



Case Western Reserve Law Review

Volume 4 | Issue 1

1952

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Recommended Citation

Franklin C. Latham and Frank D. Emerson, *Proxy Contest Expenses and Shareholder Democracy*, 4 W. Res. L. Rev. 5 (1952)
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Proxy Contest Expenses and Shareholder Democracy*

Franklin C. Latcham and Frank D. Emerson

IN THIS year of a Presidential Election a great amount of interest has been centered upon the problem of getting citizens to register and vote. And, of course, this interest is well directed for in a democratic society the ultimate control of the citizenry over the course of their government depends upon their effective utilization of the voting privilege.

The analogy between the citizen in a democratic society and the stockholder in a corporation is a fairly close one from a theoretical legal point of view. In theory, the final power over the destiny of the government in

the one case and over the destiny of the corporation in the other lies in the hands of these individuals. And these fundamental powers are only protected by their untrammelled right to vote after full and free discussion.

Indeed, the voting rights of a member of a political corporation or a shareholder of a commercial corporation were considered so valuable under

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the common law that neither of them could be delegated.¹ In the corporate field, it has only been since the establishment of state general corporation acts in the latter part of the nineteenth century that stockholders were permitted to vote by proxy. Stockholders had to attend the shareholders' meetings in person or forfeit their right to vote.²

Of course, in the modern large corporation, or even in one of medium

*While one of the writers is in the employ of the Securities and Exchange Commission, the opinions expressed are the writer's and not necessarily those of the Commission.

¹BALLANTINE, *CORPORATIONS* 408 (2d ed. 1946); 3 COOK, *CORPORATIONS* 2130 (8th ed. 1923); STEVENS, *CORPORATIONS* 532 (2d ed. 1949).

²The principal English common law cases are: *Harben v. Phillips*, 23 Ch. D. 14, 32, 35 (1882); *Attorney-General v. Scott*, 1 Vesey 413, 417-418 (1749); *Re Dean*

size, shares are so widely held that it would be physically impossible for all of the shareholders to attend an annual or special meeting. Even if the shareholder could afford the trip to the meeting place, in many cases it would be impossible to find an auditorium large enough to accommodate them.³ Therefore, the right today of a shareholder to vote intelligently by proxy is of primary importance.

Although the nineteenth century general corporation acts gave, and their present day counterparts still give, stockholders the right to vote by proxy, they both failed to provide for the companion right of affording stockholders full information and opportunities for communication with each other. This failure resulted in making a mere formality of the stockholders' meeting.⁴ Essentially the public shareholder remained disenfranchised. Since little or no information whatever was furnished the stockholder and only the most general notice of meetings was ordinarily provided, no questions of full disclosure, much less of misrepresentation or omissions to state material facts, ever came before the state courts in any substantial volume. Under the state statutes the public stockholder was no better situated than at the common law, and in addition he was compelled to face the humility of having become a dummy. The state courts rarely got beyond the formal problems of who may act as proxy holder, the execution of proxies, the duty of inspectors of election, the capacity to appoint a proxy holder, the scope of the proxy holder's authority, the binding effect of the proxy holder's unauthorized acts, and the revocation and termination of proxies.⁵

With the federal securities legislation, less than two decades old, came a restoration of the right of the public and the stockholder to a full disclosure of corporate affairs. Express provision for full disclosure to stockholders incident to efforts to obtain their proxies was provided by Congress in Section 14 of the Securities Exchange Act of 1934.⁶ That section gives the Securities and Exchange Commission authority to adopt regula-

and Chapter of Fernes, Davies 116, 129 (1608). For an early American case see *Taylor v. Griswold*, 14 N.J.L. 222 (Sup. Ct. 1834), and see, also, *Macklin v. Nicolle Hotel, Inc.*, 25 F.2d 783 (8th Cir. 1928); *Axe, Corporate Proxies*, 41 MICH. L. REV. 38, 41 (1942).

³ At the end of 1950, eight industrial corporations whose securities were listed on the New York Stock Exchange had more than 100,000 common stockholders of record. General Motors headed the list of industrials with 410,428. KIMMEL, *SHARE OWNERSHIP IN THE UNITED STATES* 130 (1952).

