

Dear Ms. Sheehan:

September 20, 2012

Thank you for the opportunity to provide input into the priorities of the Investor Advisory Committee (IAC), especially the Investor as Owner subcommittee.

By way of background, I am an individual investor and frequent commentator on corporate governance matters. Since 1995, I have published one of the Internet's most comprehensive sites on the subject at <http://corpgov.net>, getting as many as 700,000 "hits" a month. The site has resulted in dialog and cooperative initiatives with pension funds, corporate directors, labor leaders, proxy advisors, money managers, authors, academics, and hundreds of individual investors.

A 1998 Pensions & Investments article credited CorpGov.net with being "huge" in "helping shareholders win increasing control over America's corporate boardrooms." My 2002 petition with Les Greenberg "re-energized" the debate over shareowner access to the proxy with respect to nominating corporate directors, according to the Council of Institutional Investors.

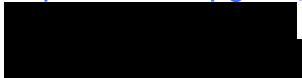
In 2010 and again in 2011 I was named by Directorship 100 on a "short list of movers and shakers who merit serious attention as potential boardroom influentials... who, by virtue of what they do and how they do it, bear watching." I am also on the board of the United States Proxy Exchange, which facilitates shareowner right for retail investors, and the advisory board of VoterMedia.org, which facilitates accountability through voter-funded media.

My recommendations to the IAC Investor as Owner subcommittee are highlighted below in bold italics. Several important cited documents include embedded links and should default to bold blue type when read online in Word. I would be happy to discuss the recommendations with you, other committee members, and/or SEC staff.

Sincerely,



James McRitchie, Publisher  
Corporate Governance  
<http://www.corpgov.net>



## **Concentrate Efforts on Retail Investors**

The IAC would do well to recommend leveling the playing field between retail and institutional investors and between investors of all types and corporate management. Retail investors are more likely to return to the market if the scales aren't so often tipped against them. It appears there may be agreement by Committee members to first concentrate their efforts on retail investors.

Commissioner Luis A. Aguilar in his remarks to Committee members, noted:

*According to a recent survey, only 15% of Americans trust the stock market. Investors continued to withdraw cash from U.S. equity funds in 2011, continuing a trend that has seen a total outflow of a half a trillion dollars from domestic equity funds since 2006. Some of this shift may be a natural result of the aging population of baby boomers. But research suggests there may also be a decline in the willingness of even younger investors to invest in the stock market.*

According to [\*\*New SEC Investor Advisory Committee to Put Retail Investors First\*\*](#) (AdvisorOne.com, 6/12/2012) Committee member James Glassman, executive director of the George W. Bush Institute, told newly appointed Committee Chairman Joe Dear that he wanted to be "assured" that the committee's agenda would focus on retail investors. "Yes," Dear replied. Barbara Roper, director of investor protection for the Consumer Federation of America, told AdvisorOne that most committee members expressed a desire to focus on the needs of retail investors—

*there is no issue of higher importance for retail investors than how we regulate the intermediaries [such as the advisors and broker-dealers] they rely on.*

## **The Importance of Retail Investors**

Too many, including those at the SEC, view individual investors as irrelevant, uninformed and incompetent, not to be trusted with tools like proxy access. Institutional investors will look out for our interests.

Many have written about inherent conflicts of interests faced by institutional investors. One recent example is Simon Wong's [\*\*How Conflicts of Interest Thwart Institutional Investor Stewardship\*\*](#). Funds hope to run 401(k) plans for companies, so don't want to be seen as biting the hand that feeds them. All funds are under pressure to keep expenses down. Active monitoring and engagement costs money and creates a collective action problem because the benefits of engagement go to all, not just those who expend resources. Although we would like to work closely with institutional investors, individual investors can't rely on them to speak on our behalf, since we have different interests.

One example of the dismissive atmosphere is the treatment of retail investors submitting proxy proposals. As you can see from the table below from John Laide at [SharkRepellent.net](http://SharkRepellent.net), individuals submit a substantial proportion of such proposals. Yet, when the SEC convenes its post-season roundtable to review how the process can be improved, it typically does not invite retail investors.

