St. John's Law Review

Volume 41
Number 2 *Volume 41, October 1966, Number 2*

Article 1

April 2013

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St. John's Law Review

VOLUME XLI OCTOBER 1966 NUMBER 2

FEDERAL PROXY REGULATION: RECENT EXTENSION OF CONTROLS

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INTRODUCTION

THE main purpose of regulation of proxy solicitation by the Securities and Exchange Commission is to furnish security holders the opportunity of intelligently and fairly exercising their right of corporate suffrage.[1] Before enactment of the federal statutes which granted the Commission proxy regulatory powers, many corporate security owners had been disenfranchised from a knowledgeable and effective voice in corporate affairs. The reasons for such disenfranchisement included (1) the inability of shareholders to attend annual and special meetings, because of the distance between the residence of the security holder and the place of the meeting, and (2) the distribution by management to security holders of information having little significant meaning during the process of management solicitation of proxies.[2] The federal legislation and the Commis-

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[1] SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948).

[2] For a general discussion of the reasons for proxy regulation, see ARANOW & EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 81 (1957); 2 LOSS, SECURITIES REGULATION (2d ed. 1961); Comment, *The Public Corporation—A New Theory for Federal Proxy Regulation*, 60 NW. U.L. REV. 349 (1965).

sion rules were enacted to place certain security holders in the position they would occupy if they could attend shareholder meetings and ask intelligent questions to which they would receive true and complete answers.

The original federal legislation with respect to proxy solicitation was narrow in coverage in that it applied only to securities registered on national securities exchanges.[3] Proxy regulatory control was later extended to the securities of registered public utility holding companies.[4] Thereafter, such regulatory control was extended to the securities of registered investment companies.[5] Finally, by virtue of the significant 1964 amendments to the Securities Exchange Act of 1934, proxy regulatory control was extended to certain over-the-counter securities.[6]

Federal legislation in the area of proxy control was badly needed, since in the absence of laws providing significant regulation, abuses took place in the course of proxy solicitation. State statutes and the common law were inadequate to deal with the problems caused by such abuses because, generally speaking, state laws were limited to: (1) provisions granting shareholders the right to vote by proxy;[7] (2) the requirement that proxies be in writing and signed by the shareholder or his duly authorized attorney-in-fact;[8] (3) certain prohibitions against selling proxies;[9] (4) the capacity to appoint a proxy holder;[10] (5) the requirements necessary to serve as proxy holder;[11] (6) certain requirements that a holder of record deliver a proxy to the beneficial owner;[12] (7) unauthorized acts by proxy holders;[13]

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[3] Securities Exchange Act of 1934, § 14, 48 Stat. 895 (1934), 15 U.S.C. § 78n (1958).

[4] Public Utility Holding Company Act of 1935, § 12(e), 49 Stat. 823 (1935), 15 U.S.C. § 79*l*(e) (1958).

[5] Investment Company Act of 1940, § 20(a), 54 Stat. 822 (1940), 15 U.S.C. § 80a-20(a).

[6] Securities Exchange Act of 1934, § 14(a), as amended, 78 Stat. 569 (1964), 15 U.S.C. § 78n(a) (1965).

[7] *E.g.*, FLA. STAT. § 608.19(5) (1966).

[8] *Ibid.*

[9] *E.g.*, N.Y. STOCK CORP. LAW § 47; N.Y. PEN. LAW § 668(1).

[10] For examples of capacity legislation, see Axe, *Corporate Proxies*, 41 MICH. L. REV. 38, 225 (1942).

[11] *Id.* at 50-51.

[12] *In re* Giant Portland Cement Co., 26 Del. Ch. 32, 21 A.2d 697 (1941).

[13] For examples, see Axe, *supra* note 10.

(8) revocation, termination, and duration of proxies;[14] (9) scope of proxies;[15] (10) the requirement that a proxy be voted according to the majority of proxy holders when it is held by more than one person;[16] and (11) the extent to which corporate funds may be used in the solicitation of proxies.[17] However, state statutes did not require the solicitation of proxies and did not require the disclosure of pertinent corporate information when proxies were solicited.

The federal legislation and the rules adopted by the Securities and Exchange Commission were intended to provide security holders with the information necessary to cast knowledgeable and effective votes. Furthermore, the 1964 amendments to the Securities Exchange Act of 1934 provide that management must distribute certain pertinent corporate information to security holders in the event proxies are not solicited,[18] thereby providing the basis on which security holders might make their own informed proposals.

The federal proxy legislation and the Commission's rules have five basic elements: (1) regulation of the form of proxy to allow the security holder to cast specific votes on specific issues, and to allow the security holder to vote on certain issues and refrain from voting on other issues;[19] (2) full and fair disclosure to security holders by means of annual reports and proxy statements, the contents of which are prescribed by the Commission;[20] (3) provisions under which individual security holders may solicit proxies by requiring management to include in its proxy statement the proposals of individual security holders;[21] (4) re-

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[14] *E.g.*, N.Y. GEN. CORP. LAW § 19.
[15] Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240 (1954).
[16] *E.g.*, FLA. STAT. § 608.10(5) (1966); Callister v. Graham-Paige Corp., 146 F. Supp. 399 (D. Del. 1956).
[17] *E.g.*, Locke Mfg. Companies v. United States, 237 F. Supp. 80 (D. Conn. 1964).
[18] Securities Exchange Act of 1934, § 14(c), as amended, 78 Stat. 570 (1964), 15 U.S.C. § 78n(c) (1965).
[19] SEC Securities Act Release No. 7775, Dec. 22, 1965.
[20] SEC Securities Act Release No. 7508, Jan. 15, 1965.
[21] SEC Securities Act Release No. 4979, Feb. 6, 1954.

quirement of the distribution of annual reports containing prescribed information in the event proxies are not solicited;[22] and (5) prohibition against solicitations by false and misleading statements for which individual security holders and the Commission may bring suit.[23]

This article defines and analyzes the aforementioned five elements in relation to the securities, companies, and solicitations which are subject to the rules of the Securities and Exchange Commission. In respect of the securities and companies subject to the Commission's proxy rules, emphasis is placed upon certain over-the-counter securities which, under the 1964 amendments to the Securities Exchange Act of 1934, are subject to Commission regulation. With respect to the Commission's rules relating to the contents of proxy forms, statements, and annual reports, emphasis is placed on the current rules and regulations.

SECURITIES AND SOLICITATIONS SUBJECT TO COMMISSION PROXY REGULATION

A. *Authority of the Securities and Exchange Commission to Regulate Proxy Solicitation of Registered Securities and Companies*

The sources of law conferring proxy regulatory authority on the Commission are the Investment Company Act of 1940,[24] the Public Utility Holding Company Act of 1935,[25] and the Securities Exchange Act of 1934.[26] These statutes require the registration of certain companies and securities with the Securities and Exchange Commission and, by virtue of registration, the Commission is granted authority to regulate proxy solicitation with respect to such companies and securities.

The Investment Company Act of 1940 grants the Commission authority to regulate proxy solicitation in respect

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[22] SEC Securities Act Release No. 7774, Dec. 30, 1965.
[23] SEC Securities Act Release No. 7775, Dec. 22, 1965.
[24] *Supra* note 5.
[25] *Supra* note 4.
[26] *Supra* note 6.

of all securities of investment companies registered with the Commission pursuant to that act.[27] To implement such legislative authority, the Commission has adopted a rule under the Investment Company Act which provides that solicitation of proxies, with respect to securities of companies registered pursuant to the act, must comply with the requirements of the rules and regulations adopted under Section 14(a) of the Securities Exchange Act of 1934.[28] Rules and regulations adopted under Section 14(a) of the Securities Exchange Act of 1934 are compiled in regulation 14A.[29] In addition to compliance with the provisions of regulation 14A, solicitors of proxies, in respect of securities registered pursuant to the Investment Company Act of 1940, must also comply with two special rules adopted by the Commission under that act.[30]

The Public Utility Holding Company Act of 1935 grants the Commission authority to regulate proxy solicitation with respect to all securities of companies registered with the Commission pursuant to that act. To implement such legislative authority, the Commission has adopted a rule under the Holding Company Act which provides that solicitation of proxies, in respect of securities of companies registered under the act, must comply with regulation 14A.[31] However, solicitations in connection with any reorganization or other transaction subject to the approval of the Commission are exempt from the provisions of regulation 14A, but such solicitations are governed by a special rule adopted under the Holding Company Act.[32]

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[27] *Supra* note 5.

[28] SEC Investment Company Act Release No. 2978, March 4, 1960.

[29] SEC Securities Act Release No. 7566, April 8, 1965.

[30] Those two special rules provide for the inclusion in the proxy statement of information pertaining to investment advisors, investment advisory contracts, and certain transactions between directors or officers of the investment company and the investment advisor. SEC Investment Company Act Release No. 2978, March 4, 1960.

[31] SEC Public Utility Holding Company Act Release No. 3090, Oct. 25, 1941.

[32] The requirements applicable to solicitations in connection with any reorganization or other transaction subject to the approval of the Commission are found in SEC Public Utility Holding Company Act Release No. 3090, Oct. 25, 1941.

The Securities Exchange Act of 1934, as amended, grants the Commission authority to regulate proxy solicitation in respect of all securities registered and listed on national securities exchanges [33] and certain securities which are traded in the over-the-counter markets.[34]

Commission regulation of proxy solicitation was extended by virtue of the 1964 amendments to certain over-the-counter securities by requiring registration of those securities in order to protect a large and constantly growing segment of the investing public. Before enactment of the 1964 amendments a large portion of the investing public was not protected by federal proxy regulation, because there was no legislation regulating unlisted securities.[35] Therefore, many corporations, other than companies required to be registered with the Commission pursuant to the Investment Company Act of 1940 or the Public Utility Holding Company Act of 1935, escaped Commission proxy regulation by foregoing a listing on a national securities exchange.

In the absence of federal regulation over proxy solicitation, many over-the-counter corporations disclosed little information concerning corporate affairs.[36] Generally speaking, shareholders in many of these corporations could not cast a knowledgeable and intelligent vote. An example of the abuses by many over-the-counter companies was solicitation of proxies for the election of directors without naming the nominees.[37]

The Special Study of Securities Markets found the proxy solicitation practices of numerous over-the-counter issuers to be vastly inferior to those of companies whose

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[33] Securities Exchange Act of 1934, § 14(a), as amended, 78 Stat. 569 (1964), 15 U.S.C. § 78(a) (1965).