⁴ The problem is nowhere better described than in BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 80-90, 139, 207, 244-245 (1932). See also, RIPLEY, *MAIN STREET AND WALL STREET* (1927)

⁵ See *Axe, Corporate Proxies*, 41 MICH. L. REV. 225, 258 (1942); Bernstein and Fischer, *The Regulation of the Solicitation of Proxies: Some Reflections on Corporate Democracy*, 7 U. OF CHI. L. REV. 226, 227 (1940).

⁶ 48 STAT. 893 (1934), 15 U.S.C. §§ 78a, 78n (1946).

tions, not merely affording full disclosure, but to govern generally the solicitation of proxies, consents, and authorizations relating to securities listed on a stock exchange. Acting under this authority the Commission has evolved rules⁷ which are the present cornerstone of shareholder democracy.

These proxy rules reflect a three-way approach to the problems of the modern stockholder, with various refinements added from time to time. First, they provide for a full disclosure of all material information pertinent to proposals for corporate action submitted by the management to the vote of its shareholders through the proxy machinery. Secondly, resort by anyone to the use of fraud in the solicitation of proxies is made unlawful. Thirdly, opportunity is afforded to stockholders themselves to solicit proxies from their fellow stockholders and to obligate the management to include in its proxy statement stockholder proposals for action.⁸ While the importance of the proxy fraud and disclosure provisions can hardly be minimized, it may well be that the opportunities afforded by the stockholder proposal rule hold the greatest promise for progress toward stockholder democracy and the salvation and growth of our corporate enterprise system. In the very best Socratic tradition the proposal rule appears to have considerable capacity for stimulating democratic growth through free discussion at almost all levels of modern corporate life.⁹

The proxy regulation, of course, has not been without its critics. There are those who believe that the federal government should take no part in ensuring stockholder democracy. And there are some who feel that the proxy regulation is not a sufficiently strong measure to protect minority stockholder interests and to guarantee that the public interest will be sufficiently reflected in corporate policies.¹⁰ The fact remains, however, that the proxy regulation is with us and it performs some extremely useful functions. Some of these may be summarized as follows.

First, realistic use of the stockholder's right under the proxy regulation to receive information and to vote restores to him the opportunity to regain the position he held at an earlier time. The proxy regulation is in accord with the common law by way of recognition of the individualistic character

⁷ The proxy regulation of the SEC is known as Regulation X-14.

⁸ For a detailed analysis of the proxy regulation see, Emerson and Latham, *SEC Proxy Regulation: Steps Towards More Effective Stockholder Participation*, 59 YALE L.J. 635; Friedman, *SEC Regulation of Corporate Proxies*, 63 HARV. L. REV. 796 (1950); LOSS, *SECURITIES REGULATION* 523 *et seq.* (1951).

⁹ See Emerson and Latham, *SEC Proxy Proposal Rule, The Corporate Gadfly*, 19 U. OF CHI. L. REV. 807 (1952) and *Further Insight Into More Effective Stockholder Participation: The Sparks-Wilmington Proxy Contest*, 60 YALE L.J. 429 (1951).

¹⁰ For a summary of the various positions see REUSCHLEIN, *THE SCHOOLS OF CORPORATE REFORM* (1950).

of the exercise of the stockholder's judgment as to how he should vote his shares. In a technological age such as this any opportunity for recognition of the dignity of the human being deserves attention, if for no reason other than the resultant fortifying of moral fibre and intellectual development.

Secondly, stockholder democracy holds promise of rekindling on a broader basis the spirit of individual inquiry and free discussion through use of the SEC provisions for stockholder communication and proposals for corporate action. This, too, is salutary in that it affords a haven for human growth in an awesome atomic age.

It may be objected that traditionally the stockholder, of all people, has shown a peculiarly high degree of indifference to what goes on in his corporation, and worse, that he would not understand it anyway. But how can one be said to be indifferent to what for a long time he had not known nor had an opportunity to learn about? How under such circumstances of corporate blackout of information could there have been any stimulus to the stockholder to attempt anything? Perhaps the greatest of all harms resulting from the lack of corporate publicity that was typical until the middle thirties was the inertia it created among stockholders, a loss of considerably greater proportions than the dollars that were wasted in frauds.

There is, moreover, impressive evidence that a start has already been made to turning the tide of stockholder inertia and ignorance. But what of the oft repeated assertion that stockholders not only have been, but still are and will always be, without an understanding even in broad perspective of matters relating to corporate operations? This scepticism seeks to sweep out from under the stockholder the substantial degree of dignity he has once again begun to realize. It also rejects the prospects for stockholder education.

