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NON-COMPLIANCE WITH PROXY REGULATIONS
EFFECT ON ABILITY OF CORPORATION TO HOLD VALID MEETING

ARTHUR H. DEAN

The business world has been somewhat startled by the construction which the Securities and Exchange Commission has been placing on its recently promulgated Regulation X-14\(^1\) governing the solicitation of proxies and the information on various matters which must be given to stockholders with respect to the securities of corporations listed on national securities exchanges. The new regulations superseded Rules LA-1 to LA-7.\(^2\) In certain instances, on the morning on which annual meetings were scheduled to take place, heads of corporations have received telegrams from the Securities and Exchange Commission citing alleged deficiencies in the proxy statement sent out by the management in connection with its solicitation of proxies and suggesting that the meeting be deferred until new notices, correcting the alleged deficiencies, have been mailed to stockholders and that the latter be given an opportunity to revoke their proxies.

In some instances, the Commission has taken the position that proxies obtained on the basis of proxy statements which are allegedly deficient (even though deficient on a matter which is not the main purpose of the meeting) may not be used even for the purpose of obtaining a quorum.

The formulation of a well thought out body of rules in connection with the various subjects under its jurisdiction is one of the ways an administrative agency can contribute to the development of the law and in undertaking to develop a set of proxy rules designed to present correct and essential information to stockholders, before they are asked to commit themselves, the Securities and Exchange Commission is undertaking a constructive task. The rules should therefore be approached with sympathy and understanding.

The purpose of this article is not to review the nature and scope of the entire proxy rules, but rather to examine, with particular relation to annual meetings,

(a) The nature and character of proxies;
(b) The nature of the relationship existing between a stockholder and the person designated to act as proxy;
(c) The duty of the management of corporations to afford stockholders the right to be represented at meetings by proxy;
(d) Whether proxies obtained on the basis of an allegedly deficient proxy statement can be used in obtaining a quorum or in voting on matters as to which accurate information was given;
(e) Whether the management must advise stockholders that before mailing the proxy soliciting material, some stockholders had filed notice

\(^1\)See infra Appendix A for full text of these regulations: Rule X-14A-1 through X-14A-9.
of intent to propose a motion of a category which may properly be pro-
posed by stockholders at annual meetings, and whether proxy statements
failing to mention such notice of intent are "false and misleading";

(f) The difficulty of the management and of the Securities and Ex-
change Commission in determining whether a proposed motion is in the
category which may properly be offered by a stockholder at an annual
meeting;

(g) Whether the management can vote proxies at a meeting on ques-
tions which have not been mentioned in the proxy statement and which are
proposed by individual stockholders rather than management.

Before discussing Regulation X-14 and its application to a management's
proxy soliciting material, it seems essential, for a proper understanding of the
subject, to review the practices of corporations when soliciting proxies prior
to the passage of the Securities Exchange Act of 1934 and under the previous
LA-1 to LA-7 rules of the Commission. Those who are not interested in this
phase of the discussion should turn at once to Part II of this Article.

I

Both Regulation X-14 and Rules LA-1 to LA-7 were adopted by the
Commission pursuant to the authority conferred upon it by the Congress in
Section 14(a) of the Securities Exchange Act of 1934, which makes it
"unlawful for any person, by the use of the mails or by any means or
instrumentalities of interstate commerce or of any facility of any national
securities exchange or otherwise to solicit or to permit the use of his name to
solicit any proxy or consent or authorization in respect of any security
(other than an exempted security) registered on any national securities
exchange in contravention of such rules and regulations as the Commission
may prescribe as necessary or appropriate in the public interest or for the
protection of investors." Prior to the passage of the Securities Exchange
Act of 1934 the solicitation of proxies was not subject to any specific rules
other than those imposed by court decisions, miscellaneous statutory prohibi-
tions or provisions and the general principles of agency.

While the following statements, particularly the conclusions drawn frorq
the facts cited, are somewhat open to question, in S. Rep. No. 792, 73d
Cong., 2d Sess. (being the Senate Report on the Securities Exchange
Act of 1934 which had then been introduced in Congress), it was stated:

"In order that the stockholder may have adequate knowledge as to the
manner in which his interests are being served, it is essential that he be

2aFor other statutory provisions relating to proxies see Appendix E.
2See infra pp. 506-507.
2See, for example: Md. Ann. Cod. (Bagby, 1924) art. 23, § 23 providing that no proxy
which is dated more than three months before the meeting at which it is offered shall be
accepted unless the proxy names a longer period on its face; Del. General Corporation
Law § 17 providing that no proxy shall be voted on three years from its date, unless the
proxy provides for a longer period; New York Stock Corporation Law § 47 providing
that no stockholder shall issue a proxy for any sum of money or anything of value.
2See infra, p. 506.
enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings. Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought. For example, in one case brought to the committee's attention, proxies were solicited by the president of a corporation by means of a letter which purported to describe certain transactions concerning which ratification by the stockholders was sought. The letter omitted all mention of other important details such as previously granted secret options in the corporation's stock, and the president's individual interest in an underwriting agreement made by the corporation which furnished the real motive behind the request for ratification. The solicitation in that case so far succeeded that not a single stockholder appeared at the meeting in person, and an employee of the company voted all proxies in favor of ratifying all acts and proceedings taken by the directors and officers of the corporation. The committee recommends that the solicitation and issuance of proxies be left to regulation by the Commission."

Cf. Rice & Hutchins, Inc. v. Triplex Shoe Co.⁶

In H. R. Rep. 1383, 73d Cong. 2d Sess., it was also stated:

"Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. Insiders having little or no substantial interest in the properties they manage have often retained their control without an adequate disclosure of their interest and without an adequate explanation of the management policies they intend to pursue. Insiders have at times solicited proxies without fairly informing the stockholders of the purposes for which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage valuable property rights. Inasmuch as only the exchanges make it possible for securities to be widely distributed among the investing public, it follows as a corollary that the use of the exchanges should involve a corresponding duty of according to shareholders fair suffrage. For this reason the proposed bill gives the . . . Commission power to control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which have frustrated the free exercise of the voting rights of stockholders."

The Securities and Exchange Commission in Part VII (Management Plans Without Aid of Committees) of its Report on the "Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees", says at page 525, in discussing charter amendments:

"Nominally at least, the greatest safeguard against oppression of the stockholder lies in his right to vote on the proposed change. In a number of states, however, no provision is made for a class vote. Moreover, the statutes do not contain adequate provisions for giving the stockholder notice of the proceedings, particularly as to the statements and disclosures

⁶See infra note 16.
In announcing Regulation X-14, in Release 1823 under the Securities Exchange Act of 1934, the Commission said:

"The new rules which apply to securities registered on National Securities Exchanges substantially broaden the amount of information which is to be made available to the security holders whose proxies are solicited and increase the facility with which they may determine the nature of the matters upon which a vote is being sought.

"The keystone of the new rules is the requirement that a 'proxy statement' must be sent to each person whose proxy is being solicited. These 'proxy statements', which must meet certain standards of legibility, must set forth (a) the identity of persons soliciting the proxy, (b) the nature of the matters to be voted on under the proxy, (c) power of the security holder to revoke his proxy and the rights of dissenting stockholders, and (d) the expenses of the solicitation including all compensation paid to solicitors. In addition, certain financial data are sometimes required to be included.

"Another feature of the new rules is that the security holder who is being solicited must be given the opportunity to direct how his vote shall be cast on each of the items under consideration. In other words, the proxy must provide some definite means whereby the security holder may indicate how he desires his vote to be cast on a given proposition and whereby the authority of the holders of the proxy will be limited accordingly. Of course, if the security holder wishes to confer full discretion upon the persons soliciting his proxy he may do so.

"Where the solicitation of proxies covers the election of directors, the 'proxy statement' must give certain information as to each person for whom it is intended to vote. Where the question is one of the issuance of securities or the alteration of the financial structure, certain financial information must be included in the 'proxy statement'. Under certain conditions, however, this financial information may be omitted but in any event reference must be made to the material which is already publicly on file with the Commission.

"... The new regulation does not prescribe in any way what matters should be submitted to a vote of security holders, but it is based upon the principle that when a question is presented to security holders for their specific action the essential information should be furnished them so far as is possible. [Note: The correctness of this statement is discussed infra pp. 511, 512.]

"* * * * *

"In adopting the new regulation, the Commission has recognized that it may at times become necessary for a management to modify a proposal after the solicitation is made and before the actual vote is taken, or to consider certain questions which were not anticipated at the time of the solicitation. Likewise, general questions are sometimes submitted to security holders before the terms and conditions have been determined. In order to allow necessary flexibility in such cases, there is a provision that information not known or reasonably available to the persons making the solicitation may be omitted from the proxy statement, and that in-
formation as to matters to occur or to be determined in the future need be given only in terms of present intention. In such case, however, there must be set forth, to the extent practicable, the limits of the authority intended to be conferred.” [Note: The real difficulty comes from attempting to determine whose views are to prevail as to what is practical—the management, the Commission, or the courts. See Appendix D.]

Although private corporations whose securities are listed on national securities exchanges are organized under state or foreign rather than a federal incorporation law,7 Section 14a of the Securities Exchange Act of 1934 and Regulation X-14 apply nevertheless to the solicitation of proxies in respect of securities of such corporations.

Neither Section 14 nor Regulation X-14 impose any affirmative duty on a company or its management to afford to stockholders, who cannot be present in person at a meeting, an opportunity of voting by proxy by requiring the Company or the management to mail a form of proxy designating someone who will cast the stockholder’s vote in his behalf at the meeting.8 In fact, no right to vote stock in a corporation by proxy existed at common law, all

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7For text of a portion of a federal bill see the last paragraph of Appendix A.

8It is understood that from October 1, 1938 to April 1, 1939, approximately 70 corporations whose securities are listed on the New York Stock Exchange out of approximately 775 such corporations adopted the policy of not soliciting proxies from their stockholders in connection with annual meetings. Under the former proxy rules of the Commission it is understood only 12 out of approximately 775 such corporations did not solicit proxies. In such cases, if on the day of the annual meeting there is a quorum present, the stockholders present can, of course, elect the board of directors for the ensuing year, and the stockholders who have not received the form of proxy or proxy statement are, as a practical matter, disenfranchised unless they wish to take the time, trouble and expense of attending the meeting personally. Furthermore, in some states (see Delaware Corporation Law § 30) unless the by-laws of the corporation specifically so provide there is no necessity of sending a notice of the annual meeting to stockholders. If no quorum is present, the directors in office would hold over until a quorum, as required by the law of the state of incorporation or the by-laws, was present and acted. If no notice of the annual meeting is sent to the stockholders at all, and no meeting is held, the existing directors will probably continue to hold office. See Apsey v. Chattel Loan Co., 216 Mass. 364, 103 N. E. 899 (1914); Baker v. Smith, 41 R. I. 17, 102 Atl. 721 (1918); La Rue v. Bank of Columbus, 165 Ky. 660, 178 S. W. 1033 (1915); Hatch v. Lucky Bill Mining Co., 25 Utah 405, 71 Pac. 865 (1903). Cf. New York Stock Corporation Law § 55 which requires that “notice of the time and place of the meeting of any election of directors shall be given as prescribed in Sec. 45 and that “at least one-fourth in number of the directors of every stock corporation shall be elected annually.” See also New York Stock Corporation Law § 57 which reads as follows:

“When acts of directors void. When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void.”

In the absence of unusual circumstances it is submitted that it is a shortsighted policy for a corporation not to send out proxy statements and proxy forms. After all, whatever may be the alleged inconvenience to management, the stockholders own the corporation and are entitled to know the pertinent facts about management. There may well be a difference of opinion as to the wisdom of requiring publication of all the information required by Regulation X-14.
While in almost every state in the Union (with the apparent exception of Texas and Iowa\(^9\)) it is now expressly provided by statute that stockholders in private corporations may vote their stock in person or by proxy, so far as can be ascertained, there is no requirement in any state incorporation law that a company or its management must mail a form of proxy for use by those stockholders who cannot or do not plan to attend meetings in person.\(^11\) Section 14(a) of the Securities Exchange Act of 1934 provides that the Securities and Exchange Commission may make rules and regulations for the protection of investors, the operation of the securities market, the execution of transactions in securities, and the maintenance of fair competition among security dealers.


\(^10\)There is evidently no statutory provision in Texas permitting voting by proxy, but Art. 1320 gives a general power to corporations to pass by-laws directing how votes of stockholders shall be cast in the elections of directors. The same is true of Iowa, but it has been held that there can nevertheless be voting by proxy if the articles of incorporation or by-laws so provide: McKee v. Home Savings & Trust Co., 122 Ia. 731, 98 N. W. 609 (1904).

\(^11\)No state seems to require that the management mail proxy forms to stockholders, although the Ohio General Corporation Act § 8623-53 is more detailed than most corporation laws on the subject of proxies:

Any shareholder of record who is entitled to attend a shareholders' meeting, or to vote thereat or to assent or give consents in writing, is entitled to be represented at such meeting or to vote thereat or to assent or give consents in writing, as the case may be, or to exercise any other of his rights, by proxy or proxies appointed by a writing signed by such shareholder.

For example, compare the following provisions:

**Delaware Corporation Law § 17:**

Unless otherwise provided in the Certificate of Incorporation, each stockholder shall at every meeting of the stockholders be entitled to one vote in person or by proxy for each share . . . but no proxy shall be voted on three years after its date, unless said proxy provides for a longer period . . .

**Illinois Constitution Art. XI, § 3:**

The general assembly shall provide, by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

**Illinois Business Corporation Act § 28:**

A shareholder may vote either in person or by proxy executed in writing by the shareholder or by his duly authorized attorney-in-fact. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

**Maryland General Corporation Law § 23:**

Stockholders or members may vote either in person or by proxy, but no proxy which is dated more than three months before the meeting at which it is offered shall be accepted, unless such proxy shall, on its face, name a longer period for which it is to remain in force.

**New York General Corporation Law § 19:**

Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may vote by proxy.

No officer, clerk, teller or bookkeeper of a corporation formed under or subject to the banking law shall act as proxy at any meeting of such corporation.

Every proxy must be executed in writing by the member, or by his duly authorized attorney. No proxy shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein its duration. Every proxy shall be revocable at the pleasure of the person executing it.
Act of 1934 does not create any right; it merely governs the method of soliciting proxies in the case of listed securities. Moreover, in some states there is not even a requirement that notice of the annual meeting be mailed to stockholders. For example, Section 3012 of the Delaware Corporation Law requires only that directors be elected at the time and place within or without the state named in the by-laws, which shall not be changed within sixty days next before the day on which the election is to be held, and that a notice of any change shall be given to each stockholder twenty days before the election is held. Section 3113 of the Delaware Corporation Law sets forth the procedure to be followed if an election for directors is not held on the day designated by the by-laws.

It has been, however, a generally accepted practice for the existing management of a corporation to mail to stockholders notices of annual and special meetings and forms of proxies for use at such meetings. Notices of meetings and forms of proxies for use at such meetings may be mailed to stockholders at least once at the expense of the corporation but, in case there is a conflict, it has been held that additional follow-up letters or expenses incurred in connection with the solicitation of proxies may not be charged to the corporate treasury. Such forms of proxies customarily designate one or more persons identified with the management as the stockholders’ proxy with authority to vote at the annual meeting upon the election of directors “and upon such other matters, if any, as may properly come before the meeting with all of the powers which the stockholder himself would possess if he were personally present at the meeting.”

At the annual meeting (assuming there is no contest), the persons designated by the stockholders usually cast their ballots for the slate of directors nominated by the management, relatively few, if any, stockholders attending in person.

or of his personal representatives or assigns; but the parties to a valid pledge or to an executory contract of sale may agree in writing as to which of them shall vote the stock pledged or sold until the contract of pledge or sale is fully executed.

\(^{22}\) The first meeting for the election of directors at which meeting any business may be transacted, shall be held at any place either within or without this State fixed by a majority of the incorporators in a writing signed by them, and thereafter the said directors shall be elected at the time and place within or without this State named in the by-laws, and which shall not be changed within sixty days next before the day on which the election is to be held. A notice of any change shall be given to each stockholder twenty days before the election is held, in person or by letter mailed to his last known post-office address.”

