CAD - 02263
to Sir Adrian?

OFFICE OF
THE CHAIRMAN

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

October 22, 1992

Actioned

Mr. Nigel Peace
Secretary
Cadbury Committee
P.O. Box 433
Moorgate Place
London EC2P 2BJ
UNITED KINGDOM

Dear Mr. Peace:

As you have probably read, the Commission last week approved final changes to its rules regarding shareholder communications and executive compensation. I thought you would perhaps be interested in seeing the Chairman's opening statement and our fact sheets regarding the new rules.

I also enclose a paper by Martin Lipton and Jay Lorsch on improving corporate governance more generally. It represents fairly well, I think, an emerging consensus on the need for more active directors.

Please let me know if you have any questions about any of this.

Sincerely yours,

Walter Stahr

Walter B. Stahr
Special Counsel

Enclosures

Sir Adrian

We already have the Martin Lipton paper, but this appears to be an updated version.

Nigel
30/10

SHAREHOLDER COMMUNICATIONS AND EXECUTIVE COMPENSATION

OPENING STATEMENT

RICHARD C. BREEDEN, CHAIRMAN
U.S. SECURITIES AND EXCHANGE COMMISSION

AT THE OPEN MEETING OF THE COMMISSION

OCTOBER 15, 1992

Few issues at the SEC have aroused the level of public commentary as our efforts to modernize the proxy rules governing shareholder voting and to create clear and comprehensible disclosure concerning the executive compensation practices of America's public corporations. We have received more public comments than on any other issue in memory as part of a careful study of the current federal system of proxy voting and the dynamics of corporate governance in America.

The U.S. economy has the broadest dispersion of ownership of any major country. More than 50 million individuals have invested in stocks. Those investors range from schoolteachers, farmers and the people next door to professional investors, and together they own just under 50% of our total equity capital. Indirectly through their pension plans, America's citizens own most of the rest of our economy. We have truly democratized corporate ownership, though of course we could benefit from much higher levels of private investment in our economic base.

While we have democratized ownership, we have not done so well in creating reasonable management accountability to those owners. Our most common managerial structure is the single "Chairman and CEO." For most companies at most times, this system works well. However, in recent years we have seen more than one case of a once-strong American corporation that endured a prolonged decline under a single CEO.

We have also seen cases in which the CEO, in spite of widespread losses to shareholders or massive employee layoffs, received immense and increasing compensation. In other cases corporations have performed well -- or even very well -- but the compensation awards of the company have been so large that they are not possible to square with a normal person's sense of right and wrong.

Our system of corporate democracy depends on an informed and independent board of directors. The directors have the job of stepping in to protect the interests of the shareholders and employees in a strong and profitable company. Without a strong board that insists on high performance standards, any company could run into trouble.

In reviewing the current proxy system, one fact is overwhelmingly clear. A system that was supposed to protect

shareholders sometimes works to insulate management in problem cases from accountability to their shareholders.

The proxy system has legitimate objectives. We seek to prevent people from obtaining proxy voting authority based on false, misleading or incomplete representations. However, in pursuing these goals we have created a system in which it takes the permission of the federal government, teams of lawyers and millions of dollars for shareholders to discuss the future of the company they own in a newspaper op-ed or on a radio talk show.

If the current proxy rules for corporate elections applied to our national political elections, then every time citizens wanted to discuss their views of President Bush, Bill Clinton or Ross Perot, they would have to file a description of themselves and their views with the SEC. Discussing tonight's debate in the newspaper or on television would require mailing a proxy statement to every registered voter in the country.

We have considered many questions in our review process. But one question came up over and over again: "Does the government really need to restrain shareholders from expressing their views?" By making discussion and debate vastly more difficult and costly for "disinterested" shareholders, we reduce the vigor and the quality of our system. We also weaken the accountability of managers and directors to the shareholders who own the company.

The new rules will include a series of steps designed to enable shareholders to communicate with each other and the board without unnecessary interference or costs. Those who are not soliciting proxies for themselves, and who do not have any other special interest in the election, will be exempt from the proxy rules except for a simple prohibition against fraud. Shareholders will be completely free to publish their views in the press or the media without the SEC's permission. Small shareholders will also be completely free to communicate directly with one another. Shareholders with more than $5 million invested in the company will simply send a copy of any written material that they circulate widely to the SEC. At minimal cost, this will help keep other shareholders informed of such communications. Oral communications will not require any notice or filing whatsoever.

We will also take several steps to improve the elections process. The new rules will give shareholders a line-item vote. They will end the current system in which voting for a minority slate of independent candidates for the board requires shareholders to forfeit part of their votes.

The best protection against abuses in executive compensation is a simple weapon -- the cleansing power of sunlight and the power of an informed shareholder base. The new compensation disclosure rules will do away with impenetrable legalistic narratives that

often obscure the bottom line without the aid of a battery of analysts and a Cray supercomputer. Instead of the legal boilerplate will be a series of tables expressly designed to inform shareholders of exactly what is being done at their expense.

The most important of these tables is a new "summary table" that will capture all forms of compensation over a three-year period on a single page. This table will bring all the bottom-line information together for shareholders in one easy format to read. A second very important new table will disclose the number of stock options granted, together with either the present value at the date of grant of these options or a presentation of hypothetical gains that could result. This will allow shareholders to see the size of awards that are being handed out as options or restricted stock.

Last year one company awarded its CEO 10-year options to buy 2,750,000 shares of stock. This single grant for one year will be worth $219 million if the company's stock growth simply matches the rate of return of a ten-year Treasury. If the company's stock rises by the same percentage during the term of the option as it did in the last 10 years, these options will be worth more than $1.1 billion. This "mega-grant" is merely the latest and largest in an increasing and quite disturbing trend.

Aside from questions regarding their absolute size, some mega options make mini-sense for shareholders. It shouldn't be up to the SEC to decide whether a mega-grant of options for any particular company is justified. However, shareholders are entitled to expect the directors who make those awards to have an affirmative reason for every award and its pricing. Presumably the company's performance has justified the CEO's compensation award. Under the new rules, the members of the Compensation Committee will describe the performance factors on which they based their decision. That report to shareholders will appear -- before the annual election of directors -- over the names of the people who actually made the decision. Then, judging the appropriateness of the directors' decision should be up to the shareholders, not the government. Armed with information and empowered to act on that information, market forces should hopefully restore a better sense of balance to America's boardrooms.

