely rare circumstances. On the other hand, the Petition recommends the same reasonable and well-tested nominator threshold criteria used for Shareholder Proposals. This threshold will allow Shareholders to have an active voice in nominating Directors at a large number of companies, restoring investor confidence because investors will know that they have been given the tools necessary to look after their own interests.

## II. An Excellent Solution to Avoid The Unfounded Fear of Crowded Ballots

The AFL-CIO cites no factual basis for its fear that, without a 3% stock ownership threshold, Director-candidates would storm the corporate gates. Be that as it may, the AFL-CIO has presented an excellent solution to cure that concern. It is similar to the concept of selecting a “lead plaintiff” in a class action lawsuit --- “lead candidate.” The AFL-CIO stated, “Thus, we believe a simple decision rule (e.g. the largest shareholder block) will be sufficient to address the possibility of competing shareholder groups ...”

With a “lead candidate” provision, there is a no need for a 3% stock ownership threshold. Further, the AFL-CIO’s proposed “lead candidate” solution would allow individual

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Shareholders to act as watchdogs of their investments at 9,000+ corporations that have publicly traded securities. Institutional Investors do not have the interest, desire and/or resources to seek Director accountability on such a scale.

The probability of crowded corporate ballots has been over exaggerated. Potential Director-candidates would carefully consider the ramifications of such a candidacy. Few would desire to fight (vis-à-vis be selected/invited) their way onto a hostile Board of Directors. There would be communications from corporate legal counsel to outsider Director-candidates to cause their voluntary withdrawals. Further, each would know that his/her candidacy would eventually subject him/her to character and credential attacks from the targeted corporation regardless of how ethical and well qualified he/she might be. Then, even if the person prevailed in the election process, he/she would be entering into a hostile work environment. Only the most sincere persons would proceed.

The Petition is grounded in the provisions of SEC Rule 14a-8. There are many well-tested safeguards written into SEC Rule 14a-8, e.g. prevention of resubmissions where a candidacy fails to draw minimum levels of support to assure corporations that they would not be harassed with frivolous Director candidacies. Those provisions, coupled with the "lead candidate" concept, should ameliorate any fear of crowded ballots.

### III. Takeovers Only Occur With Shareholder Approval

The AFL-CIO states, "They (new Director-election rules) should not provide a tool that can be used to facilitate low-cost hostile takeovers by short-term investors." Both the Petition and the AFL-CIO suggest a one-year stock ownership period to qualify to nominate Director-candidates.

Takeover attempts, when they occur, do not occur in a vacuum. Opposing views are publicly aired. Nothing would prevent incumbent Directors from revealing whether their opponent was engaged in a "low-cost takeover." The other side could respond. The opposing parties would solicit and compete for approval from Shareholders. Shareholders would vote on the issue. A takeover would occur if, and only if, Shareholders approved. In essence, all Shareholders (the owners of Corporate America) should be trusted to know what is in their collective best interests. That is the American/democratic way.

Some might argue that, if the number of available nominations is not limited to less than half the board, one might see Shareholders running slates of Director-candidates at every company with assets valued at greater than its shares just so that they could sell the company in pieces to make a short-term profit. They would argue that this is bad for

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workers, communities and the economy. However, workers and communities are also Shareholders. As Shareholders, they could utilize a "lead candidate" provision and/or their right to vote to protect their interests. Otherwise, staggering the nomination process may just temporarily defer the will of the majority of the Shareholders.

#### IV. Potential "Gaming" Does Not Justify More Rules

An additional level of Rules to deal with "gaming" by incumbent corporate Directors, who might conspire with a rogue Institutional Investor or increase the size of the board to dilute Shareholders' efforts, is not needed. It is unlikely that such "gaming" would be revealed in a corporate proxy statement --- an omission of material fact and an obvious violation of existing federal securities law. The SEC and federal courts already have the tools to deal with such matters. Further, state courts do not look kindly upon breaches of fiduciary duty. Tools to fix the potential problems are already in place.

#### V. Conclusion

The AFL-CIO's proposal to promote Director accountability would limit "equal access" to the corporate ballot to only those Shareholders with substantial means. There are 9,000+ corporations with publicly traded securities where the legitimate corporate governance needs of both Institutional Shareholders and individual Shareholders should be protected. Institutional Investors alone will not have the interest or the resources to nominate Director-candidates at many of those corporations. Director accountability should be promoted at more than a few corporations. Individual Shareholders should be able to act as their own watchdogs in protecting their investments.

The Petition has been available for public scrutiny from August 1, 2002. The straightforward and democratic provisions of the Petition should be implemented to bring accountability to the corporate boardroom. Assuming a concern as to the number of prospective Director-candidates, a "lead candidate" procedure could be included.

It would be my pleasure to discuss the matter with you at your convenience.

Very truly yours,

Les Greenberg, Chairman  
Committee of Concerned Shareholders

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cc: William H. Donaldson, Chairman  
Paul S. Atkins, Commissioner  
Roel C. Campos, Commissioner  
Cynthia A. Glassman, Commissioner  
Harvey J. Goldschmid, Commissioner  
Alan L. Beller, Director of Corporation Finance