[34] *Ibid.*

[35] Although it was not a legal requirement that shares be registered on a national securities exchange, it was and still is unlawful for any member of an exchange or any broker or dealer to effect any transaction in any security on an exchange, unless such security has an effective registration on the exchange or is exempt from registration. Securities Exchange Act of 1934, § 12, 48 Stat. 892 (1934), 15 U.S.C. § 78*l* (1958).

[36] SEC REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. DOC. No. 95, 88th Cong., 1st Sess., pt. 3, at 13 (1963), hereinafter cited as SPECIAL STUDY.

[37] *Ibid.*

securities were listed, for the latter companies were required to divulge specific corporate information.[38] The Special Study concluded as follows:

> Past surveys by the Commission have demonstrated, and the Special Study has confirmed, the urgency of extending the applicability of the Commission's proxy rules to all issuers regardless of the nature of the marketplace in which the securities are traded.[39]

A primary reason for the enactment of the 1964 amendments which extend the Commission's proxy regulatory authority was to ameliorate these ills described by the Special Study.

In 1963, it was estimated that there were approximately forty thousand over-the-counter issuers in the United States.[40] Under the terms of the new legislation, it was estimated that three thousand nine hundred over-the-counter issuers would come under federal proxy regulation.[41] As of June 30, 1965, one thousand five hundred six over-the-counter issuers have come under the Commission's rules concerning proxy solicitation.[42] The number of over-the-counter issuers which now comes under the federal proxy rules is small in relation to the large number of publicly owned over-the-counter issuers in the United States. Based upon this fact and the recommendations of the Special Study, it is submitted by the writers that the 1964 legislation was inadequate with respect to the number of publicly owned issuers subject to Commission proxy rules.

The expansion of the Commission's proxy regulatory authority was accomplished by the amendments of Sections 12 and 14 of the Securities Exchange Act of 1934.

Section 14, as amended, grants the Commission authority to regulate proxy solicitation with respect to any security registered pursuant to section 12 of the act, and the amended section 12 provides for the voluntary registra-

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[38] *Id.* at 12.
[39] *Ibid.*
[40] LEFFLER, THE STOCK MARKET 5 (3d rev. ed. 1963).
[41] S. REP. No. 379, 88th Cong., 1st Sess. 19 (1963).
[42] SEC, 31ST ANNUAL REPORT 2 (1965).

tion of securities on a national securities exchange and the compulsory registration with the Commission of certain securities traded over-the-counter.[43] It becomes mandatory for an issuer of securities traded over-the-counter to register its securities with the Commission when the following criteria are present: (1) the issuer must be engaged in interstate commerce, or a business affecting interstate commerce, or its securities must be traded by use of the mails or instrumentalities of interstate commerce; (2) the issuer must have a gross total asset value in excess of $1,000,000; and (3) the issuer must have a class of equity securities held of record by 500 or more persons.[44]

The terms "total assets," "held of record," "class," and "equity securities" have been defined by statute or Commission rule to aid in determining whether or not an over-the-counter issuer is subject to the registration requirements, and, hence, to Commission proxy regulation.

The Commission has defined the term "total assets" to mean all of the assets shown on the issuer's balance sheet or the balance sheet of the issuer and its subsidiaries consolidated, whichever is larger.[45] The balance sheet must be prepared in accordance with accounting rules prescribed by the Commission.[46]

The term "class" has been defined to mean securities which are substantially similar in character and the holders of which partake of substantially similar rights.[47] Apparently, this definition is intended to prevent corporations from establishing a number of classes of securities for the purposes of keeping the number of shareholders below 500.[48]

The term "equity security" is defined to mean "stock or similar security; or any security convertible, with or

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[43] The 1964 amendments to the Securities Exchange Act of 1934 did not substantially alter the provisions relating to registration and listing on national securities exchanges.

[44] Securities Exchange Act of 1934, § 12(g), as amended, 78 Stat. 565 (1964), 15 U.S.C. § 78e(g) (1965).

[45] SEC Securities Act Release No. 7492, Jan. 5, 1965.

[46] The Commission's accounting rules are contained in regulation S-X.

[47] Securities Exchange Act of 1934, § 12(g)(5), as amended, 78 Stat. 568 (1964), 15 U.S.C. § 78e(g)(5) (1965).

[48] Stiles, *The Securities Acts Amendments of 1964*, 6 CORP. PRAC. COMM. 344 (1965).

without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right." [49] By way of illustration, a convertible debenture is an "equity security" within the meaning of the 1934 act.

The term "held of record" has been defined to mean securities held of record by a single person in the following instances: (1) securities held by a corporation, partnership or trust; (2) securities held by one or more persons as trustees, executors, guardians, custodians or in other fiduciary capacities with respect to a single trust, estate or account; (3) securities held by two or more persons as co-owners; (4) each outstanding bearer certificate; and (5) securities registered in substantially similar names where there is reason to believe that such names represent the same person.[50]

In cases where stock transfer books have not been kept up to date, holders of record include persons who would be listed as registered security owners if the transfer books were maintained in accordance with accepted standards.[51]

Securities held subject to a voting trust, deposit agreement or other similar arrangement are deemed to be held of record by the persons in whose names the certificates are registered.[52]

The Commission has exempted savings and loan associations and similar institutions from its regulation in respect of securities issued to borrowers by providing that securities issued by such institutions, for the purpose of qualifying a borrower for membership in the issuer, are not deemed to be held of record by any person.[53]

Beneficial owners of securities are deemed to be record owners if the issuer knows or should reasonably know that the particular form in which the securities are held is used to circumvent the registration provisions of the act.[54]

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[49] Securities Exchange Act of 1934, § 3(a)(11), 48 Stat. 882 (1934), 15 U.S.C. § 78(c)(a)(11) (1958).
[50] SEC Securities Act Release No. 7492, Jan. 5, 1965.
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*

Under the proposed Commission rule, beneficial owners of securities held in "street name" and beneficiaries of employee pension, savings and profit sharing plans were to be included as separate holders of record. However, the rule as adopted does not contain this provision.[55]

The definitions of "total assets," "held of record," "class," and "equity security" are broad in scope. Unless there is a specific exemption, it would seem that there is little an issuer can do, without materially affecting corporate assets or shareholders' rights, to alter its balance sheets or equity securities so as to escape the registration and proxy provisions of the act.

However, the following actions have been suggested as lawful steps which an issuer might take to keep below the minimum shareholder and total asset standards: (1) purchase or redemption of outstanding shares, (2) elimination of duplication on transfer books, (3) combination of holdings, (4) change in accounting practices, (5) depreciation, (6) write-offs of assets, (7) creation of reserves, (8) payment of dividends, and (9) additional salaries and bonuses.[56]

With respect to purchase or redemption of outstanding shares, a corporation must have funds available to so purchase or redeem. Furthermore, many states limit the funds legally available for purchase or redemption of shares to surplus or earned surplus.[57]

In regard to elimination of duplication on transfer books, a Commission rule already provides for this problem.[58]

With respect to combination of holdings, the Commission is empowered to look behind the form of holding to ascertain whether it is used to circumvent the registration provision of the act.[59]

With respect to change in accounting practices, write-offs of assets and creation of reserves, it must be remem-

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[55] SEC Securities Act Release No. 7492, Jan. 5, 1965.

[56] PRACTICING LAW INSTITUTE, HOW TO COMPLY WITH THE NEW SEC RULES 10 (1965).

[57] For a general discussion of the state laws limiting the funds from which treasury shares may be purchased, see HENN, CORPORATIONS 521-23 (1961).

[58] SEC Securities Act Release No. 7492, Jan. 5, 1965.

[59] *Supra* note 50.

bered that accounting rules prescribed by the Commission must be used in computing total assets.[60]

With regard to payment of dividends, proper business planning may negate such payments. Furthermore, many states have enacted statutes which limit the funds legally available for dividends.[61]

Finally, with respect to additional salaries and bonuses, the issuer's first duty should be to provide for proper business planning and shareholder rights before it may be concerned with additional salaries and bonuses.

The new legislation requiring registration of certain over-the-counter issuers exempts from registration the following securities: (1) securities listed on and registered with a national securities exchange (however, such securities are registered pursuant to another subsection of the act and are, therefore, subject to Commission proxy regulation);[62] (2) securities issued by a registered investment company (however, as has been previously mentioned, such securities are subject to Commission proxy regulation); (3) securities of savings and loan associations and similar institutions which do not represent permanent capital; (4) securities of certain religious, educational, benevolent, fraternal, charitable, and reformatory institutions; (5) certain mutual or cooperative organizations; (6) direct obligations either issued or guaranteed by the United States or a political subdivision of the United States; and (7) certain insurance companies.[63]

Over-the-counter securities of insurance companies are exempt from registration and proxy regulation if the company meets state regulatory control in the following respects: (1) it files annual reports with a state commissioner of insurance in accordance with the requirements prescribed by the National Association of Insurance Commissioners

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[60] *Supra* note 45.

[61] For a general discussion of the state laws limiting the funds from which dividends may be paid, see HENN, CORPORATIONS 491-96 (1961).

[62] Securities listed on a national securities exchange are, by virtue of such listing, registered pursuant to Section 12 of the Securities Exchange Act of 1934 and hence subject to Commission proxy regulation.

[63] *Supra* note 44.

