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VIA EMAIL

October 8, 2003

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

Re: SEC File No. S7-19-03 (Security Holder Director Nominations)

Dear Mr. Katz:

This letter is sent in response to the request for comments with respect to a proposed rule to allegedly increase proxy access to Shareholders. It is divided into eight sections.

I. Introduction

Generally speaking, the purpose of the Securities Act of 1933 and the Securities Exchange Act of 1934 is to protect the investing public from improper acts of boards of directors ("BOD") and corporate managements ("Management"). The purpose is not to protect BODs and Management, who commit those acts, from Shareholders.

The underlying issue of current reform efforts is to cause members of BODs and Management to be more accountable to Shareholders, the true owners of Corporate America. At best, the proposed rule is a misguided attempt to avoid the accountability and competence problems that faced Enron, Worldcom and others. At worst, it is a sham upon the investing public.

In substance, the proposed rule implies that public confidence in the securities markets can be restored only by trusting Institutional Investors to be watchdogs of BODs and Management. The Committee of Concerned Shareholders ("Committee") feels that that public confidence will only be restored when individual Shareholders, using the Shareholder Proposal procedure, can function as their own watchdogs and can act, when necessary, to seek accountability at the 9,000+ corporations, that have publicly traded securities.

II. Been There, Done That!

The Committee, formerly 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's Director-nominees received 24% of the votes cast. 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.

The Committee's out-of-pocket expense was less than $15,000. (A member of the Committee, with a legal background, provided services without charge.) The Committee was able to solicit approximately 80% of the potential votes. Luby's expended more than $250,000 of corporate assets to oppose the Committee.

Some have said that the Committee's efforts with Luby's caused the departure of its former Chief Executive Officer ("CEO") 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 proxy contest efforts revealed the substantial difficulties that individual Shareholders would face in an attempt to hold Directors accountable. Further, it showed that the extent of Shareholder dissatisfaction might not be proportional to the size of stock holdings of Director-candidate nominators. In our proxy contest at Luby's, even though our Director-candidate nominators held about 1/4% of the outstanding stock, our candidates garnered 24% of the vote.

III. Institutional Investors Do Not Need The Alleged Benefits Of The Proposed Rule

The proposed rule, with its Director-nominator percentage ownership requirement, limits its availability to Institutional Investors. Mutual Funds are so severely conflicted that they will not avail themselves of the alleged benefits of the proposed rule. Pension Funds have had and have the ability to seek BOD and Management accountability through inexpensive proxy contests, but, if the past is prologue, do not have the will to exercise their power.

A. Mutual Funds Won't Participate Due to Conflicts of Interest

Mutual Funds will not actively participate in proxy contests even if the proposed rule is enacted. It would be detrimental to their financial interests vis-à-vis the financial interests of their public investors.

On December 12, 2002, John J. Sweeny, President of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), stated:

> [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 further 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."

With current Mutual Fund proxy voting disclosures in place, Mutual Funds may be embarrassed into voting for dissident Director-candidates. However, it is highly unlikely that Mutual Funds would nominate a Director-candidate.

B. The Pension Funds Already Have The Ability To Engage In Proxy Contests

Pension Funds vaguely allege that they need "equal access" to the corporate ballot in order to seek BOD and Management accountability. Few question the allegation. The

truth is that Pension Funds have not needed and do not need the alleged benefits of the proposed rule to engage in low cost proxy contests. Further, they have presented no evidence that they will employ any new rule or the extent of that intended employment.

Some Pension Funds claim that an “equal access” rule would alleviate the high costs of running an effective proxy contest. That is false. Corporate ownership is concentrated with Institutional Investors. Usually, the votes of less than 30 Institutional Investors with the largest stock holdings in a particular corporation would be sufficient to elect Director-candidates. By filing a bare-bones proxy statement with the SEC and securing the votes of, at most, 30 Shareholders does not present a large financial burden. The Committee, inexperienced, but determined, did that, and much more, with an out-of-pocket expenditure of less than $15,000. Also, there is always the potential expense of defending against frivolous litigation by engaging in a proxy contest. The proposed rule does not address the issue of potential legal exposure. However, the Federal Rules of Civil Procedure have and do provide for remedies against corporations and their attorneys who engage in abusive litigation. Additionally, advertising and other potential costs are not alleviated by the proposed rule.