Happily, much evidence is at hand that the stockholder along with his fellow members of the general public are being educated and experiencing an awakening of the breadth of his intellectual capacities for corporate as well as general understanding. Since corporate publicity became the standard under the federal securities laws there has been an increasingly larger amount of literature dealing with accounting, economic analysis and interpretation of financial statements, annual reports, and related corporate documents. This material has not remained entombed in the libraries and book stores, but is being borrowed and purchased and taken home for study. Photo-copies of information are being obtained from the SEC, and attorneys, accountants, statistical services, stock brokers, their member exchanges and associations, and advisers and counselors of a wide variety are being consulted by stockholders more and more often with reference to corporate affairs. The stockholder is becoming literate to a degree higher than perhaps even the most visionary could have foreseen.

The proxy regulation, then, has been of material aid to the stockholder as a voter by enlarging the scope of information he receives, by permitting him to propose policy questions for the consideration of fellow stockholders and by allowing him to vote upon questions presented by other stockholders. There is, however, another aspect of the problem which is of primary importance in the conduct of a democratic government and with which the proxy regulation does not deal. In a democratic society rival groups must stand in a fairly equal position in regard to their opportunities to place issues and candidates before the voters. This is still not true in the corporate world.

In a sharply contested proxy battle the cost of printing and mailing such material, along with other solicitation devices, may constitute substantial outlays of money.¹¹ Those in control of the corporation—the management group—have always had an advantage in regard to financing such solicitation for ordinarily they are permitted to pay for such expenses out of the corporate treasury. Outside groups, however, have had to use their own resources to cover the cost of canvassing fellow security holders. It is the purpose of this paper to review the present case law development on the subject of proxy expenses, and consider some suggestions for establishing greater equality between management and opposition groups.

A. *Management's Proxy Expenses*

A number of cases have settled the right of management to charge the corporate treasury for the cost of soliciting proxies.¹² The principal limitation which the courts have placed upon this right is that the solicitation must concern "questions of corporate policy" rather than mere "matters of personnel." The courts have justified corporate payment of expenditures on the sound theory that:

. inasmuch as the stockholders are called upon to express their judgment upon the soundness of a questioned policy, it is in the interest of an intelligent decision by them that they should be advised by the responsible managers of the corporation who formulated the policy what were the considerations which induced their approval; and that it would be highly unreasonable to require that the directors should personally defray the

¹¹ For example, in the Sparks-Withington contest discussed in Emerson and Latham, *Further Insight Into More Effective Stockholder Participation: The Sparks-Withington Proxy Contest*, 60 YALE L.J. 429 (1951), the leader of the opposition group spent his entire cash savings of \$6,000 and management spent a total of \$51,165.

¹² Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950); Hand v. Missouri-Kansas Pipe Line Co., 54 F. Supp. 649 (Del. 1944); Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741 (1946); Hall v. Trans-Lux Corp., 20 Del.Ch. 78, 171 Atl. 226 (1934); Bounds v. Stephenson, 187 S.W. 1031 (Tex. Civ. App. 1916); Peel v. London & N.W. Ry. [1907] 1 Ch. 5. Friedman, *Expenses of Corporate Proxy Contest*, 51 COL. L. REV. 951 (1951); Comment, 49 MICH. L. REV. 606 (1951).

expense incident to the performance of a duty which rested upon them to lay before the stockholders the information which is requisite for an informed decision in turn on their part.¹³

Certainly there can be no quarrel with such a statement of policy. It is in accord with the fundamental concepts of stockholder democracy. The areas left to explore are the limits, if any, to management's charging the corporate treasury, and the possibility of placing outside groups in a position of greater equality in regard to their solicitation expenses. The latter problem will be considered at a later point in this paper.