(NAIC); (2) it is regulated in the solicitation of proxies in accordance with the standards established by the NAIC; and (3) transactions in securities issued by it are subject to state regulation of insider trading and reporting requirements comparable to the requirements of the Securities Exchange Act of 1934.[64] After the enactment of the 1964 amendments, the insurance commissioners of many states thought it necessary to obtain legislative authority in order to adopt the proxy regulations of the NAIC.[65] Such legislation has been passed in many states.[66]

By virtue of the 1964 amendments, regulatory control over registration and proxy solicitation in respect of most bank securities has been delegated to federal banking agencies. The Comptroller of the Currency regulates securities issued by national and District of Columbia banks. The Board of Governors of the Federal Reserve System controls registration and proxy solicitation with respect to securities issued by state banks which are members of the Federal Reserve System. The Federal Deposit Insurance Corporation regulates securities of all other insured banks. Banks which are not subject to control by a federal bank regulatory agency are subject to proxy regulation by the Commission, providing that such banks meet statutory assets and shareholder criteria.[67]

Because of the difficulty in enforcing proxy and other regulations against foreign issuers, certain securities of foreign issuers, which were listed on national securities exchanges, have been exempt from Commission proxy regulation.[68] After enactment of the 1964 amendments extending registration and proxy regulation to certain over-the-

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[64] SEC Securities Act Release No. 7562, March 26, 1965.
[65] SEC, 31st ANNUAL REPORT 7-8 (1965).
[66] *Ibid.*
[67] For proxy solicitation rules in respect of national bank securities, see 12 C.F.R. § 11.1 (1965). For proxy solicitation rules with respect to securities of state banks which are members of the Federal Reserve System, see 30 Fed. Reg. 367 (1965). For proxy solicitation rules in respect of securities of state banks (nonmembers of the Federal Reserve System) which are insured by the Federal Deposit Insurance Corporation, see 30 Fed. Reg. 400 (1965).
[68] SEC Securities Act Release No. 7746, Nov. 16, 1965.

counter securities, the Commission also adopted a temporary exemption from registration and proxy regulation for over-the-counter securities issued by foreign governments, nationals of foreign countries, corporations organized under the laws of foreign countries, and for American Depository Receipts representing securities of foreign issuers.[69]

A new rule removes the exemption from proxy regulation for listed securities of foreign private issuers if more than 50 per cent of the outstanding voting securities of the issuer are held by United States residents and the principal business of the issuer is conducted in the United States.[70]

A proposed rule, which has not been adopted at the time of this writing, would exempt from registration and, hence, proxy regulation, over-the-counter securities issued by foreign governments, nationals of foreign countries and corporations organized under the laws of foreign countries, if the class of securities has fewer than three hundred holders resident in the United States. In computing the number of holders resident in the United States, all beneficial holders of securities held of record by a bank, broker or dealer are counted as separate holders.[71] Under this proposed rule, American Depository Receipts would also be exempt from registration and Commission proxy regulation.[72]

A Commission release observes that some foreign issuers may not register even after registration regulations are effective. Under such circumstances, trading in these securities would not be illegal, and brokers trading in these securities would not incur civil liabilities.[73] This statement by the Commission evidences the difficulty of enforc-

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[69] SEC Securities Act Release No. 7427, Oct. 19, 1965.
In April of 1966 the Commission adopted an amendment to rule 12g3-1, under the 1934 Act, extending to November 30, 1966, the exemption from the registration provisions of section 12 of that act for the securities of foreign issuers. Under the amended rule the earliest date on which a foreign issuer could be required to register will be 120 days after its fiscal year and the following November 30. SEC Securities Act Release No. 7867, April 21, 1966.

[70] SEC Securities Act Release No. 7868, April 21, 1966.

[71] SEC Securities Act Release No. 7746, Nov. 16, 1965. See also SEC Securities Act Release No. 7867, April 21, 1966.

[72] *Ibid.*

[73] SEC Securities Act Release No. 7427, Oct. 19, 1965.

ing registration and proxy regulations with respect to foreign issuers. However, there is no reason why American investors in foreign securities should receive less protection than American investors in domestic securities. Proxy regulation of foreign issuers is a neglected area, and adequate rules should be adopted by the Commission.

The Commission may exempt from its proxy solicitation and registration requirements any issuer, under appropriate terms, providing such exemptions are in the public interest and not inconsistent with the protection of investors. This relief may be granted by the Commission either by rules and regulations or upon application of interested parties.[74]

Under the above authority, the Commission has exempted from registration and proxy control certain employee benefit plans, certain common trust funds maintained by banks, and certain equity securities which would not be outstanding after a certain time period.[75]

Non-exempt over-the-counter issuers must file the required registration statement within 120 days after the last day of the fiscal year within which asset and shareholder criteria are met.[76] Registration statements become effective sixty days after filing with the Commission or within a shorter time period if the Commission so directs, and Commission regulation over proxy solicitation begins on the effective date of the registration statement.[77]

Similarly, Commission regulation of proxy solicitation in respect of securities registered on a national securities exchange does not begin until the registration becomes effective; and such registration becomes effective after the appropriate registration statements have been filed with both the Commission and exchange, and the exchange has

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[74] Securities Exchange Act of 1934, § 12(h), as amended, 78 Stat. 568 (1964), 15 U.S.C. § 78*l*(g)(3) (1965).

[75] SEC Securities Act Release No. 7581, April 23, 1965.

[76] Securities Exchange Act of 1934, § 12(g), as amended, 78 Stat. 565 (1964), 15 U.S.C. § 78*l*(g) (1965).

[77] *Ibid.*

certified to the Commission that the securities have been approved for listing and registration.[78]

Registration statements for over-the-counter issuers are filed on certain forms provided by the Securities and Exchange Commission.[79] Generally speaking, these forms require the issuer to furnish information with respect to its business, management, financial situation, balance sheet information, assets description, remuneration of directors and officers, securities options, principal security holders, interests of management, securities to be registered, and material contracts not made in the ordinary course of business.

If an issuer registers securities which are not required to be registered under the act, such securities are subject to Commission regulation in respect of proxy solicitation.[80]

Registration of over-the-counter securities is terminated ninety days after the issuer files a certification with the Commission that the number of shareholders is less than three hundred.[81] Therefore, issuers registered pursuant to section 12 of the act continue to be under Commission proxy regulation, even if the number of shareholders falls below three hundred, unless there has been a statutory termination of registration.

There is no provision for termination of registration on the ground of total asset reduction below the statutory amount.

If registration is terminated, new registration is required if the statutory criteria of assets and shareholders again comes into play.[82]

B. The Meaning of Solicitation

Commission proxy rules are applicable to any person who solicits a proxy in respect of non-exempt registered

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[78] Securities Exchange Act of 1934, § 12(d), 48 Stat. 892 (1934), 15 U.S.C. § 78*l*(d) (1958).

[79] See SEC Form 10 (general form for registration of securities pursuant to section 12(b) or (g)).

[80] SEC Securities Act Release No. 7425, Sept. 15, 1964.

[81] Securities Exchange Act of 1934, § 12(g)(4), 78 Stat. 568 (1964), 15 U.S.C. § 78*l*(g)(4) (1965).

[82] S. REP. No. 379, 88th Cong., 1st Sess. 62 (1963).

securities or securities of companies registered under the Investment Company Act of 1940 or the Holding Company Act of 1935. If any person's course of conduct constitutes solicitation, the Commission's proxy rules must be followed. However, if conduct does not constitute solicitation, the Commission may not impose its rules.[83]

The Commission has defined solicitation to include the following:

> (1) Any request for a proxy whether or not accompanied by or included in a form of proxy; (2) any request to execute or not to execute, or to revoke, a proxy; or (3) the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.[84]

Whether or not a communication amounts to solicitation is a question of fact depending on the nature of the communication and the time and manner in which it is sent to security holders.

Letters or other writings to shareholders, which do not specifically request a proxy, amount to solicitations if they "are part of a continuous plan ending in solicitation and prepare the way for its success."[85] Speeches, press releases, advertisements and the publication of reprints or reproduction of letters may also amount to solicitation if they are part of such a continuous plan.[86]

Press releases, speeches and advertisements may be analogized to press releases issued before the filing of a registration statement under the Securities Act of 1933.[87] Such items become solicitations if they are reasonably calculated to influence shareholders' voting.

A newspaper advertisement containing an analysis of a proposed merger is not solicitation within the meaning of the act, if the purpose of the advertisement is to

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[83] SEC Securities Act Release No. 7208, Jan. 7, 1964.
[84] SEC Securities Act Release No. 5276, Jan. 30, 1956.
[85] SEC v. Okin, 132 F.2d 784 (2d Cir. 1943); SEC v. Topping, 85 F. Supp. 63 (S.D.N.Y. 1949).
[86] *Ibid.*
[87] SEC Securities Act Release No. 3844, Oct. 7, 1957.

"inform and motivate the public" rather than to solicit proxies.[88] However, it would seem, under the case of *Brown v. Chicago, R. I. & Pac. R.R.*,[89] that for a communication to be intended to inform and motivate the public, the merger or other corporate act must affect the public and there must be a tribunal or board at which the public may register its satisfaction or dissatisfaction with the proposed merger.

In an election contest, the procuring of letters of intent from stockholders is solicitation within the meaning of the proxy rules. Although the letters may be labeled as not being proxies, such letters of intent are subject to Commission regulation.[90] Even an objection to proxy material may amount to proxy solicitation.[91]

Brokers, dealers and investment advisors may be engaged in solicitation when they distribute reports, information or advice to customers. Because of the growth in the size of the investing public and the number of broker-dealer firms, a great deal of information is generated from the broker-dealers and transmitted to customers. The General Counsel of the Commission has enumerated certain characteristics of the brokerage business which make this business particularly susceptible to acts which may amount to proxy solicitation.[92] Brokers may advise customers as to the manner in which they should vote, just as they give advice relative to the purchase and sale of securities. In the regular course of business, broker-dealer firms distribute written materials containing general business and individual corporate developments. Furthermore, brokers may solicit proxies in respect of securities beneficially owned by customers but carried in "street name." [93]

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[88] Brown v. Chicago, R.I. & Pac. R.R., 328 F.2d 122 (7th Cir. 1964).

[89] *Ibid.*

[90] 2 Loss, SECURITIES REGULATION 874 (2d ed. 1961).

[91] See, *e.g.*, Dyer v. SEC, 291 F.2d 774 (8th Cir. 1961).

[92] SEC Securities Act Release No. 7208, Jan. 7, 1964.

[93] Registered national securities exchanges have formal or informal rules regulating proxy solicitation of securities beneficially owned by customers but carried in "street name." See, *e.g.*, NYSE CONSTITUTION AND RULES 450-60 (1965).

A broker's response to an unsolicited request by a customer as to how to vote is generally not considered solicitation.[94] However, if the broker volunteers advice to customers, he may be engaged in solicitation. Whether or not the voluntary advice amounts to solicitation depends upon the nature of the communication to customers and the circumstances surrounding the issuance. Generally speaking, if the nature of the materials or the manner of its distribution is reasonably calculated to influence voting, the distribution to customers will be considered solicitation.[95] Material given or sent to customers while proxy solicitation is in progress constitutes solicitation, if it offers advice on how to vote or comments on the issues which are to be resolved at the annual or special meeting of shareholders.[96] In the case of *Union Pac. R.R. v. Chicago & North Western Ry.*,[97] the court held a distribution to stockholders of a broker-dealer's report to be solicitation because the report contained opinions opposing a proposed merger and thereby offered advice on how to vote.

