

Shareholder resolutions ignored even if passed, academic study finds

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By David Hoffman

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NEW YORK - Even when a proxy resolution wins a majority of the vote, most companies tend to ignore shareholder resolutions, according to a working paper scheduled to be published next year in the Harvard Law Review.

But at least one industry expert said the paper's findings are flawed.

While it is true that companies may not have acted on shareholder resolutions in the past, a rule proposal that would give shareholders limited access to the proxy- nomination process has made companies more receptive to resolutions, said Patrick McGurn, senior vice president and special counsel to Institutional Shareholder Services Inc. in Rockville, Md.

Under that rule proposal, which was first suggested in 2002, companies would be required to include on their proxy ballots director candidates nominated by shareholders, subject to certain thresholds and triggering events.

Offering examples

Mr. McGurn argued that the possibility that the Securities and Exchange Commission could adopt the proposal has caused companies to take shareholder resolutions more seriously.

"In light of board access being on the ballot, we have seen a number of folks adopting majority-passed resolutions," he said.

Mr. McGurn offered several examples.

This month, Federated Department Stores Inc. in Cincinnati said that its board intends to submit to shareholders in May a binding proposal that would eliminate staggered board terms by 2006 and provide for the annual election of directors.

The proposal is a response to a non-binding shareholder proposal to declassify the board - which received a majority vote at the company's 2003 annual meeting.

Shareholder activists don't like staggered boards, which effectively stop acquirers from gaining control of boards.

The Goldman Sachs Group Inc. in New York and Prudential Financial Inc. in Newark, N.J., both said in September that their boards intended to submit similar proposals. Their decisions were made after shareholder proposals to declassify the boards at each company received a majority of the vote.

Such examples, however, aren't enough to convince the working paper's author that shareholders have any more power today than before the access proposal was made.

"Shareholders don't have the power to initiate corporate-governance change," Lucian Bebchuk, director of the corporate-governance program at Harvard Law School in Cambridge, Mass., said at a mutual fund conference in Baltimore this month.

In his paper, he acknowledged that efforts to give shareholders greater access to the proxy-nomination process are a positive step, but he doesn't think they address the true problem.

"While I support making shareholder power to replace directors more viable, I argue that substantial attention should also be given to the possibility of increasing shareholder power with respect to issues other than the election of directors," Mr. Bebchuk wrote in the paper.

One way to increase shareholder power would be to give shareholders, under certain conditions, the power to adopt provisions that would permit them to pass binding resolutions with respect to specific business decisions, he said.

Beyond election of directors

But giving shareholders more access to the proxy-nomination process isn't enough, Mr. Bebchuk said. "A vote to replace directors with a rival team that promises to initiate a given rule change is a highly imperfect instrument for achieving the desired change," he said.

Until that happens, shareholders will always run the risk of being ignored.

As evidence, Mr. Bebchuk's paper showed that shareholder resolutions asking to repeal staggered boards that were passed over the past few years, including years in which companies should have been aware of the proxy-nomination proposal, had yet to be implemented by this fall.

For example, shareholders passed 33 resolutions to do away with staggered boards last year, but 69.7% hadn't been implemented by this fall.

Resolutions that would dispense with staggered boards totaled 32 in 2002, but 65.6% hadn't been implemented by this fall.

For the most part, socially conscious investors said they aren't sure who is right.

"It's impossible for me to make a generalization, because it's company by company," said Anita Green, vice president of social research at Pax World Management Corp. in Portsmouth, N.H.

But even if Mr. Bebchuk is correct about the tendencies for companies to ignore majority-passed shareholder resolutions, she disagrees that shareholders have no power to effect change.

They may not have any legal power, Ms. Green said, but shareholders, especially institutional shareholders such as mutual funds, have been successful at working behind the scenes to resolve issues at companies before those issues are brought up as resolutions.

Bruce Goldfarb, senior managing director of Georgeson Shareholder Communications Inc. in New York, a proxy-solicitation service, agrees.

"Our findings are that shareholders can have significant power, but it's power that is not necessarily exercised through the shareholder resolution process," he said.

Timothy Smith, senior vice president of Walden Asset Management in Boston, added that if an issue is brought up as a resolution, it generally means that the communication process between a company and its shareholders has broken down.

"It tends to be a last resort when a resolution has to go on the ballot," he said. That usually doesn't bode well for shareholders, said Mr. Smith, who is also president of the Social Investment Forum in Washington.