The new rules also require a table comparing the performance of the particular company with both a broad-based stock index, such as the S&P 500, and a narrower index or a group of peer companies. This will allow shareholders to compare the company's relative performance with the broader market and with competitors.

Finally, the new rules contain special provisions and transitions for small business. Many of the comments expressed concern that the rules were unnecessarily complex for smaller

businesses: we have attempted to respond to those comments by permanently exempting small businesses from many of the new rules.

There are indications that the new rules, even as proposals, have already helped to encourage directors to listen more closely to shareholders. At General Motors and Sears in the last year, directors have stepped in to require major changes in the company. Whether or not these specific board decisions were correct will only tell with time. However, what we know now is that those decisions came from exactly the body that has the information, the power and the responsibility to act in the company's best long-term interests. This is a good trend, and I hope that our efforts contribute to more boards acting vigorously to promote corporate success.

The new rules maintain many corporate governance traditions. However, they represent a large step to restore accountability to the system -- something that is absolutely essential to a healthy market and a productive economy. By requiring clear and complete information and allowing vigorous and informed discussion, we can hopefully make sure that we remember who pays for the economic party -- America's shareholders.

REFORM OF EXECUTIVE COMPENSATION DISCLOSURE RULES

FACT SHEET

In February 1992, the SEC announced that it would consider changes to the disclosure in proxy statements of compensation of senior executive officers. The SEC's goal is to ensure that the marketplace receives information about executive compensation that is easier to understand and more relevant to proxy voting and investment decisions. The fundamental principle of the SEC's actions is that market forces, rather than legislators or bureaucrats, should shape corporate compensation policies.

The SEC on June 23 proposed revisions to the rules governing executive compensation disclosure. After substantial revisions and simplification of the proposed rules in response to almost 1000 letters of comment, the SEC today announced the following rule changes:

<u>General</u>

- Deletion of rules that require the inclusion in proxy statements of long, narrative, legalistic discussions of compensation plans, including option plans and pension plans.
- Disclosure of the compensation of
  - the CEO, regardless of amount of compensation, and
  - the four most highly paid senior executive officers, other than the CEO, who earn more than $100,000 per year in salary and bonus.

<u>Summary Compensation Table</u>

- The rules provide for a new comprehensive table disclosing the annual salary, bonuses and all other compensation awards and payouts of the named officers.
- Stock options will be disclosed as a number awarded and will not be assigned a value.
- The table covers a 3-year period, although two of the columns ("Other Annual Compensation" and the catch-all "Other Compensation") may be phased in by companies over the first three years of reporting. Small business issuers may phase in the entire table over 3 years.

<u>Option and Long-Term Compensation Tables</u>

- Two tables detailing options and stock appreciation rights ("SARs") are required.
  - One table summarizes the number and terms of options/SARs granted during the fiscal year. The table may list potential values for the options/SARs based on assumed annual compounded rates of stock price appreciation (5% and 10%). Alternatively, a value for the options on the date of grant may be calculated by using a financial formula for calculating the present value of the options.
  - The second table summarizes exercises of options by the named executives (including the net value received) and the number of, and the spread (the difference between the current market price of the stock and the exercise price of the option) on, unexercised options that they hold.
- The new rules require a table outlining awards under long-term incentive plans, such as phantom stock grants and restricted stock grants that vest after a period of time upon satisfaction of a performance goal.

Pension Plans and Other Benefit or Actuarial Plans

- A pension table is required to set forth estimated annual benefits payable upon retirement under pension plans. This table is not required for small business issuers.

Employment Contracts and Termination Agreements

- Disclosure of employment and severance agreements (with payments of more than $100,000) with respect to the named executive officers is required.

Director Compensation

- Disclosure is required regarding standard compensation arrangements for directors (payments for services on board and committees), as well as any other compensation for services (such as consulting contracts).

Compensation Committee Report

- The rules require a new report to shareholders by the members of the compensation committee that generally discusses the company's compensation policies for executive officers and the committee's bases for determining the compensation of the CEO for the past fiscal year. The report also must include a discussion of the relationship of executive compensation and CEO compensation to corporate performance.

- The rules specify that the report should not include disclosure of specific quantitative or personal factors or confidential information.

- This report is a key element in enhancing the communication between directors and shareholders and in reinforcing the directors' cognizance of their accountability to the shareholders.

- Limited Liability. The rules also specifically provide that this report will have the same status as the annual report to shareholders. Shareholders dissatisfied with the report should act through their power to elect directors, not through litigation.

- This requirement applies to compensation committee decisions made after the effective date of the rules and does not apply to small business issuers.

Stock Performance Chart

- The rules require a new chart that graphs the performance of the cumulative total return to shareholders (stock price appreciation plus dividends) during the previous 5 years in comparison to returns on a broad market index (such as the S&P 500) and a peer group index (such as the S&P Retail Index, depending on the line of business of the company). This format provides flexibility for the marketplace to develop appropriate, meaningful comparisons for the more than 13,000 public companies registered in the United States.

- Limited Liability. The rules also specifically provide that this chart will have the same status as the annual report to shareholders. Shareholders dissatisfied with the presentation in the chart should act through their power to elect directors, not through litigation.

- This requirement does not apply to small business issuers.

Option/SAR Repricing Disclosure

- If after effective date of the rules a company reprices any options or SARs held by a named executive, it must prepare a table detailing terms of that repricing and any other repricing that has occurred during the past 10 years that the company has been public.

- The compensation committee is required to explain the reasons behind the repricing in the last fiscal year and the basis for determining the new prices.

- The requirement of a 10-year repricing history does not apply to small business issuers.

Interlocking Relationships of Directors and Other Matters

- Additional disclosure is required in the proxy statement regarding relationships existing on or after January 1, 1993 between directors and the company if

  - the compensation committee included employees or former or current officers of the company or its subsidiaries,
  - there is "interlocking" membership between the company's compensation committee and another company's compensation committee (that is, a member of one company's compensation committee sits on another company's compensation committee or board, and *vice versa*).

- This disclosure is not required for small business issuers.

Effective Date

- The new rules are effective immediately upon publication in the *Federal Register.*

- Companies may still use the old rules for proxy statements, if they file the proxy statements with the SEC before January 1, 1993 (unless the proxy statement pertains to an annual meeting of a company with a fiscal year ended on or after December 15, 1992).