### Top Sponsors of Shareholder Proxy Proposals

Proponent Type	Rank	2011		2010	
		# Proposals		# Proposals	
Individuals	1	358		1	494
Religious Groups	2	194		2	223
Labor Unions	3	130		3	161
Public Pension Funds	4	96		4	116
Investment Advisers	5	68		5	76
Other Stake Holders/Activist Groups	6	59		6	60
Other Institutions	7	26		7	21
Hedge Fund Companies	8	3		8	11

Most at the SEC will say the individual retail investor is key but let's put those good intentions into practice. Where to begin?

***The IAC should recommend the Commission to include representatives of retail investors in roundtable and other events typically attended by institutional investors. Since the cost of attending such meeting may be burdensome, the Commission should endeavor to facilitate participation through electronic means when possible.***

### Broker Letters

The process to obtain proof of ownership from retail investors should be less onerous. What real problem did Staff Legal Bulletin No. 14F (CF) address? Many retail shareowner proposal proponents viewed this SLB as a complicated labor-intensive answer seeking a problem. Had introducing brokers provided false evidence of ownership letters for retail investors holding shares in street name? I have never heard of any brokerage providing a letter saying one of their clients owned shares when he or she did not. If such cases exist, why aren't these incidents brought to the attention of prosecutors for criminal violation? Wouldn't that be a much simpler process unless such practices are rampant? If such practices are rampant, where is the evidence?

SLB 14F(CF) sets up a process whereby proponents may be required to obtain a letter from a clearing bank verifying their broker or bank held specified shares, even though the proponent may have no relationship with the clearing bank and the clearing bank has no legal obligation to provide a letter.

***The IAC should ask staff for examples of fraudulent broker letters. If there were no fraudulent letters, the IAC should recommend that a letter from the proponent's broker or bank is sufficient and there is no need to get a letter from the clearing bank.***

SEC rules require that proponents affirm their intention to continue holding at least the minimum amount of shares necessary to submit a proposal through the date of the annual meeting. Companies typically do not seek reconfirmation of share ownership once the proposal has gone through no-action review. In some sense, they are trusting that shareowners haven't sold their shares during the several month period between submission and the annual meeting. However, when it comes to a day or two around the submission date, companies typically play "gotcha." See page 6 of Council of Institutional Investors guide, [\*\*Everything you wanted to know about Filing a Shareholder Proposal but were afraid to ask.\*\*](#)

*To prove ownership, a proponent needs to get a letter from a bank or broker confirming that he or she owned the requisite number of shares on the date the proposal was sent to the company. Ideally, the broker letter should be submitted along with the shareowner proposal.*

*This can get tricky. As a practical matter, however, the broker may prepare the broker letter a day or two in advance of the date the proponent submits it. Thus, when it is sent in, it will have a different date than the date of the letter. The company may argue that the submission is insufficient because the broker letter is dated November 15, whereas the submission is dated November 17 and it is conceivable that all of the proponent's (shares) were sold on November 16.*

***The IAC should recommend to the Commission that two or three days between the submission date of a proposal and the date of a letter evidencing ownership is immaterial and should not be allowed as the basis for a no-action letter. Let's stop playing games.***

## **Voter Information Forms**

Retail investors should be entitled to the same protections as shareowners holding actual proxies. Retail investors typically hold their shares in "street name" and receive voter instruction forms (VIFs) from Broadridge, rather than actual proxies. Broadridge claims (in correspondence and conversations) the rules that apply to proxies don't apply to VIFs.

If VIFs go out to about 1/3 of the total number of shareowners and the rules don't apply to them, then the SEC appears to sanction the treatment of retail shareowners as second class citizens, in comparison to those who receive actual proxies. (I don't know the actual proportion going out as VIFs, but 1/3 seems like a reasonable guess.) SEC Rule 14a-4(a)(3) states the proxy

*shall identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders.*

Broadridge claims the rules for proxies don't apply to voter information forms (VIFs), since they are not legal proxies. It may be helpful here to provide an example. John Chevedden submitted a proposal to Altera, asking them to end supermajority voting requirements. His resolved language read as follows:

*Shareholders request that our board take the steps necessary so that each shareholder voting requirement in our charter and bylaws, that calls for a greater than simple majority vote, be changed to a majority of the votes cast for and against the proposal in compliance with applicable laws. This includes each 80% supermajority provision in our charter and bylaws.*

Broadridge identified the item to be voted on the VIF, which most retail shareowners got, as follows:

***TO CONSIDER A STOCKHOLDER PROPOSAL REQUESTING THAT BOARD TAKE THE STEPS NECESSARY SO THAT EACH STOCKHOLDER VOTING REQUIREMENT IN ALTERA'S CERTIFICATE OF INCORPORATION.***

In an April 1, 2010, letter to the SEC and Altera, Chevedden complained that voting would not be accurate with such a description of his resolution. On April 2, 2012, I posted an article entitled [Abusive Practices Continue as VIFs Tilt Voting in Favor of Management](#) and urged readers to bring this abusive practice to the attention of the former SEC Investor Advisory Committee through use of their online comment form. On April 9, 2010 Broadridge had acknowledged the error and "corrected" ballot language so that it read as follows:

***A STOCKHOLDER PROPOSAL REQUESTS A CHANGE TO ALTERA'S VOTING REQUIREMENTS, SEE PROXY STATEMENT FOR FURTHER DETAILS.***

A Broadridge representative said they "try" to summarize the issues but if that can't be done easily they put a general statement on the VIF, referring the shareowner to the proxy materials, such as that used at Altera. It is difficult to understand why Broadridge claimed to not be able to summarize this proposal as "end supermajority voting requirements," or something similar. It certainly was not a unique or hard to understand proposal. Many, many such proposals had gone before.

This "corrected" ballot language certainly does not meet the requirements of SEC Rule 14a-4(a)(3). I asked the SEC for clarification on whether or not proxy rules apply to VIFs but received no response. If the SEC is trying to set up a system of rules that will persuade retail investors to come back into the market, why does it allow VIFs to obfuscate the issues?

For a more complete review of the problems related to VIFs, see my [comment letter to the SEC dated October 20, 2010](#). See also, [Investors Against Genocide Fighting American Funds, Broadridge and Vague SEC Requirements: More Problems Solved Using Direct Registration](#) and Ross Kerber's piece for Reuters on zombie voting ([Top U.S. proxy vote site favors boards, critics say](#), 5/29/2012).

***The IAC should ask staff for a legal opinion discussing what legal requirements apply to VIFs and how, if at all, do they differ from those that apply to proxies. The IAC should recommended changes necessary so the same protections are afforded to retail investors as are afforded to shareowners with direct registration.***

### **Blank Votes**

If the SEC determines their rules *do* apply to VIFs, that may clarify the need for including a "clear and impartial" description required by Rule 14a-4(a)(3) and as discussed above. Additionally, such a finding might also somewhat address another issue — votes left blank that turn, almost magically, into votes for management. At least more voters would be alerted to the fact that blank votes will be counted as votes in favor of the position taken by the company's soliciting committee because warnings would then have to be in bold-type, instead of in micro-type footnotes, as Broadridge now uses.

However, Rule 14a-4(b)(1) still needs to be changed. See my post on the HLS Forum at [Don't Let Companies Change Shareholders' Blank Votes](#) and my 2009 rulemaking petition to the [SEC 4-583](#). Just as the SEC finally agreed to abolish the practice of "broker voting" in most instances because a non-vote isn't necessarily intended to be a vote for management, the SEC should also amend 14a-4(b)(1) so that blank votes are counted as blank votes, not as votes in favor of the position taken by the company's soliciting committee.

***The IAC should try to level the playing field by recommending the Commission take action on my rulemaking petition to eliminate blank votes from automatically going to management.***

### **Voting Uninstructed Shares**

It makes little sense to prohibit brokers from voting uninstructed shares, but continuing to allow companies the ability to vote on matters where the shareowner has failed to indicate his or her choice. Congress' objective in enacting Section 957 of Dodd-Frank should logically be seen as extending to blank votes and other issues. The intent appears clear; if beneficial owners fail to provide instructions on how their proxies should be marked with respect to "significant" matters, no one should be empowered to vote on their behalf.

It would appear from the bill's language that the prohibition already overrides provisions of SEC Rule 14a-4(b)(1) that "a proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the beneficial owner or security holder." At least it appears to clearly override granting such discretionary authority for votes on directors and executive compensation to brokers.