\(^{23}\) If the election for directors of any corporation shall not be held on the day designated by the by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but the Chancellor may summarily order an election to be held upon the application of any stockholder, and at any such election the shares of stock represented at said meeting, either in person or by proxy, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the by-laws of the corporation to the contrary.

\(^{39}\) Hall v. Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78, 171 Atl. 226 (1934); 3 Cook on Corporations (8th ed. 1923) 2134.

Prior to the passage of the Securities Exchange Act of 1934 and the adoption by the Securities and Exchange Commission of its proxy rules, the notices of annual meetings and proxies for use thereat were customarily couched in rather concise form and the information given the stockholders was usually confined to (a) the date, hour and place of the meeting; (b) a statement that directors would be elected for the ensuing year; (c) a statement that such other business as might properly come before the meeting would be transacted; (d) a proposal to approve the annual report; and (e) a proposal to approve the minutes of the meetings of the board of directors held since the last annual meeting and the action of directors or officers taken pursuant thereto; but as has been stated, the proxy customarily did no more than refer to the notice of the meeting, name the proxies and confer upon them the power to use their discretion in voting on the matters enumerated in the notice of the meeting and "upon any other business that might properly be brought before the meeting".

It was at that time an accepted corporate practice to give the proxies power to approve, adopt, ratify and confirm all of the minutes of the board of directors since the date of the last annual meeting and all acts and transactions of the directors or officers taken pursuant thereto, although a detailed description of such minutes or action was customarily not included in the notice. Corporate practice varied as to whether at the meeting the presiding officer would merely state that the minute books were at hand and available for inspection by the stockholders prior to action upon the customary motion for approval and ratification, or whether a clerk would read the minutes aloud for several hours while the proxies designated by the stockholders sat around in bored silence. Some lawyers and managements regarded this so-called ratification by the stockholders of the acts of the management even though not set forth in detail in the notice of the meeting as being of great efficacy. Others followed the practice only because it seemed the accepted thing to do. But as the Court said in *Rice & Hutchins, Inc. v. Triplex Shoe Co.*:16

"It would be flying in the face of the simplest conception of justice to say that an agent could, without informing his principal, use the authority of his agency to commit the principal to an act done by the agent solely in his own peculiar personal interest. . . . A person acting as proxy for another is but the latter's agent and owes to the latter the duty of acting in strict accord with those requirements of a fiduciary relationship which inhere in the conception of agency. If directors who are the agents of the stockholders are invested with a fiduciary character which inhibits them from passing judgment where their own peculiarly personal interests are involved, as was held in the *Lofland* case (13 Del. Ch. 384, 118 Atl. 1), I am unable to see why on principle the same sort of inhibition is not imposed on those who act as proxies for a stockholder."17

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In this case, the proxies designated by the stockholders had voted for the adoption of a resolution ratifying the previous acts of the directors (the board of directors having voted for the issuance to certain members thereof of stock without consideration). There was no specific mention in the notice of meeting that this matter would be considered.

In announcing its first proxy rules, in September, 1935 (which rules were superseded by Regulation X-14 effective October, 1938), the Commission stated that they were designed to assure that the security holders, whose proxy or consent was solicited, would be afforded adequate information as to the action proposed to be taken and as to the source of the solicitation and the interest of the solicitor. The security holder was to be advised of the matters intended to be considered in the exercise of the proxy together with the action proposed to be taken by the grantee of the proxy except that the names of nominees for officers, directors and committees could be omitted. The literature also had to indicate whether any directors proposed to solicit proxies on their own behalf as distinct from the management. The information to the stockholder could be contained in the proxy or in an accompanying notice, although the information as to the matters to be considered and the action to be taken thereon could be contained in a report which had previously been sent to security holders, provided an appropriate reference was made to such report.

The rules prohibited the solicitation of proxies by means of any communication or statement which was false or misleading with respect to any material fact. Upon being tendered costs and expenses, any stockholder could require any management, engaged in soliciting proxies, to send a form of proxy, together with a proxy statement to the same list of security holders as were being solicited.

The original proxy rules as adopted by the Commission did not materially change previous corporate practice except that the rules of the Commission tended to discourage the solicitation of proxies designed to ratify the acts of the directors as set forth in the minute books and transactions of the officers taken pursuant to authority granted by the Board of Directors, inasmuch as the proxy rules required that specific page references be made to any matters in the annual report which those soliciting proxies wished authority to approve. The Commission used further to advise managements soliciting proxies...
proxies (when the proxy literature referred to specific pages of the annual report and specific pages of financial statements and asked for authority to approve of them), that this approval did not extend to transactions which might have taken place during the past year and which might have resulted in the status reflected in the pages of the annual report or the balance sheet referred to unless specific mention was also made of all interim transactions.

General Counsel of the Commission rendered an opinion\(^2\) that Rule LA-3-(a) (5) of the former rules required that a person from whom a proxy, consent or authorization was solicited, should receive a "brief description" of the various matters to be presented or considered in the exercise of the proxy, and that the brief description should include "a concise description of the substance of each of the various matters which, at the time of the solicitation, it is intended shall be considered by the meeting at which the proxy is to be exercised and that a mere statement that the stockholders would be requested to ratify the minutes of the directors and acts of the officers does not meet this requirement". He stated that for such of the acts and matters involved as were of a class calling for recurrent consideration or one of a routine nature, a general description or enumeration of each of the various types of acts, contracts or proceedings would ordinarily appear to be sufficient, but that where it is desired to submit to the stockholders the question of ratification of all the acts of the directors, and officers taken during the preceding year, the notice, or accompanying statement or report, should include not only a general description or enumeration of the acts or matters of a recurrent or routine nature, as indicated above, but also a specific, although brief, description of

of record as of a given date, if such form, notice or statement makes reference to such report and to the page or pages where the required description may be found.

\(^2\)Securities Exchange Act Release No. 461, January 21, 1936. Cf. the specific position adopted in the following letter of General Counsel of the Commission in respect to certain proxy material:

"It appears from the proxy form and notice that one of the purposes for which the proxy is intended to be voted is 'considering and voting upon the approval of the form of the Annual Report to Stockholders heretofore sent to stockholders entitled to vote at the meeting, and the ratification of such matters as are described therein in the President's letter on page 2, the financial statements on pages 3 to 5 inclusive, the Corporation's portfolio on pages 6 to 9 inclusive, and the supplementary information summarizing transactions in which officers or directors, or firms or corporations of which officers or directors were members, or officers, were financially interested, on page 10, thereof.'

"It seems clear that the financial statements appearing at pages 3 to 5 of the annual report can hardly be deemed to describe acts and proceedings of the directors and officers of the company—at least with sufficient definiteness to advise the stockholders as to the character of acts and proceedings as to which ratification is to be sought. Furthermore, I have difficulty in determining what is sought by the management in connection with the proposed voting by the stockholders upon the company's portfolio as set forth on pages 6 to 9 of the annual report. This statement of the company's portfolio clearly does not reflect the transactions in which the securities described therein were acquired, so that it can hardly be that approval of the portfolio will be a ratification of such transactions. In addition, the approval of the portfolio can hardly be deemed to constitute an authorization by the stockholders to the directors and officers of the company to hold such securities indefinitely."
any other acts or matters in respect of which approval or ratification is to 
be proposed; and that where approval is sought of the annual report of the 
company, or of the minutes of prior meetings as a ratification of the acts of the 
oficers and directors of the company described in the annual report, the 
substance of such action should be described in the same manner as that sug-
gested for the ratification of directors' and officers' acts.

As a result of the attitude of the Commission, the proposal to approve the 
annual report and the acts of the officers and directors began to be eliminated 
from most notices of annual meetings of corporations whose securities were 
listed on national securities exchanges, and no such action was taken at 
the meeting.

Prior to the adoption of Regulation X-14, it was not customary in man-
agement proxies to give stockholders the specific right to cast negative votes, 
although, of course, any stockholder was privileged to do so by rewriting the 
proxy. Management proxies customarily sought the power to vote "in favor 
of" certain propositions or to vote "for" certain nominees. In case a stock-
holder returned a proxy instructing the management's proxies to vote 
"against" the propositions or the nominees, it is not clear that a proxy named 
in an "affirmative" proxy solicited by the management is duty bound to accept 
the authority vested in him in a "negative" proxy, but perhaps a proxy de-
ciding not to accept a "negative" proxy is under a duty to notify a stock-
holder that he did not wish to accept the proxy relationship on this basis.

The new regulations (according to the Commission) do not prescribe what 
matters must be submitted to a vote of security holders, but are based upon

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\[29\] In August, 1937, in connection with the proposed plan of consolidation of the Alleghany 
Corporation and The Chesapeake Corporation, the Commission announced that it had 
requested the two corporations to amplify certain of the information which they had given 
to their security holders in soliciting proxies to approve the plan of consolidation. The 
additional information requested was with respect to the security holdings of all directors 
of both corporations, certain additional information with respect to the details of the 
plan and the rights of security holders, and the extent to which certain interests controlled 
the two corporations. As a result of the objection of the Commission, the management 
advised it that they would adjourn the special meeting scheduled for August 17, 1937 
until a later date, so that the security holders could have ample time to reconsider the plan 
and their action thereon, in the light of the additional information.

\[30\] See supra note 1.

\[31\] In cases where a management soliciting proxies received back the management form 
of proxy duly executed by the stockholder but containing instructions to the persons named 
as proxies to vote against certain proposals for which the management was soliciting 
affirmative proxies, it was considered the better practice for the persons named as such 
proxies to cast their votes in accordance with the instruction of the stockholder. The 
foregoing statement does not apply to cases where there was a contest for the election 
of directors as it is difficult to state any practice in this respect. Technically speaking, 
however, it was probably possible for the persons named as proxies to return such a form 
of proxy to the stockholder and to advise him that they did not wish to act as his proxies 
at the annual meeting and in this event the stockholder would have to attend in person 
or select another person to act in his behalf.

\[32\] A statement of the Commission's attitude is contained in the portion of Release No. 
1823, August 11, 1938, reprinted infra Appendix C.

However, in Duffy v. Loft, Inc., 17 Del. Ch. 140, 151 Atl. 223, 227 (1930), the court 
said in a case involving proxies solicited by a management: "But it would seem to be
the principle that when a question is to be presented to them, the information essential for a decision must be furnished to them in a full, fair and frank manner.

Rule X-14A-1 of Regulation X-14 sets forth specific directions as to: the manner in which proxies and proxy statements must be furnished; the necessity of providing a means whereby the person solicited can indicate the way in which the proxy shall vote on specific questions; legibility of the soliciting material; the duty to file material with the Securities and Exchange Commission and with the national securities exchange on which the securities are listed. The Rule prohibits solicitation of proxies by or on behalf of the issuer of the securities or its management unless the issuer has complied with the requests of any security holder who has requested information as to the number of security holders, or who has requested the issuer to mail proxy statements for him. It sets forth certain exceptions to the rules, determines the effect of a violation of them, and defines terms used in the rules.

Rule X-14A-8 provides:

"Failure to comply with the rules contained in this regulation shall not invalidate any proxy pursuant to which action has been taken: Provided, however, that this rule shall not be construed to prevent the granting of injunctions in any proper proceedings, or to exempt any person from any penalty or prohibition provided by the Act in respect of violations of the Act or any rules or regulations thereunder.

Rule X-14A-5 provides:

"No solicitation subject to Section 14 (a) of the Act shall be made by means of any form of proxy, notice of meeting or other communication containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or omits to state any material fact necessary in order to make the statements therein not false or misleading."

reasonable to say that where an agency of the present sort has been sought, and freely conferred, strict and exacting proof of its assumption in action ought not to be required; or, conversely, relatively slight circumstances ought to justify the conclusion that a solicited agency when granted was assumed and acted on when the occasion for its exercise arises and the agent is present participating in some way in the business with which the proposed agency is concerned. Cf. Allen v. Adams, 16 Del. Ch. 77, 140 Atl. 694 (1928). Perhaps this principle also would be applicable where a proxy different in form from that solicited is returned to the management.

It has also been suggested that the solicitation by the management and return of a proxy by the stockholder gives rise to a contract to vote, even though the proxy returned differs from that solicited; or that a refusal to accept the proxy would be a violation of a fiduciary duty: comment, Regulation of Proxy Solicitation by the Securities and Exchange Commission, (1939) 33 Ill. L. Rev. 914, 928-929. The same writer also advances the theory that a management failing to vote a proxy differing from the type solicited might be subject to the criminal penalties under Section 32, on the ground that "the solicitor has impliedly made the false and misleading representation that he will cast the solicited stockholders' ballot at the stockholders' meeting in the manner indicated in the proxy." But this seems questionable.

*See supra note 1.
Schedule 14A[^28] of Regulation X-14 sets forth the items of information which must be contained in proxies under Rule X-14A-1.

In adopting the new regulation, the Commission stated in Securities Exchange Act Rel. No. 1823[^28] that it had recognized that it may “at times become necessary for a management to modify a proposal after the solicitation is made and before the actual vote is taken, or to consider certain questions which were not anticipated at the time of the solicitation. Likewise, general questions are sometimes submitted to security holders before the terms and conditions have been determined. In order to allow flexibility in such cases there is a provision that information not known or reasonably available to the persons making the solicitation may be omitted from the proxy statement, and that information as to matters to occur or to be determined in the future need be given only in terms of present intention. In such case, however, there must be set forth to the extent practicable, the limitations of the authority intended to be conferred.”

It might be well, at this point, to outline the mechanics of solicitation of proxies. Corporations which have securities listed on the New York Stock Exchange are required in their listing application to agree to give at least ten days’ notice of the fixing of a record date for the determination of stockholders entitled to notice of and to vote at a meeting[^30]. In large corporations, it usually takes several days after the record date for the transfer agent to complete the mailing of the notices, proxy statements and proxies.

In the case of a large corporation, considerable clerical work is involved in getting out notices of annual meetings, proxy statements and proxies, checking with brokerage firms as to the number of pieces of proxy material which they will require and checking with stockholders who have not sent in proxies sufficiently in advance of the meeting in order to be sure that there will be a quorum represented at the meeting. In the case of most large corporations, the record date for the purpose of determining stockholders entitled to notice of and to vote at the meeting is usually fixed several weeks in advance of the date of the meeting. Consequently, the proxy material is usually mailed several weeks prior to the date of the meeting. From a mechanical standpoint therefore, it is not easy to mail new notices or material, once the proxy soliciting material has gone out to stockholders.

If the stockholder does not return the proxy duly executed, and if there is no contest over proxies, a member firm of the New York Stock Exchange, may on the tenth day before the meeting, execute and send to the company a proxy for the number of shares owned by the customer but standing in the name of the member firm.

[^28]: See infra Appendix D for full text of Schedule 14A with comments thereon by the writer.
[^30]: See supra note 26.

"The Corporation will give the Exchange at least ten days’ notice in advance of the closing of the transfer books, or of the taking of a record of its stockholders for any purpose."
A considerable percentage of the voting stock of any large corporation is registered in the names of brokers, the names of the stockholders owning the beneficial interest but not appearing on the books of the corporation. Many stockholders who own their securities outright, for facility of transfer, also prefer to have their shares registered in brokers' names or so-called "street" names. For example, 10,000 shares standing on the books of the ABC Corporation in the name of Dombey & Son may belong to several hundred individual stockholders. In the large wire houses, the records of this ownership may be scattered in a number of offices in various cities, and it involves considerable expense to the brokerage house to compile this information for each meeting of a corporation and to mail the notice, proxy and proxy statement to each beneficial owner of the stock.

The New York Stock Exchange has adopted several rules designed to

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2Rule 770. No member firm shall give a proxy to vote stock registered in its name, except as required or permitted under the provisions of Rule 772, unless the firm is the beneficial owner of such stock.