Exemptions for Small Business Issuers

- As noted above, certain disclosure rules are not applicable to, or are phased in for, companies eligible to use the SEC's small business forms (companies that have annual revenues of less than $25 million, and whose public float is under $25 million).

Washington, D.C.
15 October 1992

REGULATORY REFORM OF COMMUNICATIONS AMONG SHAREHOLDERS

FACT SHEET

For almost 40 years, the complex regulations governing communications with shareholders regarding corporate voting matters have tended to discourage communication even on non-voting matters. Today, the SEC has taken several steps to

- Facilitate effective shareholder communication and participation in corporate governance by removing unnecessary regulatory barriers; and

- Reduce the costs of complying with the proxy rules.

Until today, the proxy rules required the filing of a detailed proxy statement with the SEC by anyone -- shareholders, corporate management, corporations and private citizens -- who wished to communicate with more than 10 shareholders in a manner that, *after the fact, could be found to have been calculated* to influence a proxy voting decision. All communications with shareholders by such a "soliciting party" had to be accompanied by its proxy statement, which is a detailed document requiring disclosure about finances, intentions and personal history with the objective that shareholders should know the background of why and by whom they are being solicited. Communications subject to this burdensome disclosure could include letters to shareholders, advertisements and financial advisory letters. The soliciting party's proxy statement and all other communications were subject to review by the staff of the SEC.

After three years of study, two releases for public comment and careful review of more than 1700 public comments, the SEC has adopted the following reforms to the rules governing shareholder communications:

- Promotion of Fair Communication. Today's actions are intended to restore a balance between the First Amendment and Congress's concern that solicitation of proxy voting authority be conducted on a fair, honest and informed basis. The rules remove unnecessary regulations on the free speech rights of shareholders.

- Disinterested Persons. Any person, whether or not a shareholder, is exempt from all proxy requirements (such as printing, filing and distributing of proxy statements) in connection with any written or oral communication with shareholders of a company, so long as the person communicating

    - is not seeking proxy authority (that is, the power to cast a vote on behalf of another shareholder),
    - does not have a special interest in the voting question to be put before the shareholders, other than as a shareholder, and
    - does not have a special relationship with the company, such as a shareholder that has filed a Form 13D (that is, it owns more than 5% of the outstanding stock) without disavowing plans to seek control of the company.

- Notification for Certain Writings. Disinterested shareholders owning more than $5 million in securities of the company must notify the SEC and any stock exchange on which the company is listed if they solicit other shareholders by sending unpublished, written material. All that is required is sending a copy of the writing to the SEC and exchange within 3 days of its first distribution. Scripts used in oral solicitations (such as in an orchestrated telephone solicitation) are treated as written materials. Press releases are treated as published if they have been reported in a publication or carried over a wire service.

- Antifraud Provisions Applicable. Even though the foregoing communications are exempt from filing requirements, the antifraud provisions of the securities laws still apply.

- No Notification Necessary for Publicized Communications. All communications, whether or not by disinterested persons, may be published in a newspaper or broadcast without delivering a proxy statement to each and every shareholder.

- Announcements of Voting Decisions. Published or broadcast announcements about how a shareholder intends to vote and the reasons for the shareholder's decision will be expressly carved out of the definition of a proxy solicitation.

- Communications by Advisors. Today's release confirms the SEC position that persons such as brokers, lawyers and proxy advisors are entitled to rely on the existing exemption for giving proxy advice to clients in the ordinary course of business.

- No Prior SEC Review for Most Communications. The SEC will no longer review most shareholder communications before they may be used, including "Dear Shareholder" letters and newspaper advertisements. Only proxy statements and the form of proxy (the proxy voting card) must be submitted to the SEC for prior review.

- Public Availability of Preliminary Proxy Statements. Proxy statements submitted in preliminary form for SEC review will be immediately available to the public and may be distributed in preliminary form. This will allow the shareholders more time to study and react to proposals. Some proxies in connection with business acquisitions or sales (except for roll-ups of limited partnerships and going-private transactions) will be given confidential treatment because of sensitive financial information contained in the proxy statement.

- Circulation of Preliminary Proxy Statements. Upon public filing of the preliminary proxy statement, solicitations may begin immediately, so long as a proxy voting card is not distributed. This rule change will allow open discussion of proposals before definitive materials and proxy cards are distributed.

- Elimination of Schedule 14B. The new rules abolish Schedule 14B, which was required to be filed in the case of election contests. This form required background information that oftentimes was largely redundant with information in the proxy statement.

- Shareholder Lists. Subject to state law requirements, management may choose to mail solicitations directly on behalf of requesting shareholders, rather than releasing the shareholder list. In the case of roll-ups and going-private transactions, the shareholder list must be released.

  - The shareholder list or information of the cost of mailing must be provided to the requesting shareholder within 5 business days, whether or not management's materials are ready for mailing.
  - Requesting shareholders may target their mailing to groups of shareholders, if the groups specified can be determined from the information contained in the list (such as size of holding or geographic location).
  - The requesting shareholder must certify that the list is for a proper purpose.
  - The list must be returned at the end of the solicitation.
  - Lists will include names and addresses of those who hold securities through nominees or in "street name," so that solicitations can be more efficient.

- "Unbundling" of Related Proposals. Companies must allow shareholders to vote on each matter presented, although the passage of some proposals may be conditioned on the passage of others. This change will end the practice of "bundling" several proposals together, which forces shareholders to vote for a package, some of which they may favor and some of which they may oppose. If permitted by state law, the company may still condition adoption of any proposal on the adoption of other proposals.

- Voting for Independent Candidates for Director. Until today, shareholders wishing to vote for a non-management nominee could not also vote proxies in favor of management's nominees. Now, a non-management proxy may be voted for non-management nominees as well as management nominees. No management nominee may be listed on the non-management proxy card without the nominee's consent, except for those to be excluded from the board. The proxy statement and proxy card must clearly state that management nominees may refuse to serve as directors if the non-management nominees are elected. Shareholders completing the proxy cards may withhold authority to vote for individual nominees on either slate.

- Disclosure of Voting Results. Issuers must disclose the outcome of all shareholder votes, including the number of votes for and against, as well as abstentions and non-votes, on each matter or nominee subject to a vote. The proxy statement must state how abstentions will be treated in tabulating the votes.