The SEC should use its rulemaking powers, not only to conform the provisions of Rule 14a-4(b)(1) to the mandate and the implied intent of Dodd-Frank but should also make a determination that all proxy matters to be voted on are "significant." All votes for all matters should only be cast in a manner as instructed by beneficial owners. Non-votes should not be counted as "for" or "against," since they are obvious abstentions.

Who can say even selection of auditors is routine after Andersen's involvement in Enron? Andersen struggled to balance the need to maintain its faithfulness to accounting standards with its clients' desire to maximize profits, as reflected in quarterly earnings reports. Although the Supreme Court of the United States unanimously reversed Andersen's conviction because of vague jury instructions, Andersen was also alleged to have been involved in the fraudulent accounting and auditing of Sunbeam Products, Waste Management, Inc., Asia Pulp & Paper, and the Baptist Foundation of Arizona, WorldCom, as well as others. Four years ago, a Department of Treasury advisory committee suggested that more companies have their shareholders vote on auditors, as a way to keep audit committees more accountable to their oversight duties.

More companies hold such votes. However, how do such votes keep audit committees more accountable if broker votes and blank votes tip the scales and override actual votes by shareowners? Additionally, broker votes allowed on any issue deny shareowners the ability to withhold their proxy, a possibly important strategy where shareowners believe the process being followed is illegitimate, as when companies hold a virtual-only annual meeting.

***The IAC should recommend the Commission amend Rule 14a-4 to remove the provision that confers discretionary authority on matters where choice has not been specified by the security holder or beneficial owner, should explicitly extend such prohibition of discretionary authority to companies where beneficial owners fail to provide instructions, and should make similar amendments to other rules that may provide such authority.***

### **Client Directed Voting**

Historically, most retail shareowners toss their proxies. During the first year under the "notice and access" method for Internet delivery of proxy materials, I understand that less than 6% voted. This contrasts with almost all institutional investors voting, since they have a fiduciary duty to do so.

“Client directed voting” (CDV), a term coined by Stephen Norman, is seen by many as a solution for getting more retail shareowners to vote, ensuring companies get a quorum, and helping management recapture a good portion of the broker-votes cast in their favor that evaporated with recent reforms. I viewed Norman’s initial proposal as an extension of the “Vote with the Board’s Recommendations” button seen on VIFs. An open form of CDV could create much more thoughtful and robust corporate elections.

The key issue in any open CDV system is to let shareowners control where their electronic ballots are delivered. Just as there is no question shareowners can control where hardcopy ballots are delivered, there should be no question they can direct where their electronic ballots are delivered. This simple requirement would insure third-party content providers, like the late effort at MoxyVote.com, an opportunity to compete and improve the quality of voting advice.

Additional elements for a more effective CDV system include:

- A wide range of voting opinion sources that will eventually cover all issues;
- Open access for any new opinion sources to publish their opinions;
- Open access for shareowners to choose any opinion source for our standing instructions on voting;
- Sufficient funding for professional voting opinion sources that compete for funding allocated by retail shareowner vote (or by beneficial owners of funds that may choose to “pass through” their votes).

Under an open system for of CDV, feeds would offer the ability for retail shareowners to essentially build a “voting policy,” just as institutional voters are now able to do. That model will increase participation and voting quality. We shouldn’t ask shareowners to affirm every single pre-filled ballot. That could be a deal breaker for people with stock in many different companies who would rather spend their time on other activities.

Third-party CDV systems, like the former MoxyVote.com, could allow investors to create hierarchies of voting instructions. (Vote like X. If X hasn’t voted the item, vote per Y. If Y hasn’t voted, vote per Z, etc. Eventually, these systems could become very complex. Vote like X on issue A; vote like Y on issue B, also specifying defaults if either X or Y don’t have votes recorded.) See [Client Directed Voting Q&A](#) on the VoterMedia.org site.

If brokers are required to deliver proxies as directed by their clients, another whole model could emerge around “proxy assignments.” Proxies assigned to organizations or individuals, for example, could give annual meetings a new meaning. See [Investor Suffrage Movement](#) by Glyn A. Holton. For a more complete discussion on CDV and my recommendations, see my discussion at [An Open Proposal for Client Directed](#)

**Voting**, Harvard Law School Forum on Corporate Governance and Financial Reform,  
July 14, 2010.

***The IAC should ask staff what rulemaking changes would be needed to create an open and robust form of client directed voting and should then recommend such changes to the Commission.***