Rule 771. Whenever a person soliciting proxies shall furnish a member firm:
(1) copies of all soliciting material which such person is sending to registered holders, and
(2) satisfactory assurance that he will reimburse such member firm for all out-of-pocket expenses, including reasonable clerical expenses, if any, incurred by such member firm, in obtaining instructions from the beneficial owners of stock, such firm shall transmit to each beneficial owner of stock which is in its possession or control the material furnished together with a request for voting instructions and also a statement to the effect that, if such instructions are not received by the tenth day before the meeting, the proxy may be given at discretion by the owner of record of the stock. This rule shall not apply to beneficial owners outside the United States.

Rule 772. A member firm shall give a proxy for stock registered in its name, at the direction of the beneficial owner. If the stock is not in the control or possession of the member firm, satisfactory proof of the beneficial ownership as of the record date may be required.

A member firm may give a proxy to vote any stock registered in its name if the member firm holds such stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote.

A member firm which has not received instructions from the beneficial owner by the tenth day preceding the stock registered in its name, provided the owner of such stock has first been afforded an opportunity to give instructions in accordance with the provisions of Rule 771, and provided the person signing the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action does not include authorization for a merger, consolidation or any other matter which may affect substantially the legal rights or privileges of such stock.

A member firm which has in its possession or control stock registered in the name of another member firm shall forward to the second member firm any voting instructions received from the beneficial owner, or if no instructions have been received by the tenth day before the meeting and material has been sent out in accordance with Rule 771, shall so notify the second member firm in order that such firm may give the proxy as provided in the third paragraph of this rule.

Rule 773. In all cases in which a proxy is given by a member firm the proxy shall state the actual number of shares of stock for which the proxy is given.

Rule 774. A member firm, when so requested by the Committee on Stock List, shall transfer certificates of a listed stock held either for its own account or for the account of others, if registered in the name of a previous holder of record, into its own name, prior to the taking of a record of stockholders, to facilitate the convenient solicitation of proxies.

Said Committee shall make such request at the instance of the issuer or of persons owning in the aggregate at least ten per cent of such stock, provided, if said Committee
afford the beneficial owners of stock registered in the names of brokers, a copy of the material used by the corporation in soliciting the proxy and the right to express their own preference as to how the stock registered in the name of the broker should be voted. Whenever the company soliciting the proxy furnishes the broker with satisfactory assurance that it will reimburse such broker for his out-of-pocket expenses, including reasonable clerical expenses, if any, and expense incurred in obtaining instructions from the beneficial owners of such stock, the member firms send the notice, proxy statement and form of proxy to the beneficial owner of the stock, together with a proxy which they have signed, limited to the number of shares owned by the customer and advise the beneficial owner that if he desires to have the enclosed executed proxy voted by the management he should mail it to the management.

Inasmuch as the information to be given stockholders in case rival factions are seeking control depends entirely on the facts involved, this article does not take into consideration the procedure where there is a conflict, but only the normal course of mailing the proxy soliciting material by the management to stockholders in connection with annual meetings.

II

An example of the type of problem confronting the management of a corporation under the new proxy rules is found when a stockholder has notified it, prior to the time that it has mailed its proxy soliciting material, that he proposes to make a motion at the next annual meeting that the auditors should be selected by the stockholders rather than by the management. Because of recent occurrences in connection with the auditing of accounts, there has been considerable discussion whether the accountants making the annual audit of a corporation should be chosen by the directors or by the stockholders at the annual meeting, and whether the accountants should report to the management or to the stockholders. The problem is not so simple as would seem from current discussions in the press and when managements of some listed corporations have been notified by stockholders that they propose to make motions at the annual meeting that the auditors be chosen by the stockholders, the managements have been put into a considerable quandary. In the first place, they do not know whether the motion may validly be made by stockholders; in the second place, they do not know whether the stockholders would pick competent accountants, which is essential for the proper direction of the business, and the directors and officers are sometimes made personally liable for action taken on the basis of the

so requires, the issuer or persons making such request agree to indemnify member firms against transfer taxes, and said Committee may make such a request whenever it deems it advisable.

RULE 775. Rules 770 through 774 shall apply also to individual members and to any nominees of member firms or individual members. They shall apply also to voting in person.
audited accounts; and in the third place, managements are fearful lest a bare statement of the proposition "should the Board of Directors or the Stockholders choose the auditors" may be misleading to stockholders on the ground that the full facts surrounding the proposal are not given.

For example, in order that the stockholders may make an intelligent decision on this proposition, in addition to the bare question, there would also have to be submitted to them appropriate information along the following lines:

(a) Instructions to the auditors as to the character and extent of the audit and the extent to which auditors are to be permitted to rely on previous audits;
(b) The extent to which the company will authorize the accountants to pick independent experts to check inventory, and what this will cost, or the extent to which they may rely on officers' certificates;
(c) The extent to which the auditors may rely on the internal system of audit and control, or, if not, what it will cost to have the auditors make complete independent verifications;
(d) Report by the management to the stockholders whether the management regards the auditors proposed for election to be competent and diligent;
(e) An estimate as to what it will cost the company to change auditors since new auditors would have to make a review of the accounts for several years back before certifying to the financial statements;
(f) Whether the accountants are to make a general examination in accordance with good auditing practice and are to make a spot check of certain original entries, and vouchers supporting such original entries, or whether the accountants are to make a complete "cash" audit and examine each original voucher supporting each original entry and the estimated cost of the "general examination" or "complete cash audit".

Letters from stockholders signifying an intention to make such a motion have taken various forms; in some instances, they are so vague as to be almost unintelligible, and in other instances they take the form of a notification to the management that the stockholder proposes to amend the by-laws so that they will provide that the stockholders rather than the directors shall pick the auditors.

Apart from this specific instance, in times of depression, almost every management receives numerous letters after it has sent out its proxy soliciting material. In many cases, the letters are merely an expression of the stockholder's wrath because economic conditions are such that the market price of his stock is less than the price at which he purchased it. Such letters may threaten all forms of dire penalties. In other cases, the stockholder gives the management some good fatherly advice, or denounces the management and announces

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See, for example, Section 11 of the Securities Act of 1933 and Section 18 of the Securities Exchange Act of 1934.

This took place in the case of the recent meeting on April 25, 1939, of the Bethlehem Steel Corporation. See infra pp. 503-504.
his intention of voting to elect as directors persons other than those designated by the management (usually without naming them). Or a stockholder may demand that some precise action, coming within the discretion of the management be taken at the annual meeting, and may send a copy of his letter to the Securities and Exchange Commission. It is frequently difficult for the management to tell exactly what the stockholder has in mind or exactly what action the stockholder wishes the management to take. It would be difficult, without utterly confusing a large percentage of the stockholders, to communicate to all stockholders the substance of each communication received from every stockholder who advised the management that he proposed to take or wished to have taken certain action at the annual meeting.

However, Rule X-14A-2 provides:

"No solicitation subject to Section 14(a) of the Act shall be made unless (a) means shall have been provided whereby the person solicited is afforded an opportunity to specify, in a space provided in the form of proxy or otherwise, the action which such person desires to be taken pursuant to the proxy on each matter, or each group of related matters as a whole, described in the proxy statement as intended to be acted upon, other than the election of directors or other officials, and (b) the authority conferred as to each such matter or group of matters is limited by the specification so made. Nothing in Regulation X-14 shall prevent the solicitation of a proxy conferring discretionary authority with respect to matters as to which the person solicited does not make the specification provided for above, or with respect to matters not known or determined at the time of the solicitation, or with respect to elections of directors or other officials." (Italics supplied.)

It is customary in management notices of meeting, after stating the specific matters to be brought before the meeting by the management, to make a statement that it is not the intention of the management to bring any other matters before the meeting and then to make a statement along the following lines: "However, if any other matters properly come before the meeting, it is the intention of the persons named in the attached form of proxy to vote said proxy in accordance with their judgment on such matters."

In a recent case, the Securities and Exchange Commission interpreted Regulation X-14 as meaning (a) that if a stockholder has notified the management prior to the time the management has sent out its proxy material that the stockholder proposes to offer a resolution at the annual meeting on some subject which falls generally within the province in which a stockholder may properly propose resolutions, hereinafter sometimes for convenience called "valid motions"; and (b) that if the management makes no mention of such proposal in its proxy statement and does not afford to stockholders an opportunity to specify in a space provided in the form of proxy, the action which the stockholder desires to be taken pursuant to the proxy on such matter, but intends at the meeting to vote against such proposed resolution in
accordance with the general clause giving the persons named in the management proxies the right to vote upon such other matters as may properly be brought before the meeting, in accordance with their discretion, the proxy statement “at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or omits to state any material fact necessary in order to make the statements therein not false or misleading.”

The Securities and Exchange Commission apparently draws a distinction between (a) valid motions by stockholders (i.e., those which properly fall within the province of stockholders to make), and (b) motions by stockholders which clearly invade the province of management left to directors, which latter class of motions by stockholders are invalid and can properly be ruled out of order by the Chairman at the meeting and which are for convenience herein sometimes called “invalid motions”. The Commission apparently is of the opinion that if the management of a company is notified, prior to mailing its proxy soliciting material, by a stockholder of his intention to propose at the annual meeting a motion of the type referred to herein as an invalid motion, the management need not mention such fact in its notice and its proxy statement is not misleading unless the management, instead of stating that “it does not intend to bring any other matters before the meeting,” states that it does not “know” of any other matters which may be brought before the meeting. In other words, even though the type of motion of which the management has been notified falls within the category of “invalid motions” the proxy statement in the opinion of the Commission may nevertheless be misleading under Rule X-14A-5 on the ground that the management did in fact “know” of something else that was coming before the meeting, even though the stockholder had no right to bring it before the meeting. Query, however, whether this distinction between the management’s intention and its knowledge is really a valid one and whether if the stockholder does not have the right to bring the matter in question before the meeting, but nevertheless notifies the management he intends to bring it before the meeting, the proxy statement is “false or misleading with respect to any material fact, or omits to state any material fact necessary in order to make the statements therein not false or misleading”.

It would seem that the statement cannot properly be construed as meaning

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33See Regulation X-14, Rule X-14A-5, supra p. 494.
34Nothing contained in this article should be deemed to be an authoritative statement as to the opinion of the Securities and Exchange Commission, as obviously the Commission itself is the only body which can state precisely what its opinion is. In this article where statements are made as to the position or apparent position of the Securities and Exchange Commission, they are based on actual experiences with the staff of the Commission. However, the practice of the Commission is changing from time to time and the rulings of the Commission on the basis of the facts in a particular case are not necessarily indicative of what their rulings would be in similar but not identical cases. Although particular managements, caught in the toils of the proxy rules, may not believe it, the Commission is endeavoring to follow the “rule of reason”. It is obvious that it must reconsider its proxy rules and have a “round table” to discuss and clarify them.
that the management knows of no matters which may be "validly" brought before the meeting.

Despite the fact that the Securities and Exchange Commission draws this distinction in theory as to "valid" and "invalid" motions, it nevertheless apparently regards a statement made by a stockholder to the management of a corporation, prior to the mailing of its proxy soliciting material, that he intends to make a motion for the annual election of auditors by the stockholders, as notice to the management of an intention by a stockholder to make a motion at the annual meeting which can properly be made by a stockholder. And, moreover, holds the proxy material to be misleading if mention is not made of the stockholder's intent, with space afforded to the stockholder to express the way he wishes his proxy to vote on the matter, even though the laws of the state of incorporation, the charter and the by-laws of the particular company can properly be construed as vesting in the board of directors, and not in the stockholders, the right to choose the auditors. While no definitive statement can be made as to the attitude of the Commission, it is, nevertheless, believed that the Securities and Exchange Commission would regard a statement made by a stockholder to the management that the stockholder intended to make a motion at the annual meeting that (i) the executive officers be elected annually by the stockholders; or (ii) a dividend be declared by the stockholders; or (iii) that the amount being set aside for depreciation be reduced, as notices of motions which in the ordinary case, at least, fall within the category of "invalid motions", and hence require no mention in the proxy statement; this is, on the whole, in accord with the legal situation, for under most laws of the state of incorporation, and the charter and the by-laws, boards of directors have the authority: (a) to elect or appoint the executive officers of the corporation and fix their compensation within reasonable limits; (b) to declare dividends, set up reserves, determine depreciation policies; (c) determine production and sales policies; and (d) propose dissolution, reduction in capital, merger or consolidation, etc., and recommend the advisability thereof to the stockholders. In some jurisdictions either by the basic law or by authority of the certificate.

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35It can be questioned whether such a matter is properly within the discretion of stockholders. The choosing of auditors may well be a matter relating to management; and it has been said that majority stockholders could not unite in order to take away from a board of directors the duties and responsibilities of management of the corporation and, if they did so, the minority stockholders who had not so agreed could insist that the directors "assume and perform the duties which the law imposes": Manson v. Curtis, 223 N. Y. 313 (1918). Nor can the stockholders attempt to control the directors in the matter of electing officers and fixing officers' stipends: McQuade v. Stoneham, 263 N. Y. 323 (1934). If stockholders cannot agree among themselves to exercise such powers, query whether they have such powers and query whether the SEC can insist that they have such powers?

The foregoing principles of law are evidently not applicable in the case of a closed corporation, with all the stockholders agreeing: Clark v. Dodge, 209 N. Y. 410 (1936). See, generally, Meek, Employment of Corporate Executives by Majority Stockholders (1938) 47 YALE L. J. 1079.

36Delaware, under the DELAWARE CORPORATION LAW § 10, provides that the officers shall
of incorporation, the board of directors and not the stockholders has the authority to initiate the amendments to the by-laws.308

But, it is understood that if a stockholder notifies the management that he proposes to make a motion to amend the by-laws, the Commission regards this motion as being a "valid motion", and one which requires specific mention in the proxy statement, unless the law of the state of incorporation, the certificate of incorporation or the by-laws specifically and clearly provide that amendments to the by-laws must be proposed by the board of directors. Even though the by-laws of a particular company provide that the by-laws may not be amended at an annual meeting unless specific notice of the proposed amendment is given in the notice of the meeting, the Securities and Exchange Commission apparently believes that the receipt by the management of a statement from a stockholder that he proposes to move to amend the by-laws (if this is a valid motion) requires the board of directors to insert mention of the stockholder's intent in the notice of the meeting and to give stockholders the right to specify how they wish their proxy to be voted thereon. If a stockholder notifies the management he intends to make a motion to amend the by-laws even though no notice is necessary under the laws of the state of incorporation or the by-laws, the Commission nevertheless apparently believes the management must act in the same way. Where the charter of the company, pursuant to statutory authority, such as is found, for example in Sec. 1237 of the Delaware Corporation Law, confers the power to make by-laws upon the directors and not on the stockholders, and the certificate of incorporation also confers such authority on the directors, query whether a notice by a stockholder to the management that he intends to make a motion at an annual meeting to amend the by-laws can force a board of directors to include such proposal in a notice of the meeting sent out by the management as one of the matters to be acted upon by stockholders at the annual meeting?

be chosen by the directors or stockholders, as the by-laws may direct. § 12 confers the power to make, alter or repeal by-laws on the stockholders, unless the certificate of incorporation confers that power on the directors. § 34 confines the declaration of dividends to the powers of the directors. By § 39 voluntary dissolution is to be proposed by the Board of Directors; so, by § 59 of consolidation or merger.

Maryland, under Md. Ann. Code art. 23, § 12, provides that the officers shall be chosen by the directors unless the by-laws otherwise provide. § 15 confers the powers of amending by-laws on the stockholders. By §§ 88 and 91, voluntary dissolution is to be initiated by the Board of Directors; so, by § 33, of consolidation; the declaration of dividends is not specifically entrusted to the directors in Maryland by statute.


308Ibid.

309"The original by-laws of a corporation may be adopted by the incorporators. Thereafter, the power to make, alter or repeal by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors."
In connection with the recent annual meeting of the Bethlehem Steel Corporation,\(^3\) it is understood that prior to the time the proxy soliciting material was sent out, a stockholder notified the management that he proposed to make a motion at the annual meeting to amend the by-laws so that the stockholders should choose the auditors. Apparently the management of the Bethlehem Steel Corporation did not regard this notice as requiring them to make any specific reference thereto in their proxy soliciting material and accordingly made no mention of the receipt of such proposed intent.