Material which is distributed by a broker at the same time that the broker distributes material for someone else would be solicitation within the meaning of the act, thus requiring filing with the Commission and observance of Commission rules.[98]

Where there is no contest involved, broker-dealers may issue research reports and other investment information without being engaged in solicitation, providing the investment information does not offer voting advice or comment upon matters which are to be voted upon by shareholders.[99] The General Counsel of the Commission has taken the position that "even where there is a contest, ordinary investment advisory material distributed in the ordinary course of business is not necessarily a solicitation but more care is called for." [100]

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[94] Securities Act Release No. 7208, Jan. 7, 1964.
[95] *Ibid.*
[96] *Ibid.*
[97] 226 F. Supp. 400 (N.D. Ill. 1964).
[98] *Supra* note 94.
[99] *Ibid.*
[100] *Ibid.*

The Commission has provided that the following acts do not constitute solicitation: (1) providing a form of proxy upon the unsolicited request of a shareholder; (2) mailing by management of proxy statements furnished by shareholders; or (3) ministerial acts for a person soliciting a proxy.[101] The distribution of periodic earning reports and other business reports sent to shareholders is not solicitation, providing they are sent in the ordinary course of business and not in connection with a proxy contest.[102]

The following solicitations are exempt from the Commission's proxy rules: (1) solicitation of ten or less persons by someone other than management; (2) solicitation by someone, other than a voting trustee, in respect of securities in his name, the name of a nominee, or in his custody, under certain circumstances; (3) solicitation by a person in regard to securities of which he is the beneficial owner; (4) solicitation in the offer or sale of certificates of deposit or other securities registered under the 1933 act; (5) certain solicitations in respect of reorganization under the Bankruptcy Act;[103] (6) certain solicitations subject to the Public Utility Holding Company Act;[104] (7) solicitations through newspaper advertisements if the advertisement only names the issuer, states the reason for the advertisement, states the proposals to be acted on by shareholders, and states where proxy forms and materials may be obtained.[105]

Exemption number (2), as described above, was intended for brokers, bankers, or other persons who would be acting in a ministerial capacity and not making solicitations of their own.[106] The person transmitting the material

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[101] SEC Securities Act Release No. 5276, Jan. 30, 1956.
[102] *Ibid.*
[103] Specifically, this exemption relates to "a plan of reorganization under Chapter X of the Bankruptcy Act, as amended, if 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." SEC Securities Act Release No. 7566, April 8, 1965.
[104] Specifically, those solicitations that are subject to Holding Co. Rule 62.
[105] SEC Securities Act Release No. 7566, April 8, 1965.
[106] SEC Securities Act Release No. 7408, Sept. 1, 1964.

must act impartially and transmit all material promptly to the beneficial owners.[107] Brokers who transmit their own material along with another person's soliciting material may lose the exemption and thus be required to conform with the Commission's rules.[108]

Until 1942, solicitations of proxies on an intrastate basis were exempt from Commission regulation. Since 1942, there has been no such exemption.[109] Apparently, the Commission has taken the position that registration pursuant to section 12 or registration as an investment company or holding company provides a sufficient constitutional basis for Commission regulation of intrastate solicitations.[110] Furthermore, the wording of the statute infers the congressional intent that the Commission shall have regulatory control over intrastate solicitation of proxies.[111]

REQUIREMENTS OF PROXY FORM, ANNUAL REPORT, PROXY STATEMENT AND INFORMATION STATEMENT

The philosophy underlying the Commission's proxy regulation rules is the full and fair disclosure of information to security holders so as to allow a knowledgeable and intelligent vote in corporate affairs. To implement this goal, the Commission's regulations are designed to require the distribution by all persons soliciting proxies of a proxy statement containing prescribed information on the business and persons involved in the solicitation.[112] All persons from whom a proxy is solicited must be furnished with such a proxy statement either before or at the time of the solicitation.[113] However, under certain circumstances, solicitations are permitted prior to the distribution of proxy

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[107] *Ibid.*
[108] SEC Securities Act Release No. 7208, Jan. 7, 1964.
[109] SEC Securities Act Release No. 3347, Dec. 18, 1942.
[110] Loss, *supra* note 90.
[111] Securities Exchange Act of 1934, § 14(a), as amended, 78 Stat. 569 (1964), 15 U.S.C. § 79n(a) (1965).
[112] SEC Securities Act Release No. 7775, Dec. 22, 1965.
[113] *Ibid.*

statements in the event of a contest for election of directors,[114] or in the event of opposition to other proposed action to be taken at a meeting of shareholders.[115]

Solicitation prior to the distribution of proxy statements in the event of election contests or other corporate contests is permitted to allow opposition groups to put their arguments and contentions before security holders within sufficient time before the meeting of shareholders so that serious consideration may be given to such proposals. However, in the event of such pre-proxy statement solicitations, no form of proxy may be provided to security holders until a complete proxy statement is furnished,[116] and a complete written proxy statement must be furnished to security holders at the earliest practicable date.[117] Furthermore, each pre-proxy statement communication to security holders must contain information concerning the identity of all persons on whose behalf the solicitation is made and the security holdings of such persons in the business association involved in the contest.[118]

Proxy statements, even in the case of pre-proxy statement solicitations, are the main vehicles by which security holders are informed by management and opposition of either contested or uncontested proposals to be voted upon at meetings of security holders. In view of the importance of proxy statements, the Commission has adopted a detailed and technical schedule of information that must be included in proxy statements.[119] In addition to the contents and form of proxy statements, the Commission has adopted rules establishing requirements as to the form of proxy[120] and as to the contents and form of annual reports[121] which must be furnished to security holders whose proxies are solicited by management with respect to an

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[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*
[119] See SEC Schedule 14A, Regulation 14A.
[120] SEC Securities Act Release No. 7775, Dec. 22, 1965.
[121] SEC Securities Act Release No. 7508, Jan. 15, 1965.

annual meeting of security holders at which directors are to be elected.

A. The Form of Proxy (The Box Rule)

The Commission's rules with respect to the requirements of proxy forms are designed to require the person soliciting to furnish a proxy which clearly and impartially indicates each matter which will be acted upon, whether proposed by management or any other person.[122] Proxy forms must be prepared to permit by ballot a specific approval or disapproval by each security holder of each such matter.[123] Such specific approval or disapproval is commonly accomplished by the inclusion of boxes on the proxy form which the security holder may check to signify a vote FOR or AGAINST a particular proposal.

If a security holder does not indicate his choice with respect to approval or disapproval of a specific proposal, the proxy may confer discretionary authority over such matters to the person soliciting the proxy, providing that the proxy form contains a statement in bold-face type as to how the proxy will be voted when no choice is indicated by the security holder.[124]

No boxes for specific approval or disapproval of election of directors need be provided on the proxy form, unless the form provides both for election of directors and for balloting on other specified matters.[125] If the proxy form provides both for election of directors and for balloting on other specified matters, then boxes or other means must be provided whereby security holders may signify that they withhold authority to vote for elections to office.[126] The purpose of boxes or other means of signifying such withholding of authority is to enable security holders to vote upon proposals submitted to them without authorizing the proxy for election of directors.[127] Any form executed

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[122] *Supra* note 120.
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.* See also SEC Securities Act Release No. 7481, Dec. 7, 1964.
[127] *Ibid.*

by a security holder in a manner not signifying the withholding of such authority is deemed to convey such authority, providing a statement to this effect is included in bold-face type on the form of proxy.[128] However, a proxy form may not, under any circumstances, convey authority to vote for the election of any office for which a bona fide nominee is not named in the proxy statement.[129]

A box or other means of signifying the withholding of authority to vote for directors need not be included in the proxy form if the election of directors is an integral part of a plan of merger or consolidation, or if the only other matter to be voted upon is the selection of auditors.[130]

Proxies may give discretionary authority with respect to matters which are not specifically mentioned in the proxy form or statement, provided that the person on whose behalf the proxy is solicited is not aware, within a reasonable time before the solicitation, that such matters may be presented at the meeting.[131] A statement to the effect that such matters are not known at the time of the solicitation must be included in the proxy form or statement in order to confer such discretionary authority.[132]

The proxy form must contain a specifically designated blank space for dating the proxy.[133] A Commission rule prohibits the solicitation of proxies which are undated, postdated, or provide that they shall be deemed to be dated as of a date subsequent to the date on which it was signed by the security holder.[134] Proxy forms may not be drawn to give authority to vote at any annual meeting other than the next annual meeting to be held following the date on which the proxy statement and form are sent to security holders.[135]

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[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid.*
[133] *Ibid.*
[134] SEC Securities Act Release No. 4775, March 31, 1952.
[135] *Supra* note 119.

The proxy form must state in bold-face type whether or not it is solicited on behalf of management.[136] It must state that the shares represented by proxy will be voted, and that the shares will be voted in accordance with the specific choice of the security holder if a specific choice has been indicated on the form.[137]

Although the Commission rules provided for the size type to be used in proxy statements,[138] there are no such requirements with regard to the form of proxy. Apparently, any size type or form is acceptable providing the form is clear and readily discernible.

Proxy forms may not be used to advocate particular proposals except that management is permitted to state that it favors or opposes a particular proposal. Furthermore, the format of the proxy form may not be prepared in a manner which would direct a security holder's attention to a place for voting in a particular way.[139] Advocation of proposals, with the single exception of management's favor or disfavor with regard thereto, must be confined to the proxy statement.

Proxy forms furnished by management are generally labelled with a proxy number which is used for identification purposes,[140] and such forms usually contain a statement of the number of shares represented by the form. A common practice is to include a memorandum on the form advising security holders to sign exactly as their names appear on the stock certificate, and that persons signing in a representative or fiduciary capacity shall insert their title or capacity. These common practices are not required by the Commission, but are commonly followed to insure valid proxies that may be related to the appropriate security holder.

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136 *Ibid.*
137 *Ibid.*
138 SEC Securities Act Release No. 4775, March 31, 1952.
139 P-H SECURITIES REGULATION, *Report Bulletin* ¶245 (1966).
140 Several of the registered securities exchanges also require such number or symbol labelling for identification purposes. *E.g.,* NYSE CONSTITUTION AND RULES, Rule 451(b) (1965).

Although the Commission rules do not contain provisions requiring the appointment of more than one proxy, it is common practice to name two or more persons to insure the presence of at least one named proxy at the meeting.