Pension Funds have had the ability to seek BOD and Management accountability through the existing proxy process, but have not availed themselves of it. There is no assurance that they will do it even if the proposed rule is implemented.

IV. The Opposition Represents Entrenched Entitlement

The Business Round Table and others (collectively “BRT”) oppose “equal access” to the proxy statement. Their objections are based upon factually unsupportable forecasts of doom and gloom.

It took the sarcasm/wisdom of Molly Ivins to summarize the situation. "If you look around on almost any level, you'll notice that people who have special advantages almost always manage to convince themselves that they are entitled to those advantages. ... [P]eople will just get outraged if you try to correct even the most glaring inequities -- that sense of entitlement to special privilege is really tricky. Almost everyone who has previously enjoyed an advantage and is suddenly forced onto a level playing field will feel cheated, treated unfairly, singled out for undeserved punishment."

V. Sarbanes-Oxley Act Failed To Deal With Real BOD Accountability

The Sarbanes-Oxley Act did not focus on the real problem, i.e., lack of BOD accountability.

"Two influential Delaware judges have thrown something of a legal hand grenade in the direction of federal lawmakers ... over recent efforts at corporate reform. ... [T]he judges take a decidedly shareholder-friendly approach on two issues. ... Described as a forgotten element ... for 2002 reforms, they say it is time to examine the 'management-biased corporate-election system.' Because incumbent directors can 'spend their companies'

money in an almost unlimited way in order to get reelected,' the judges said the corporate-election process is an 'irrelevancy' ... '... [T]he rhetorical analogy of our system of corporate governance to republican democracy will ring hollow so long as the corporation election process is so tilted toward the self-perpetuation of incumbent directors.'" (Dow Jones Newswires, 2/7/03, "Two Delaware Judges Take Issue With Governance Reforms")

VI. Proposed Rule – A Sham Upon The Investing Public

A. Dilatory "Triggering Events"

In essence, the SEC, vis-à-vis Shareholders, determined what events constitute justification for Shareholder dissatisfaction. Shareholders, owners of the corporation, are supposedly not capable of making that determination.

By conditioning access to the corporation's proxy machinery to "triggering events," Shareholders, who have legitimate grievances, would be stalled for years. In the interim, corporations could be looted, businesses could be destroyed and non-executive jobs lost. "Triggering events" is another way of saying "dilatory tactic."

B. Arbitrary Percentage Ownership And An Effective Alternative

The percentage ownership requirement is arbitrary. On the other hand, the Shareholder Proposal criteria (continuously owned at least $2,000 of the corporation's stock for at least one year) have already been tested for many years and have proved to be effective. Further, the issue of feasibility has been ignored.

For the most part, it will be necessary for Pension Funds to form groups to meet the percentage nominator criteria. 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 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 the percentage stock ownership to pursue the complex issue of Director-candidate nominations.

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, our Petition recommends the same reasonable and well-tested nominator threshold criteria used for Shareholder Proposals. That threshold would allow Shareholders to have an active voice in nominating Directors at a large number of corporations. It would restore investor confidence because investors would know that they have been given the tools necessary to look after their own interests.

C. Basic Inequity

There is no suggestion that members of a corporation's Nominating Committee, also, need meet the percentage ownership criteria. Our studies have shown that members of Nominating Committees own (not counting recently granted unexecuted stock options) less than 2/100ths of 1% of the outstanding stock. Some members own no stock whatsoever. In our campaign with Luby's, our Director-candidates owned or controlled more stock than substantially all of the Directors.

