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September 11, 2003

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

Re: File S7-14-03
Disclosure Regarding Nominating Committee Functions and
Communications Between Security Holders and
Boards of Directors

Dear Mr. Katz:

On August 8, 2003, the Commission, by Release 34-48301 (the "Release"), issued a proposed rule entitled "Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors'' (the "Proposed Rules"). As an attorney who has been practicing securities law for 29 years often representing smaller publicly held companies, I would like to comment on the Proposed Rules with respect to what I see as the potential adverse impacts of parts of the Proposed Rules on smaller issuers. Pursuant to the Release, enclosed are three (3) copies of this letter. At the outset, however, I would like to note that these comments are strictly my own and do not necessarily reflect the views of my firm, my partners or any of my present or past clients.

Specifically, I want to address two matters. One is the cost of the Proposed Rules to small businesses. The second is some problems for small businesses raised by the proposals set forth in the second half of the Release relating to Communications between Security Holders and the Boards of Directors.

Cost to Small Businesses

As a preliminary matter, let me note that I think of a small business as being defined more by the size of a company's management and its office staff than by the amount of its annual revenue. It is not uncommon for a business to have a management consisting of a CEO, a CFO and a comptroller and one or two administrative assistants

and have several hundred million dollars in annual revenue. Even when management consists of four or five people, it is usually fully occupied in running the company and has little time for non-operational activities. By contrast, despite what they say, Fortune 500 companies, which have much larger staffs, find it much easier to get a few hours extra work out of their much large staffs, parts of which are engaged in largely administrative activities anyway.

The cost problem for small businesses raised by the Proposed Rule, especially when considered in conjunction with other rules which the Commission has recently proposed or adopted, is that the imposition of more and more obligations on the managements of small businesses does not increase the number of hours available to meet those obligations. Thus, the Commission's model for assessing the impact of the Proposed Rules on small businesses is seriously flawed. It appears to assume that the time available to the small management of small businesses is infinitely expandable at an incremental cost of only $x per staff hour. In fact, as the Commission increases the amount of management activities needed to deal with regulatory matters, small businesses are faced with having to hire additional staff, the cost of which exceeds $x per hour since the first hour is very expensive, or having to reduce the amount of time spent by management on running the business, the cost of which is harder to quantify but clearly exceeds the Commission's rate of $x per hour.

Further, the Commission's request in the Release for specific information on the cost of the Proposed Rules is all but impossible to comply with, since it requires estimates of the impact of the fairly imprecise Proposed Rules on a large number of companies each of which is in a different position with respect to the utilization of management and staff time, partly depending on what it has done and is doing in response to other rules recently adopted by the Commission. The only way to even begin to get a reasonable estimate of the quantitative costs of the Proposed Rules to small businesses is to conduct a survey after the final rules have been adopted and been in force for one or two years, so there is an experience base to analyze.

Obviously, this is impossible to do prior to the adoption of the proposed rules. However, this timing problem should not deter the Commission from actually determining the effects of its rules on small businesses and then taking appropriate actions. Among other things, the Commission should conduct a survey each year to assess the impact of all rules adopted in the preceding two or three years. This would give the Commission an opportunity to collect quantitative information on these matters. It would also give the Commission an opportunity to assess whether the adoption of a series of seemingly immaterial rules has had a cumulatively material effect.

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Communications Between Security Holders and Boards of Directors

The Proposed Rules relating to communications between security holders and boards of directors (the "Communication Rules") raise a number of problems which will adversely affect small businesses, and possibly larger ones as well. The problems can be broadly summarized as resulting from the ambiguous and unclear nature of the Proposed Rules and the lack of a clear problem which the Proposed Rules are intended to solve.

A. Lack of a Problem. The Release lacks a clear description of the problem the Communication Rules are intended to solve. The Release does not cite, and I am unaware of, any significant number of instances where major shareholders of small publicly held companies were unable to communicate with the boards of directors of those companies on matters which were really important to them. In part this would be an unlikely event because in many small publicly held companies the largest shareholders are in management and/or on the board. On the other hand, because of their potential impact on the trading price of the stock of the small business, both management and the board take the views of major unaffiliated shareholders very seriously. Thus, the only group that might feel its (probably infrequent or non-existent) attempts at communicating with the board of a small company were unsuccessful would be small, unaffiliated shareholders. In its adopting release, the Commission should make clear if this group is the focus of its concerns and why the adoption of these complex rules are necessary for them. If the focus of the Commission's concern is larger companies, than it should spare smaller businesses from the expense of complying with them.