The proxy form of a listed company is set forth below and illustrates the following requirements established by the Commission: (1) boxes provided for the specific approval or disapproval of particular proposals; (2) no box for the specific approval or disapproval of directors, but, because the proxy form provides for the ratification of an Employee's Stock Purchase Plan as well as election of directors, a box is provided so that security holders may signify that they withhold authority to vote for directors; (3) a provision conferring authority to vote in favor of such other matters, not known at the time of the solicitation, as may arise at the meeting; (4) a bold-face type statement that the proxy is solicited on behalf of management; (5) a bold-face type statement that the proxy will be voted as specified by the security holder, or, if not specified, in a particular manner; and (6) a specifically designated place for dating the proxy.

FRONT SIDE

WOMETCO ENTERPRISES, INC.

Proxy

The undersigned hereby appoints MITCHELL WOLFSON and FREDERICK H. SCHROEDER, and each of them, proxy for the undersigned, with full power of substitution, to vote all stock of WOMETCO ENTERPRISES, INC. owned by the undersigned at the annual meeting of stockholders to be held at Miami, Florida on April 11, 1966 and any adjournments thereof;

1. For the election of nine directors for the ensuing year.
2. FOR ☐ or AGAINST ☐ the proposal to appoint Haskins & Sells, Public Accountants, as the General Auditors of the Company for the year 1966.
3. FOR ☐ or AGAINST ☐ the proposal to approve and ratify the Employees' Stock Purchase Plan of the Company adopted by the Board of Directors on October 18, 1965 as described in the accompanying proxy statement.

4. For such other matters (not known at the time of the solicitation of this proxy) as may properly come before the meeting.

You may withhold authority to vote for elections to office by placing an X in the box appearing on the following line.

Do not vote for directors. ☐

(*Continued and to be Dated and Signed on Reverse Side*)

REVERSE SIDE

This proxy will be voted as specified by you. If not otherwise specified, this proxy will be voted FOR the nine directors named as nominees in the accompanying proxy statement and FOR the appointment of Haskins & Sells as General Auditors of the Company and FOR the proposal to approve and ratify the Employees' Stock Purchase Plan of 1965 of the Company.

Date .....1966.

Signed .....

Stockholder's Signature

NOTE: Please sign exactly as your name appears on the stock certificate as shown by the stencil appearing on this proxy. If stock is owned jointly each joint owner should sign. When signing as attorney, executor, administrator, trustee or guardian, please give full title. Proxies executed by a corporation should be signed with the full corporate name by duly authorized officer or officers.

PROXY SOLICITED ON BEHALF OF MANAGEMENT

The proxy solicited by the management of another listed company is set forth below, and illustrates the Commission rule eliminating the necessity of a box to signify withholding authority to vote for directors. Such elimination is allowed in this proxy form because the only matter to be acted upon, other than election of directors, is the election of auditors.[141] This proxy form also illustrates the common practices of stating the number of shares represented by the proxy on the form, labelling the form with a reference number (18006), and providing instructions for the proper signature of the security holder.

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[141] *Supra* note 120.

FRONT SIDE

PITTSBURGH PLATE GLASS COMPANY

Proxy

For Annual Meeting

Please sign, date, and return this Proxy in the enclosed envelope before April 6, 1966.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned shareholder of Pittsburgh Plate Glass Company hereby appoints DAVID G. HILL, JAMES F. JUNGE, and R. F. BARKER, or any of them, proxies for the undersigned to vote at the Annual Meeting of the Shareholders of the Company at One Gateway Center (Eleventh Floor), Pittsburgh, Pennsylvania, on Wednesday, April 6, 1966, at 10 a.m., or any adjournments thereof, in the election of Directors, in the election of Auditors, and in the transaction of any other business that may lawfully come before the meeting, hereby revoking any proxy heretofore given by the undersigned for said meeting.

Without limiting the general powers hereby conferred, the said proxies are directed to vote as follows:

FOR ☐ AGAINST ☐

the election of Haskins & Sells as Auditors for the ensuing year.

REVERSE SIDE

This proxy is solicited on behalf of the Management. The shares represented hereby will be voted for the election of Directors and as directed on the foregoing proposal for the election of auditors, but if no direction is given, they will be voted for such proposal. 18006

———— Name———————— 204

.....

SIGNATURE

....., 1966

DATE

Please sign name exactly as it appears hereon. Executors, administrators, trustees, etc. should so indicate when signing. If the shareholder is a corporation, the full corporate name should be inserted and the proxy signed by an officer of the corporation, indicating his title.

Three preliminary copies of the form of proxy, clearly marked as "preliminary copies," must be filed with the Commission, together with three copies of the proxy state-

ment and other soliciting material, at least ten days before the date final forms of proxy, proxy statements and other materials are first distributed to security holders.[142] The Commission, for good cause shown, may permit proxy forms and other materials to be filed less than ten days prior to the date such materials are first furnished to security holders.[143]

Eight final copies of the form of proxy, proxy statements and other soliciting material must be filed with the Commission no later than the date final proxy forms and other materials are first distributed to security holders.[144] At the same time such final copies are filed with the Commission, three copies of such final proxy forms and other final materials must be filed with, or mailed to, all national securities exchanges upon which any class of securities of the subject corporation is listed.[145] The purpose of this latter requirement is to provide information from which national securities exchanges may notify member firms of proxy solicitation; member firms may, in turn, obtain and distribute to its customers, for whom securities are held in "street name," proxy forms, statements and other materials.

All preliminary and final proxy forms filed with the Commission must be accompanied by a document stating the date such forms are to be distributed to security holders.[146]

If a form of proxy is amended or otherwise changed, such amended or otherwise changed copies must be filed with the Commission within the time limitations described above and in the number described above. Furthermore, two copies of the amended form of proxy must be appropriately labelled or marked so that the amendments or changes are clearly indicated.[147]

The Commission warns persons soliciting proxies not to print final proxy forms and other materials until the

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142 SEC Securities Act Release No. 7566, April 8, 1965.
143 *Ibid.*
144 *Ibid.*
145 *Ibid.*
146 *Ibid.*
147 *Ibid.*

comments of the Commission's staff have been considered.[148] Comments of the Commission's staff are mailed to the person soliciting the proxies after the staff has reviewed preliminary and amended proxy forms and other materials.

B. The Annual Report

Persons soliciting proxies, subject to Commission regulation, on behalf of management must give solicited security holders an annual report, either with the proxy statement, or before distribution of the proxy statement, if the solicitation relates to an annual meeting at which directors are to be elected.[149] Such annual reports need not be sent before or at the same time as the proxy statement if a solicitation is being made in opposition to management, and financial information required for such reports is not available. However, in this event, management must furnish security holders with such annual reports at least twenty days before the meeting.[150]

The Commission has not prescribed a specific format for annual reports except to provide that such reports must contain financial statements for the last fiscal year [151] which reflect, in the opinion of management, the operations and financial condition of the corporation whose securities are the subject of proxy solicitation.[152] Financial statements included in such annual reports may omit details and may be condensed.[153] However, such statements may not omit information necessary to reflect fairly upon the corporation's financial condition without misleading security holders.[154]

If such financial statements differ in contents or form from the contents and form prescribed for financial state-

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148 *Ibid.*
149 SEC Securities Act Release No. 7508, Jan. 15, 1965.
150 *Ibid.*
151 Last fiscal year is defined to mean "the last fiscal year of the issuer ending prior to the date of the meeting for which proxies are to be solicited." SEC Securities Act Release No. 5276, Jan. 30, 1956.
152 *Supra* note 149.
153 *Ibid.*
154 *Ibid.*

ments which are filed with the Commission, such differences must be noted and explained in the report if they have a material effect on the financial condition or operations of the corporation.[155]

Financial statements required in annual reports must be certified by an independent public or certified public accountant.[156] However, such certification is unnecessary if those same financial statements were not required to be certified when filed with the Commission or if the Commission orders in a particular case that certification is unnecessary.[157]

If an annual report has not been furnished to security holders pursuant to Commission proxy regulations, the first such annual report must also contain a statement of the general nature and scope of the corporation's business.[158]

Four copies of each annual report must be mailed to the Commission no later than either the date on which such reports are first sent to security holders or the date on which management files preliminary copies of soliciting materials with the Commission, whichever is later.[159] Annual reports are filed with the Commission solely for the Commission's information, and such reports are not deemed to be "soliciting materials" or "filed" with the Commission so as to create civil liability or criminal responsibility which, by statute, is attached to misdeeds in respect of "soliciting materials" and materials "filed" with the Commission.[160] Furthermore, false or misleading statements in such annual reports do not create liability in favor of persons who have purchased or sold securities in reliance on such statements.[161]

C. *The Proxy Statement*

The Commission has adopted elaborate requirements with respect to the contents and form of proxy statements.

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155 *Ibid.*
156 *Ibid.*
157 *Ibid.*
158 SEC Securities Act Release No. 7508, Jan. 15, 1965.
159 *Ibid.*
160 *Ibid.*
161 *Ibid.*

Proxy statements must evidence full, fair and clear disclosure of required information in the same manner required information is disclosed in prospectuses prepared pursuant to the Securities Act of 1933.

The Commission has adopted a schedule of twenty-two items of information which must be disclosed in the proxy statement. Although the exact format and order of the Commission's schedule need not be followed by counsel in preparing proxy statements, information required by the schedule must be set forth in separate sections according to subject matter and each section must be labelled with an appropriate heading.[162]

To simplify reading of the proxy statement by security holders, the Commission requires information to be set forth in tabular form in appropriate circumstances and amounts to be stated in figures.[163] Although proxy statements are not specifically required to be printed, printed statements are preferred by the Commission; and, if printed, statements must be set in certain size type.[164]

Information required in the proxy statement but not known and not reasonably ascertainable by the solicitors may be omitted, providing a reference to this effect is included in the statement; and information contained in any other proxy soliciting material which has been furnished to all persons solicited may also be omitted from the statement, if a reference is made in such statement indicating where that information may be found.[165]

Twenty-two items of information must be contained in all proxy statements.[166]

The statement must contain any limitation on revocability and any procedure that must be followed.

In addition to a description of dissenters' rights of appraisal, statutory procedures necessary to perfect such rights must be described. Counsel must, therefore, include

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[162] SEC Securities Act Release No. 4775, March 31, 1952.
[163] *Ibid.*
[164] The statements must be in at least 10 point modern Roman type. Information included in financial statements or tabular matter may be set in 8 point type. *Supra* note 162.
[165] *Supra* note 162.
[166] See SEC Schedule 14A, Regulation 14A.

requirements under state law and must warn security holders that their failure to vote against a proposal may constitute a waiver of appraisal rights if the state law so provides.