The notice of the annual meeting of stockholders stated that the meeting would be held at the principal office of the corporation "for the election of five directors, each for a term of three years, and the transaction of such other business as may properly be brought before said meeting". A proxy statement accompanied the notice of the annual meeting of the stockholders, but the proxy form only authorized the proxies to vote "with respect to the election of five directors of said corporation, each for a term of three years" and did not confer any authority upon the persons named in the proxy to vote on any other business that might properly be brought before the meeting.

The proxy statement said, among other things:

"One of the purposes of said meeting is the election of five directors, each for a term of three years. Other matters may properly be brought before said meeting by the stockholders, but proxies in such form will confer authority only with respect to the election of directors and will not confer any authority with respect to any of such other matters."

Apparently it was the intention of the management, in the event that the stockholder at the annual meeting proposed the motion of which he had given notice to the management, to allow the motion to be made but to permit only stockholders present in person (or holding specific proxy authorization) to vote thereon.

The stockholder complained to the Securities and Exchange Commission and the Commission advised the Bethlehem Steel Corporation that the Commission considered its proxy soliciting material as having omitted to state a material fact necessary in order to make the statements therein not false or misleading. The Commission suggested that the meeting be adjourned until proxy soliciting material in form satisfactory to the Commission on this point had been mailed to stockholders and that stockholders be given the right to revoke their proxies. Apparently the management of Bethlehem Steel Corporation agreed to adjourn the meeting and to send out new letters notifying the stockholders of the proposed motion; but since the proxies originally solicited by the management did not confer upon the management the right to vote on other matters that might properly be brought before the meeting, but only for the election of directors, the management did not solicit new

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\(^3\) Held at Wilmington, Del. on April 11, 1939, adjourned to April 25, 1939. See N. Y. Times, April 12, 1939, p. 33, and April 26, 1939, p. 33.
proxies and did not vote the original proxies against the stockholder's proposal at the adjourned meeting; the proposal was voted down by stockholders present in person.

It is understood that the Securities and Exchange Commission advanced the theory that if the proxy soliciting material omitted to make mention of notification by a stockholder that he proposed to make a motion which fell within the category of a valid motion, the proxy material mailed was, in the opinion of the Commission, misleading, and the proxies obtained on the basis of such proxy soliciting material could not be used even for the purpose of determining whether a quorum was represented at the meeting, whether or not the proxies so obtained were used, or were intended to be used, in voting against the motion in question; and that unless the management agreed to adjourn the meeting, send out new notices and afford stockholders a chance to revoke the previously executed proxies, the Commission might be compelled to seek injunctive relief.

This is a rather new and startling theory. It is naturally entitled to the most respectful consideration. It may make the solicitation of proxies by a management a very delicate and perhaps expensive undertaking and deserves careful examination.

Nothing in Section 14 of the Securities Exchange Act of 1934 or Regulation X-14 makes action taken at any meeting, even though taken pursuant to proxies which may have been obtained in contravention of rules and regulations of the Commission, in any way invalid, for, as we have seen, Rule X-14A-8 of Regulation 14 provides:

"Failure to comply with the rules contained in this regulation shall not invalidate any proxy pursuant to which action has been taken: Provided, however, that this rule shall not be construed to prevent the granting of injunctions in any proper proceedings, or to exempt any person from any penalty or prohibition provided by the Act in respect of violations of the Act or any rules or regulations thereunder."

Let us assume that (a) prior to the mailing by a corporation of its proxy material a stockholder has notified it that he proposes to make a motion of the category herein termed a "valid motion" and (b) the management makes no mention of the receipt of such notice of intent from the stockholder; (c) the Commission notifies the management that it considers its proxy material misleading under Rule X-14A-5 of Regulation X-14 and asks it to adjourn the meeting and to mail new proxy material mentioning the proposed motion and to ask for instructions on how to vote on the proposed motion; (d) the company refuses to acquiesce in the Commission's interpretation; and

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388 It can very plausibly be argued that the Commission, though it has power to enjoin an improper solicitation of proxies, has no power to enjoin the voting of proxies once they have been solicited, on the ground that the voting of the proxies is not a violation of the rules. See (1939) 33 Ill. L. Rev. 914, 937-939.

390 See supra p. 494.
(e) the Commission seeks injunctive relief: (i) against the proxies being counted at the meeting for the purpose of determining whether or not there is a quorum so as to prevent all action at the meeting and (ii) against the management's voting the proxies either for or against the particular motion which the stockholder has stated he proposes to make.

As for (i), it is, of course, possible to imagine a stockholder notifying the management that he proposes to make a certain motion and that failure to mention such notice of intent in the proxy statement would be so material and so misleading in the light of the circumstances under which the proxies were being solicited, as to make it proper for a court to enjoin the company from counting such proxies for the purpose of determining a quorum or in voting such proxies on matters other than the particular matter in question.

Generally speaking, however, in most of the cases which can be visualized, and where the alleged deficiency does not affect the real purpose of the meeting, the granting of injunctive relief forbidding the management to count proxies, solicited on such allegedly inadequate basis, in order to determine whether a quorum is present and to vote such proxies on matters where admittedly complete information was given would seem to be a most unusual exercise of a court of equity's power.40

For example, suppose Corporation A has given full and complete information concerning the persons it proposes to nominate as directors at the annual meeting pursuant to Regulation X-14, Schedule A, Item 6,41 but has omitted to mention in its proxy statement that prior to the mailing of the proxy material a stockholder has notified the management that he proposes to make an amendment in the by-laws (assuming a stockholder can properly make such a motion), changing the place of the annual meeting from Louisville to New York. In this situation it would seem that the management should clearly not be enjoined from counting such proxies in determining a quorum or from voting proxies (received by it on the basis of correct information as to nominees in the proxy material) for the election of directors, but (assuming, as stated above, the motion is a valid one) should only be enjoined, if at all, from voting such proxies on the particular question involved. Clearly there is a quorum present for the purpose of electing directors. On the facts supposed, it can hardly be said that a stockholder who has granted the management his proxy to vote for directors with respect to whom he has received full and correct information has been so deceived by the management's failure to notify him that a stockholder proposes to change the place of the annual meeting, that the management should not be entrusted with his proxy for the

40In Berendt v. Bethlehem Steel Corp., 108 N. J. Eq. 108, 154 Atl. 321 (1931), the court pointed out that proxies had been obtained by the management without revealing the real issues which would arise at the stockholders' meeting, but nevertheless assumed that the proxies could be voted on the propositions submitted to the meeting and that they could be used to constitute a quorum. Cf. Starrett Corporation v. Fifth Ave. and Twenty-Ninth St. Corporation, 1 Fed. Supp. 868 (S. D. N. Y. 1932).

41See supra note 28.
purpose of selecting directors; or that the matter is grave enough to justify putting the corporation to the expense of re-mailing new proxy material and soliciting new proxies.

Turning now to (ii), in determining the extent to which a proxy may exercise the power conferred upon him, it is apparent that the nature of the relationship existing between the stockholder granting the proxy and the person named in the proxy must be made clear. As stated above, the right of stockholders in American corporations to designate someone else as their proxy to vote in their behalf at meetings is purely a creature of statute law. Although the courts have attempted to analogize the relationship of the stockholder and his proxy to that of principal and agent, the relationships are not entirely comparable.

Where an agent is given certain specific powers in a power of attorney and then is given certain general powers in connection with the enumerated powers, the courts have been fairly strict in limiting the powers of the agent to those necessary to the effective carrying out of the specifically enumerated powers. This is not so with regard to proxies. In the absence of something in the proxy expressly negating general powers granted to a proxyholder, the courts have been inclined to allow proxyholders rather wide latitude in exercising their discretion as to the manner in which they should vote the proxies at a meeting with respect to matters of which no specific mention was made in the notice, where such specific notice was not required by statute, charter, or by-law. Moreover, it has been held that a proxyholder may waive any irregularity in the proceedings or calls of the meeting, if any, which could be waived by the stockholder if personally present.

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42See supra note 9.


44Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 Fed. 217 (C. C. Tex. 1907); White v. Young, 122 Ga. 830, 51 S. E. 28 (1905); Rossiter v. Rossiter, 8 Wend. 494 (N. Y. 1832). See Hodge v. Combs, 66 U. S. 192 (1861); I MECHEM ON AGENCY (2nd ed. 1914) 553; RESTATEMENT, AGENCY § 37.


46Columbia Nat. Bank v. Mathews, 85 Fed. 934 (C. C. A. 9th 1898); Crook v. Inter-
It is submitted that unless the proxyholder has some interest adverse to the interest of his principal, he should have every right and power that his principal, if present, would have, and hence may vote not merely on the main questions for which the meeting was called, but also on all subsidiary and incidental motion or motions which may properly be brought before the meeting even though no specific mention thereof is made in the notice. If the strict construction theory were followed, unless these matters were specifically mentioned in the notice of the meeting, a proxy would have no right to vote for a chairman, inspector of election, or whether voting should be by ballot, or whether an adjournment should be taken.

While modern corporate practice seems to be that matters should not be brought up at an annual meeting unless specific mention thereof has been made in the notice of the meeting or unless the matters brought up are incidental to such specified matters, the courts have nevertheless held that it is proper to act on a wide variety of questions at an annual meeting even though no mention thereof has been made in the notice. In this respect the courts sharply distinguish between what may be transacted at an annual meeting without notice of the particular action to be taken and what may be transacted at a special meeting without notice.

An individual stockholder who makes a motion at an annual meeting with respect to a matter of which no mention is made in the notice is, however, in a somewhat different position than a management acting pursuant to proxies which it has solicited from its stockholders pursuant to notices or proxy statements which it has drafted. While it can hardly be said that prior to the time that the proxies are accepted, the persons named in the management’s proxies stand in the relationship of agents to the stockholders who are being solicited to send in their proxies, nevertheless, although there seem to be no cases

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specifically in point, on general theory it would seem that a management which mails out forms of proxies to its stockholders soliciting their execution stands in a general fiduciary relationship to all of the stockholders. And since the adoption by the Securities and Exchange Commission of its proxy rules, it is made illegal to solicit proxies on the basis of false or misleading information.

It would probably introduce an enormous element of confusion and uncertainty in the conduct of annual meetings of corporations whose securities are listed on national securities exchanges if at an annual meeting any stockholder could make a motion of a type which may properly be made by stockholders and successfully contend that the management’s proxies could not vote on such motion because such motion was not mentioned in the proxy statement on the basis of which such proxies were solicited. If this were true, any stockholder, by the simple expedient of failing to notify the management prior to the time that it mailed out its proxy material, could disenfranchise all stockholders sending their proxies to the management, and only those stockholders could vote on such motions who were present in person or who, having been apprised of the stockholder’s intention, had granted proxies giving specific authority to vote thereon. This construction would leave the repre-

69In two cases an analogous problem has been considered. In General Investment Co. v. American Hide & Leather Co., 97 N. J. Eq. 230, 127 Atl. 659 (1925) proxies had been solicited by the management for a stockholders’ meeting and at the meeting, no notice having been given in this respect, the stockholders ratified a contract in which one of the directors had a personal interest. In a suit by a stockholder to set aside the transaction, it was claimed that he was bound by the action of the stockholders in ratifying the action since his proxy had been given to the management and had been voted for the transaction. The court replied that the stockholders should have been informed by the management at the time the proxy was solicited:

“It was further urged that sufficient notice of Mr. Tinker’s dual interest was exhibited to the stockholders at the time of the meeting, and that it was their duty to be present. But it appears to me self evident that such notice, considered by the company of sufficient importance to be communicated at the meeting, comes then too late. The shareholder has a right at the time his proxy is sought by the corporate officers to rely upon their fairness and the discharge of their confidential duties, and that the unwary public should not be held to the consequences of an act secured by constructive fraud.” [But see Baker v. Power Co., 61 Wash. 578, 112 Pac. 647 (1911); Tilden v. Oats Co., 1 F. (2d) 160 (1924).]

The court further said that it believed that a new meeting should be held and proxies resolicited. It should be emphasized that this was a case in which the transaction would be completely improper unless entered into and ratified by the stockholders with their full knowledge; it would seem that the case can therefore be distinguished from a transaction which requires merely the approval of the stockholders and is not one in which the management must, if there is not to be a breach of the fiduciary relationship, reveal certain facts in connection with the proposition to the stockholders.

In Townsley v. Bankers’ Life Insurance Co., 56 App. Div. 232 (N. Y. 1900), a manager of a corporation had solicited proxies for his personal use in attempting to oust the management, and in so soliciting, the material used misrepresented that the proxies were being solicited for the management. The court did not pass on the question of whether proxies solicited under these circumstances could not be voted. It is submitted, in any case, that there is a distinction between soliciting proxies with a definite misrepresentation as to the person soliciting them and soliciting proxies without revealing that certain matters will be brought up by stockholders at the meeting.

68Rule X-14A-5; see supra p. 494.
sentatives of the majority helpless in protecting their interests against ill-advised motions by individual stockholders. Of course, in cases where the stockholder has not notified the management of his intention to make any motion, there could be no question about the right of the management to count its proxies for the purpose of determining a quorum, to vote them upon all matters of which appropriate mention is made in the notice and proxy statement, and upon valid motions of which they did not receive notice prior to mailing the proxy soliciting material. Invalid motions should preferably be ruled out of order.

It is submitted that in order for the management to know when it must make specific mention in its proxy soliciting material of statements by stockholders that they intend to make motions at an annual meeting, it is necessary to determine (a) whether the motion properly falls within the category of "valid motions" of which mention must be made; (b) whether the motion falls within the province of management and not within the province of stockholders, but is of such a character that mention should probably be made of it; or (c) whether it is clearly the type of motion which can be declared out of order at the meeting as not being the type of motion which can properly be brought up at a meeting and hence that no specific mention of the subject matter of the motion need be stated in the notice of the meeting. If the management is notified of the stockholder's intention to make a motion of a doubtful character and the management in good faith believes that it is not a valid motion, it would seem that the proper procedure would be for the management to hold the meeting and vote the proxies, unless the character of the motion is such that to permit the management to vote the proxies would do irreparable harm to the stockholders. This would leave the stockholders to any action which they may have at law against the persons named in the proxies for damages in voting their proxies on matters on which the stockholders should have been afforded an opportunity to express their preferences but were not. The procedure unfortunately exposes the management to charges that it has violated Regulation X-14, Rule X-14A-8 and Section 32 of the Securities Exchange Act of 1934. The only alternative is to adjourn the meeting and send out new notices and give stockholders an

62 The actions would presumably be analogous to a suit by a principal against an agent for a breach of duty. No actual case can be found at the time of writing.

There is also a possibility that the Commission might attempt to use its "delisting" power, granted under Section 19 (2) of the Securities Exchange Act of 1934. A further possibility is an application by the Commission for a writ of mandamus to force the management to accede to the Commission's view. But the propriety of the use of either of these remedies is seriously questioned in (1939) 33 ILL. L. REV. 914, 936-937, 939-940.

63 Penalties:

Sec. 32 (a) Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this
opportunity to revoke their previously executed proxies—not a happy choice. Otherwise, the only safe thing to do would be for the management to mention in the proxy statement all notices received from stockholders of intent to make motions (except those which are clearly invalid) and afford stockholders an opportunity to express their preference as to how the management should vote on each proposal. Let us assume one stockholder notifies the management that he proposed to make a motion that the firm of XYZ be selected as auditors; another stockholder notifies the management that he proposes to make a motion that ABC be selected as auditors; another stockholder notifies the management that he proposes to make a motion leaving the selection of the auditors to the management; another stockholder notifies the management that he proposes to make a motion that the stockholders select the auditors; another proposes the auditors be selected by competitive bidding (with no provision for protection against those who on this basis might do a careless job); and each of the motions propose different audits of varying types and scope. If the management must afford to stockholders an opportunity to state how they wish the persons named in management proxies to vote on each proposal, it is submitted that the result will be to confuse the stockholders rather than afford them an opportunity of expressing their preference. Furthermore, the management would have to include in the proxy statement a concise statement of the pros and cons of each proposition submitted inasmuch as the adoption of certain propositions might involve the company in considerable expense and might be to the distinct disadvantage of the stockholders.