Washington, D.C.
15 October 1992

A Modest Proposal For Improved Corporate Governance

By

Martin Lipton and Jay W. Lorsch

August 20, 1992

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A Modest Proposal For Improved Corporate Governance

Martin Lipton* and Jay W. Lorsch**

The Importance of Effective Boards

Corporate governance in the U.S. is not working the way it should. The problem is not the system of laws, regulations and judicial decisions which are the framework of corporate governance, but the failure by too many boards of directors to make the system work the way it should. The most obvious sign of this failure is in the gradual decline of many once great American companies. If boards of directors cannot find the solutions to these difficulties, the only realistic avenue for shareholders to voice their disapproval is to sell their shares. Directors may eventually act, as they recently did at General Motors, but their actions are often late, after the shareholders have lost value, employees jobs, and the corporation, its competitive market position.

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* Martin Lipton is a partner of Wachtell, Lipton, Rosen & Katz, New York City. He is the co-author of _A New System of Corporate Governance; The Quinquennial Election of Directors_, 58 University of Chicago Law Review 187 (1991) (Hereinafter _The Quinquennial Election of Directors_).

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During the 1980s, it was argued by many academics and financiers that the "disciplines of the capital markets," through the threats or actualities of takeovers, would cause managers to take corrective action to improve performance. We leave it to historians to decide whether this argument was valid. What is clear today is that this era of highly-leveraged takeovers and buy-outs is behind us. The U.S. needs effective means to improve performance by publicly-owned companies. We believe that these means should be developed and adopted by corporations on their own initiative and not imposed by legislation, regulation, court decisions overruling settled principles of corporate law, or bylaw amendments originated by institutional investors.

The difficulties we face today were presaged by Berle and Means in 1933. In their seminal work[1] they argued that a clear separation had developed between shareholders and management, with shareholders no longer having any real voice in how the corporation is run and with management only theoretically accountable to the board of directors. The shareholders to which Berle and Means were referring were primarily individual investors. When the historian Alfred Chandler declared in 1977 that America had created a system

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1. Adolf A. Berle and Gardiner C. Means, <u>The Modern Corporation and Private Property</u> (Harcourt, Brace & World, Rev Ed 1968).

of "Managerial Capitalism" in which management, not shareholders, controlled the corporation, he too was thinking mostly about individual investors.[2]

Since Chandler's work was completed, and especially in the last decade, there has been a rapid rise in the proportion of total U.S. equity owned by institutional investors. The most reliable estimates indicate that the equity ownership by all types of public and private institutions is between 50% and 60% of the total value of stock-exchange-listed companies. In the case of some corporations, especially large ones, this proportion is even higher.

The current difficulty is that these institutional investors, like their individual counterparts, find it difficult to act as owners. They cannot follow the fortunes of specific companies in detail, because their portfolios are so large and diverse. This also means that a given institution never owns a sufficiently large proportion of any one company to warrant a boardseat. All of this is complicated by "indexing," which means that a large proportion of a particular portfolio is managed by following the market average instead of focusing on individual companies. Finally, institutional investors may face real conflicts of interest between their

2. Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (Harvard University Press 1977).

fiduciary responsibility to beneficiaries and any role as active owner. The best institutions have been able to do in their role as owners is to focus public attention on a few companies which have been singled out for especially poor financial performance or other reasons.

Although certain institutional investors are actively seeking ways to communicate more easily with each other and to jointly elect directors, to be successful in a meaningful way such efforts would require changes in Securities and Exchange Commission regulations beyond the changes recently proposed by the SEC, as well as in the attitudes of incumbent managers and directors. In addition, direct participation by institutional investors in corporate governance might give rise to insider-trading restrictions and other legal and practical problems. Despite the problems confronting institutional investors that seek greater participation in corporate governance, it is clear that they are in the corporate governance business to stay. They will not just go away.[3] As the owners of more than a majority of the shares of most major public companies, they will continue to insist on accountability for poor performance.

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3. The Korn/Ferry 1992 survey shows that the majority of CEOs "anticipate an increase in the involvement of institutional investors in board decisions" and only 6% of CEOs expect influence of institutional investors to diminish in the future. Korn/Ferry, Board of Directors Nineteenth Annual Study 1992, p. 14 (hereinafter, Korn/Ferry 1992).

This state of affairs suggests clearly to us that more effective corporate governance depends vitally on strengthening the role of boards of directors. Our own conclusion on this point was reinforced by a recent speech by Chancellor William Allen of the Delaware Court of Chancery, one of the leading judicial scholars on corporate law. Chancellor Allen said:

> The conventional perception is that boards should select senior management, create incentive compensation schemes and then step back and watch the organization prosper. In addition, board members should be available to act as advisors to the CEO when called upon and they should be prepared to act during a crisis: an emergency succession problem, threatened insolvency or an MBO proposal, for example.
>
> This view of the responsibilities of membership on the board of directors of a public company is, in my opinion, badly deficient. It ignores a most basic responsibility: the duty to monitor the performance of senior management in an informed way. Outside directors should function as active monitors of corporate management, not just in crisis, but continually; they should have an active role in the formulation of the long-term strategic, financial, and organizational goals of the corporation and should approve plans to achieve those goals; they should as well engage in the periodic review of short and long-term performance according to plan and be prepared to press for correction when in their judgment there is need.[4]

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4. "Redefining the Role of Outside Directors In an Age of Global Competition" by William T. Allen, Chancellor, Delaware Court of Chancery, presented at Ray Garrett Jr., Corporate and Securities Law Institute, Northwestern University, Chicago, April 1992.

Since Chancellor Allen's view may well adumbrate what the courts would hold are the legal duties of independent directors, it is possible to discern an alignment between the practical reality and an emerging legal perspective on what is necessary to improve corporate governance.

If directors perform well the duties Chancellor Allen has outlined, they should prevent the long-term erosion of corporate performance that has plagued so many once successful U.S. corporations. By acting early and effectively, directors can prevent small problems from growing into a major crisis over many years. Chairman Richard Breeden of the SEC made the same point cogently and succinctly in a recent speech:

> By every measure, the board of directors is the linchpin of our system of corporate governance, and the foundation for the legitimacy of actions taken by management in the name of the shareholders. The board has the access to information and the power to provide meaningful oversight of management's performance in running the business, and it needs to use them cooperatively but firmly. This is particularly vital when a company is in a downward spiral, since the cost of waiting for a takeover or bankruptcy to make management changes will be far higher than through board action.[5]

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5. "Corporate Governance and Compensation" by Richard C. Breeden, Chairman U.S. Securities and Exchange Commission, presented at Town Hall of California, Los Angeles, June 1992.