The names of persons by whom the solicitation is made must be stated, and if the solicitation is made by management, the statement must so provide. If the solicitations are to be made by personal contact, telephone or means other than the mails, the statement must so state, and any representatives specially employed for the purposes of solicitation must be named, along with a description of the material features of any arrangement for such solicitation and the cost thereof.[167] With respect to persons engaged in making the solicitations and the costs therefor, the Commission has provided special rules requiring more detailed descriptions in respect to solicitations involving an election contest than those rules applicable when such a contest does not exist.[168]

The proxy statement must contain a description of any substantial security interest or other interest in any matter to be acted upon at the meeting of security holders, if such interest relates under certain circumstances to any person who has been a director or officer during the last year, to each person on whose behalf the solicitation is made, to each nominee for election as a director, and to all associates of such interested persons.[169] Special provisions require separate statements by persons having substantial interests in matters to be voted upon at the meeting if the solicitations involve an election contest.[170]

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[167] The following excerpt from the American Cement Corporation proxy statement relating to the 1966 annual meeting illustrates these requirements:

"The cost of the solicitation will be paid by the Company. In addition to solicitation of proxies by use of the mails, directors, officers or employees of the Company may solicit proxies personally, or by other appropriate means, and the Company may request banks, brokerage houses and other custodians, nominees or fiduciaries holding stock in their names for others to send proxy materials to and obtain proxies from their principals and will reimburse them for their expenses in doing so. The Company has retained Georgeson & Co. to assist in the solicitation of proxies at an estimated cost to the Company of $5,000, including out-of-pocket expenses."

[168] Schedule 14A, Regulation 14A, Item 3.

[169] *Id.* at Item 4.

[170] *Ibid.*

With respect to voting securities and the principal holders thereof, the following information must be provided: (1) number of outstanding shares and votes to which each class of securities which may be voted at the meeting is entitled; (2) record date entitling securities to be voted; (3) description of cumulative voting rights if election of directors is set for the meeting; (4) name of security holder and number of shares held by person owning more than ten per cent of the outstanding voting securities; (5) description of material aspects of a change of control since the beginning of the last fiscal year; and (6) any arrangements which may later result in a change of control of the corporation.

Information with respect to nominees and directors should be furnished in tabular form, and additional information must be included for each nominee and each director whose term of office will continue after the meeting.[171]

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[171] The following excerpt from the Pittsburgh Plate Glass Company proxy statement relating to the 1966 Annual Meeting illustrates the presentation of information in respect of nominees and directors.

INFORMATION ABOUT DIRECTORS

The shares represented by all proxies executed in the enclosed form will be voted for the following nominees (present incumbents) for Directors. If any nominee or nominees shall become unavailable for election, by reason of death or other unexpected occurrence, it is intended that such proxies will be voted for the election of a substitute nominee or nominees who shall be designated by the Management.

Information regarding the nominees and their associates is set forth below:

Name	Principal Occupation	Has Served as a Director Since	Shares Owned Beneficially as of 12-31-65
R. F. Barker	Vice President—Glass and Fiber Glass Group, Pittsburgh Plate Glass Company	1960	2,316
C. M. Beeghly[1]	Chairman of the Board and Chief Executive Officer, Jones & Laughlin Steel Corporation[2]	1965	200
Guy J. Berghoff	Vice President and General Manager, Coatings and Resins Division, Pittsburgh Plate Glass Company	1962	2,071
Frank R. Denton	Vice Chairman of the Board, Mellon National Bank and Trust Company	1961	105
David G. Hill	President, Pittsburgh Plate Glass Company	1954	2,430
James F. Jungé[3]	President, The Pitcairn Company[4]	1960	100

If action is to be taken with respect to election of directors or any option, warrant, bonus, profit sharing, or similar plan, then certain information must be supplied in tabular form.[172]

Name	Principal Occupation	Has Served as a Director Since	Shares Owned Beneficially as of 12-31-65
J. A. Neubauer	Vice President and General Manager, Chemical Division, Pittsburgh Plate Glass Company	1962	519
Jack W. Robbins[3]	Vice President and General Counsel, The Pitcairn Company[4]	1965	103
Virgil C. Sullivan	President, Cangro Resources Ltd.[5]	1963	100
J. C. Warner	Industrial Consultant; President Emeritus, Carnegie Institute of Technology	1965	100

[1] Mr. Beeghly was elected a Director on July 1, 1965. He is Chairman of the Board and Chief Executive Officer of Jones & Laughlin Steel Corporation and has served as such since May 1, 1963. He served as President of Jones & Laughlin Steel Corporation from May 1, 1960, to May 1, 1963.

[2] Jones & Laughlin Steel Corporation is a Pennsylvania corporation, the principal business of which is the production and sale of carbon, alloy and stainless steel products.

[3] Messrs. Jungé and Robbins are directors and officers of The Pitcairn Company, which, as of December 31, 1965, was the direct beneficial owner of 3,121,296 shares (approximately 29.42% of the total outstanding shares) of the stock of Pittsburgh Plate Glass Company. Mr. Jungé directly and beneficially owns 0.11% of the common voting stock of The Pitcairn Company.

[4] The Pitcairn Company is a personal holding company.

[5] Cangro Resources Ltd. is a corporation, the principal business of which is financing business enterprises in Canada.

Such information must contain (1) the name of the nominee or director and his position with the company; (2) his principal occupation; (3) date of termination of term of office; (4) periods of previous service as a director; (5) amount of each class of securities in the corporation beneficially owned, either directly or indirectly; (6) amount of each class of securities owned by such nominee's or director's associates, if the nominee or director beneficially owns more than ten per cent of any class of securities; and (7) description of any arrangement between the nominee and any other person by which the nominee is proposed for election. The above information is required only if there will be action taken with respect to election of directors.

[172] The following excerpt from the American Cement Corporation proxy statement illustrates these requirements.

Remuneration of Officers and Directors

The following table sets forth the amount of direct remuneration paid during 1965 to each director, and each of the three highest paid officers, whose aggregate remuneration exceeded $30,000 and to all officers and directors as a group. The table also shows the estimated annual benefits payable to such persons under the Company's pension plan in the event of retirement at their normal retirement dates.

Name of Individual or Identity of Group	Capacities in Which Remuneration was Received	Aggregate Remuneration	Estimated Annual Benefits Upon Retirement
J. P. Giles	President of the Company and Chairman, Executive Committee	$ 66,250	$25,783
W. M. Caldwell	Senior Vice President	46,625	17,452
A. C. Eichenlaub	Vice President	36,041	4,511
All Directors and Officers as a Group (21 persons)		302,021	

Mr. Eichenlaub retired on February 1, 1966. The Company has retained his sevices as a consultant for a period of three years, commencing March 1, 1966, at a total compensation of $27,000, payable in installments over the term of the agreement. In case of his death or disability during the term of the agreement, the Company will continue to make these payments to Mr. Eichenlaub or his estate or beneficiary for the unexpired portion of the term. The Company has also agreed to employ one of its other officers for a period commencing April 1, 1964 and ending on his scheduled retirement date, March 31, 1967, at an annual salary of $20,000 and has agreed to retain him to render advisory services thereafter for a period of three years at a compensation of $15,000 per year. In case of death, disability or termination of employment during the period of active employment, the agreement calls for payment of the balance of the $20,000 annual salary for the year in which such event occurs and payments of $15,000 per year for a period of three years. If any of these events occurs during the period of advisory service, the $15,000 per year payments will be continued for the unexpired portion of the term.

Transactions With Nominees and Their Associates

Since January 1, 1965, the Company has paid the law firm of Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pennsylvania, of which Robert B. Wolf is a Partner, the sum of $25,007 for legal services and has paid the firm of Chickering & Gregory, San Francisco, California, of which Allen L. Chickering, Jr. is a Partner, the sum of $18,100 for legal services.

Information under this heading must include the following: (1) the name, capacity and amount of remuneration of each director whose remuneration exceeded $30,000; (2) the name, capacity and direct remuneration of each of the three highest paid officers whose remuneration exceeded $30,000; (3) the number of all officers and directors as a group and the aggregate remuneration for the group; (4) estimated annual benefits of such officers and directors upon retirement and, under certain circumstances, the amount set aside or accrued during the last year for such retirement benefits; (5) names of directors and three highest paid officers whose remunerations exceed $30,000 and number of officers as a group who will receive proposed future remuneration and the amount of such future remuneration; (6) where the market value of securities called for by options exceeds certain specified amounts, then complete descriptions of such options, securities called for, prices, market values and considerations; (7) each nominee for director, each director, each officer and each associate of such persons together with a complete description of any indebtedness of such persons to the corporation, if such persons' indebtedness exceeded a certain specified amount; and (8) a description of any transactions of the corporation during the past year involving an amount in excess of $30,000 (certain transactions excluded) with any director, officer, nominee for director, insider, or associated person.

If auditors are to be selected or approved, the names of the proposed auditors must be stated along with their financial interests, employment capacities, and directorships in the corporation and its subsidiaries.[173]

If any action is to be taken with respect to any bonus, profit sharing, pension, retirement, option, warrant or other similar plan, descriptions must be given of the material features of such plans. This provision was recently amended to require a description of benefits received under such plans within the five years preceding the proxy statement.[174]

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[173] The following excerpt from American Machine and Foundry Company proxy statement relating to the 1966 Annual Meeting illustrates this requirement.

II. SELECTION OF INDEPENDENT PUBLIC ACCOUNTANTS

The Board of Directors has selected the firm of Arthur Young & Company, independent public accountants, who have audited the accounts of the Company since 1926, to audit the accounts of the Company and its subsidiaries for the fiscal year 1966. The stockholders are asked to signify their ratification or disapproval of this selection.

IT IS RECOMMENDED THAT THE STOCKHOLDERS VOTE "FOR" THE PROPOSED RESOLUTION.

[174] SEC Securities Act Release No. 7481, Dec. 7, 1964. The following excerpt from the American Cement Corporation Annual Report illustrates these requirements.