Some might argue that the negligible stock ownership of members of the corporation's Nominating Committee should be excused, as each owes a "fiduciary duty" to the corporation and/or Shareholders that outsiders do not owe. However, members are NOT truly independent as they are beholden to their fellow Directors and/or the CEO for their positions and longevity and, thus, have a conflict of interest in the nominating process. Self-preservation will prevail. Nominating Committees will substantially always find outsider suggested potential Director-candidates to be "unqualified" and/or will decline to "consider" them.

D. Ineffective Short Slates of BOD Candidates

A recent study has demonstrated that permitting the nomination of only a few truly independent Directors would be ineffective in causing real reform. If elected, their fellow board members will isolate those truly independent Directors. "[T]he corporate director who asks management the tough questions often gets a cold shoulder from the 'in' crowd or shunned by the ruling clique. ... 'These processes are to some extent under the radar screen of institutional investors.' ... The research and resulting 65-page paper, 'Social Distancing as a Control Mechanism is the Corporate Elite' by Westphal and Poonam Khanna, confirms what critics have long argued -- country-club cronyism bogs down efforts to rein in CEO power and advance shareholder rights. ... [T]he corporate

board rocker's views will not be solicited, his advice will be shunned, and his contact with fellow directors will wane. ... '[Y]ou should be relatively pessimistic about the chances for voluntary board reform, unless there is a significant turnover in board membership...'"(Reuters, 8/3/03, "Reformist directors get the big chill, study finds")

The publicly reported experiences of Guy Adams, who unseated the Chairman of the Board of Directors and substantial shareholder of Lone Star Steakhouse & Saloon, in a bitterly fought proxy contest, vividly confirms the results of the study.

VII. Petition for Rulemaking (SEC File No. 4-461)

A recent background paper, prepared by the Council of Institutional Investors, stated that the Petition for Rulemaking (SEC File No. 4-461), filed on August 1, 2002 with the Securities and Exchange Commission ("SEC") by the Committee and James McRitchie, Editor of CorpGov.Net, has "re-energized" the "debate over shareholder access to management proxy cards to nominate directors and raise other issues."

The Petition seeks "equal access" to the corporate ballot for ALL Shareholders by using the Shareholder Proposal procedure. The SEC has received hundreds of positive comments from investors and posted them on its website. However, no mention was made of the Petition and/or its wide public support in the July 15, 2003 Staff Report: Review of Proxy Process Regarding the Nomination and Election of Directors.

The BRT fears that, without a percentage stock ownership threshold, Director-candidates would storm the corporate gates. There is an excellent solution to cure that concern. It is similar to the concept of selecting a "lead plaintiff" in a class action lawsuit --- "lead nominator." With a "lead nominator" provision, there is absolutely no need for a percentage stock ownership threshold. The "lead nominator" solution would allow individual 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.

Further, it is human nature that individual Shareholders will not field Director-candidates because it is enjoyable to engage in what generally evolves into a bitter proxy fight. However, individual Shareholders should have an effective means to attempt to secure BOD and Management accountability if the need arises.

VIII. Conclusion – A Political Kabuki Dance

The proposed rule, allegedly intended to promote BOD and Management 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 all investors 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 SEC, Institutional Investors and the BRT are engaged in a political kabuki dance to the detriment of the investing public. An ineffective proxy reform rule will probably be implemented. The SEC and Institutional Investors will probably claim "victory" on the part of Shareholders. The BRT will publicly moan and groan and, privately, claim "victory" for the proponents of business as usual. The media will inform the investing public that it has been handed a great "victory." However, BODs will remain just as unaccountable to individual Shareholders as before the strange dance began.

Failing to provide individual Shareholders with an effective means to hold BODs accountable will assure that the children of Enron, Worldcom and others will eventually take their places in the hall of sham. The choice is clear: true corporate democracy or continued paternalism by the corporate aristocracy.

It would be my pleasure to discuss the foregoing issues with the SEC and/or its Staff.

Very truly yours,

Les Greenberg, Chairman
Committee of Concerned Shareholders