If the Securities and Exchange Commission is proceeding upon the theory that it is not necessary for a management to make specific mention in its proxy statement and to give the stockholders the right to determine whether an affirmative or negative vote shall be made on certain matters, where a stockholder has apprised the management before it mails its proxy material that he proposes to make a motion which is invalid, and that therefore the

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(b) Any issuer which fails to file information, documents, or reports pursuant to an undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 15 of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.
proxy statement is not misleading, but that the proxy soliciting material is misleading if the proposed motion of which notice is given is a valid motion, but the management’s proxy soliciting material makes no mention of it, it is obvious that the Securities and Exchange Commission must determine for itself, prior to the time it determines to seek injunctive relief, just what motions under the law of incorporation, the charter and the by-laws are valid and what are invalid motions; and that failure to mention valid motions affords a ground for injunctive relief. It is obvious that managements which fail to mention proposed motions proceed at their peril. Either a management which has received letters from its stockholders, prior to mailing its proxy material, advising it that a stockholder proposes to make a motion at the annual meeting, which motion may be in the twilight zone, must as a practical matter ascertain whether the Securities and Exchange Commission determines that this motion is or is not within the category which may properly be made by a stockholder and abide by the decision, or it must be prepared to combat a request for injunctive relief or prosecution for violating Section 32 of the Securities Exchange Act of 1934. If the Commission does not seek injunctive relief and the meeting is held, the validity of the action taken at the meeting under Regulation X-14, Rule X-14A-8 is not subject to attack, but the management may have subjected itself to criminal proceedings for violation of the proxy rules.

The current practice of the Securities and Exchange Commission places a federal agency in the rather curious position of having to make an examination of state laws, charters and by-laws and the appropriate state decisions and of having to advise managements of corporations in advance as to whether, in the opinion of the Securities and Exchange Commission, the inclusion of certain notices of intention to make motions will make the proxy soliciting material correct and not misleading or whether the omission of notices of intent will make the proxy material misleading and therefore the proper subject of injunctive relief.

Since the Congress has not seen fit under any general authority conferred upon it by the Constitution impose any duty on corporations or their managements to mail out forms of proxies for use by stockholders who cannot be personally present at meetings, it would seem that the power of the Congress over the solicitation of proxies would rest on its control over the mails and facilities of interstate commerce and its ability to prevent fraudulent matter from being carried in the mails or in interstate commerce. Under Section 14 (a) of the Securities Exchange Act of 1934 the Congress has not attempted to regulate the internal affairs of corporations organized under the laws of the several states, except that it has made it unlawful “by the use of the mails or any means or instrumentality of interstate commerce or any facility of national securities exchanges or otherwise to solicit proxies of securities registered on a national securities exchange in contravention of such rules
and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 5 The Commission stated in Release No. 1823 64 under the Securities Exchange Act of 1934 that the regulation did not "prescribe in any way what matters should be submitted to a vote of security holders but it is based upon the principle that when a question is presented to security holders for their specific action, the essential information should be furnished them so far as is possible". As a matter of general principle, no quarrel can be had with this statement; but if the Securities and Exchange Commission, as a result of specific complaints made to it by stockholders, undertakes to tell corporations to postpone their meetings and send out new proxy soliciting material and to solicit new proxies or else face the possibility that the Commission may attempt to enjoin the use of such proxies or perhaps to prosecute criminally for violations, is not the Commission, in effect, determining what matters may properly be brought before a meeting? In order to determine whether it should or should not seek injunctive relief, the Commission must decide what matters may properly be brought before a meeting by the management, what matters may properly be brought before a meeting by a stockholder, and of what proposed motions notice must be given in management proxy statements with an opportunity afforded stockholders to express their preference.

So far as known, the Securities and Exchange Commission has never taken the position that statements of intent to make motions received by a corporation after it has mailed its proxy material but prior to the date of the meeting must be communicated either (a) to stockholders to whom the proxy material has already been mailed or (b) to stockholders who are still receiving it after the proxy material has been mailed and prior to the meeting. This latter situation might arise in those states where there is some question about the right of a corporation to fix a record date 5 in lieu of closing its books and where it is generally deemed advisable to continue mailing the proxy material to all stockholders who became stockholders after the record date but prior to the date of the meeting. Inasmuch as most stock exchanges prefer to have corporations take record dates rather than to close their books, few corporations close their transfer books today in order to determine stockholders entitled to receive notices, to vote, etc.

If, however, the authority of a proxy may be analogized to the authority of an agent, 56 it would seem that the person soliciting the proxy would be under the same duty to communicate to his principal all relevant facts affecting the exercise of his agency which may have been brought to his attention between the date of the creation of his agency and the time for him to exer-

5See supra note 26.
6Delaware has expressly provided for setting a record date: Del. General Corporation Law § 17. So have Maryland and New York [Md. Ann. Code § 15; N. Y. Stock Corporation Law § 47].
7See supra note 43.
But as we have seen, the powers of a proxy may be broader than those of an agent and in order to facilitate the holding of meetings the courts are not inclined to follow the agency analogy too closely. Otherwise the receipt by a management, after it had mailed its proxy soliciting material, of advice from a stockholder that he proposed to make a valid motion at a meeting would invalidate proxies already received. For the purpose of this discussion it is assumed that notice to the management of a corporation would be notice to the persons named as proxies in the form of proxy mailed out by the management, even though no specific notice of the stockholder's intent to make the motion was actually communicated to such persons.

As will be seen from the above, in the case of corporations whose securities are listed on national securities exchanges and especially in the case of the larger corporations, it is not an easy mechanical matter to mail out notices of meetings, forms of proxy for use thereat and proxy statements, and it would be most confusing for a corporation to be mailing one type of material up to the record date and another type of material after the record date and prior to the meeting. If the management is under a duty to communicate to its stockholders notices of intention to make valid motions received by it after mailing its proxy material, it is obvious that minority stockholders, bent on harassing the management, could, as a practical matter, cause continual postponements of the date of the meeting and subject a corporation to very considerable annoyance and expense. In the absence of extraordinary circumstances, it would therefore seem only reasonable for the courts to hold that managements are not under any duty to communicate to their stockholders notices of intent to make valid motions received by it after the date of the mailing of the proxy material. The number of shares owned by

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57 The following cases hold that an agent is under a duty to disclose important information acquired in the course of his agency: Emerson v. Turner, 95 Ark. 597, 130 S. W. 538 (1910); Hegenmyer v. Marks, 37 Minn. 6, 32 N. W. 785 (1887); Dorr v. Camden, 55 W. Va. 226, 46 S. E. 1014 (1904). See also MECHEN ON AGENCY (2d ed. 1914) 993-994; RESTATEMENT, AGENCY § 381. There is no indication in the cases, however, that as a result of the violation of such duty, the contract of agency is void though it has been held that the contract of agency is voidable and can be rescinded: Gage v. Boston Nat. Bank, 257 Mass. 449, 154 N. E. 74 (1926).

58 In connection with the duties of proxy holders, in Moore v. Ensley, 112 Ala. 228, 20 So. 744 (1896) it was said that a proxy holder is under no duty to communicate to the stockholder knowledge acquired before the proxy holder was constituted such, even though the knowledge was acquired by the proxy holder at a previous meeting of the same corporation when he was acting as proxy for the same stockholder. After the giving of the proxy it might be argued that there is a duty to communicate on the ground that the stockholder is bound by the proxy's knowledge; but the cases on the latter point deal only with the question of attributing to the stockholder knowledge acquired by the proxy at the stockholders' meeting: Seaman v. Ironwood Amusement Corporation, 283 Mich. 220, 278 N. W. 51 (1938); Trinity-Universal Ins. Co. v. Maxwell, 101 S. W. (2d) 606 (Tex. 1937).

59 See supra pp. 495 et seq.

60 In Columbia Nat. Bank of Tacoma v. Mathews, supra note 45, after a management had received a general proxy from the plaintiff, it itself decided to propose a certain motion and gave notice thereof to the stockholders in the notice of the meeting. No such notice was sent to plaintiff, but it was nevertheless held that he was bound by the vote of the holder of his proxy in favor of the motion.
the persons proposing to make the motion and the ordinary and extraordinary character of the proposed motion would, of course, all be relevant factors.

Suits under the Securities Exchange Act of 1934 may be brought only in the Federal courts.\(^6\)

In view of the recent decision in *Erie Railroad v. Tompkins*,\(^6\) if injunction proceedings were brought by the Securities and Exchange Commission in the Federal courts to enjoin the holding of a meeting on the ground that the proxy statement violated Regulation X-14 by omitting to state a material fact and it is thus contended that the proxies solicited by the management should not be permitted to be used even for the purpose of determining whether there was a quorum at the meeting or for the purpose of voting on matters other than the matter with respect to which material omission is alleged, the question arises whether the Federal courts would attempt to decide the matter within the confines of the Securities Exchange Act of 1934 and the Regulations of the Commission\(^6\) or whether or not they would attempt to follow the law of the state of incorporation\(^6\) or the law of the jurisdiction in which the alleged act making the proxy statement misleading was committed, namely, the state in which the proxy material was mailed.\(^6\)

Apart from the present views of the Securities and Exchange Commission which are naturally entitled to very respectful consideration, it is essential, in order to know what notices of motion must be mentioned in the proxy soliciting material and the results which follow if notices of intent to make motions are not so made, to formulate certain conclusions on the basis of existing state laws and decisions.

On the basis of this study, the writer believes that it is possible to advance the following conclusions:

1. Proxy statements mailed by the management are not false or misleading even though a management has been notified by a stockholder, prior to the mailing thereof, that he proposes to make a motion at the annual meeting, if such motion is an invalid motion, *i.e.*, of the category which may not properly be made by a stockholder under the law of the state incorporation, the charter or the by-laws; and that proxies received by the management on the basis of such

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\(^6\) 304 U. S. 64 (1938). And of course the federal courts are bound by applicable state statutes.


\(^6\) The *Tompkins* decision may be applicable only in cases where jurisdiction is based on diversity of citizenship. See Shulman, *The Demise of Swift v. Tyson* (1938) 47 Yale L. J. 1336, 1350. It has been said that the *Tompkins* case is applicable to a question arising under the federal revenue acts: East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (N. D. Cal. 1938); *cf.* the following case applying state law by reason of the *Tompkins* case in suits involving national banks: Reno National Bank v. Seaborn, 99 F. (2d) 482 (C. C. A. 9th 1938); but see Downey v. City of Yonkers, 23 F. Supp. 1018 (S. D. N. Y. 1938); Bradford v. The Chase National Bank, 24 F. Supp. 28 (S. D. N. Y. 1938).


\(^6\) If the theory were that a bill by the Commission could be analogized to a tort action,
solicitation can clearly be voted against such motions if made at the meeting if
the chairman of the meeting allows such motions to be made instead of
declaring them out of order.⁶⁵⁸

2. Even though a stockholder notifies the management, prior to the mail-
ing of its proxy material, that he proposes to make a motion at the meeting
which falls within the category of motions which stockholders may properly
make, and the management makes no mention thereof in its proxy soliciting
material, nevertheless, the proxies obtained by the management may be
counted for the purpose of determining a quorum and may be properly voted
by the management on all questions other than the particular question in
dispute, unless it is essential that the stockholders have knowledge that notice
of intent to make such a motion has been received by the management in order
for them intelligently to decide how they wish the management to vote in their
behalf on the other matters.

3. If the motion relates to a matter which can properly be voted on at
an annual meeting without specific mention thereof in the notice of the
annual meeting, in the absence of a specific statutory or by-law provision
there would seem to be no duty on the part of the management to make
specific reference with respect to such notice of intent in its proxy material.
If the proxy material reads, "The management does not intend to bring
anything in addition to the matters enumerated above before the meet-
ing", it seems doubtful whether the Securities and Exchange Commission
could obtain injunctive relief under Rule X-14A-8⁶⁶⁶ on the ground that the
proxy material was false or misleading within the meaning of Rule X-14A-5⁶⁷⁷
because the management making the solicitation knew at the time of the
solicitation that the stockholder proposed to make the motion even though it
was an invalid motion. It can be argued that Rule X-14A-2⁶⁸⁸ does not require
that the management specify in its proxy material any motions which it knows

then it might also be argued that the law of the state where the stockholder relied on the
proxy material is to govern; this view would, in the case of a large corporation, require
a court to search the decisions of practically every state in the Union.

⁶⁵⁸ Possibly the Securities and Exchange Commission would take issue with some of these
conclusions, and particularly the first one, on the ground of the wording of Rule X-14A-2.
That rule can be interpreted as limiting the solicitation of discretionary authority to four
types of matters, two of them being matters "not known or determined at the time of
the solicitation". The Securities and Exchange Commission might argue that if the
management, at the time of solicitation, wishes to permit an invalid motion to be brought
before the meeting, the matter is "known" at the time of the solicitation and notice
thereof must be contained in the proxy material. On the other hand, however, a manage-
ment often finds it difficult to determine at the time of solicitation whether it will permit
an invalid motion to be voted on at the meeting, the decision often being made at the
meeting itself. Under those circumstances, the management may be said not to "know",
at the time of solicitation, of other matters coming before the meeting. Further, it can
be said that such a matter is one which has not been "determined" at the time of
solicitation.

⁶⁶⁶ See supra p. 494.
⁶⁷⁷ Ibid.
⁶⁸⁸ See supra note 1.
other persons propose to make but only the motions which it itself intends to make, unless such motions are valid motions and of such character as to require specific notice if the management itself intended to bring them up at the meeting. If, however, the motion is of the type which would require specific mention in the management's statement, then it seems only fair to require the management to mention that notice of intent to make such a motion has been received. Rule X-14A-2 prohibits any solicitation unless means shall have been provided whereby the person solicited is afforded an opportunity to specify, in a space provided for in the form of proxy or otherwise, the action which such person desires to be taken pursuant to the proxy on each matter, or each group or related matter as a whole, described in the proxy statement as intended to be acted upon, other than the election of directors or other officials. Inasmuch as the management has no means of knowing whether the stockholder will or will not make the motion, even though he has stated his intention of so doing, it can be argued that the management at the time it sends out its proxy material has no present intention of acting upon anything other than the matters stated in the management's notice of the meeting.

4. Where, under the law of incorporation, the charter or the by-laws, certain matters must be initiated by the board of directors, a stockholder, by advising the management he intends to make a motion on such matters, cannot compel the management to insert in the notice of the meeting a statement that certain matters are to be acted upon, when it rests within the discretion of the board whether or not such matters should be initiated. For example, if a board of directors has the right to initiate the reduction of capital and a stockholder writes in and states that he proposes to make a motion that the capital be reduced, it would seem that such a motion may properly be declared out of order, with no mention made of it in the proxy statement, rather than requiring the management to state that notice of intention to make such a motion has been received, that the board of directors considers it an invalid motion, and inadvisable even though the invalidity were waived. It seems inadvisable to provide space in the form of proxy or otherwise where the stockholder may specify the action he wishes taken. Otherwise there will be utter confusion as to matters which may properly be brought up by stockholders and matters which are properly left to the board of directors.

5. A person named in a proxy has broader authority than an ordinary agent, the rights of a proxy holder are not completely analogous to the rights of an agent, and he may vote on all matters which are properly brought before a meeting even though specific mention thereof is not made in the notice of the annual meeting.

6. There is no statutory duty imposed upon any corporation or upon the management of a corporation to mail forms of proxy for use by stockholders at annual or special meetings of stockholders.
7. In the absence of unusual circumstances it is better policy for corporations having securities listed on national securities exchanges to comply with the new proxy regulations and to provide their stockholders with proxy forms so that they may be properly represented at annual meetings rather than refrain altogether from soliciting proxies.