Chancellor Allen and Chairman Breeden are not alone in their view of the role of the board. In 1979 Donald Perkins, then Chairman and CEO of Jewel Companies, described the role of the board as follows:

> A board of directors can contribute minimally if it acts only as a necessary legal entity tolerated by the chairman. On the other hand, a board can contribute a great deal if it acts as a truly diverse group of informed and interested counsellors, advisors and directors of management.[6]

Why a "Modest" Proposal

If effective boards are so important, one may well ask why just a "modest" proposal. The answer rests in our definition of modest. What we mean are changes in board practices which can be implemented by individual boards, with no changes in laws, stock exchange rules, SEC regulations, or new court decisions. As was noted in The Quinquennial Election of Directors, trying to change regulations or laws will be politically difficult and at best very time consuming.

Consistent with our democratic institutions, there are differences in opinion and ideas among business leaders,

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6. Donald S. Perkins, What the CEO and Board Expect of Each Other, Harvard Business Review, Mar.-Apr. 1979.

various types of institutional investors, lawyers and academics as to what changes in regulations and laws would be desirable. If we wait for this debate to be completed, we risk another decade or more of a continuation of these governance difficulties and the contribution they make to the decline of U.S. competitiveness. We also risk the imposition of ill-considered or politically motivated governance requirements that would cause serious harm, rather than improve corporate performance.

We have, therefore, used our combined experience, research and different perspectives to develop a proposal for changes in the boardroom, which we believe will be acceptable to all those concerned with corporate governance, but especially to institutional investors, CEO/chairmen and of course directors themselves. Our proposal does not require major changes in what well-advised companies are already doing; indeed our view of the role and function of the board of directors is not that different from that of The Business Roundtable.[7] Our proposal would not require any changes in laws or regulations, because it deals primarily with the way boards actually perform their duties and not the legal context in which they do so. Nor does our proposal require correlative or compensatory action by institutional investors

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7. See, Corporate Governance and American Competitiveness (The Business Roundtable, March 1990) p. 7.

such as becoming patient, long-term investors; participating in corporate governance activities; or modifying in any way their investment policies, however desirable those changes might be. Our proposal is for unilateral action by corporations to be taken in their self interest and not as part of a "deal" with institutional investors.

We are not convinced that good corporate governance produces good corporate performance. Some of the most successful companies are managed by entrepreneurs who disdain what we view as good corporate governance. However, we are convinced that if a company is underperforming due to poor management or persisting with a failed strategy, good corporate governance is the safety valve that can provide the means to deal with the problem and improve performance.

Limits on Board Effectiveness

To understand the rationale behind our proposal, it is necessary to comprehend the factors which we believe make it difficult for so many boards to carry out the monitoring function to which Chancellor Allen points, and which we agree is their critical role. We say "so many companies" because we recognize that some boards are doing a better job of monitoring management and company performance than others, and we also believe the limits on board effectiveness which

concern us exist in varying degrees and combinations in different boardrooms.

Lack of Time and Board Size

Based on our experience, the most widely shared problem directors have is a lack of time to carry out their duties. The typical board meets less than eight times annually.[8] Even with committee meetings and informal gatherings before or after the formal board meeting, directors rarely spend as much as a working day together in and around each meeting. Further, in many boardrooms too much of this limited time is occupied with reports from management and various formalities. In essence, the limited time outside directors have together is not used in a meaningful exchange of ideas among themselves or with management/inside directors.

Another related reason for the lack of meaningful dialogue is the size of many boards. When a board has more than ten members, it becomes more difficult for them all to express their ideas and opinions in the limited time available. This contributes to the expectation, discussed below, that directors are not supposed to voice their opinions freely and frequently.

8. Korn/Ferry 1992 p. 12.

Complexity of Information

A related difficulty is the complexity of the matters directors must understand, discuss and decide upon in their limited time. The concern most independent directors have is not with a lack of information, but with the amount and complexity of the data they receive. Part of the problem is that too little attention is given by management and directors themselves to how best to organize and conceptualize the data. It is also true that too much emphasis is placed on information about short-term financial performance and not enough on data about longer-term trends, not just of a financial nature, but also apropos of competitive position and organizational health.

Even if the data provided were comprehensive and well organized and presented, independent directors still face the difficulty of comprehending the past and likely future state of a company's affairs in a very limited time and without a depth of experience and background in industry and company matters. Such knowledge is the critical context in which directors, like managers, need to consider their evaluations and choices. The more time directors spend on the affairs of a given company and the more they have an open exchange of ideas, the more they will develop this important knowledge base.

Lack of Cohesiveness

A board is essentially a group of individuals working together. If any group is to be effective, the members need to share a common purpose, be able to communicate with each other clearly, and ultimately reach a consensus which builds on the differing points of view among members. Because boards are often large, spend such a limited amount of time together and spend even less time in open discussion of ideas, these qualities are in too short supply in most boardrooms. Further, independent directors are very busy, usually CEOs of their own companies, and often involved with more than one board. As a result, a particular board may not be an especially salient or important group to them. Thus, most boards are not a cohesive group able to work well together toward a common purpose.

In fact, as was pointed out in Pawns or Potentates, the norms of behavior in most boardrooms are dysfunctional. They discourage directors from speaking out, especially if they are going to be critical of management, and they inhibit independent directors from asserting leadership among their peers. Clearly, if independent directors are to be more effective monitors, we need to find a means to strengthen the cohesiveness of boards and the process by which directors work together.

Power of Top Management

In America the term "power" is often considered a "dirty" word, a phrase to be avoided. Yet, in any discussion of governance, power is a key concept. No one can govern without the power to do so. In U.S. boardrooms, the most influential person is the CEO/chairman.[9] That this is so is not surprising, nor is it usually because the CEO/chairman deliberately or willfully tries to control the board. It is simply because the CEO/chairman is the most knowledgeable and experienced person about his or her company in the boardroom, with the most time to devote to the company's affairs. By custom and necessity the CEO/chairman controls the flow of information, sets agendas, runs meetings. The CEO/chairman is truly the leader of the board.

