

## California Bill Won't Be Key to Proxy Door''

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If California is a proxy for the entire country, the prospects for more shareholder power in board of directors elections don't look good.

While the **Securities and Exchange Commission** considers opening up the board of directors ballot -- and receives criticism for not going far enough -- a bill in California that lawmakers have significantly watered down is drawing a similar complaint.

"At best, the proposed act is a misguided attempt to avoid the accountability and competence problems that faced **Enron**, **WorldCom** and others," Les Greenberg, a shareholder activist in Culver City, Calif., wrote in a stinging letter protesting amendments to the bill. "At worst, it would be a sham upon the investing public."

Assembly Bill 2752, dubbed the "Corporate Elections Fairness Act of 2004", was introduced by Southern California Assemblywoman Judy Chu, (D - Monterey Park), and sponsored by Secretary of State Kevin Shelley. The bill initially proposed sweeping reforms to give shareholders a greater role in board of director elections. Currently, the nomination of candidates to the board can be so complex and expensive that small shareholders are virtually locked out of the process.

The bill proposed to change that by going even further in two key ways than the rules under consideration by the SEC:

- First, while the SEC proposal would allow investors -- or groups of investors -- who own 5% or more of a company's stock to nominate a director candidate under certain circumstances, the state bill proposed an even lower threshold of 2% ownership of a company's stock. (Both proposals required that shareholders owned their stock for at least two years.)
- Second, the bill proposed a requirement that companies implement shareholder proposals that win a majority vote -- or else face a potential court order and fines of up to \$100,000 a day.

"Originally, of course, we wanted to actually change the corporate elections process in a manner that was similar to the SEC proposal," Chu said in a telephone interview. "The whole idea was to open up the shareholder access to proxies so that there could be more accountability for the board of directors."

That effort was lauded by Greenberg, who launched a grass-roots proxy battle against the restaurant chain **Luby's** four years ago. "We compliment the Act's author(s) and sponsor(s) for accomplishing in a few words what the Securities and Exchange Commission seems unable and/or unwilling to accomplish with its recently proposed Rule 14a-11," Greenberg wrote in an earlier letter supporting the first draft of the bill.

But not surprisingly, the first draft generated opposition from business interests, including the California Business Roundtable and California Chamber of Commerce. The last straw, however, was opposition from the giant pension fund California Public Employees' Retirement System (Calpers), combined with questions in the Assembly Banking Committee.

The banking committee raised what Chu called a "very valid point": Can California accomplish something on the board of directors election front separately from the rest of the nation?

Of course, California has tried to do just that on other issues such as automobile emissions. "Many times California can be the leader and spark change elsewhere," Chu acknowledged, explaining her initial decision to sponsor the bill. "We thought it might even be a spur for [the SEC's] change if they were able to see that California was contemplating change."

Ironically, the Business Roundtable -- a vehement opponent of the SEC rule changes -- has argued that proxy access is a state matter rather than one for the SEC.

However, Chu ultimately decided to retreat when staff from Calpers told her the giant pension fund preferred to follow the SEC process rather than go down another road in California, she said.

"We felt something of this nature has to happen at the national level," explained Calpers spokesman Brad Pacheco.

Instead, at the suggestion of Calpers, Chu introduced a resolution in support of the SEC rules. That whereas-laden resolution won overwhelming support in both branches of the Legislature, but it was essentially just a symbolic gesture.

Chu also agreed to amend her bill to require that companies provide a process in which shareholders could merely "recommend" candidates for election as directors and that they file the process with the secretary of state. Chu maintained that requirement still would help shareholders better understand corporate election procedures.

In June, the bill went through yet another round of tweaking in the state Senate Judiciary Committee, which eliminated the watered-down "recommend" clause. Those changes turned it into simply a disclosure bill, which would require publicly traded companies to file a copy of their corporate election procedures -- or those portions of the company's articles of incorporation and bylaws that related to nominating and electing directors -- with the secretary of state.

"We think our office is the perfect office for making that accessible to the public, because by the end of this year, all corporate records will be available online" through the agency's Web site, said Willie Guerrero, assistant secretary of state for legislative affairs.

The bill will be heard by the Senate Appropriations Committee on Aug. 2. Since it's been diluted, business groups have withdrawn their opposition. Now only the state Department of Corporations remains opposed to the bill because it believes the issue should be addressed by the SEC.

"If there weren't a question of federal preemption law, we would have gone much further," Guerrero acknowledges.

But Greenberg believes Chu and Shelley "copped out." "There is just no real change from the status quo," Greenberg said. "Anyone seriously considering nominating a director candidate would know to review the bylaws and article of incorporation, and know that the documents are already available on the SEC's Edgar Web site."

But one supporter, Willie Pelote, the California political and legislative director for the American Federation of State, County and Municipal Employees, suggested the bill is a step in the right direction. More progress may come next year, after Chu and Shelley have more time to educate fellow lawmakers about corporate governance, Pelote said.

"We're still supporting the bill in hopes this will open the door," Pelote said. "Sometimes you have to take baby steps before you get where you want to be."

Whether such baby steps will be enough to make board of directors elections more democratic remains to be seen.