The limitation that solicitation must cover "questions of policy" rather than "matters of personnel" is reduced to rather meaningless jargon when prodded under careful investigation. One early case thought corporate expenditures improper when they merely related to "proceedings by one faction in its contest with another for control of the corporation."¹⁴ It is difficult to determine from the court's opinion whether the expenditures were disallowed because they were thought to be of a personal nature. The case has been cited a number of times as standing for that proposition. However, if that is the court's holding, the case stands alone for although other courts have spoken of the limitation none of them have actually disapproved of corporate expenditures on that ground.¹⁵ The very courts which purport to see the possibility of such a limitation also understand the difficulty of applying it. For example, one court has said:

A question of policy which concerns very intimately the future of the corporate business may turn upon the particular personnel of the directors and officers. Indeed it often happens in practice that questions of policy come up not as abstract propositions which are referred to the stockholders for a yes or no vote, but in the form of whether the directors who stand for the given policy shall be re-elected to office.¹⁶

Actually, unless opposing directors are men of no ideas or policies at all, the limitation has no meaning and might as well be forgotten by the courts.

Once the courts are clear that matters of policy are involved, they have been liberal in allowing management to take all steps reasonably necessary to insure that security holders receive pertinent facts and an opportunity to express their opinion on issues. Thus it is proper for management to advertise in newspapers to inform stockholders concerning proposals.¹⁷ Material can be mailed to security holders, and management may enclose a self-addressed, stamped envelope to facilitate the security holder in voting

¹³ Hall v. Trans-Lux Corp., 20 Del. Ch. 78, 81, 171 Atl. 226, 227 (1934)

¹⁴ Lawyers' Advertising Co. v. Consolidated Ry., 187 N.Y. 395, 399, 80 N.E. 199, 200 (1907).

¹⁵ Cases cited note 12 *supra*.

¹⁶ Hall v. Trans-Lux Corp., 20 Del. Ch. 78, 84, 171 Atl. 226, 228 (1934). See also Friedman, *supra* note 12, at 952. Comment, 49 MICH. L. REV. 606 (1951).

¹⁷ Lawyers' Advertising Co. v. Consolidated Ry., 187 N.Y. 395, 80 N.E. 199 (1907).

and the expression of his ideas to management.¹⁸ Furthermore, management may print and mail such follow-up material as is necessary to answer or clarify statements made by the opposition group.¹⁹ Additional material of this type is necessary if security holders are to be fully informed. But last minute telegrams and long-distance telephone calls sent by management in an effort to obtain proxies, or to effect a "switching" of proxies, should not be held to be a proper corporate expense.²⁰ Solicitation expenses must stand the test of reasonableness as must all corporate outlays. If security holders have received clear expositions from both sides through the mails, there can be no justification for management charging the corporate treasury for bitter-end telephone and telegraphic messages.

These forms of pressure activities lead to a consideration of another type of expense: the hiring of paid proxy solicitors. In another article the use of paid professional solicitors by a management group is discussed by the authors in some detail.²¹ In that situation paid solicitors were utilized by management to aid in its efforts to retain control of the corporation.

It would seem that the propriety of hiring paid solicitors should again be measured by the rule of the reasonableness of the expenditure. The basis upon which the courts have permitted management to charge the corporate treasury for solicitation expenses has been that dissemination of information to stockholders is necessary for their intelligent decision. But is the use of paid solicitors necessary for the dissemination of information? It does not seem that they are needed to supplement the information already distributed by mail. The only use of such solicitors would be to attempt to persuade stockholders to vote a certain way, a use which goes far beyond the courts' justification for permitting solicitation expenditures to be charged against the corporation. Also, there is the additional factor that the use of solicitors paid by the corporation gives the management another advantage in a contest already slanted heavily in its favor.

The use of paid proxy solicitors in a contest over control or corporate policies (the two being indistinguishable) should not constitute a proper corporate expenditure. Of course, if the directors or officers wish to pay for such expenses from their own pockets, that is perhaps a different matter. Both sides should probably be allowed to hire professionals if they wish to pay for them personally. It does not seem necessary to prohibit such expenditures entirely.

¹⁸ *Bounds v. Stephenson*, 187 S.W. 1031 (Tex. Civ. App. 1916)

¹⁹ *Hall v. Trans-Lux Corp.*, 20 Del. Ch. 78, 171 Atl. 226 (1934).

²⁰ See Emerson and Latham, *Further Insight Into More Effective Stockholder Participation: The Sparks-Wilmington Proxy Contest*, 60 YALE L.J. 429, 445-449, 451-452 (1951).