8. In those cases where a management has an honest doubt as to whether a motion which it is advised a stockholder proposes to make prior to mailing its proxy soliciting material falls within the category of a valid or invalid motion, the management should resolve the doubt in favor of the stockholders, make specific mention of the proposed motion in its proxy soliciting material and afford to the stockholders an opportunity of expressing their desires as to how their proxy should be voted thereon; but that the Securities and Exchange Commission, on the other hand, should (at least until the proxy regulations are better understood), unless bad faith is proved or serious damage to stockholders is threatened, resolve doubts in favor of the management in order that meetings may not have to be postponed and companies involved in additional expense over what is a doubtful point.

9. The only remedy of the Securities and Exchange Commission is to seek injunctive relief for violations of Regulation X-14 prior to the meeting or to proceed criminally after the meeting because, whether or not the proxy material violates Regulation X-14, according to Rule X-14A-8 action taken at the meeting cannot be invalidated solely by reason of the fact that the proxy material was misleading and violated Rule X-14A-8.

It is the author's belief that the aims of the Securities and Exchange Commission in promulgating the new proxy rules and in taking active steps for their enforcement in the situations outlined in this article are highly commendable. However, it is the purpose of this article to suggest that Regulation X-14 and the rules relating thereto, unless materially clarified so that managements of corporations may proceed to solicit proxies without undue risk and expense, may lead the Securities and Exchange Commission into situations in which, as a practical matter, there can be no easy and happy solution. Managements which have had to postpone their meetings at the last moment because of alleged technical violations of the proxy rules are not inclined to be cordially disposed toward the new rules. If it be true that managements of corporations have not given sufficient information in connection with the solicitation of proxies in the past, a constructive regulation of the matter might very well be accepted by them in a cooperative spirit. Since the new rules are technical, the Commission should be liberal in its administration until managements have learned what to avoid. In the proper administration of the Securities Exchange Act of 1934, it is not only essential that the Commission be diligent in seeing that the rights of security holders are not violated and that stock-

*Ibid.* For a discussion of the slight possibility of using the "delisting" and "mandamus" provisions of the Securities and Exchange Act, see *supra* note 52.
holders are not imposed upon, but it is also essential that such rules should interfere as little as possible with existing corporate machinery in order to accomplish the desired end. It is not only essential that an administrator should be right. It is necessary, for the completely successful working of the Act, that the people who are subject to administration believe that the administrator is right. Unless both of these objectives are achieved, the purpose of the Act will not be completely successful. In any case, it is the belief of the writer that the new rules should be approached by the Securities and Exchange Commission, the managements of corporations whose securities are listed on national exchanges, and the bar in a spirit of cooperation so that there may be a reasonable approach to a solution satisfactory to all concerned.

Certainly stockholders are entitled to accurate information and to information which is complete enough to enable them to form an accurate judgment. If it is the belief of some managements that the present rules require them to submit too much information, it is their duty to attempt to convince the Securities and Exchange Commission of this fact and not to refrain from soliciting proxies, thereby depriving the non-management stockholders of any information along the type required by Regulation X-14. The Commission alone cannot solve this problem but it can solve it with the help of intelligent managements who are even now using their annual report to stockholders as an effective means of broadcasting to their stockholders and employees the progress of their corporation.

APPENDIX A


RULE X-14A-1. PROXY STATEMENT.—No solicitation subject to Section 14(a) of the Act shall be made unless a written “proxy statement” is concurrently furnished or has previously been furnished to each person solicited. Such proxy statement shall contain the information specified in such of the items of Schedule 14A, as may be applicable in the particular case: Provided, however, that—

(a) Except as to item 1(a) of Schedule 14A, no statement need be made in the proxy statement in response to any item or sub-item of Schedule 14A which is inapplicable, or the answer to which is in the negative. None of the items need be restated in the proxy statement, and the order of the items and sub-items in the schedule need not be followed. Information required by more than one applicable item need not be repeated in the proxy statement.

(b) Any information required to be included in the proxy statement which is not known and not reasonably available to the persons making the solicitation may be omitted, if a brief statement of the circumstances rendering such information unavailable is made in the proxy statement. Likewise, information as to matters to occur or to be determined in the future need be given only in terms of present intention, but in such case there shall be set forth, to the extent practicable, the maximum and minimum limits of the authority to be conferred concerning each such matter.

(c) There may be omitted from the proxy statement any information contained in any document which has been furnished within a reasonable time in advance of the solicitation to each person solicited, if a clear reference is made to the place where such information appears. Any statement made in the proxy statement may be qualified by clear reference to any such document, or to any document which is on file with the Commission and with each exchange on which the securities are listed.
PROXY REGULATIONS

(d) In all cases in which past occurrences are to be consented to or acted upon pursuant to the proxy, the applicable items of Schedule 14A shall be read in the past tense, if appropriate.

(e) Unless the context clearly shows otherwise, whenever any fixed period of time in the past is indicated, such period shall be computed from the date of filing the proxy statement.

RULE X-14A-2. DUTY TO PROVIDE MEANS BY WHICH DESIRED ACTION CAN BE SPECIFIED.—No solicitation subject to Section 14(a) of the Act shall be made unless (a) means shall have been provided whereby the person solicited is afforded an opportunity to specify, in a space provided in the form of proxy or otherwise, the action which such person desires to be taken pursuant to the proxy on each matter, or each group of related matters as a whole, described in the proxy statement as intended to be acted upon, other than the election of directors or other officials, and (b) the authority conferred as to each such matter or group of matters is limited by the specification so made. Nothing in Regulation X-14 shall prevent the solicitation of a proxy conferring discretionary authority with respect to matters as to which the person solicited does not make the specification provided for above, or with respect to matters not known or determined at the time of the solicitation, or with respect to elections of directors or other officials.

RULE X-14A-3. LEGIBILITY OF SOLICITING MATERIAL.—Every printed proxy statement and form of proxy, and all related printed material furnished to the persons solicited in connection with any solicitation subject to Section 14(a) of the Act, other than documents not prepared in connection with the solicitation, shall be set in type not smaller than 10-point roman, at least 2-point leaded; except that financial statements may be set in type not smaller than 8-point roman, if necessary for convenient presentation.

RULE X-14A-4. DUTY TO FILE MATERIAL WITH COMMISSION AND EXCHANGE.—(a) Three copies of each of the following documents shall be filed with the Commission at its office in Washington, D. C., and one copy with each exchange on which is listed the security with respect to which any solicitation subject to Section 14(a) of the Act is made:

(1) The proxy statement, form of proxy, and any additional material intended to be furnished to security holders along with the proxy statement;
(2) Any additional material relating to the same subject matter or meeting furnished to any substantial number of security holders after the first solicitation; and
(3) Any document to which reference is made in the proxy statement in accordance with Rule X-14A-1(c), unless such document shall have been previously filed with the Commission and the exchange.

(b) The material described in paragraphs (a) (1) and (a) (3) above shall be filed not later than the time when the first solicitation is made. The material described in paragraph (a) (2) above shall be filed not later than the time when such material is first sent or given to any security holders.

(c) If any document filed pursuant to paragraph (a) of this rule is amended after the filing thereof, a copy of the amendment or amended document shall be filed with each exchange on which the security is listed and three copies with the Commission not later than the time when such amended document is first sent or given to any security holders.

RULE X-14A-5. FALSE OR MISLEADING STATEMENTS.—See supra p. 494.

RULE X-14A-6. DUTY OF ISSUER TO FURNISH INFORMATION AND MAIL PROXIES AT REQUEST OF SECURITY HOLDER.—No solicitation subject to Section 14(a) of the Act shall be made by or on behalf of the issuer or its management, directly, or indirectly, unless the issuer performs or has performed such of the following acts as may be duly requested by any record owner of any security of the issuer (hereinafter called "the applicant") with respect to the same subject matter or meeting:

(a) At the written request of the applicant, the issuer shall furnish the following information:

(1) A statement of the approximate number of the holders of record of any specified class of securities of which any of the holders have been or are to be solicited by or on behalf of the issuer or its management (as of any date selected in connection with such solicitation, or if none has been selected, approximately as of the date designated by the applicant), and the approximate number of any other holders of the specified class of securities who have been or are to be solicited by or on behalf of the issuer or its management; and
(2) An estimate of the cost of mailing a specified form of proxy or other communication to such holders.
Any information requested pursuant to this paragraph shall be mailed or otherwise furnished on or before the third business day after receipt of the written request.

(b) At the written request of the applicant, copies of any form of proxy or other communication furnished by the applicant shall be mailed by the issuer to holders of record, (as of the date selected under (a)) of any specified class of securities of which any of the holders have been or are to be solicited by or on behalf of the issuer or its management, and to any other holders of the specified class of securities who have been or are to be solicited by or on behalf of the issuer or its management. Such material shall be mailed with reasonable promptness after receipt by the issuer of a tender of the material to be mailed, of envelopes or other containers therefor, of postage or payment for postage, and of reasonable reimbursement to the issuer of all expenses incurred in connection with such mailing or of a surety company bond satisfactory to the issuer in an amount sufficient to cover such expenses; except that such material need not be mailed prior to the first day on which the solicitation is made by or on behalf of the issuer or its management.

RULE X-14A-7. SOLICITATIONS TO WHICH RULES ARE NOT APPLICABLE.—Notwithstanding any other provision in this regulation, the rules contained therein shall not apply to:

(a) Any solicitation made otherwise than by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange;

(b) Any solicitation of a proxy by any person in respect of securities carried in his name or in the name of his nominee, or held in his custody, if (1) such person received no commission or remuneration for such solicitation, directly or indirectly, other than reimbursement of reasonable out-of-pocket expenses and clerical expenses, and (2) such person furnishes to the person solicited a copy of all soliciting material which the persons on whose behalf the solicitation is made are sending to other persons: Provided, however, that this exemption shall not be applicable to any solicitation by a voting trustee in respect of securities of which he is trustee;

(c) Any solicitation of a proxy by any person in respect of securities of which he is the beneficial owner;

(d) Any solicitation of a proxy evidenced by a certificate of deposit or other security which is registered under the Securities Act of 1933;

(e) Any solicitation of an acceptance, conditional or unconditional, of a plan of reorganization under Chapter X of the Bankruptcy Act, as amended, or of an authority, conditional or unconditional, to accept any such plan, if such solicitation is made after the entry of an order approving such plan pursuant to Section 174 of said Act and after, or concurrently with, the transmittal of information concerning such plan as required by Section 175 of said Act.

(f) Any solicitation made in connection with a reorganization of a registered holding company or any subsidiary company thereof, if such solicitation is made in compliance with paragraph (a) and with paragraph (b), (d) or (e) of Rule U-12E-3 under the Public Utility Holding Company Act of 1935.

RULE X-14A-8. EFFECT OF VIOLATION.—See supra p. 494.

RULE X-14A-9. DEFINITIONS.—For the purposes of Regulation X-14, unless the context otherwise requires:

(a) The term “proxy” includes every proxy, consent, or authorization within the meaning of Section 14 (a) of the Act;

(b) The term “solicitation” includes any request for a proxy, whether or not such request is accompanied by or included in a written form of proxy; but the term does not include the performance by the issuer or its agents of acts required by Rule X-14A-6, or the performance by any person of ministerial acts on behalf of a person soliciting a proxy;

(c) The term “proxy statement” means the statement required by Rule X-14A-1, whether or not contained in a single document;

(d) The term “issuer” means the issuer of the security in respect of which the proxy is solicited;

(e) The term “associate”, used to indicate a relationship with any person, means (1) any corporation or organization (other than the issuer) of which such person owns of record or beneficially 10% or more of any class of voting securities, (2) any firm of which such person is a partner, and (3) any relative or spouse of such person having the same home as such person;

(f) The term “affiliate”, used to indicate a relationship with any person, means a person controlling, controlled by, or under common control with, such person.
Compare the following provisions of S. B. 330, "Corporation Licensing Act of 1938", introduced by Senators Borah and O'Mahoney on January 5, 1939:

Sec. 5. Every license issued under this Act shall contain, and the licensee shall be subject to the following conditions:

(j) That any stockholder of the licensee may deliver his proxy to any person who may be certified by the Civil Service Commission, in accordance with the provisions of section 20 of this Act, as a certified corporation representative; that such corporation representative shall be entitled to all the rights and privileges of the stockholder whose proxy he may hold with respect to the examination of the books and affairs of the licensee and the transaction of business at any meeting of the stockholders or any meeting of the board of directors in which said stockholder might himself participate; and that every licensee to which this paragraph is applicable shall notify all of its stockholders of the provisions of this paragraph.

Sec. 20. The Civil Service Commission is authorized and directed to issue certificates, upon application, to persons whom it finds to be properly qualified and familiar with corporation and commercial law and corporate accounting, authorizing such persons to act as certified corporation representatives for the purposes of this Act. The Civil Service Commission is authorized to prescribe such rules and regulations, and to conduct such examinations as may be necessary for the purposes of this section. The Civil Service Commission shall prescribe and collect such fees for such examinations as may be reasonably necessary to cover the costs thereof, and the moneys so collected shall be covered into the Treasury as miscellaneous receipts. The Civil Service Commission may, for cause, after notice and hearing, revoke any such certificate; and if any person who has not received such a certificate, or whose certificate shall have been revoked, shall hold himself out to act as a certified corporation representative under this Act, he shall be deemed guilty of a misdemeanor; and, upon conviction thereof by any court of record of the jurisdiction in which the offense was committed, he shall be fined not more than $1,000 for each such offense.

APPENDIX B

Release No. 378 (Class B):

The Securities and Exchange Commission today announced the adoption of rules regarding the solicitation of proxies, consents and authorization in respect of securities listed on a national securities exchange. The rules are designed to assure that the security holder whose proxy or consent is solicited will be afforded adequate information as to the action proposed to be taken, and as to the source of the solicitation and the interest of the solicitor.

If the solicitation is initiated by the directors of the issuer or by an officer or employee or committee of the issuer acting as such, the security holder must be told whether the proxy is being solicited by or in behalf of the management. If any of the directors of the issuer have notified the issuer within twenty days prior to the date of solicitation that they oppose solicitation by the management and intend themselves to solicit proxies from the holders of 25% or more of any class of security, this information must also be furnished.

If the solicitation is initiated otherwise than by the issuer, the security holder must be advised as to who is initiating the solicitation, together with the amount and classes of securities owned by such person. If any person is compensated for soliciting or recommending the execution of proxies, this fact must be stated and the name of the person in whose behalf solicitation is being made must be furnished.

“Solicitation” is defined to include any communication or request for a proxy, consent, or authorization, or the furnishing of any form of proxy, whether or not the form is in blank.

The security holder must be advised of the matters intended to be considered in the exercise of the proxy, together with the action proposed to be taken by the grantee of the
proxy, except that the names of nominees for officers, directors and committees may be omitted.

The information required may be contained either in the proxy or in an accompanying notice, although the information as to the matters to be considered and action to be taken thereon may be contained in a report which has been sent to security holders at some previous time, provided an appropriate reference is made to such report.

The rules provide that no proxy may be solicited by means of any communication or a statement which is false or misleading with respect to any material fact. A copy of the form of proxy and a statement of the required information must be filed with the exchange on which the security is listed and with the Commission not later than the first day on which solicitation is made. A copy of any additional material submitted to security holders in connection with any further solicitation must also be filed with the exchange and with the Commission not later than the day on which such further solicitation is made.

Where the management is engaged in soliciting proxies, any security holder may require the issuer to send a form of proxy, together with a statement, to the same list of security holders as have been solicited by the management. Any security holder requesting an issuer to do this, however, must furnish the necessary forms, statements, envelopes, and postage, or must tender to the issuer the cost of these, or post a bond to cover the cost. In determining the cost to be paid by the security holder, the issuer may not demand more than its own cost for mailing solicitations, if the service is of comparable magnitude.

Violation of any of the proxy rules carries with it the penalties imposed for violation of any provision of the Securities Exchange Act of the regulations thereunder, but the rules provide that any such violation will not invalidate any proxy obtained thereby, and will not limit the authority of the holders of a proxy.

