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

January 27, 2020

**Re: File No. S7-23-19**

Dear SEC Commissioners and Staff:

This letter supplement my previous comments.

The SEC rule proposes to *increase* ownership and resubmission thresholds for Rule 14a-8 shareholder proposals to discourage participation by retail shareholders. A better alternative would be to move in the opposite direction, encouraging and empowering main street investors.

In his remarks introducing the proposed rule, Chairman Clayton noted:

> [I]t is clear to me that a system in which five individuals accounted for 78% of all the proposals submitted by individual shareholders would benefit from greater alignment of interest between the proposing shareholders and the other shareholders—who hold more than 99% of the shares.[1]

Given its history and statutory mandate, one might expect the SEC to *encourage* individual investors, rather than erecting barriers to direct participation in our equity markets. Although he implies that proposals from the five individuals are not aligned with the interests of other shareholders, Chairman Clayton presented no evidence for that belief. If five players in baseball hit 78% of the home runs, would their interests be necessarily unaligned with those of other players or the fans?

It is time to set the record straight that my proposals, like the proposals of Chevedden and Steiner, are often widely supported. The argument from those who want to reduce democratic corporate governance seems to be that low thresholds for submitting and resubmitting shareholder proposals allow a few shareholders to impose their personal policy priorities on companies, with costs borne by all shareholders, most of whom do not support those proposals.

As can be seen in the table below, my proposals averaged 52.3% support this proxy season. I am exactly the type of shareholder targeted by the rulemaking under consideration – a small retail investor who files a substantial number of proposals each proxy season. If my submissions were really “idiosyncratic,” why do they win the votes of so many shares?

True, my proposals to deduct the impact of share buybacks from CEO performance pay only averaged 3.1% support. However, buybacks (BB in the table) was a new topic. Cyber security (Cyber) is also a relatively new concern and won only 26.8%. Many funds that do not have a proxy voting policy on a new topic vote as the board recommends until they develop a policy.

[1] https://www.sec.gov/news/public-statement/statement-clayton-2019-11-05-open-meeting

On the other hand, my proposals to move to annual elections (AE) for directors averaged more than 70% support. Proposals to elect directors by majority vote (DMV) averaged 51.6% support. Proxy access (PA) proposals averaged 64.8%. Eliminating supermajority in favor of simple majority voting standards won an average 56.5%. Special meeting proposals (SPM) to either adopt or lower thresholds won an average of 54.5%. Transparent political spending (TPS) averaged 46.4%. I expect this will rise above the 50% threshold in 2020 with the upcoming Presidential elections heightening concerns. Finally, written consent proposals from our work averaged 61.1%.

### McRitchie 2019 Proxy Season Table

| **Ticker** | **Company Name** | **Submission** | **Mtg Date** | **% Y/N** | **Notes** |
|---|---|---|---|---|---|
| COST | Costco | AE | 1/24/19 | 99.8 | N/A (no-action) Board substitute |
| GWRE | Guidewire Software Inc | AE | 12/6/18 | 92.3 | |
| K | Kellogg | AE | 4/26/19 | 62.1 | |
| PAYC | Paycom Software Inc | AE | 4/29/19 | 0.0 | not presented |
| UTHR | United Therapeutics Corp | AE | 6/26/19 | 96.9 | |
| | **AE Average** | | | | **70.2** |
| AXP | American Express | BB | 5/7/19 | 3.2 | |
| CSCO | Cisco | BB | 12/12/18 | 6.1 | |
| WBA | Walgreens Boots Alliance | BB | 1/25/19 | 0.0 | lost N/A |
| | **BB Average** | | | | **3.1** |
| DIS | Walt Disney | **Cyber** | 3/7/19 | **26.8** | |