In fact, when boards develop innovative leading-edge practices, it is the CEO/chairman who usually initiates them. The difficulty, however, is that the influence of the CEO and the esteem in which he or she is held by the independent directors can make it difficult for the latter to carry out their monitoring function. As pointed out in the

9. Eighty percent of the companies in the 1992 Korn/Ferry survey report that the CEO is also the chairman. Korn/Ferry 1992 p. 7.

Cadbury Committee recommendations to improve corporate governance in Great Britain, the acid test is whether the board provides an effective check and balance to the CEO.[10]

Confused Accountabilities

The final limiting factor that we want to mention is directors' understanding of their ultimate accountability. As was reported in Pawns or Potentates, there is confusion about this in most boardrooms, and this is another important reason directors often lack a clear sense of purpose. Certainly the historical idea that directors are responsible for enhancing shareholder value has permeated all boardrooms. But this objective is narrower than many directors would personally prefer, since they are committed to a broader ideal of long-term corporate health. Directors also are not clear about the impact of the broad constituency statutes, adopted in about half the states, which authorize or mandate concern for employees, customers, suppliers and communities, along with shareholders. Further, they seem not to understand yet the broader definition of their responsibility stated by Chancellor Allen. To be effective monitors of management and the corporation, independent directors must have a clear

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10. Draft Report, Committee on Financial Aspects of Corporate Governance (May 27, 1992) p. 12. See also, Donald S. Perkins, What the CEO and Board Expect of Each Other, Harvard Business Review, Mar.-Apr. 1979.

shared understanding of the criteria they should use in judging performance. Such criteria must include a concern for the long-term value of the shareholder's investment as well as a broad range of related corporate performance criteria.

Proposed Changes

The innovations which we propose are intended to reduce these constraints on the board's role as an effective monitor in a fashion which does not blur the distinction between the executives who manage the company and the directors who monitor its performance. We subscribe to Donald Perkins' view of the need to recognize "the very distinct differences between the daily responsibility of management and the periodic responsibility of directors to evaluate plans and results. Directors simply cannot and should not try to manage the daily affairs of the business."[11]

Board Size and Composition

We believe that the size of a board should be limited to a maximum of ten directors (and we would favor boards of eight or nine)[12] with a ratio of at least two independent

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11. Donald S. Perkins, What the CEO and Board Expect of Each Other, Harvard Business Review, Mar.-Apr. 1979.

12. We recognize that in some companies a larger board is functioning very well and should not be reduced arbitrarily. In these situations we suggest that the reduction take place

(footnote continued)

directors to any director who has a connection with the company, either as management or substantial customer or supplier of goods or services. In addition, we would not view as independent an executive of another company on the board of which an executive of the company serves.[13] A smaller board will be most likely to allow directors to get to know each other well, to have more effective discussions with all directors contributing and to reach a true consensus from their deliberations.

Some may argue that boards of this size will limit the range of viewpoints and ignore the need of our society for diversity in the boardroom. Our rejoinder is that five or six independent directors, who are carefully selected, should provide the breadth of perspective and diversity required. In this connection we recommend that each board establish, and update annually, the criteria to be followed in

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(footnote continued)

through attrition by retirement over a period of time.

The companies in the 1992 Korn/Ferry survey have an average of twelve directors, with larger companies and banks and financial institutions reporting an average of thirteen and sixteen, respectively. Korn/Ferry 1992 p. 7.

13. We recognize that our definition of independent is different from that of the New York Stock Exchange and from that generally applied by the courts. It is similar to that proposed by the SEC with respect to compensation committees. We intend our definition only for the purpose of our proposal and not for legal or rulemaking purposes.

selecting candidates for nomination as a director of that company.[14] We approve and adopt the proposal by Donald Perkins and a number of other thoughtful directors of major companies that each board should establish a term limit for the independent directors.[15] As a practical matter this is the only way in which a board can replace a director who no longer meets his or her responsibilities. Each board should

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14. See, Kenneth A. Macke, The Board and Management: A New Partnership, Directorship July/Aug. 1992 p. 8:

> [T]he composition of the board is critical to how well it functions. We like to make sure that everything is geared toward making the board as independent and active as possible. By tradition, we look for board members who are successful in their careers so that they do not rely heavily on their Dayton Hudson position for income or prestige. It is no accident that the board is relatively young, with an average age of 56 and that all 13 members are at the top of their professions. That way, Dayton Hudson benefits from their experience as well as their fresh ideas.
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> We are not looking for "professional" directors; hence, there are limits to how long directors may serve. They must rotate off the board after 15 years, or at the mandatory retirement age of 65. . . . As a national corporation, we seek out directors with varied backgrounds. We also look for geographic diversity so that there is no hometown clique. But perhaps most important, board members must be forward-thinking individuals who take their commitment to our board seriously. . . .

15. "The average tenure for directors was reported at 10 years, the same as last year. Forty-two percent of the respondents believe there should be a limit to a director's term of service, up from 29 percent in 1990. Those who favor a limit believe it should be 12 years." Korn/Ferry 1992 p. 14. See also, note 14, supra.

also establish a mandatory retirement age for the independent directors.

We endorse the now widely accepted view that a corporation should have an audit committee, a compensation committee and a nominating committee.[16] Each of these committees should consist only of independent directors, one of whom should be the chair. Each independent director should serve on at least one of these committees.

We believe that given the time requirements for directors and the responsibilities they have, except in special situations a person should not serve on more than three boards.

Frequency and Duration of Meetings

Boards should meet at least bi-monthly and each meeting should take a full day, including committee sessions and other related activities. One meeting each year should be a two or three day strategy session. Directors should also spend the equivalent of another day preparing for each meeting by reviewing reports and other materials sent to them in advance. This would mean that directors would be expected

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16. According to the Korn/Ferry 1992 survey, 98% of the responding companies have an audit committee, 95% a compensation committee and 67% a nominating committee. Korn/Ferry 1992 p. 9.

to spend more than 100 hours annually on each board, not counting special meetings and not counting travel time.[17] We believe this much time is essential to allow directors properly to carry out their monitoring function. The additional meeting time will also have the salutary effect of strengthening the cohesive bonds among the independent directors.