The rules are inapplicable to solicitations by banks, dealers, brokers or nominees in respect of securities carried in their names, or by custodians in respect of securities held in custody, provided no commission is paid them for such solicitation. The rules are also inapplicable to solicitations by trustees, except voting trustees and trustees of business trusts, in respect of the securities held in trust. Beneficial owners are exempt from the rules in respect of securities of which they are such beneficial owners and ministerial agents of the solicitor of the proxy are also exempt.

The rules become effective immediately, except that they are inapplicable to any solicitation of a proxy begun prior to November 1, 1935, where the proxy is effective only in respect of a meeting to be held prior to January 1, 1936, or any adjournment thereof, and are also inapplicable to any solicitation of a consent or authorization begun prior to November 1, 1935, where the consent or authorization is to be effective for more than six months.

APPENDIX C

26. Release No. 1823, August 11, 1938:

The Securities and Exchange Commission has announced the first complete revision of its proxy rules since the original rules were adopted on September 24, 1935. The revision, which has been in preparation for several months, is based on the experience of security holders, corporations and the Commission's staff over the period of almost three years since the first rules were adopted.

The new rules which apply to securities registered on National Securities Exchanges substantially broaden the amount of information which is to be made available to the security holders whose proxies are solicited and increase the facility with which he may determine the nature of the matters upon which a vote is being sought.

The keystone of the new rules is the requirement that a "proxy statement" must be sent to each person whose proxy is being solicited. These "proxy statements", which must meet certain standards of legibility, must set forth (a) the identity of persons soliciting the proxy, (b) the nature of the matters to be voted on under the proxy, (c) power of the security holder to revoke his proxy and the rights of dissenting stockholders, and (d) the expenses of the solicitation including all compensation paid to solicitors. In addition, certain financial data are sometimes required to be included.

Another feature of the new rules is that the security holder who is being solicited must be given the opportunity to direct how his vote shall be cast on each of the items under consideration. In other words, the proxy must provide some definite means whereby the security holder may indicate how he desires his vote to be cast on a given proposition
and whereby the authority of the holders of the proxy will be limited accordingly. Of course, if the security holder wishes to confer full discretion upon the persons soliciting his proxy he may do so.

Where the solicitation of proxies covers the election of directors, the "proxy statement" must give certain information as to each person for whom it is intended to vote. Where the question is one of the issuance of securities or the alteration of the financial structure, certain financial information must be included in the "proxy statement". Under certain conditions, however, this financial information must be omitted but in any event reference must be made to the material which is already publicly on file with the Commission.

The new rules have been designated "Regulation X-14". The items of information to be given in the "proxy statement" are listed in Schedule 14A. The new regulation does not prescribe in any way what matters should be submitted to a vote of security holders, but it is based upon the principle that when a question is presented to security holders for their specific action the essential information should be furnished them so far as is possible.

The rules require that three copies of the "proxy statement" must be filed with the Commission at the time solicitation begins. The new rules make no provision for a "waiting period" after the filing of the material with the Commission. Furthermore, the Commission has adopted the policy of consultation and assistance for the benefit of persons who desire to prepare the material which must be filed under the new regulation. Any person desiring informal opinions or suggestions in this connection is requested to present his requests as far in advance of the solicitation as practicable.

In adopting the new regulation, the Commission has recognized that it may at times become necessary for a management to modify a proposal after the solicitation is made and before the actual vote is taken, or to consider certain questions which were not anticipated at the time of the solicitation. Likewise, general questions are sometimes submitted to security holders before the terms and conditions have been determined. In order to allow necessary flexibility in such cases, there is a provision that information not known or reasonably available to the persons making the solicitation may be omitted from the proxy statement; and that information as to matters to occur or be determined in the future need be given only in terms of present intention. In such case, however, there must be set forth, to the extent practicable, the limits of the authority intended to be conferred.

Several types of solicitations are exempted from the operation of the rules. In place of the present exemptions relating to solicitations by banks, dealers, brokers, nominees, custodians and trustees, there is a new exemption relating to certain solicitations by a person in respect of securities carried in his name or in the name of his nominee, or held in his custody. Such solicitations are exempt if the person receives no remuneration for the solicitation and furnishes a copy of all soliciting material to the person whose proxy is solicited. There is also an exemption for solicitations of proxies, consents or authorizations evidenced by securities which are registered under the Securities Act of 1933. Solicitations of acceptances of a plan of reorganization under the recently enacted Chapter X of the Bankruptcy Act, or of authorizations to accept any such plan, are likewise exempt if made subsequent to the entry of an order approving such plan pursuant to Section 174 of that Act.

In addition to the exemptions appearing in the text of the new Regulation, a further exemption is provided by Section 77 of the Bankruptcy Act with reference to certain proxies in connection with railroad reorganizations, by Rule JP4 (b) with reference to securities admitted to unlisted trading privileges, but not listed and registered on a national securities exchange, and by Rule AN18 with reference to securities of foreign issuers and American depositary receipts.

By virtue of Rule U-12E-2 under the Public Utility Holding Company Act of 1935, the new regulation is applicable to certain types of solicitations regarding securities of registered holding companies or subsidiaries thereof.

The present rules will continue in effect until October 1, 1938, and will apply thereafter as to certain solicitations begun before that date.

APPENDIX D

SCHEDULE 14A

ITEMS OF INFORMATION IN PROXY STATEMENT UNDER RULE X-14A-1.—

(Attention is directed to Rule X-14A-1, which contains detailed provisions as to the use, form and contents of proxy statements, as to the omission of inapplicable items, and
particularly as to certain circumstances under which information specified below need not be furnished.)

A. REVOCATION; RIGHTS OF DISSENTERS.

Item 1. (a) State whether or not the person giving the proxy has the power to revoke the proxy.
(b) In the case of any consent or other type of proxy revocable subject to express conditions, summarize briefly such conditions.

Item 2. Summarize briefly or quote any applicable provisions of statutory law relating to rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon pursuant to the proxy, and summarize briefly any provisions of the charter or any agreement or other document relating to such rights.

B. COMPENSATION AND EXPENSES FOR SOLICITATION.

Item 3. (a) Describe briefly the general plan of compensation, if any, for making the solicitation.
(b) State the amount of such compensation and other expenses of the solicitation paid or to be paid, directly or indirectly, by (1) the issuer, and (2) any other person furnishing any substantial portion of the funds for payment of such compensation or expenses, naming such person.

C. PERSONS MAKING SOLICITATION.

Item 4. If the solicitation is made by or on behalf of the issuer or its management, directly or indirectly—
(a) Make a statement to that effect.
(b) Describe briefly any substantial interest, direct or indirect, of any director or officer of the issuer, or any associate of any director or officer, in any matter to be acted upon pursuant to the proxy. In case the interest is one in property acquired or to be acquired by the issuer, state the cost of the property to the issuer and the cost to the vendor if the property was acquired by the vendor within 2 years prior to the acquisition by the issuer. (No statement need be made under this paragraph as to any interest of a director, officer, or associate arising solely by reason of his being a director or officer of the issuer or, unless the matter to be acted upon involves the issuance of any securities or the modification or exchange of any class of securities, by reason of his being a security holder of the issuer.)
(c) In case any director of the issuer shall have notified the issuer or its management in writing, at least 2 business days prior to the date of filing the proxy statement, that he opposes any action intended to be taken pursuant to the proxy and intends to solicit proxies from any holders of securities of the issuer, give the name of the director and state that such notification has been received.

Item 5. If the solicitation is made otherwise than by or on behalf of the issuer or its management, directly or indirectly—
(a) State the names of the persons directly or indirectly making the solicitation, except persons making the solicitation as agents or employees.
(b) State, as of the most recent date practicable, the approximate aggregate amount of each class of securities of the issuer owned of record or beneficially by all persons named in (a) and their associates.
(c) Furnish information as to the persons named in (a) and their associates, similar to that required by item 4 (b).

D. MATTERS TO BE ACTED UPON PURSUANT TO THE PROXY.

Item 6. If action is to be taken with respect to the election of directors or other officials (other than inspectors of election and similar officials)—
(a) Name the offices to be filled by election.
(b) Furnish the following information as to each person (hereinafter called "nominee") for whom it is intended that a vote will be cast for election to any such office pursuant to the proxy:
(1) If such nominee received, in all of his capacities, one of the three highest aggregate amounts of remuneration paid by the issuer and its subsidiaries, directly or indirectly, to any director, officer, or employee of the issuer during the last fiscal year of the issuer, state (A) the amount of such remuneration and (B) the aggregate amount of remuneration paid to such nominee during such year by all other affiliates of the issuer, directly or indirectly. (The information should be given on an accrual basis, if practicable.)
(2) Describe briefly any substantial interest, direct or indirect, of such nominee or any of his associates in any property acquired within 2 years or proposed to be acquired by the issuer or any of its subsidiaries, other than property acquired in the ordinary course of business or on the basis of bona fide competitive bidding. State the cost of the
property to the issuer or subsidiary and the cost to the vendor if the property was acquired by the vendor within 2 years prior to the acquisition by the issuer or subsidiary.

(3) State, as of the most recent date practicable, the approximate amount of each class of securities of the issuer, or of any of its affiliates, owned of record or beneficially by such nominee.

(4) If such nominee is an officer, director, partner, or employee of any principal underwriter of any securities of the issuer or any predecessor of the issuer sold by the issuer or such predecessor within 5 years, or is the record or beneficial owner of more than 10% of any class of equity securities of any such principal underwriter, make a statement to that effect, naming the underwriter. Make a similar statement as to any such relationship existing within 3 years.

(5) State the names of the persons primarily responsible, directly or indirectly, for the original designation of such nominee as a possible candidate for the office, and furnish information as to each such person similar to that required by (b) (3) and (b) (4) of this item. (If the designation originated with the board of directors of the issuer, a statement to that effect will suffice.)

Item 7. If action is to be taken with respect to any plan providing for remuneration of any director, officer, or employee, or with respect to any other compensation of any director or officer—

(a) Furnish the following information as to such remuneration plan:
   (1) State the name and position with the issuer of each person eligible to participate in the plan. (As to any of such persons constituting a class, an identification of the class, including the approximate number of its members, will suffice.)
   (2) Describe briefly the method provided for determining (A) the persons who shall actually participate in the plan and the amount of each participation, and (B) the funds or securities to be distributed under the plan.
   (3) State (A) the name of each person, or each member of any committee, authorized under the plan to make the determinations described in (2) above, (B) the position with the issuer of each such person or member, and (C) the extent to which each such person or member may share in the plan.
   (4) Summarize briefly any other material provisions of the plan.
   (5) Furnish an estimate of the aggregate amount which would have been allocated for distribution under the plan during the last fiscal year of the issuer if such plan had been in effect.

(b) Furnish the following information as to each director or officer who will be eligible to receive under the plan to be acted upon one of the three highest amounts to be received by any director or officer under the plan, and as to each director or officer whose compensation is otherwise to be acted upon:
   (1) Name and office.
   (2) The aggregate remuneration (A) paid by the issuer and its subsidiaries, and (B) paid by all other affiliates of the issuer, directly or indirectly, to such director or officer in all capacities during the last fiscal year of the issuer. (The information should be given on an accrual basis, if practicable.)
   (3) Describe briefly any substantial interest, direct or indirect, of such director or officer or any of his associates in any property acquired within two years or proposed to be acquired by the issuer or any of its subsidiaries, other than property acquired in the ordinary course of business or on the basis of bona fide competitive bidding. State the cost of the property to the issuer or subsidiary and the cost to the vendor if the property was acquired by the vendor within two years prior to the acquisition by the issuer or subsidiary.
   (4) State to what extent, if any, such director or officer may share in any remuneration plan to be acted upon.
   (5) If any other compensation of such director or officer is to be acted upon, state the amount of such proposed compensation.

Item 8. If action is to be taken with respect to any amendment of the charter, by-laws, or other document—

(a) State briefly the purpose and general effect of the amendment.
Item 9. If action is to be taken with respect to the authorization or issuance of any securities, otherwise than in exchange for outstanding securities of the issuer—

(a) State the title of issue and amount of securities to be authorized or issued.

(b) Furnish a brief description of such securities, in respect of the matters concerning which information would be required to be furnished under the caption "Description of Securities" in the appropriate form for registration of such securities on a national securities exchange.

(c) Describe briefly the transaction in which the securities are to be issued, sold, or exchanged, including a statement as to (1) the nature and approximate amount of consideration received or to be received by the issuer, and (2) the approximate amount devoted to each purpose, so far as determinable, for which the net proceeds have been or are to be used.

(d) If the transaction is to involve the granting by the issuer of options to purchase any of the securities, furnish the following additional information as to each such option:

   (1) The amount of securities called for by the option;

   (2) The price, expiration date, and other material terms and conditions on which the option may be exercised; and

   (3) The consideration received or to be received for the option.

(e) Furnish financial statements such as would presently be required in an original application for registration of securities of the issuer under the Act, except that all schedules other than the schedules of supplementary profit and loss information and the surplus statements or schedules may be omitted. However, any or all of such financial statements which are not material for the exercise of prudent judgment as to the proposal may be omitted, if there are set forth the considerations relied upon to justify such omission. In either case, a statement shall be made that financial statements (or further financial statements) of the issuer are on file at the office of the Commission and at the office of the Exchange (naming each exchange).

Item 10. If action is to be taken with respect to any plan involving the modification of any class of securities of the issuer, or the issuance of securities of the issuer in exchange for outstanding securities of the issuer—

(a) State the title of issue and amount of the outstanding securities which are to be modified or exchanged.

(b) In cases of exchange, describe briefly the basis of exchange, including the title of issue and aggregate amount of each class of new securities to be issued in exchange.

(c) Describe briefly any material differences between the outstanding securities and the modified or new securities, in respect of any of the matters concerning which information would be required to be furnished under the caption "Description of Securities" in the appropriate form for registration of such securities on a national securities exchange.

(d) Furnish a brief statement as to dividends in arrears or defaults in principal or interest in respect of the outstanding securities which are to be modified or exchanged, and as to the effect of the plan thereon.

(e) Summarize briefly any other material features of the plan, or, if the plan is set forth in a written document, furnish a copy thereof.

(f) Furnish financial statements such as would presently be required in an original application for registration of securities of the issuer under the Act, except that all schedules other than the schedules of supplementary profit and loss information and the surplus statements or schedules may be omitted. However, any or all of such financial statements which are not material for the exercise of prudent judgment as to the plan may be omitted, if there are set forth the considerations relied upon to justify such omission. In either case, a statement shall be made that financial statements (or further financial statements) of the issuer are on file at the office of the Commission and at the office of the Exchange (naming each exchange).

Item 11. If action is to be taken with respect to any plan of merger or consolidation, or any plan involving (i) the liquidation or dissolution of the issuer, or (ii) the acquisition by any class of security holders of the issuer of securities of another issuer, or (iii) the transfer of all or a substantial part of the assets of the issuer in exchange for securities of another issuer, or (iv) the acquisition, by the issuer, of any other business, including the acquisition of control of another person or the acquisition of securities having a book value on the books of the issuer thereof of more than one-half of the net worth of such issuer (or in the case of evidences of indebtedness, of more than one-half of the sum of the net worth of such issuer and its outstanding funded debt)—
(a) Summarize briefly the material features of the plan, or, if the plan is set forth in a written document, furnish a copy thereof.

(b) Furnish financial statements such as would be required in an original application for registration of securities of the issuer under the Act, except that all schedules other than the schedules of supplementary profit and loss information and the surplus statements or schedules may be omitted. However, any or all of such financial statements which are not material for the exercise of prudent judgment as to the plan may be omitted, if there are set forth the considerations relied upon to justify such omission. In either case, a statement shall be made that financial statements (or further financial statements) of the issuer are on file at the office of the Commission and at the office of the Exchange (naming each exchange).

(c) Furnish the following information as to each person which is to be merged into the issuer, or into or with which the issuer is to be merged or consolidated, or the business of which is to be acquired, or which is the issuer of securities to be acquired by the issuer in exchange for all or a substantial part of its assets or to be acquired by security holders of the issuer:

(1) Describe briefly the business of such person.