| | | | | | |
|---|---|---|---|---|---|
| GOOGL | Alphabet Inc. | DMV | 6/19/19 | 30.4 | |
| FB | Facebook | DMV | 5/30/19 | 24.5 | |
| MBII | Marrone Bio Innov | DMV | 5/30/19 | 100.0 | Board adopted |
| | **DMV Average** | | | | **51.6** |
| AAPL | Apple | PA | 3/1/19 | 29.5 | |
| TDOC | Teladoc, Inc | PA | 5/30/19 | 100.0 | Board adopted |
| | **PA Average** | | | | **64.8** |
| ALRM | Alarm.com Holdings, Inc | SMV | 6/5/19 | 65.0 | |
| AAXN | Axon Enterprise, Inc. | SMV | 5/31/19 | 96.6 | |
| BLK | BlackRock Inc | SMV | 5/23/19 | 7.5 | |
| GHDX | Genomic Health Inc. | SMV | 6/13/19 | 64.0 | |
| ISRG | Intuitive Surgical | SMV | 4/25/19 | 68.9 | |
| IRBT | iRobot | SMV | 5/22/19 | 99.3 | Withdrawn. Mgt agreed to proposal to implement our 81.9% 2014 win |
| JNJ | Johnson & Johnson | SMV | 4/25/19 | 0.0 | lost N/A |
| LM | Legg Mason | SMV | 7/26/19 | 97.4 | |
| NCR | NCR Corporation | SMV | 6/18/19 | 97.7 | Withdrew to support mgt proposal |
| PETS | Petmed Express | SMV | 7/26/19 | 59.6 | |

| | | | | | |
|---|---|---|---|---|---|
| TSLA | Tesla, Inc. | SMV | 6/11/19 | 22.2 | |
| TWTR | Twitter Inc | SMV | 5/20/19 | 0.0 | not presented |
| | **SMV Average** | | | | **56.5** |
| DDD | 3D Systems | SPM | 5/21/19 | 49.0 | |
| AMZN | Amazon | SPM | 5/22/19 | 4.8 | |
| BERY | Berry Global Group, Inc. | SPM | 3/6/19 | 49.4 | |
| DFS | Discover Financial Services | SPM | 5/16/19 | 65.4 | |
| EA | Electronic Arts Inc | SPM | 8/8/19 | 57.5 | |
| BEN | Franklin Resources | SPM | 2/12/19 | 84.2 | Board substituted weaker prop |
| NTRS | Northern Trust Corp | SPM | 4/23/19 | 35.0 | |
| PGNX | Progenics Pharmaceuticals | SPM | | 100.0 | Board adopted |
| UTX | United Technologies Corp | SPM | 4/29/19 | 0.0 | lost N/A UTX failed to notify of revision opportunity |
| WDFC | WD-40 Co | SPM | 12/11/18 | 100.0 | Board adopted |
| | **SPM Average** | | | | **54.5** |
| AMT | American Tower | TPS | 5/21/19 | 34.9 | |
| CTSH | Cognizant | TPS | 6/4/19 | 53.6 | |
| ILMN | Illumina Inc | TPS | 5/29/19 | 37.7 | |

| | | | | | |
|---|---|---|---|---|---|
| NFLX | Netflix | TPS | 6/6/19 | 41.7 | |
| NEE | NextEra Energy | TPS | 5/23/19 | 48.7 | N/A duplicate |
| PYPL | PayPal Holdings | TPS | 5/22/19 | 8.4 | |
| TSCO | Tractor Supply Co | TPS | 5/9/19 | 100.0 | Board implemented |
| | **TPS Average** | | | | **46.4** |
| FDX | FedEx Corporation | WC | 9/24/18 | 38.0 | |
| GILD | Gilead Sciences | WC | 5/8/19 | 98.6 | mgt proposal implements our 50.9% 2018 win |
| MAR | Marriott | WC | 5/10/19 | 46.8 | |
| | **WC Average** | | | | **61.1** |
| | **Overall Average** | | | **52.3** | |
| | | | | **22** | **wins from 46 proposals** |
| | | | | **5** | **losses with over 40% Yes** |

**McRitchie 2019 Proxy Season: Context**

Many people will be surprised by these numbers. That is because companies frequently do not disclose shareholder proponents in their proxies, so they do not all get counted.

Additionally, we attempt to negotiate with companies to get them to implement our proposals without a shareholder vote. Two examples come immediately to mind. The secretary of WD-40 actually asked me what was next on my agenda for the company. Their board adopted special meeting rights without hesitation upon request. Similarly, our proposal that Marrone Bio Innovations move to elect directors by majority vote was also embraced by the board. In other cases, the Board was able to substitute their proposal for ours. Although these proposals sometimes present weaker options, they still head in the right direction. Many such management proposal would not happen without our push.

One of the problems with looking at a single season is that proposals often take years to go into effect. For example, we have had several winning corporate governance reform proposals at iRobot over the last several years. Now we are working with them to help increase turnout.

Although the most recent management proposal to eliminate supermajority provisions won 99.3%, that was still not enough based on votes as a proportion of shares outstanding. We are all frustrated.

