SEC policy vacuum enlivens proxy season

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Armed with little more than a blog and a posting on YouTube, Yahoo shareholder Eric Jackson has launched a quixotic campaign for the forthcoming proxy season.

The 34-year-old hopes his web-based effort will force change at the internet group, including the departure of chief executive Terry Semel over “outsized compensation for small shareholder return”.

It highlights what promises to be an unusually lively proxy season in coming weeks, thanks to a policy vacuum at the Securities and Exchange Commission, the US markets regulator.

At issue is access to the company proxy for the purpose of nominating directors to the board, a vital corporate governance battleground this proxy season.

While state law governs what shareholders are allowed to vote on, federal law – and thus the SEC – governs the crucial communication and disclosure process in proxies.

An SEC rule long blocked such access until last year, when a US appeals court supported a challenge to the rule from the American Federation of State, County & Municipal Employees (AFSCME) in a case involving insurer AIG.

Christopher Cox, SEC chairman, has in recent months twice delayed deliberations on whether to amend the SEC’s rules in light of the ruling, a move that would mark one of the most significant concessions to investors in decades.

He and his fellow four commissioners are divided on the issue, and Mr Cox has been trying to build a consensus to avoid a divisive 3-2 vote.

In the absence of a clear SEC policy, investors have been bringing their own proxy proposals at Hewlett-Packard and UnitedHealth Group, a healthcare insurer, for consideration at shareholder meetings starting later this month.

The groups appealed to Mr Cox to have these proposals removed from their proxies. But Mr Cox declined to take a position pending resolution of the SEC’s policy on its proxy rule.

Last week, the California Public Pension Employees Retirement System (Calpers) took advantage of the vacuum by throwing its weight behind an AFSCME proposal that would change HP’s by-laws to allow shareholder access to the proxy.

Opponents of access fear that this could open the way for a flood of similar initiatives, causing havoc at annual meetings. So far there are about 70 shareholder resolutions planned calling for a say on executive pay, albeit non-binding.

Far from seeking confrontation, shareholder activists are gambling that a relatively smooth season of shareholder meetings involving carefully chosen issues could persuade the SEC to come down on their side in the end.

Nell Minnow, editor of The Corporate Library, a corporate governance research group, said: “Time is on our side. If we show there are substantial investor votes for these proposals, it makes it much harder for the SEC to come back and exclude them.”

A reason for the shift in shareholder activist attitudes can be found outside the US. Institutional investors have been growing frustrated at the lack of basic shareholder rights in the US that are enjoyed in Europe, such as allowing advisory or non-binding shareholder votes on executive pay.

Norway’s Norges Bank Investment Management and Hermes, the UK pension manager, recently appealed directly to Mr Cox on the issue.

Rich Ferlauto, AFSCME’s pensions director, said that increasing foreign ownership of US companies meant such shareholders felt they had a stake in pushing improvements in US corporate governance for the first time.

He said: “This is about international competitiveness and how US companies attract capital.

“What we get from our conversations with European shareholders is that they are looking at enhanced shareholder rights and advisory votes on pay as fundamental reforms that they believe are necessary to protect their increasing investments.”

He is open to giving Mr Cox time to build consensus at the SEC. Mr Cox’s appearance next week at a US Chamber of Commerce conference on US competitiveness is a sign that his interests appear to be similar.

Opponents of proxy access, uneasy at the SEC’s policy vacuum, are on the move.

John Berlau is director of the centre for entrepreneurship at the Competitive Enterprise Institute, which last month wrote to Mr Cox along with more than 25 other pro-business groups arguing against proxy access.

He said the danger was not access to the proxy, but “backroom deals” management might have to negotiate with activist shareholders to avoid uncomfortable proxy campaigns.

Peter Montagnon, head of investment affairs at the Association of British Insurers, warned that the proxy season could end up with too much compromise, such as management conceding to advisory votes and falling short of endorsing proxy access.

“We have to be a bit wary that this isn’t used by companies to have an advisory vote on executive remuneration as a way of heading off more radical reform of access to the proxy.”