

## SEC May Aid Rebels Seeking Board Seats

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When Les Greenberg decided in 2000 to run for the board of Luby's Inc., a San Antonio-based cafeteria chain, he assumed his name would appear on the ballot. Luby's to put it there. "The company just put in one line saying there was a dissident committee," said Greenberg, a California lawyer.

He launched a proxy fight for about \$75,000, but could only afford to contact large shareholders. His effort also suffered from the stigma associated with dissident crusades, he said. He received 24 percent of the votes cast, not enough for a board seat.

The SEC is drafting rules that may help activists such as Greenberg, by requiring that corporate ballots include the names of directors proposed by major shareholders as well as those nominated by management. The rules may also force companies to disclose more about their nominating processes, how they review candidates proposed by shareholders and how shareholders can communicate with directors.

The agency has embraced the idea that stronger and more independent boards of directors, that are more responsive to investor concerns, will improve corporate governance and prevent future accounting blowups, such as those at Enron Corp. and WorldCom Inc. The SEC has gotten almost 700 comments on a report it issued on this subject earlier this year.

The commission is scheduled to consider today whether to publish the disclosure proposal. The commissioners will take up the more controversial issue of mandatory inclusion of shareholder candidates on corporate ballots later this year. Corporations generally support increased disclosure and some say it would eliminate the need for further changes in the nominating process.

After today's meeting, the SEC will take comments for 60 days before issuing a final rule on the disclosure issue.

Investor groups generally support the SEC's effort, but some say they are concerned about some of the details. For instance, in its report, the SEC discussed allowing only large, longtime shareholders to nominate directors. And it's possible that only corporations that have failed to take certain actions requested by shareholders would be affected by the new requirements. These restrictions are intended to prevent frivolous challenges and to stop the process from being used by advocacy groups pushing a single issue or by corporate raiders.

But Greenberg and some other investor advocates worry that the restrictions could be used to hinder shareholder efforts. "The boards will fight tooth and nail to protect themselves," said Greenberg, who today directs a small group of independent activists called the Committee of Concerned Shareholders. "If they get the chance, they'll use this opportunity to push back shareholders."

Corporations generally present shareholders with a slate of choices selected by the company. Outside candidates must contact shareholders with an alternative ballot at their own expense.

In its report, the SEC discussed extending nominating rights to groups or individuals who own at least 3 to 5 percent of a company's stock. Most shareholder groups that have filed comments with the SEC said the threshold makes sense, to ensure that challengers have a stake in the company.

But a few are sounding a warning. Charles Elson, director of the Center for Corporate Governance at the University of Delaware, said, "The danger is that once you set a threshold, it is not farfetched to see that threshold leak into other roles."

Shareholder resolutions can generally be submitted by anyone who owns \$2,000 worth, or 1 percent, of a company's stock. Corporations can exclude a shareholder resolution only after notifying the SEC, according to John Heine, a spokesman for the agency. In some cases, the SEC tells the company that such an exclusion would violate agency rules.

Evelyn Y. Davis, who has made numerous shareholder proposals in the past, worries that corporations will argue that the tighter rules for director nominees should apply to shareholder resolutions as well. "The companies are going to say that shareholders need 5 percent of the shares before they can submit a resolution," said Davis. Other investor activists, like Beth Young, a senior research associate at the Corporate Library, a shareholder research and consulting firm, do not expect the SEC to allow that to happen. When the SEC considered making it harder to propose shareholders' resolutions a few years ago, it was "a political quagmire for the SEC, and they won't wade back into it soon."

Another worry among some securities experts is that the idea of a "triggering event" will frighten companies. It's possible that only companies where the proxy process has been shown to be ineffective may have to include shareholder candidates on their ballots. Triggering events could occur if a company fails to act on widely supported shareholder proposals or if a significant number of shareholders withhold their votes in director elections.

Thomas Woo, a professor at the University of California at Davis law school, argues that, as a result, corporations may fight shareholder reform efforts earlier or more aggressively in an effort to keep them off the ballot, out of fear that they will become

triggering events. Some also fear that the SEC, knowing what is at stake, will agree to more corporate requests to keep proposals off the ballot.

Institutional investors also warn that if large shareholders try to nominate a candidate they may inadvertently trigger company takeover defenses. The SEC report noted that "if nominating shareholders or shareholder groups beneficially own 15 percent or more of a company's shares, nominating shareholders may trigger applicable poison pill provisions under state law."

The SEC may attempt to write the new rule in a way that would prevent triggering poison-pill defenses, said Lawrence A. Hamermesh, a professor at the Widener University School of Law in Wilmington, Del. But that could conflict with state laws, leading to potential disputes.

"It's not clear the SEC has the power to preclude what state law has validated and authorized for a long time now," Hamermesh said.