Other Remuneration or Incentive Plans

In addition to the Plan, the Company has instituted certain other remuneration or incentive plans for its employees, including pension plans for salaried and hourly employees and various profit incentive or bonus plans. The pension plans are implemented through funded trusts to which the Company makes cash contributions on the basis of actuarial valuations of the trust assets. Within the past five years the Company contributed a total of $655,022 to its salaried employees' pension trust (for the benefit of all salaried employees, including officers and those directors of the Company who are employees) and a total of $746,978 to its hourly employees' pension trusts. It is not practicable to determine the amounts which have been contributed on account of particular individuals. As required by certain collective bargaining agreements, the Company also makes contributions to union pension trusts on behalf of some of its hourly employees who are not covered by the Company's own pension plans.

The Company has a Salaried Employees' Profit Incentive Plan which calls for incentive payments to salaried employees in any year in which certain minimum standards of profit performance are achieved. Under the plan, profit performance is measured by net return, before Federal income tax, on assets employed. As profit performance exceeds the required minimum levels, the amounts of the payments called for by the plan increase, but in no event may the total of payments under the plan in any year exceed ten percent of the Company's pre-tax profit. Entitlement to incentive payments under the plan is computed separately for salaried employees of each operating division of the Company and for all salaried employees of the Company, including the divisions. Salaried employees of an operating division of the Company are entitled to incentive payments with respect to any year in which the net return before Federal income tax on the assets employed by

If any action is proposed regarding the authorization or issuance of securities other than for outstanding securities, information must be furnished giving the title, amount and description of such securities. Moreover, the reasons for the proposed offering or issuance must be given along

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the particular division exceeds ten percent. Incentive payments have been made under the plan to salaried employees of certain of the Company's operating divisions for the years 1963, 1964 and 1965. All salaried employees of the Company, including the operating divisions, are entitled to incentive payments with respect to any year in which the Company's net return before Federal income tax on its total assets exceeds eight percent. However, the profit performance standard which would require incentive payments to all salaried employees has not been exceeded since the plan was instituted on January 1, 1963.

The Company has also had various other profit incentive or bonus plans which are no longer in effect.

The following tables summarize certain information with respect to payments made by the Company within the past five years pursuant to remuneration or incentive plans in effect within that period:

	Payments Under Salaried Employees' Profit Incentive Plan Within Past Five Years				
	1961	1962	1963	1964	1965
J. P. Giles	$.....	$.....	$.....	$.....	$.....
W. M. Caldwell	.....	.....	.....	.....	.....
A. C. Eichenlaub	.....	.....	.....	1,049	3,582
Directors and Officers as a Group	.....	.....	1,237	1,049	3,582
All Salaried Employees, including Officers and Directors	.....	.....	30,817	78,809	97,487
Hourly Employees	.....	.....	.....	.....	.....

	Payments Under Other Remuneration or Incentive Plans Within Past Five Years				
	1961	1962	1963	1964	1965
J. P. Giles	$.....	$ 24,000	$.....	$.....	$.....
W. M. Caldwell	.....	16,000	.....	.....	.....
A. C. Eichenlaub	6,850	4,936	5,178	.....	.....
Directors and Officers as a Group	14,944	131,577	5,178	.....	.....
All Salaried Employees, including Officers and Directors	294,563	628,806	208,367	31,487	16,496
Hourly Employees	326,059	240,831	240,891	208,801	268,413

The Company has also made a plan available to its salaried employees by which they may purchase Common Stock of the Company on the open market through payroll deductions. Under this plan, which is administered by a securities broker, the Company pays only its expense of payroll deductions and the actual brokerage commissions.

Reference is made to the section on "Remuneration of Officers and Directors" for a description of certain other remuneration payments.

with a description of the transaction and the effect upon the rights of existing security holders.[175]

With respect to proposals regarding the modification of securities or any exchange of securities, the material difference between the outstanding and modified or new securities must be described along with the reasons for the modification or exchange. A statement must also be included which explains any arrears in dividends or defaults in principal or interest regarding the securities which are to be modified or exchanged.[176]

With respect to any action which is to be taken concerning mergers, consolidations, acquisitions, sale of assets or liquidation, information must be furnished which conveys to security holders a complete picture of the nature and effect of the proposed transaction.[177] The material features of the plan or transaction must be described in connection with the reasons therefor.[178]

Proposals in respect to merger, consolidation, acquisition, liquidation, dissolution, modification or exchange of securities, or authorization or issuance of securities otherwise than for exchange require financial statements prepared in accordance with regulation S-X (the Commission's official accounting rules) to be included in the proxy statement.[179] However, the proxy statement may incorporate by reference financial statements which were con-

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[175] SEC Schedule 14A, Regulation 14A, Item 12.

[176] *Id.* at Item 13.

[177] *Id.* at Item 14.

[178] Generally speaking, information which will affect an investor's appraisal of the proposed action must be set forth in the proxy statement, and such information must include the following facts relative to the companies which are to be merged, consolidated, or whose assets are to be acquired: (1) description of the business; (2) location and description of plants and other physical properties; (3) dividends in arrears or defaults in principal or interest of securities outstanding; (4) tabulation reflecting existing and pro forma capitalization; (5) historical summary of gross earnings, net earnings per share, dividends per share and book value for the past five years set forth in columnar form; (6) combined pro forma summary, in columnar form, for the past five years of the information required in (5) *supra*; (7) interim earnings and dividend information for the current year; and (8) high and low sale prices or bid and asked prices for each quarterly period within the last two years, if the securities of the companies involved have a market or are traded on a national securities exchange.

[179] SEC Schedule 14A, Regulation 14A, Item 12.

tained in an annual report distributed to security holders, providing those financial statements conform to the requirements of regulation S-X.[180]

If action is to be taken regarding the acquisition or disposition of property, a description of the property, consideration therefor, names and addresses of transferors and transferees, and material features of any contracts must be included in the proxy statement.[181]

With respect to proposed restatements of assets, capital or surplus accounts, the proxy statement must describe the nature of the restatement, reasons for the restatement, effective date of the restatement, amount affected, and the extent to which the amounts available for dividends are changed.[182]

The proxy statement must include a description of any reports of directors, officers or committees which are to be approved or disapproved at the meeting.[183]

A statement of the reasons for any amendments to the charter, by-laws or other documents must be included along with an analysis of the effect of such amendments.[184]

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[180] *Ibid.*

[181] *Supra* note 179, at Item 16.

[182] *Supra* note 179, at Item 17. See also SEC Securities Act Release No. 7481, Dec. 7, 1964.

[183] SEC Schedule 14A, Regulation 14A, Item 18.

[184] The following excerpt from the Tennessee Gas Transmission proxy statement relating to the 1966 Annual Meeting illustrates these requirements:

Change of Company Name

The name Tennessee Gas Transmission Company no longer accurately and completely describes the full scope of the Company's activities. Integrated oil operations, chemical manufacturing and marketing, and packaging now stand with natural gas transportation as the four major areas of business activity at Tennessee Gas. Added to these are the Company's investments in life insurance, real estate and banking. After allocation of Federal income tax payments and credits, more than 50% of the Company's consolidated gross and net revenues were derived from non-pipeline activities in 1965.

In recognition of these factors, the Board of Directors has proposed that the Company name be changed to Tenneco Inc. The proposed name is free from restrictive terminology. Additionally, the name Tenneco has gained public recognition and acceptance through its use by Tenneco Oil Company and Tenneco Chemicals, Inc. The Tenneco emblem, which appears on the back of this proxy statement, has served for several years to identify products manufactured and sold by these subsidiaries.

The resolution to be submitted to stockholders provides for an amendment of the Company's Certificate of Incorporation to change the name of the Company to Tenneco Inc. The resolution is as follows:

If a matter is not required to be submitted to a vote of security holders, but is nevertheless submitted, then the nature of such matter and the reasons for requesting the vote of security holders should be incorporated in the proxy statement.[185]

Finally, the vote required for approval of resolutions must be stated in the proxy statement with respect to each matter upon which the security holder will vote.[186]

The rules relating to the filing of proxy statements with the Commission are the same as those which relate to proxy forms.[187] Therefore, the number of preliminary and final proxy statements which must be filed with the Commission and the time of filing will be the same as the number of proxy forms which must be filed and the time at which they must be filed. These numbers and time periods have been described previously in relation to proxy forms.[188]

D. Proposals of Security Holders

Management must set forth in its proxy statements proposals, except those relating to election of directors, submitted by security holders within a reasonable time before the solicitation.[189] If management opposes the proposal, it

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"BE IT RESOLVED by the stockholders of Tennessee Gas Transmission Company (herein called the "corporation"), that the Certificate of Incorporation of the corporation, as amended, be, and the same hereby is, further amended by changing Article First to be and read as follows:

'FIRST: The name of the corporation shall be TENNECO INC. (hereinafter sometimes called the "corporation").'"

The adoption of this resolution is recommended to the stockholders by the Board of Directors as being advisable and in the best interests of the Company. If the proposed name change is approved, the interstate pipeline businesses of the Company and its subsidiaries will be operated under the names "Tennessee Gas Pipeline Company" (a division), "Midwestern Gas Transmission Company" and "East Tennessee Natural Gas Company," respectively.

A vote of the holders of a majority of the outstanding Second Preferred Stock and Common Stock voting together as a single class, is necessary for the adoption of the proposed amendment.

[185] SEC Schedule 14A, Regulation 14A, Item 19.

[186] *Id.* at Item 22. The vote required for election of directors or approval of auditors need not be stated.

[187] SEC Securities Act Release No. 7566, April 8, 1965.

[188] See examples of proxy forms *supra.*

[189] SEC Securities Act Release No. 4979, Feb. 6, 1954.

must include in its proxy statement the name and address of the proposing security holder and a statement furnished by the security holder, in 100 or less words, in support of the proposal. However, such proposals and statements may be omitted by management from its proxy statement under certain circumstances.[190]

Management must follow a prescribed procedure if it omits proposals and statements. This procedure includes submission of such proposals and statements to the Commission together with management's reasons for omitting these items from its proxy statement.[191]

The following proposals may be omitted from the management proxy statement: (1) proposal to end double taxation of dividends;[192] (2) proposal to revise the antitrust laws;[193] (3) proposal to have company end segregated seating in the South;[194] (4) proposal that corporation revise its pension plan to increase employee benefits (because such a proposal, under Delaware law, relates to a corporation's ordinary business activities);[195] (5) proposal to bar directors and officers from spending corporate funds for "false" and "deceptive" advertising and for corporate communications to security holders;[196] (6) proposal to amend corporate charter (because, under Missouri law, shareholders may not propose charter amendments);[197] (7) proposal for by-laws which would bar voting for or against a proposal unless the proxy is so marked by the security holder (because such a by-law would be contrary to the

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[190] Generally speaking, proposals and statements may be omitted (1) if under the laws of the corporation's domicile, they are not a proper subject for security holder action; (2) if they relate to a personal claim or grievance or if they relate to general political, economic, racial, religious or similar causes; (3) if they recommend the management to take action on a matter within the ordinary business of the corporation; or (4) if they have been proposed previously and have been defeated within a certain number of years by a certain number of votes.