²¹ *Ibid.*

Another possible limitation upon expending funds for pressure soliciting is the factor of non-deductibility for income tax purposes. Commercial enterprises are allowed a deduction under Section 23(a)(1)(A) of the Internal Revenue Code for "ordinary and necessary expenses paid or incurred in carrying on any trade or business." The regulations include "management expenses" as a part of deductible trade or business expenses.²² Thus it seems that expenses incurred by the corporation in holding annual or special meetings, including the cost of soliciting proxies, are deductible as long as they are "ordinary and necessary," and not obviously for the benefit of individual directors or officers.²³ But would the cost of pressure soliciting constitute "ordinary and necessary" expenditures of the corporation? By definition they would not seem to. Instead, they would appear to be "extraordinary, unusual" and, perhaps, "extravagant." The Supreme Court has specifically disallowed the deduction of business expenditures coming under these last categories.²⁴ And, at least one federal court of appeals has denied the deduction of business expenditures which were "unreasonable" in amount, stating that the expenses were therefore not "ordinary and necessary."²⁵ It would seem that amounts spent for pressure soliciting would easily constitute "extraordinary and unusual" expenditures, and would certainly be "unreasonable," from the standpoint of the corporation. These expenditures are not being used to inform the shareholders, but to persuade them to adopt a specific position. Deduction of expenses relating to pressure soliciting should not be allowed.

If the corporation cannot deduct these amounts because they are not "ordinary and necessary," neither can directors or officers deduct amounts for pressure soliciting upon their personal returns even though they pay for this solicitation from their own pockets. For whether the directors or officers are claiming a business deduction under Section 23(a)(1)(A), or a non-business deduction under Section 23(a)(2), both sections limit deductions to those which are "ordinary and necessary."²⁶ The same limitations would also apply to expenses of non-management groups, if we assume that their expenses are deductible under the Code, an assumption that is far from clear.²⁷

²² U.S. Treas. Reg. 111, § 29.23(a)(1) (1943).

²³ Cf. *Missouri-Kansas Pipe Line Co.*, 3 T.C.M. 15 (1944), *aff'd*, 148 F.2d 460 (3d Cir. 1945).

²⁴ *Botany Worsted Mills v. United States*, 278 U.S. 282, 49 Sup. Ct. 129 (1929)

²⁵ *Commissioner v. Lincoln Electric Co.*, 176 F.2d 815 (6th Cir. 1949), *cert. denied*, 338 U.S. 949, 70 Sup. Ct. 488 (1950).

²⁶ Note that the regulation interpreting Code § 23(a)(2) specifically limits deductions under that section to those which "are reasonable in amount." U.S. Treas. Reg. 111, § 29.23(a)-15(a) (1943).

²⁷ Ordinarily the opposition group would seek a deduction for their expenditures under Code § 23(a)(2) which limits deductions to the "ordinary and necessary"

There has been a suggestion that the corporation might properly hire solicitors when it is necessary to obtain a specified percentage of the outstanding shares in order to take some corporate action.²⁸ Such a vote is normally required in the case, for example, of a merger, consolidation, or stock reclassification. There is merit in this suggestion, particularly in view of the difficulty of obtaining the necessary vote by simply mailing proxies. Generally, there is no personal advantage adhering to management through such a proposed change, except the fact of benefit to the entire corporation. Therefore, the fact that there may be opposition to the plan should not make any difference. Insofar as paid solicitors are used merely to obtain a specified percentage of security holders to vote on an issue, or to obtain a quorum at a meeting, the expense involved should be a proper corporate charge. But if the use of solicitors is to retain incumbents in office, or to justify existing policies, their hire should not be allowed as a corporate expense.

B. *Expenses of Opposition Group*

The discussion to this point has been limited to the problem of the right of management to use corporate funds in a proxy contest. But what of the opposition group? Must the "outs" forever stand the cost of urging adoption of their policies and election of their directors out of their own pockets? This aspect of the proxy solicitation problem has not received extensive attention from the courts. The problem should be considered carefully for two reasons. The first reason is that of more fully informing the stockholders. The courts have permitted management to charge the corporate treasury in order that stockholders may receive adequate information for an informed vote. Should not this argument also apply to the material disseminated by opposition groups? Secondly, there is the argument of equality or equity. Management already has the tremendous advantage of depending upon the corporate treasury. Should not a non-