Directors' compensation should be raised commensurate with the increased amount of time they are being required to spend. While financial remuneration is not an important reward for most independent directors (see Pawns or Potentates), we believe a director should be compensated adequately for the responsibilities he or she assumes in accepting a directorship. We approve the growing trend toward stock options or restricted stock being used as a significant portion of director compensation.

Because the limited time available is such an important issue, we believe that within each board it is essential to consider the way scarce meeting time is utilized. The agenda should focus the vast majority of the board's time on activities connected to its monitoring role. In fact, if boards focused on the three issues that directors themselves

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17. According to the Korn/Ferry 1992 survey, the average time spent on "board-related business (including time for preparation, meeting and travel)" was 94 hours. Korn/Ferry 1992 p. 12.

(see Pawns or Potentates) identified as their key tasks -- selecting, evaluating and rewarding the CEO, approving corporate strategy, and assuring compliance with the laws and ethical standards -- they would be doing what Chancellor Allen suggests. One way to assure that board time is well spent is to develop a board calendar, which specifies at which meeting the board will carry out various duties and reviews. A concrete sample of what we have in mind, which is from the Dayton Hudson Corporation, is attached as Exhibit 1. As shown in this exhibit, Dayton Hudson divides the areas to be monitored by the board into five principal segments, (1) strategic planning, (2) capital allocation, (3) long range goals, (4) performance appraisal and (5) manpower planning, with each segment further divided into its main components. If board agendas were planned in this careful manner and meetings and preparation time expanded, we believe that there would be major progress in improving the effectiveness of America's corporate boards.

The Lead Director

Over the years, whenever there is a resurgence of interest in U.S. corporate governance, one idea which resurfaces is to separate the job of chairman from that of CEO. This is a key point in the Cadbury Committee's recommenda-

tions.[18] While this idea works well in many European companies, and even in a few in the U.S., we recognize that it is strongly resisted by U.S. top management.

Nevertheless, if independent directors are to be effective, they need some form of leadership from among their own number. While this is true in normal times, it is especially valid if the CEO is incapacitated or is failing in his or her duties. We therefore propose (as does the Cadbury Committee for those British companies that do not have a non-executive chairman) that each board select from among the independent directors a leader. The person in this role could be rotated on an annual or bi-annual basis. What this person is called is not important, but his or her duties are. We believe that the CEO/chairman should consult with this lead director on the following matters: the selection of board committee members and chairpersons; the board's meeting agendas; the adequacy of information directors receive; and the effectiveness of the board meeting process. Additionally, this director would play a leading role in the CEO evaluation described below. Finally, if the independent directors should face a crisis because of the incapacity of

18. Draft Report, Committee on Financial Aspects of Corporate Governance (May 27, 1992) p. 13.

the CEO/chairman, or a failure in top management performance, they would have a designated leader in advance. This could be key to their ability to act promptly if the need arose.

While some top managers' immediate emotional reaction to this idea will be negative, we believe it is a critical factor in making boards more effective. In fact, we believe that in many boardrooms today such a leader is already recognized by management and independent directors alike. He or she may be a particular committee chairperson, the director with the most seniority, or the one who is most respected. Our proposal would simply legitimate this role, without compromising the leadership prerogatives of the CEO/chairman.

Improved Information

Even when directors spend more time preparing and discussing corporate issues, they still will need information which is superior to what they now receive in two senses. First, to carry out the monitoring of the corporation's performance in relation to its long-term strategic, financial, and organizational goals, directors need a broader array of data than the financial reports they typically now receive. That financial reports alone are inadequate for assessing corporate performance is not a new idea. As Eccles and

Nohria point out,[19] as far back as 1951, Ralph Cordiner, then CEO of General Electric, asked McKinsey and Company to develop a broader set of measures for business performance. Several different classes of measures were recommended: profitability; market position; productivity; product leadership; personnel development; employee attitudes; public responsibility; and balance between short- and long-range goals. Earlier this year Cyrus Friedheim, Jr., Vice Chairman of Booz, Allen & Hamilton, proposed a similar list of measures as the basis upon which CEO performance should be judged in relation to compensation.[20] Following this recommendation would also be of considerable value in enabling companies to comply with the proposed SEC requirement that compensation committees report in the annual proxy statement the factors they considered in setting executive compensation.

The specifics of the performance data supplied to the directors will vary depending on the company's business(es) and the adequacy of its information systems. We recognize that the amount of this data could be overwhelming

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19. R.G. Eccles and N. Nohria, Beyond the Hype: Rediscovering the Essence of Management (Harvard Business School Press due September 1992).

20. "Measuring Executive Performance," by Cyrus Friedheim, Jr., presented at Corporate Governance Conference, Kellogg Graduate School of Management, Chicago, January 1992.

to outside directors, even with the increased time we have proposed they devote to their responsibilities. Hence, our second proposal apropos director information is that great care and attention be given to how data is organized and presented, with each board choosing (and reevaluating annually) the format it finds the most useful.

Corporate and CEO Performance Evaluation

The purpose of these broader data is not only to enable independent directors to be better informed in making decisions, but also to enable them to do a more thorough and meaningful assessment of the performance of their company and of its leadership. We believe the board's performance evaluation should be an explicit annual event. It should consist of three related aspects.

First, there should be an assessment of the company's long-term financial, strategic and organizational performance in relation to the goals previously established by management and the board. This assessment of company performance should also include an examination of the company's historical trends as well as its performance along these dimensions compared to competitors and/or similar companies. This assessment of company performance would be a critical part of the board's annual evaluation of the CEO's perfor-

mance, the second aspect of the board's annual review of performance.

The independent directors' review of the CEO's performance is obviously a sensitive and delicate matter, which must be conducted with skill and tact. Many boards profess to do such an assessment, but we know of only a few companies that conduct a thorough and systematic review. The Business Roundtable says one of the primary functions of the board of directors is to "select, regularly evaluate and, if necessary, replace the chief executive officer."[21] Because of the sensitivities involved we do not recommend any specific process. What will work in a particular company will depend on its business(es), size, history and culture, and the relationship between the CEO and the independent directors.

