

## SEC Asks for Delaware's Help In Proxy-Cost Fight

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*Monday, Jun 30, 2008* --- The Securities and Exchange Commission has asked the Delaware Supreme Court to rule on whether companies have to reimburse shareholders for the costs of even partially successful short-slate proxy contests.

The case in question centers on whether Islandia, N.Y.-based business software developer CA Inc. should be required to reimburse the American Federation of State, County and Municipal Employees for a short-slate proxy contest that the union plans to stage at a shareholders meeting in September.

The AFSCME says CA's board of directors should reimburse any shareholder or group of shareholders who put up candidates in contested elections for the minority of a board and place at least one. CA, which is incorporated in Delaware, says that the proposal would violate the state's corporate governance laws.

In a letter on behalf of CA dated April 18, David Harms of Sullivan & Cromwell LLP asked for confirmation that the commission's staff would not "recommend any enforcement" of the union's proposal. CA also asked for permission to remove the AFSCME's proposal from its proxy documents.

Harms wrote that the proposal, essentially, is meant to restrict the board of directors' actions in short-slate proxy moves that shareholders lose.

"The proposal seeks to mandate reimbursement when contest proponents do not gain control of the board, so that they can bypass the board and obtain reimbursement without board approval," Harms said.

CA also said that the reimbursements for even partially successful short-slate proxy fights would increase the number of contested board of director elections.

AFSCME disputed that claim, saying that the proposal would only reallocate costs after the fact and only when at least one candidate won a seat on the board.

"The fact of the election contest would exist regardless of the proposal," Charles Jurgonis, the director of AFSCME's employee pension plan, wrote to the SEC on May 21.

Thomas Kim, the SEC's corporate finance division's chief counsel, disagreed with CA's interpretation that the AFSCME proposal violated SEC regulations and Delaware law in his letter notifying CA that the commission was asking for a ruling from the Delaware Supreme Court.

"We are unable to concur in your view that CA may exclude the proposal," Kim wrote in a letter that was published on the commission's Web site Friday.

Among the expenses AFSCME is looking to get reimbursed are printing, mailing, legal services, travel and any other costs incurred in the proxy contest.

The union proposed similar changes on two previous occasions with Houston-based oil and gas driller Apache Corp., but neither change was brought to the SEC, according to Michale Barry, an attorney at Grant & Eisenhofer PA in Wilmington, Del.

"The only difference is that Apache put it on its proxy statement," Barry, who wrote an opinion supporting AFSCME's move for the SEC, said.

Shareholders voted down the AFSCME's proposals on both occasions, Barry added.

The normal process for reimbursements involves board approval, and the AFSCME proposal would violate Delaware's corporate governance law by taking decisions on payments away from the board of directors and putting them directly into the hands of stockholders, CA's attorneys claim.

The union says Delaware allows for such actions that take power away from directors.

The SEC's request marks the first time the SEC has made such a request since the state's legislature amended Delaware's constitution last May to allow the Supreme Court to rule on questions from the SEC. Around half of all publicly traded companies in the United States are incorporated in Delaware.

The Delaware Supreme Court has not yet said whether it will take the case. CA did not immediately respond to requests for further comment on the case.