expenditures of an individual "paid or incurred for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." The leading case interpreting the section is *Bingham's Trust v. Commissioner*, 325 U.S. 365, 65 Sup. Ct. 1232 (1945). There is no case considering specifically the deductibility of proxy solicitation expenses. Compare *McDonald v. Commissioner*, 323 U.S. 57, 65 Sup. Ct. 96 (1944); *Commissioner v. Josephs*, 168 F.2d 233 (8th Cir. 1948); *Commissioner v. Heide*, 165 F.2d 699 (2d Cir. 1948); *Missouri-Kansas Pipe Line Co. v. Commissioner*, 148 F.2d 460 (3d Cir. 1945); and *Marion A. Burt Beck*, 15 T.C. 642 (1950) with *Hochschild v. Commissioner*, 161 F.2d 817 (2d Cir. 1947); *Stella Elkins Tyler* 6 T.C. 135 (1946); and *Heller v. Commissioner*, 147 F.2d 376 (9th Cir. 1945). Perhaps if the corporation reimbursed the non-management group, the corporation would be in a better position under Code § 23(a)(1)(A) to deduct non-management expenses.

²⁸ Friedman, *supra* note 12, at 953. See also LOSS, SECURITIES REGULATION 554 (1951).

management group with real merit in its proposals at least be allowed reimbursement for its expenditures?

(1) *Successful Opposition*

The argument advanced in the last paragraph is, of course, strongest in the case of an opposition group that gains control of the corporation. It is clear in such a case that a majority of stockholders believed the proposals of new management to be the soundest and in the best interests of the corporation. Certainly, if the solicitation expenses of old management whose views were rejected should be borne by the corporation, new management should be reimbursed.

This was the position adopted in the sole case to consider the problem. *Stemberg v. Adams*²⁹ involved a proxy contest in which the non-management group were successful in electing their slate of candidates to the board of directors. Old management spent something over \$20,000 in the contest; the opposition spent about \$27,000. Old management defrayed its expenses from the corporate treasury while in office. When new management came into office it thereupon reimbursed itself for its proxy expenses out of corporate funds. This action was later ratified by the stockholders. A stockholder then brought a derivative action in the name of the corporation against the old and new directors for the total proxy contest expenses incurred by both sides. Cross motions for summary judgment were filed by plaintiffs and defendants. The trial judge denied the motions on the ground that he did not have sufficient facts before him to tell whether or not a question of "policy" was involved in the proxy contest. The court indicated, however, that he would have granted defendants' motion if he had been satisfied that the dispute was over a matter of "policy." He was not concerned that the insurgents had reimbursed themselves for their expenditures "unless these were unreasonable." On this question the court concluded:

My own choice is to draw no distinction between the "ins" and the successful "outs." I see no reason why the stockholders should not be free to reimburse those whose expenditures succeeded in ridding a corporation of a policy frowned upon by a majority of the stockholders. Once we assert that incumbent directors may employ corporate funds in policy contests to advocate their views to the stockholders even if the stockholders ultimately reject their views, it seems permissible to me that those who advocate a contrary policy and succeed in securing approval from the stockholders should be able to receive reimbursement, at least where there is approval by both the board of directors and a majority of the stockholders. An analogy may be found in the reimbursement of the successful stockholder who brings a derivative action for the benefit of the corporation. There he is reimbursed regardless of the views of the stockholders.³⁰

²⁹ 90 F. Supp. 604 (S.D.N.Y. 1950).

³⁰ *Id.* at 607

The reasoning of the court on the issue of reimbursing the successful insurgent group is sound. Although we may disagree with the court's adhering to the "policy" vs. "personnel" formula, its theory that a successful opposition which proves to be representing the thinking of a majority of the stockholders should be reimbursed does not seem open to dispute.

(2) *Unsuccessful Opposition.*

But what of the unsuccessful contestants? Is there any plausible basis for an argument that they should be reimbursed? Apparently members of the bar have not thought about the possibilities, or have not believed such a course of action proper, for no suits to reimburse defeated contestants have yet been reported.

And yet, if an "outside" group has honestly proposed an intelligent course of conduct, and has received the support of a substantial body of stockholders, is there not a reasonable basis for reimbursing them from the corporate treasury? Certainly there is as much ground for reimbursing unsuccessful insurgents as there is for upholding the use of corporate funds by a defeated management.³¹ Corporate payments to both groups can be justified on the basic ground of fully informing the stockholder. For he is entitled to have both sides of the argument, not just that of successful management, nor that of successful opposition.