*The Never-Ending Quest for Shareholder Rights: Special Meetings and Written Consent*[2] 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).

Our actions not only improved the long-term value of our companies, they also helped move the entire market by driving what is considered best practice. Driving beta (the whole market) is much more impactful and sustainable than seeking a slight alpha edge, which tends to fluctuate more.

More investors should focus on beta and good environmental, social and governance (ESG) practices in order to increase long-term returns, argue Jim Hawley and Jon Lukomnik in *The Long and Short of It: Are We Asking the Right Questions – Modern Portfolio Theory and Time Horizons*.[3] See also, *More Beta: 21st Century Portfolio Theory*.[4]

**"Chevedden Group" 2019 Proxy Season Results**

John Chevedden may have used different timeframes and counting methods but he finds the three of us (Chevedden, Steiner and McRitchie/Young) had the following proxy season results on our collective proposals:

- 28 majority votes
- 37 votes between 40% and 50%
- 13 proposals adopted without a shareholder vote
- 10 proposals adopted in a process that included a shareholder vote
- 12 proposals, with a 2018 majority vote, that were adopted by the end of the 2019 proxy season.

*Sullivan & Cromwell LLP 2019 Proxy Season Review: Part 1*[5] also reviewed the proxy season. See the table on page 15 that shows proposals to allow shareholders to act by written consent averaged 39%; eliminate supermajority thresholds averaged 68%; adopt a proxy access right averaged 53%; to lower thresholds required to allow shareholders to hold a special meeting averaged 44%; require majority voting in uncontested elections averaged 58%; and declassify the board averaged 76%. These are exactly the types of proposals submitted by the individuals Chairman Clayton contended submitted proposals unaligned with the interests of most shareholders. He presents no evidence to support that contention. As demonstrated above, the most prolific individual shareholder proponents file proposals that are widely supported.

[2] https://corpgov.law.harvard.edu/2019/05/31/the-never-ending-quest-for-shareholder-rights-special-meetings-and-written-consent/
[3] https://digitalcommons.law.seattleu.edu/sulr/vol41/iss2/44/
[4] https://www.corpgov.net/2019/08/more-beta-modernizing-modern-portfolio-theory/
[5] https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-1-Rule-14a-8-Shareholder-Proposals.pdf.

## SEC Should Encourage Involvement by Individuals

When Markowitz first developed *Modern Porfolio Theory*[6] in the 1950s, institutions owned about 8% of US equities. Today, they own about 78%. Any action to raise proxy proposal thresholds would further discourage share purchases by Main Street investors by taking away their rights.

In the United States, the wealthiest 10% of households own about 84% of corporate stock. Given that imbalance, proxy votes cannot truly reflect the full spectrum of American values. For the 1967 revised edition of *The Modern Corporation*, Berle added a new preface asking, "Why have stockholders?"[7]

> What contribution do they make, entitling them to heirship of half the profits of the industrial system, receivable partly in the form of dividends, and partly in the form of increased market values resulting from undistributed corporate gains? Stockholders toil not, neither do they spin, to earn that reward. They are beneficiaries by position only. Justification for their inheritance must be sought outside classic economic reasoning… justification turns on the distribution as well as the existence of wealth. Its force exists only in direct ratio to the number of individuals who hold such wealth. *Justification for the stockholder's existence thus depends on increasing distribution within the American population. Ideally the stockholder's position will be impregnable only when every American family has its fragment of that position and of the wealth by which the opportunity to develop individuality becomes fully actualized.* (My emphasis.)

As long as 84% of corporate stock is owned and controlled by 10% of Americans, corporations will not be trusted. As noted by the president and CEO of the U.S. Chamber of Commerce, "Despite overall economic gains nationwide, "many Americans have lost faith in core institutions—public and private alike. They don't believe that government or business understand the challenges they face, or are willing or able to address them."[8]

A one percentage point increase in the Gini index for income inequality leads to a fall of two percentage points in the share of individuals who believe that 'most people can be trusted.[9] For capitalism to be compatible with democracy, we need *most* American families to participate in share ownership. That should be part of the mission of every corporate director, as well as the SEC in order to maintain legitimacy.