(2) Furnish financial statements such as would presently be required in an original application for registration of securities of such person under the Act, except that (A) such statements need not be certified, and (B) all schedules other than the schedules of supplementary profit and loss information and the surplus statements or schedules may be omitted. However, any or all of such financial statements which are not material for the exercise of prudent judgment as to the plan may be omitted, if there are set forth the considerations relied upon to justify such omission. In either case, if any financial statements of the person are on file with the Commission or with any national securities exchange, a statement to that effect shall be included. (This paragraph (2) shall not be applicable in the case of (i) a person which is already a totally held subsidiary of the issuer and is included in the consolidated statements of the issuer and its subsidiaries, or (ii) a person which is to succeed to the issuer or to the issuer and one or more of its totally held subsidiaries without any substantial change in capital structure, under such circumstances that Form 8-B would be appropriate for registration of securities of such person issued in exchange for listed securities of the issuer.)

(3) Furnish a brief statement as to dividends in arrears or defaults in principal or interest in respect of any securities of such person, and as to the effect of the plan thereon.

(4) As to each class of securities of such person which is admitted to dealing on a national securities exchange and which will be involved in or materially affected by the plan, state the high and low sale prices (or in the absence of trading in a particular period, the range of the bid and asked prices) for each quarterly period within two years.

(d) As to each class of securities of the issuer which is admitted to dealing on a national securities exchange and which will be involved in or materially affected by the plan, furnish information similar to that required by paragraph (c) (4) above, unless the plan involves merely the liquidation or dissolution of the issuer.

Item 12. If action is to be taken with respect to the acquisition or disposition of any property—

(a) Describe briefly the general character and location of the property.

(b) State the nature and amount of consideration paid or to be paid, or received or to be received, by the issuer; to the extent practicable, summarize briefly the facts bearing upon the question of the fairness of the consideration.

(c) State the name and address of the transferor or transferee, as the case may be, and the relationship of such person to the issuer and to any affiliate of the issuer.

(d) Summarize briefly any other material features of the contract or transaction.

Item 13. If action is to be taken with respect to any report of the issuer or of its directors, officers or committees, or any minutes of meetings of its directors or stockholders—

(a) State whether or not such action is to constitute approval or disapproval of any of the matters referred to in such reports or minutes.

(b) Identify each of such matters which it is intended will be approved or disapproved, and furnish the information required by the appropriate item or items of this schedule with respect to each such matter.

Item 14. If action is to be taken with respect to any matter not specifically referred to above—

(a) Describe briefly the substance of each such matter in substantially the same degree of detail as is required under items 6 to 12.
The foregoing action of the Commission shall be effective on October 1, 1938, except that compliance with the rules heretofore in effect shall be sufficient, and compliance with Regulation X-14 shall not be required, in the case of a solicitation made after October 1, 1938, with respect to any subject matter or meeting as to which the first solicitation was made prior to such date.

The writer would like to add the following comments to the matters treated in this Schedule 14A:

(1) Statement of original designation of directors.

If the designation of a nominee the first time he was elected to the board does not originate with the board of directors, a statement seems to be called for as to the names of the persons primarily responsible for his designation. The Commission has indicated that the provisions of the proxy regulations were clearly meant to cover the original designation of nominees the first time they were elected to the board and not the designation of nominees for any particular election. As to the availability of the provision of the proxy rules, reading, "If the designation originated with the board of directors of the issuer, a statement to that effect will suffice", the S. E. C. interprets this provision as available only in cases where the board of directors as a whole had considered the names of various candidates for the office of director and had finally determined upon a particular nominee. This might be true, even though the candidate eventually determined upon may have been first suggested by some one member of the board of directors or some person not a member of the board of directors. The S. E. C. is inclined to limit this interpretation to cases where the primary consideration of several names came from the board of directors and that it was not applicable to situations where persons other than the board considered several candidates and finally suggested one name to the board of directors. The S. E. C. wants to know who it was that was really selecting a director, i.e. who was really responsible for the director being chosen.

Several specific cases were put to a member of the Commission's staff, and these may be illustrative of the general views of the S. E. C. A case was presented where a man had been asked in 1912 to serve on the board of directors of a corporation to represent the estate of a large stockholder. After the original election of the director, the estate was completely wound up and its holdings in the corporation distributed to the public. It was stated that since the particular director had been originally designated by the estate, that information should be disclosed regardless of whether the estate was still in existence and regardless of when he was originally elected. Another case was put where a vacancy had occurred in the board of directors of a corporation, and, after consideration, the president of the corporation had recommended to the board a certain man to fill the vacancy, the board acting promptly upon the president's recommendation. It was indicated that, in the view of the S. E. C., the director had been originally designated by the president of the corporation. It was pointed out, however, that the person who first suggested a nominee's name was, in the view of the S. E. C., not necessarily the person primarily responsible for his designation. If in the above case the president had discussed several names with the directors and finally recommended one man to them, it might be thought that the board of directors had designated him.

It is apparently the Commission's opinion that Item 6(b) (5) is designed to elicit information which will enable the security holder to perceive any relationship between a nominee for an office to be filled by election and any other person or persons which (i) may be said to have occasioned the nominee's designation as a candidate for the office and (ii) might influence the nominee in his action as an incumbent of the office, and that Item 6 (b) (5) calls for disclosures in respect of the persons primarily responsible for the designation of each nominee for a directorate as of the time of his first selection as a candidate for a directorate. If, in those cases where a director or other official is standing for re-election, the present implications of the relationships between him and any other person or persons indicated by the statement in respect of his original designation would be misleading because of circumstances intervening since the original designation, Rule X-14A-5 would appear to require that the disclosure in the soliciting material in response to Item 6 (b) (5) be expanded to include clarifying information. (See Prentice-Hall Securities Regulation Service, p. 14,095, para. 14,052.)

(2) Substitution of Nominees for Director

The S. E. C. staff has advised that where a nominee dies, refuses to serve, or otherwise becomes unavailable between the date of solicitation and the date of the meeting, the proxies may be voted for a substitute under the general reservation of discretionary power.
to act upon any matters coming before the meeting which were not known at the
time of solicitation. Although it is frequent practice to include in the proxy statement a
specific reservation of the right to elect a substitute, the S. E. C. staff does not consider
this necessary. The substitution may, however, be attacked on the ground of bad faith.
For example, in several instances the S. E. C. has found that the nominee named in the
proxy statement was a dummy and that the intention to elect a substitute existed at the
time of solicitation. If a dummy is named with the intent to vote for a substitute at the
time the proxy statement is mailed then it is of course misleading.

(3) Extent of Investigation Required of a Company Soliciting Proxies.

In conversations with representatives of the S. E. C., the question was raised as to the
extent to which a corporation was required to go in ascertaining the person primarily
responsible for the original designation of a director and in ascertaining the information
required by the proxy regulations respecting such person. The representatives of the
S. E. C. indicated that a company need make no special investigation, merely setting
forth the facts in its knowledge and such information as it could obtain from the nominee
himself or the other directors. This, of course, would not be true if there were extra-
ordinary circumstances known to the company.

(4) Increase in Securities.

In case proxies are being solicited with respect to an increase in the authorized amount
of securities even though there is no present intention of issuing the securities, the Com-
misson believes that financial statements may be necessary to enable a stockholder to
form a judgment as to whether the Board of Directors should be vested with discretion
to issue, from time to time, the securities proposed to be authorized. Apparently, the
Commission interprets rather strictly the words in Regulation X-14A-2 "Nothing in
Regulation X-14 shall prevent the solicitation of a proxy conferring discretionary authority
with respect to matters as to which the person solicited does not make the specification
provided for above, or with respect to matters not known or determined at the time of the
solicitation, or with respect to elections of directors or other officials". For example, if
the stockholders are asked to authorize an increased amount of preferred stock, issuable
in series, the Commission believes that the dividend rates, redemption prices and conversion
features of the initial series to be created by the Board of Directors pursuant to authoriza-
tion, should be stated if these matters are "known or determined at the time of the solicita-
tion". Obviously they generally are not known with sufficient definitiveness to be stated. In
a recent case the Commission advised they believed the discretion to be vested in the Board
of Directors should be stated within certain limits although the state law did not so
require. This interpretation of the language seems strained, although attention is called
to Release 1823 under the Securities Exchange Act of 1934 in which it is stated in
discussing the proxy rules "that information as to matters to occur or to be determined
in the future need be given only in terms of present intention. In such case, however,
there must be set forth, to the extent applicable, the limitations of the authority intended
to be conferred".

In another case where it was proposed to send proxy material to stockholders and to ask
them to create a new preferred stock in order that an offer of this preferred stock might
be made to existing preferred stockholders, the Commission interpreted the language in
Item 4(b) of Regulation X-14: "describe briefly any substantial interest, direct or
indirect, of any director or officer of the issuer, or any associate of any director or officer,
in any matter to be acted upon pursuant to the proxy" as requiring that the holdings of the
directors and officers in the class or classes of stock with respect to which the exchange
offer was proposed to be made, should be stated in the proxy statement.

This interpretation may be spelled out from the parenthetical matter in Item (4)b but
it is not particularly clear on first reading.

(5) Time of Filing with S. E. C.

In the old Form LA proxy regulations a provision was made for the filing of proxy
material with the S. E. C. by depositing the material in the mail at the same time
that the material was mailed to stockholders. In the present regulations this provision
was omitted and, accordingly, it appears to be necessary that time schedules be worked out
which permit the mailing of proxy material to the S. E. C. in sufficient time so that it is
received by the S. E. C. prior to the time when the material is mailed to stockholders.
(6) Securities owned of record or beneficially.

The old question of the meaning of "securities owned of record or beneficially" arises in connection with the proxy regulations. One interpretation of the similar words in Form A-2 has been this: give the record holdings (as secured from the transfer agent) and give the beneficial holdings (whether or not held of record), and don't attempt to relate the two types of ownership in any way. Perhaps this form can be used in a proxy statement, although in certain instances the S. E. C. has questioned it.

On the most practical basis, however, the statement gives a stockholder information from which he can only determine the maximum rather than the actual voting power a director has. This may be an overstatement as some or all of the director's shares owned beneficially may also be owned of record. The exact amount of a director's financial stake in the securities of a corporation can be told from the table of securities owned beneficially and this seems to be the only really important information. The form suggested has only this defect: a stockholder might add the securities owned of record and the securities owned beneficially and assume a director has more voting power than he actually has. It is hard to think of a case where this would be damagingly misleading.

It has been suggested that the proxy statement contain three columns, one setting forth the securities owned of record but not beneficially, another the securities owned beneficially but not of record, and the third the securities owned beneficially and of record. In that way a stockholder can tell (1) the exact voting power of a director and (2) the exact financial stake of a director in the enterprise. The drawback to this is that when it has been tried it leads to confusion and the information is exceedingly difficult to compile accurately. It is particularly difficult in the case of executors, partnerships, trusts, etc. and requires an amount of time out of proportion to its value.

In the normal case a statement may properly be made that the proxy is solicited by the issuing company. In many cases issuers may prefer to state that the solicitation is made by the management rather than by the company itself. The latter seems more correct.

In order that there may be no question about postponing meetings, it is suggested that proxy material be cleared with the Commission in advance of mailing. Merely mailing the proxy material to the S. E. C. apparently is not sufficient, as the Commission has in certain instances raised questions about the mailing even though they have had the material for some time prior to the mailing.

APPENDIX E

The subject of proxies has been treated in various provisions other than Section 14(a) of the Securities Exchange Act of 1934:

Securities Exchange Act of 1934 § 14(b):
"It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member to give a proxy, consent, or authorization in respect of any security registered on a national securities exchange and carried for the account of a customer in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Public Utility Holding Company Act:

Section 11(g): "It shall be unlawful for any person to solicit or permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or any subsidiary company thereof under this section, or otherwise, or in respect of any plan under this section for the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

(1) the plan has been proposed by the Commission, or the plan and such information regarding it and its sponsors as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers has been submitted to the Commission by a person having a bona fide interest (as defined by the rules and regulations of the Commission) in such reorganization;

(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for a hearing
on the plan and other plans submitted to it, or by an abstract of such report made or
approved by the Commission; and
(3) each such solicitation is made not in contravention of such rules and regulations
or orders as the Commission may deem necessary or appropriate in the public in-
terest or for the protection of investors or consumers.
Nothing in this subsection or the rules and regulations thereunder shall prevent any
person from appearing before the Commission or any court through an attorney or proxy.

Section 12(e): "It shall be unlawful for any person to solicit or to permit the use of his
or its name to solicit, by use of the mails or any means or instrumentality of interstate
commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding
any security of a registered holding company or a subsidiary company thereof in contra-
vention of such rules and regulations or orders as the Commission deems necessary or
appropriate in the public interest or for the protection of investors or consumers or to
prevent the circumvention of the provisions of this title or the rules, regulations, or
orders thereunder.

Holding Company Act Release No. 759:
The Securities and Exchange Commission today announced the issuance of its proxy
rules under the Holding Company Act with reference to registered holding companies and
their subsidiaries.
The rules may be divided into two general categories: First, the rules apply to the
solicitation of proxies, deposits, consents and dissents from owners of securities of
registered holding companies and subsidiaries, in connection with reorganizations and for
other similar purposes. Second, the rules make applicable the existing and any future
rules with regard to proxies under the Securities Exchange Act of 1934, such rules being
applicable in ordinary cases of proxy solicitation.
In so far as applicable to reorganizations, the rules are designed for temporary operation
under provisions of existing law and are, therefore, more limited in scope than the
recommendations which the Commission has made as to new legislation dealing with
the general field of corporate reorganizations and committee activities.
Generally, the rules set up standards to which those soliciting proxies must conform.
Such standards, for instance, call for periodic accounting by protective committees, pro-
bhition against trading in securities by committee members and detailed information
through Commission reports to enable those solicited for votes to act with sound judgment.
The new rules are adopted under Section 12(e) of the Act which prohibits the use of
instruments of interstate commerce generally to solicit proxies; and under Section 11(g)
which specifically prohibits the solicitation of proxies in a reorganization plan unless,
among other things, the plan is submitted to the Commission by a person having "a bona
fide interest (as defined by the rules and regulations of the Commission) in such reorgan-
ization" and each solicitation is accompanied or preceded by a copy of a report on the
plan to be made to the Commission and is otherwise in compliance with the rules and
regulations or orders of the Commission.
Rule 12E-1 defines various terms used in the other rules.
Rule 12E-2 makes applicable to the solicitation of proxies in regard to securities of
registered holding companies and subsidiaries, whether or not listed on a national securities
exchange, the existing and any future rules adopted by the Commission pursuant to Sec-
tion 14(a) of the Securities Exchange Act of 1934.
Rule 12E-3 deals with solicitation of authorizations in connection with reorganizations.
Rules 12E-4, 5, and 6 prescribe the form and content of applications to the Commission
for reports on plans and for declarations to be used in compliance with Rule 12E-3.

Bankruptcy Act § 77(p):
"It shall be unlawful for any person, during the pendency of proceedings under this
section or of receivership proceedings against a railroad corporation in any State or Federal
court, (a) to solicit or permit the use of his name to solicit, from any creditor or share-
holder of any railroad corporation by or against whom such proceedings have been
instituted, any proxy or authorization to represent any such creditor or shareholder in
such proceedings or in any matters relating to such proceedings, or to vote on his behalf
for or against, or to consent to or reject, any plan of reorganization proposed in connection
with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy
or authorization from any such creditor or shareholder which has been solicited or obtained
prior to the institution of such proceedings; or (c) to solicit the deposit by any such
creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action: Provided, however, that nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters.

The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Chandler Act, Chapter X, § 176:

"No person shall, without the consent of the court, solicit any acceptance, conditional or unconditional, of any plan, or any authority, conditional or unconditional, to accept any plan, whether by proxy, deposit, power of attorney or otherwise, until after the entry of an order approving such plan and the transmittal thereof to the creditors and stockholders, as provided in section 175 of this Act; and any such authority or acceptance given, procured, or received by reason of a solicitation prior to such approval and transmittal shall be invalid, unless such consent of the court has been so obtained."