A recent article has presented a well documented argument in favor of reimbursing unsuccessful opposition groups.³² The writer finds support from case law development and from the change in stockholder-management relations effected over the past two decades by statute and administrative action. The case law development lending support to the proposed course of action comprises those decisions permitting reimbursement to directors or stockholders where their legal actions have "benefited" the corporation. For example, a number of cases have authorized reimbursement for a director's expenses in successfully defending on the merits a stockholder's action against him for alleged wrongdoing.³³ The corporation is benefited because directors are encouraged to defend themselves against unfounded charges thus ensuring the retention of good personnel. And, again, stockholders and their counsel have been reimbursed where the result of their action was to eliminate unfavorable restrictions.³⁴

³¹ *Steinberg v. Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950).

³² Friedman, *supra* note 12, at 958 *et seq.*

³³ *In re E. C. Warner Co.*, 232 Minn. 207, 45 N.W.2d 388 (1950); *Solimine v. Hollander*, 129 N.J. Eq. 264, 19 A.2d 344 (1941); *Figge v. Bergenthal*, 130 Wis. 594, 109 N.W. 581 (1906), *rehearing denied*, 110 N.W. 798 (1907). See Washington, *Litigation Expenses of Corporate Directors in Stockholders' Suits*, 40 COL. L. REV. 431 (1940).

³⁴ *N.Y. Central R.R. v. N.Y. & H. R.R.*, 275 App.Div. 604, 90 N.Y.S.2d 309, *aff'd*,

The statute and administrative action referred to above is, of course, Section 14 of the Securities Exchange Act³⁵ and the proxy regulation authorized by that section. In the course of administering its powers under that section the SEC has asserted not only the power to ensure that the stockholder receives full information, but it has asserted the authority to make the corporate management take affirmative steps. Through the adoption of Rule X-14A-8 management must provide a method whereby stockholders may present ideas and suggestions to fellow stockholders for their consideration and vote. It is through such an extension of the philosophy of Section 14 that the writer above mentioned believes the commission has the power to amend the proxy regulation to require management to reimburse unsuccessful opposition groups.

One immediate objection to reimbursing unsuccessful opposition groups will be the argument that the corporation must underwrite every stockholder's scheme however ill advised. No doubt there are stockholders' proposals which border on the "crack-pot" variety and no beneficial corporate purpose will be served by their discussion. Some method must be devised for ensuring that the corporation stand the expense of only meritorious contests.

One method for so limiting corporate liability would be to utilize the plan followed in the proposal rule (X-14A-8) of the proxy regulation.³⁶ That rule provides that management does not have to enclose a stockholder's proposal in its proxy material if "substantially the same" proposal was submitted to the stockholders in the previous year and it received a favorable vote from less than 3% of the stockholders voting on the proposal. While the number of stockholders voting in favor of a proposal is not necessarily a criterion for measuring merit, it does show stockholder reaction as to its worth. And this factor is important in determining possible benefit to the corporation.

In order to arrive at a proper minimum percentage figure a study of votes cast in proxy contests would have to be made. The 3% figure is probably too low. Some figure around 10% or 15% would probably be closer to the proper minimum requirement. In the survey of voting under Rule X-14A-8 discussed in a recent article it was found that 30% of the proposals obtained an affirmative vote of less than 3%, and 60% of the proposals obtained less than 8%.³⁷ On the basis of such figures an affirma-

301 N.Y. 567, 93 N.E.2d 451 (1949). See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COL. L. REV. 784, 799 (1939).

³⁵ See note 6 *supra*.

³⁶ For the same suggestion see Friedman, *supra* note 12, at 963.

³⁷ Emerson and Latham, *SEC Proxy Proposal Rule, The Corporate Gadfly*, 19 U. OF CHI. L. REV. 807, 828-830 (1952)

tive vote of 10% in proxy contests would not seem too high to justify corporate reimbursement for expenditures of an unsuccessful opposition.

It must be remembered also that expense figures on both sides will be materially reduced if, as suggested above, payments for hired solicitors and last-minute telegrams and telephone calls to stockholders are limited, or not permitted, as proper corporate expenditures.

