

Corporate Governance

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Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

January 21, 2020

Re: File No. S7-23-19

Dear SEC Commissioners and Staff:

This letter supplements my previous letters of December 28 and 29 on File No. S7-23-19.



Modernization of Shareholder Proposal Rules Protect Entrenched Boards

The SEC's so-called **modernization of shareholder proposal rules** would significantly reduce the spread of long-term focus and best practices generated by proposals submitted by "gadflies" like myself to make corporations more democratic. **Chairman Clayton** (<https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting>) seems to believe we file unpopular costly proposals.

[I]t is clear to me that a system in which five individuals accounted for 78% of all the proposals submitted by individual shareholders[19] would benefit from greater alignment of interest between the proposing shareholders and the other shareholders—who hold more than 99% of the shares. Yes, you heard that right, five individuals accounted for 78% of all the proposals submitted by individual shareholders.

There is nothing historically unusual about a few shareholders filing most of the proposals. A study of 286 shareholder proposals submitted between 1944 and 1951 found that 137 or 47% of *all* proposals, not just those of individuals, were submitted by the Gilbert brothers (**The SEC Proxy Proposal Rule: The Corporate Gadfly**, p. 830, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2770&context=uclrev>)

While five individuals may file a disproportionate number of shareholder proposals, that does not mean our proposals lack value. My proposals and my wife's averaged more than 50% support this year. All sought to make corporations more democratic and accountable. See **McRitchie 2019 Proxy Season Win for Market Beta**, <https://www.corpgov.net/2019/08/mcritchie-2019-proxy-season-win-for-market-beta/>.

Modernization of Shareholder Proposal Rules: Poll Tax Coming?

Due to the proposed increased thresholds for submission or increased waiting period, my wife and I would have to wait an extra year or two before filing most of our proposals. We have held about half of the 150 company investments in our portfolio for less than 3 years. Since we have a diversified portfolio, we have less than \$15,000 in each of our newer investments. As a result, adoption of best practices would take longer... unless CalPERS and others file at hundreds of additional companies each year.

As discussed in **SEC Proposal to Improve Proxy Voting Advice**, <https://www.corpgov.net/2019/11/sec-proposal-to-improve-proxy-voting-advice/>, although none of the Big Four funds have ever filed a shareholder proposal, they do vote in favor of proposals generally recognized by industry as best practices after years of shareholder advocacy. **The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent** (<https://corpgov.law.harvard.edu/2019/05/31/the-never-ending-quest-for-shareholder-rights-special-meetings-and-written-consent/>) by Emiliano Catan and Marcel Kahan found:

Out of the 114 firms in our sample that granted that power over 2005-2017, 80% had received a precatory proposal. Relatedly, 84% of the unique firms that received at least one shareholder proposal asking for the right to call special meetings had granted their shareholders that right by the end of 2017...

The proposals were almost exclusively filed by individuals (as opposed to pension funds or other institutional investors). Remarkably, close to 90% of the proposals were filed by members of four families (the Chevedden family, the Steiner family, the Young-McRitchie family, and the Rossi family).

Progress on best practices often depends on the initiative of a few. Since the **average shareholder holds their shares for somewhere between four and eight months** (<https://www.politifact.com/virginia/statements/2016/jul/06/mark-warner/mark-warner-says-average-holding-time-stocks-has-f/>), requiring shareholders to hold \$2,000 of shares for *three years* before filing or \$25,000 for one year before filing appears entirely unreasonable. The next step might be to deny shareholders the right to *vote* unless they have hold large value shares or have held shares for three years or more. If that does not protect entrenched boards and managers enough, will we see an old-fashioned poll tax? Speaking of taxes, the IRS has long considered a one-year shareholder eligible for long-term capital gains treatment. The two and three years proposed by the Commission appear arbitrary and capricious.

Higher resubmission thresholds are often recognized as problematic for environmental and social proposals, but they will also be a problem for governance proposals. For example, it took years and many low threshold votes to reach “consensus” around the terms of proxy access proposals. Resubmissions at many firms would have been prohibited for years under the proposed rule. Therefore, spread of proxy access provisions, now in place at more than 70% of S&P 500 companies and a near majority of the Russell 1000, would have been delayed by many years if the proposed rule had been in place.

Chevedden Amendment and Reserving Shareholder Calendars

The proposed rule would also hit shareholders with procedural limitations on our ability to coordinate submissions and require proponents keep calendars open for the convenience of companies, rather than making normal appointments for negotiations.

Companies are allowed to use the same outside counsel for filing more than one no-action request. Why should shareholders be prohibited from using an agent who has also filed a proposal or has filed a proposal on another’s behalf? The “one proposal” rule should be called the “Chevedden Amendment,” because it is specifically targeted at one individual and those who work with him. Will shareholders seek a “Gibson Dunn Amendment” aimed at cutting down the number of companies any single law firm can represent?

With regard to negotiations, I am always happy to negotiate with companies. For example, I have filed a proxy access proposal at Apple for several years to bring them into best practices with regard to the standard “20% or two, whichever is higher” provision regarding the number of nominees. Apple has never been willing to negotiate or have a conversation about the proposal, other than around the logistics of presenting it at the annual meeting. I have no problem being available via teleconference 10-30 days after submission of a proposal but it would be unduly burdensome to commit in advance to keep specific days and

times on my calendar open in advance, especially when I have no commitment from a company they are even willing to engage in discussion.

In conclusion, while Chairman Clayton claims to be out to protect the Main Street investors, the proposed rules further disenfranchise us, leaving Mr. and Ms. 401(k) largely dependent on a conflicted Big Four mutual fund families to monitor the same corporations they seek contracts with to administer their retirement services.

Modernization of Shareholder Proposal Rules: A Better Way

The current annual N-PX proxy reporting requirements, promulgated before widespread use of the internet, obfuscate the ability of investors to compare voting records. Compare the **sortable voluntary disclosure of Trillium Asset Management** (<https://trilliuminvest.com/approach-to-%20sri/proxy-voting/>), which often includes voting rationale, with the **mandated disclosure of the Vanguard Index Trust Total Stock Market Index Fund** (<https://www.sec.gov/Archives/edgar/data/36405/000093247118006890/indexfunds0085.htm>), which requires a laborious effort to decipher.

A better way for the SEC to evaluate the proxy proposal rules would be to first increase public scrutiny of how funds vote. Driving competition around votes would drive discussion and the demand for proposals better aligned with investor values. Some shareholders and fund investors may seek better alignment between fund labels, such as “ESG” or “positive impact” and fund voting. Others may focus exclusively on short-term shareholder returns regardless of environmental, social or governance impact.

Real-time disclosure in machine readable format will allow us to quickly see which funds are voting with the values of Mr. and Ms. 401(k) and Main Street investors. See my rulemaking proposal File **4-748** (<https://www.sec.gov/rules/petitions/2019/petn4-748.pdf>), **Report of proxy voting record**.

The SEC should focus on increasing public and investor information, not discouraging the involvement of retail shareholders and fund holders in shaping the world corporations develop on our behalf.

Sincerely,



James McRitchie, Shareholder Advocate/Publisher
Corporate Governance (CorpGov.net)