As a matter of state law, the directors of a corporation have a fiduciary duty to run the corporation in the best interests of the all of the shareholders. It is inevitable that the board and all of the shareholders will not agree on every possible aspect of running the company all of the time. Indeed, the shareholders will not all agree with each other on every aspect of the running of the company all of the time. For this reason, among others, the board is not obligated under state law to listen to every comment or suggestion which every shareholder might like to make, nor is it obligated to take every or any action requested by a shareholder. Given this, it is not clear why a small business needs to set up written procedures with logs, tracking, supervision, verification, etc. to deal with each and every communication that comes from any shareholder no matter how trivial, unreasonable, self-serving or potentially detrimental to the company. Again, the Release offers no explanation why the Commission feels investors will be aided by this attempt to override state law in the matter of the relationship between the board and the shareholders.

B. Problems with the Operation of the Communication Rules. There are several questions which the Communication Rules raise. In no particular order, some of these are:

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1. Virtually all small business already have a process for dealing with any communication from a shareholder, whether directed to the board or not: namely, they deal with the communication as appropriate. Is this an acceptable description of their "process"?

2. Shareholders can attempt to communicate with the board on a large number of issues. There are only two alternatives for dealing with these communications: either have one or more directors read each letter (and be paid at a rate far in excess of the Commission's assumed rate of $x) or have management screen out the letters which the board does not need to see. Even if one or more directors read the letters, they must also screen out those which should be dealt with by management, other employees or by outside advisors, ignored, or passed on to the entire board.

This need for screening so as not to take up the entire board's time with issues that it is not equipped to handle or which it is not **a** good idea for it to handle raises the question of how detailed the disclosure of the screening procedures should be. Not to mention the issue of how even the most detailed set of procedures can cover all of the possible subjects which can be raised in communications from shareholders. The use of judgment is necessary in dealing with shareholder communications. Currently that judgment is made by management. The Release does not mention, nor am I aware of any reason to believe, that management is incapable of doing the screening job fairly. On the other hand, it is unlikely in the current corporate governance climate that any single director will agree to act as the screener, and even if there was only one screener, that same climate all but guarantees that most matters will be referred to the whole board so as to limit the liability of any one director for having made a wrong decision.

3. Suppose the screening person, be it management or a director, makes a mistake and does not follow the process set out in the proxy statement, does this mean proxy solicitations describing the process were invalid? Does it mean that future proxy solicitations using that description are invalid if they do not mention the deviation from the process?

4. The Communications Rules open the door to the board becoming the appeals court for all management decisions relating to employment (hiring, firing and promotion) of shareholders unless the final rules make clear that it is not the Commissions intention to prevent the board from appointing management as the final decision-maker in all employment matters other than those related to executive officers.

5. **As** the Commission may not be aware, companies of all sizes from time to time receive unsolicited offers of ideas or products which may or may not be protected by the intellectual product laws and offers to arrange various kinds of business transactions.

Experienced companies have the mail from unknown sources screened to keep people in authority from receiving those letters. In order to defeat later unfounded claims of idea stealing or use of the letter writer as a broker or finder of some sort, these letters are answered with a polite "not interested" by a person who has no involvement of any kind in business development. This permits the company to demonstrate that no one related to product development or transactions had any contact with the proposal. If the Commission forces companies to send these letters to the directors, the very people who are responsible for running the company under state law, it will make defeating these scams much more difficult.

6. The Communications Rules require that companies "describe any material action taken by the board of directors during the preceding fiscal year as a result of communications from security holders". (Proposed Item 7, (h)(2)(iv)) In the first place, it is not clear why this disclosure would be meaningful to shareholders. Beyond that, however, this requirement needs considerable clarification. It is very unclear what would constitute "material action". Material as to what or whom? Also, does action include non-action?

For example, suppose a holder of 10 shares writes to say the CEO should be fired, an action which would normally be viewed as a material development for the company. Is the failure to fire the CEO as requested a "material action"?

Further, suppose the board takes an action suggested by one or more shareholders, whether the suggestion came in the preceding fiscal year or earlier. Does this mean that the action was necessarily "as a result of communications from security holders"? If the board believes in good faith that it would have taken the action anyway, must it still be disclosed? Does the failure to attribute everything possible to shareholder communications open the company to having the validity of its proxy solicitation challenged? If so, how are investors (particularly in small companies) helped, especially if expensive litigation occurs?

In reality, the proposed ruleS forces the board to keep detailed records of shareholder communications for an indefinite time so that, after extensive research, shareholders can be credited with all of their suggestions which some day become reality. Is all of this disclosure going to do anything for investors other than clutter up proxy statements and lead to unnecessary expenditures of funds to keep unnecessary records?

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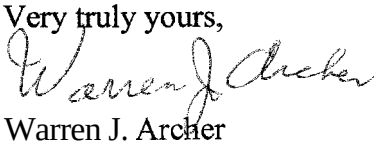
In summary, whatever the merits of the proposed rules on disclosure of the nominating procedures, the proposed Communication Rules are **a** solution in search of a problem. Adoption of them will serve only to waste the money of small publicly held companies, create confusion, open small companies to pointless litigation and provide no useful service to shareholders. I urge the Commission not to adopt them.

Very truly yours,



Warren J. Archer