Nevertheless, we do have in mind certain broad guidelines which we believe are critical if the process of evaluation is to be helpful both to the CEO and the independent directors:

1) The assessment should be based on company performance, and the progress the CEO has made towards his personal long- and short-range goals. Such

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21. Corporate Governance and American Competitiveness (The Business Roundtable, March 1990) p.7.

personal goals would constitute the major extraordinary initiatives the CEO wanted to achieve, e.g., developing and selecting a successor; expanding into markets internationally; making a major acquisition; creating a significant joint venture. Short-term goals we envision being agreed upon annually between the CEO and the independent directors. The longer-term goals might have a three-to-five-year horizon, but would be reviewed annually and changed as necessary.

2) Each director would make an individual assessment of the CEO's performance. These would then be synthesized to reveal the central tendency, as well as any range of views. This synthesis could be done by the lead director, or by a small group or committee of independent directors.

3) The CEO would receive this synthesized feedback in a confidential manner in which both he or she and the independent directors were comfortable.

4) After the CEO has had time to reflect on it and to develop a response, he or she would then discuss his or her reactions to the assessment with all the independent directors. This discussion should also

focus on any changes in goals for the company or the CEO which seem appropriate.

We believe that a careful annual assessment would accomplish several important objectives. For the CEO it would provide concrete data about how the independent directors assessed his or her performance and that of the company. Leaders of large companies rarely get such feedback, but they tell us it can be very helpful to them. For the independent directors such a process would enable them to share their ideas on the company's progress and on the CEO's performance. It would also provide a tangible basis for defining CEO compensation. Finally, this process would improve communication between the CEO and the independent directors as well as among the latter, which in itself is desirable.

We recognize that some companies may be concerned with the litigation implications of the annual CEO evaluation, however, we believe that the benefits, both substantively and as demonstrating discharge by the directors of their monitoring responsibilities, outweigh the possible misuse or misinterpretation of the evaluation in a lawsuit.

In order to avoid any misunderstanding or implication that the independent directors are meeting or conferring because of dissatisfaction with management, the CEO evaluation could take place at the same time each year. Some com-

panies have adopted a practice of having the independent directors meet separately as part of several of the regularly scheduled board meetings, again to avoid any implication of a problem with management.

The third aspect of the annual performance evaluation is an assessment of how the board itself is functioning. Questions like the following should be discussed: Is the board satisfied with the information it is receiving? Is there a director who does not participate fully in the board's activities? What can the board do to improve its own processes and performance?

The Board and Shareholders

Our focus so far has been largely on the relationship between management and the board. We now want to turn to the board's relationship to shareholders. As we noted earlier, shareholders, especially institutional investors, are searching for legitimate means to express their concerns about corporate performance. As we describe this facet of our proposal, we must emphasize that the term "legitimate" to us means shareholders should focus their attention on the financial and strategic performance of the company, and should not use the corporate governance arena to further social or political ends. Such activity only serves to exacerbate the tensions between shareholders and managers and

directors, diverting the latter two groups from focusing on efforts to improve performance.

We recommend that the board of directors (including its management members) meet annually in an informal setting with five to ten of the larger investors in the company.[22] The primary purposes of the meeting are to promote understanding between the two groups and provide a convenient and informal opportunity for the investors to tell the directors either as a group or individually of any concerns the investors have. Thus the meeting might avoid much of the letter writing, meeting requests, boardseat requests, and proxy proposals some institutions have been pursuing. If the meeting does nothing more than improve understanding between investors and directors, it will serve a valuable purpose. However, the meeting will be of little or no value, and likely will fall into disuse, if the investors are not represented by knowledgeable, high-level officers. A company with satisfactory performance may find that its large investors prefer to meet once in two or three years rather than annually.

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22. This type of meeting must be conducted carefully to avoid inside information problems. We believe that this is readily achievable and does not present any problems beyond those of the customary meetings with security analysts and portfolio managers.

If the company's performance is satisfactory, the informal meeting with the large investors and the customary quarterly and annual reports, plus the usual pattern of management's meetings with analysts should provide adequate information to investors. However, when the company's performance is not satisfactory, we believe the company should provide investors with more information about the causes of the company's difficulties, and the actions the board and management are taking to correct the situation, than is normally provided in the "Management Discussion and Analysis" section of the company's periodic reports.

Specifically, if in three of the past five years a company has failed to meet its goals or plans, or suffered losses or declines in earnings, or erosions in competitive positions, or has underperformed the market averages or its competitors or peer group of companies, a special section of the annual report should be prepared under the supervision of the independent directors. This special report should describe the causes of the problems and the actions the board and management are taking. This special report should be continued in subsequent annual reports until the problem has been rectified. While this special report may in some situations relate to certain elements of the CEO performance review, we do not intend that such review be published or nec-

essarily referred to in any way in the special report or otherwise.

When a corporation's underperformance triggers these explanations in the annual report, substantial shareholders should be entitled to voice their views through the proxy statement for the annual meeting. To provide this we would adapt the recent proposal made by New York State Comptroller Edward Regan to grant such access to long-term substantial shareholders, and we would provide that the annual meeting be rescheduled so that there is sufficient time after the mailing of the annual report for shareholders to determine if they desire to have their views included in the proxy statement for the meeting. Provided there is no proxy fight, up to three shareholders or groups of shareholders who individually or together have held 1% or more of the shares of the corporation for a year would each be permitted to include a statement of up to 500 words setting forth their views of the corporation's performance.

The performance reviews, annual meeting with large investors and special report to shareholders for troubled companies are central features of our proposal. We believe that these performance reviews, investor meetings and special reports will result in better monitoring and higher standards of accountability. The special reports will provide all

shareholders with adequate information for purposes of communicating with management and the directors and upon which to make proxy decisions.

Conclusion

We believe that our proposal provides an effective means for improving corporate governance and thereby improve performance and the competitive position of U.S. companies. All of our proposal can be adopted by individual boards of directors with no more than changes in bylaws and boardroom procedures. We are convinced that moving in the directions we have proposed will strengthen corporate governance by making management more directly accountable to the board and, in problematic situations, improving shareholder communication with independent directors. Lastly, we believe that our proposal will reduce the growing tension between activist institutional investors and shareholder advocacy groups and corporations; eliminate much of the proxy resolution activity by institutional investors designed to impose their concepts of governance on companies; arrest the efforts for more federal regulation and legislation; and avoid a judicial shift away from the traditional business-judgment-rule review of board actions.

1 Dayton Hudson "Wheel" of Board of Directors Duties

BOARD OF DIRECTORS — DUTIES

RELATIONSHIP TO THE MANAGEMENT PROCESS