(3) *Inclusion of Opposition Nominees in Management Proxy Statements and Proxy Ballots.*

If it be thought that the reimbursement of either successful or unsuccessful opposition groups would result in burdensome drains on corporate cash and working capital generally there is yet another way to achieve more equality. All nominees, management and opposition, could be listed in the opening management proxy statement and opportunity given for voting by an accompanying proxy ballot. Such a suggestion was made by the SEC in 1942, reiterated by a Chicago business man on a proposal for corporate action, and recently renewed by another writer.³⁸ Moreover, this could be accomplished in most instances without statutory or regulation changes by means of an amendment to the original charter or by-laws. Amending the SEC proxy regulation could achieve such a result far more quickly and uniformly than by piecemeal and scattered by-law amendment.

In one form, the proposal has been that nominations for directors could only be made by signators owning of record at least 5,000 shares. Furthermore, there would be included in the management proxy statement the same information at present required by the SEC for management nominees for directorships, and 100 words giving the nominees' qualifications. An opportunity to vote for the non-management candidates would also be afforded by means of appropriate boxes to be carried in the management form of proxy.³⁹

Essentially this technique would merely carry the proxy proposal rule one step further. Non-management groups could not only propose issues to stockholders for their consideration via the management proxy statement, but they could also place the names of nominees for the Board of Directors before stockholders. The suggestion would eliminate inequality to only a limited extent since any further solicitation by the non-management group would necessitate personal expenditures. However, names and some infor-

³⁸ SEC Act Release No. 3347 at 2 (Dec. 18, 1942); Illinois Central R. Co. 1949 proxy statement, discussed in Emerson and Latham, *SEC Proxy Proposal Rule, The Corporate Gadfly*, 19 U. OF CHI. L. REV. 807, 818, 819 (1952); Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653 (1951).

³⁹ See Illinois Central R. Co. 1949 proxy statement, Emerson and Latham, *SEC Proxy Proposal Rule, The Corporate Gadfly*, 19 U. OF CHI. L. REV. 807, 818, 819 (1952).

mation about nominees for both groups would originally be presented before the stockholders at the same time and in the same instrument: significant factors which in themselves would constitute long steps toward more equal treatment for all groups.

Conclusion

The problem of expenditures in a proxy contest is one of vital importance in the field of stockholder democracy. The early development of the law has been extremely favorable to the "ins," while entirely ignoring the "outs." The "policy" vs. "personnel" limitation upon corporate expenditures by management has in actuality amounted to very nebulous distinctions being drawn. Management has been left by the courts in the comfortable position of being able in most cases to defend its position of control through the use of corporate funds. More recently, however, one court has recognized the justification, when the issue was put to it, of reimbursing a successful opposition from corporate funds. Furthermore, it would seem that in the interests of adequate stockholder information an unsuccessful opposition group that has made a substantial showing on the basis of votes cast should also be entitled to reimbursement. The cases point towards such a result if an action for reimbursement were brought. And the regulatory power of the SEC suggests that the Commission could validly require reimbursement through administrative action. If reimbursement is considered too extreme a remedy, then the possibility of including the names of non-management nominees in the management proxy statement should be considered, not only as an alternative proposal, but also as a constructive development in its own right.

The methods of resolving the matter of proxy solicitation expenses outlined above seems preferable to administrative action which would limit the amount available for expenses to a prescribed limit and require parties to request permission for expenditures beyond that amount.⁴⁰ Such a more stringent limitation would cause unnecessary inflexibility, it would seem. Corporate expenditures are limited by the rule of "reasonableness." If both sides know that their own expenditures plus those of the opposition may be met out of the corporate treasury, there should be some reluctance on the part of both sides to spend an unreasonable amount.

⁴⁰ This is the theory of Rule U-65, General Rules and Regulations, Public Utility Holding Company Act of 1935. Under Rule U-65 a corporation is permitted to spend an amount sufficient to cover the ordinary costs of preparing, assembling and mailing proxy solicitation material, plus \$1,000 in any calendar year. If the corporation wishes to spend a greater sum a declaration must be filed with the Commission. See *Standard Gas & Electric Co., SEC Holding Co.* Act Release No. 7020 (Dec. 2, 1946) denying the effectiveness of a declaration for estimated expenditures of \$21,000. See also *LOSS, SECURITIES REGULATION* 554 (1951).