After World War II, the New York Stock Exchange developed a marketing campaign, Own Your Share of American Business (OYS), to rebuff communism, restore profitability to retail brokerage firms, and persuade Americans to lower capital gains taxes. OYS was never aimed at shifting power from the few to the many. Participation in corporate governance was not an objective. Giving small retail shareholders a "sense" of participating in capitalism was enough.[10]

Imagine, instead, if most Americans had a substantive stake, as well as a meaningful voice in corporate governance. Imagine if investing in shares was promoted as a way to participate in financial returns *and* in voting on what future we want to live in based on each company's "social purpose," as Larry Fink of BlackRock has called it.[11] Creating a nation of small

[6] http://www.economicsdiscussion.net/portfolio-management/markowitz-theory-of-portfolio-management-financial-economics/29748
[7] https://en.wikipedia.org/wiki/The_Modern_Corporation_and_Private_Property
[8] 2018 *State of American Business Address*, Thomas J. Donohue, January 10, 2018, https://www.uschamber.com/speech/2018-state-american-business-address.
[9] Citi GPS & Oxford Martin, *Inequality and Prosperity in the Industrialized World: Addressing a Growing Challenge*, Oxford Martin, September 2017, https://www.oxfordmartin.ox.ac.uk/downloads/Citi_GPS_Inequality.pdf.
[10] A Nation of Small Shareholders: Review Essay, https://www.corpgov.net/2018/07/a-nation-of-small-shareholders-review-essay/
[11] https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter

shareholders involved in corporate governance would be transformative. We will never get there by stripping small shareholders of their rights. That would be *The Road to Serfdom*.[12]

## Driving Best Practices

Investors do not have to be large to affect best practices. In fact, funds with mega-portfolios like BlackRock, State Street, Vanguard and Fidelity have *never* initiated changes through the use of proxy proposals. Research on US passive managers, which are responsible for one quarter of all votes at S&P 500 companies, concludes:

> Specifically, we find that relative to active funds, index funds are significantly more likely to side with firm management on contentious corporate governance votes. Low-fee index funds are even more likely to vote with firm management, which indicates that the low-cost structure of index funds directly affects their capacity to monitor. Index funds are also less likely to use exit to enforce governance, and we find no evidence that index funds engage with firm management either publicly or privately.[13]

Although the largest funds have never filed a proxy proposal to improve best ESG practices, they often *do* support the efforts of small investors. With regard to driving ESG practices, massive fund families are not leaders; they are followers. Many widely supported proposals from individual and other small investors would not get filed if thresholds are raised, as proposed. As a result, ESG best practices would stagnate.

However, it is difficult for most main street or 401(k) investors to determine how large funds vote on issues important to them. They are often surprised to learn "ESG funds" from the largest mutual fund families vote against ESG proposals, since fund families like BlackRock and Vanguard typically vote as a block. See *Morningstar Direct Uncovers ESG Hypocrites*.[14]

## Modernization of Shareholder Proposal Rules: SEC Should Consider Alternative

The current annual N-PX proxy reporting requirements, promulgated before widespread use of the internet, obfuscate the ability of investors to compare funds based on voting records. Compare the sortable voluntary disclosure of Trillium Asset Management,[15] which often includes voting rationale, with the mandated disclosure of the Vanguard Index Trust Total Stock Market Index Fund,[16] which requires a laborious effort to decipher.

If the Commission wants to weed out "bad" proposals and to increase scrutiny of how funds using proxy advisors vote, it should consider requiring N-PX filings in real-time and in a sortable format. Driving competition around votes would drive discussion and the demand for more refined analysis. Shareholders and fund investors would have the information needed to seek better alignment between fund labels and fund voting. Others may want more focus on short-term shareholder returns, regardless of environmental, social or governance impact. See my rulemaking proposal File 4-748, Report of proxy voting record.[17]

The SEC should focus on increasing public and investor information, not placing barriers in front of shareholders who want to participate more fully in corporate governance.

[12] The Road to Serfdom: Text and Documents--The Definitive Edition (The Collected Works of F. A. Hayek, Volume 2
[13] Swiss Finance Institute, Research Paper Series N°19-08, http://www.shareholderforum.com/access/Library/20190706_SFI.pdf.
[14] https://www.corpgov.net/2019/03/morningstar-direct-uncovers-esg-hypocrites/
[15] https://trilliuminvest.com/approach-to-%20sri/proxy-voting/
[16] https://www.sec.gov/Archives/edgar/data/36405/000093247118006890/indexfunds0085.htm
[17] https://www.sec.gov/rules/petitions/2019/petn4-748.pdf

Sincerely,

J. McRitchie

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