[191] *Ibid.*

[192] SEC Securities Act Release No. 3638, Jan. 3, 1945.

[193] *Ibid.*

[194] Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951).

[195] Curtin v. American Tel. & Tel. Corp., 124 F. Supp. 197 (S.D.N.Y. 1954).

[196] Dyer v. SEC, 266 F.2d 33, 42 (8th Cir.), *cert. denied*, 361 U.S. 835 (1959).

[197] Dyer v. SEC, 289 F.2d 242 (8th Cir. 1961).

Missouri law permitting the stockholder to give an unsolicited discretionary proxy);[198] (8) proposal requesting security holders to oppose the directors proposed by management;[199] (9) proposal that corporation create a stockholder relations office;[200] (10) proposal that nominees for re-election be disqualified as candidates for directorships;[201] and (11) security holder's statement opposing management's proposal that the authorized stock of the corporation be increased.[202]

The following proposals are proper matters to be included in management's proxy statement: (1) proposal to have independent auditors elected by the security holders;[203] (2) proposal to abolish by-law requirement providing that notice of proposed amendment to by-laws be included in the notice of meeting;[204] and (3) proposal that corporation mail to security holders a report of the annual meeting proceedings.[205]

Proxies solicited on behalf of management may be voted at the meeting for the election of directors although management's proxy statement omitted proper proposals of a security holder.[206]

In addition to including proper proposals of security holders in the proxy statements, management, if it intends to solicit certain proxies, must give to security holders information concerning the approximate number of holders of record of the corporation's securities, the approximate number of beneficial owners of securities, and an estimate of the cost of mailing of proxy statements, form of proxy or other materials to security holders.[207] Furthermore, security holders may furnish management with proxy soli-

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[198] Holding Co. Act Release No. 13962 (1959).
[199] *Ibid.*
[200] Dyer v. SEC, *supra* note 196, at 41-42.
[201] *Supra* note 197.
[202] Dyer v. SEC, *supra* note 196.
[203] SEC v. Transamerica Corp., 163 F.2d 511 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948).
[204] *Ibid.*
[205] *Ibid.*
[206] The rule requiring inclusion of proposals of security holders in management's proxy statement does not apply to elections to office. *Supra* note 189.
[207] SEC Securities Act Release No. 5276, Jan. 30, 1956.

citation materials, and management must mail these materials to all security holders.[208] The security holder making this request of management must pay the reasonable costs of such distribution.[209] However, management may elect not to mail these proxy materials if it furnishes the security holder making such a request with a current list of names and addresses of security holders.[210]

E. Information Required to be Distributed When There is no Solicitation

The 1964 amendments to the Securities Exchange Act of 1934 provided an important new requirement for companies whose securities are subject to Commission proxy regulation but whose management does not solicit proxies in accordance with the Commission rules.[211] As a result of the 1964 amendments, such companies must file with the Commission and distribute to all holders of record information which is equivalent to the information which would be included in a proxy statement.

The document which must be distributed when there is no solicitation of proxies has been named the "information statement." [212] This statement must include the information which would be contained in a proxy statement.[213] On the first page of the information statement, the following sentence must appear in bold-face type:

WE ARE NOT ASKING YOU FOR A PROXY AND YOU ARE REQUESTED NOT TO SEND US A PROXY.[214]

The date, time and place of the meeting of security holders must be included in the information statement. Although the meeting may not involve an election of directors or be concerned with directors' benefits, a description must be included in the information statement of security

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208 *Ibid.*
209 *Ibid.*
210 *Ibid.*
211 Securities Exchange Act of 1934, § 14(c), as amended, 78 Stat. 570 (1964), 15 U.S.C. § 78n(c) (1965).
212 SEC Securities Act Release No. 7774, Dec. 30, 1965.
213 SEC Schedule C, Regulation 14C.
214 *Ibid.*

holdings and other interests in the corporation of directors and associates.[215] Furthermore, the information statement must include the name of any director who has told management that he intends to oppose an action to be taken by management at the meeting.[216]

Management must include in the information statement a description of proposals to be made by security holders at the meeting.[217] Management's intentions to rule such a proposal out of order at the meeting must be stated in the information statement and, in such case, management must also so advise the Commission within a certain time period.

The information contained in the information statement must be presented according to the same formal requirements prescribed by the Commission for the proxy statement,[218] and filing requirements for information statements are the same as those requirements for proxy statements.[219]

Information statements must be distributed to every security holder who is entitled to vote at any meeting of security holders, and such statements must be so furnished at least twenty days before the meeting date.[220]

If the information statement relates to an annual meeting of security holders at which directors are to be elected, it must be accompanied or preceded by an annual report.[221] Such reports must conform to the same requirements established by the Commission for annual reports which precede or accompany proxy statements,[222] and the filing requirements for reports are identical to those established for reports which accompany or precede proxy statements.[223]

If a company knows that its securities are held of record by broker-dealers, banks or voting trustees, the company must ascertain whether such record holders are also

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215 *Ibid.*
216 *Ibid.*
217 *Id.* at Item 5.
218 SEC Securities Act Release No. 7774, Dec. 30, 1965.
219 *Ibid.*
220 *Ibid.*
221 Sec. Exch. Act Rule 14c-3.
222 *Ibid.*
223 *Ibid.*

beneficial holders and, if so, it must furnish record holders with sufficient information statements and annual statements for distribution to all beneficial owners.[224] Reasonable expenses incurred by record holders in the distribution of information statements and annual reports to beneficial owners must be paid by the companies required to furnish such materials to security holders.[225]

F. Rules Relating to Election Contests

The Commission has prescribed special rules which are applicable to proxy solicitations with respect to the election or removal of directors. These rules require the filing of certain information with the Commission by participants in election contests.

Participants who must file the required information, if an election contest exists, include: (1) the issuer of the applicable securities; (2) directors and nominees for directorship; (3) committees, groups, members thereof, and any persons who solicit proxies or who engage in the financing of such committees, groups or persons; (4) any person who lends money or furnishes credit for the purpose of financing or inducing the purchase, sale, holding or voting of securities in support of or in opposition to participants.[226]

Any person who merely contributes 500 dollars or less is not a participant,[227] and banks and broker-dealers who lend money in the ordinary course of business for the purchase or sale of securities are not participants.[228] Persons engaged in ministerial duties for participants, and persons engaged as attorneys, accountants, advertising, public relations or financial advisors are not participants within the meaning of the Commission's rules.[229] Finally, regularly employed officers or employees of the issuer and regularly employed officers, directors or employees of other partici-

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224 Sec. Exch. Act Rule 14c-7.
225 *Ibid.*
226 SEC Securities Act Release No. 7775, Dec. 22, 1965.
227 *Ibid.*
228 *Ibid.*
229 *Ibid.*

pants are not, as such, participants subject to the Commission's rules.[230]

Persons who are participants must file with the Commission, within prescribed time periods, a statement in duplicate containing certain information.[231]

With respect to the identity and background of the participant, business associations must furnish such information for each partner, officer and director. Identity and background information must include the participant's name, business and residence addresses, principal occupation, material occupations and employments within the preceding ten years, criminal convictions within the preceding ten years and other proxy contest participation within the preceding ten years.[232]

The information statement filed by participants must be signed by participants or their authorized representatives, and participants must certify that the information contained in the statement is true and complete.

Under certain circumstances, solicitation of proxies may be undertaken prior to furnishing security holders with the required proxy statement. One of the circumstances in which such solicitation is permitted is the existence of an election contest.[233] The special requirements relating to pre-proxy solicitation have already been described.

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[230] *Ibid.*

[231] SEC Schedule 14B, Regulation 14A. Such information must include the following: (1) name and address of the issuer; (2) identity and background of the participant; (3) participant's interest in the securities of the subject corporation; (4) amount of any interest of the participant in any transactions, during the past year or in the future, of the subject corporation; (5) arrangements for future employment or transactions with the subject corporation; (6) the amount contributed or to be contributed by the participant, in excess of five hundred dollars, in support of the solicitation; and (7) a description of the circumstances under which the participation in the solicitation arose and the nature and extent of the participant's activities in the solicitation.

[232] SEC Schedule 14B, Regulation 14A, Item 1.

[233] SEC Securities Act Release No. 7775, Dec. 22, 1965.

SANCTIONS FOR VIOLATION OF PROXY RULES

Generally speaking, proxy materials are processed by the Commission through an examination and letter of comment similar to the examination and letter of comment used with respect to registration statements under the Securities Act of 1933. However, the Commission does not have authority to use a stop-order procedure, applicable under the Securities Act of 1933, with respect to proxy materials which do not conform to the Commission's specifications. It is suggested that the Exchange Act be amended to grant the Commission stop-order remedies for violations of proxy rules.

In its enforcement of proxy rules, the Commission may (1) conduct investigations;[234] (2) publish information relating to proxy violations;[235] (3) bring disciplinary proceedings when the wrongdoer is a broker, dealer or exchange member;[236] (4) delist securities involved in proxy solicitation offenses; (5) request the Attorney General of the United States to prosecute wilful offenders;[237] and, (6) seek injunctive relief in the district courts.[238]

The Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Investment Company Act of 1940 provide the Commission with power to bring actions to enjoin violations of those acts. Furthermore, the Securities Exchange Act of 1934 and the Public Utility Holding Company Act of 1935 confer upon the Commission authority to seek writs of mandamus commanding compliance with those acts and the rules thereunder.[239] The most important weapon of the Commission in enforcing its proxy rules is the injunction.

No provision of the Exchange Act, Holding Company Act or Investment Company Act specifically grants anyone

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[234] Securities Exchange Act of 1934, § 21, 48 Stat. 899 (1934), 15 U.S.C. § 78(u)(a) (1958).
[235] *Ibid.*
[236] Securities Exchange Act of 1934, § 15, 78 Stat. 570-73 (1964), 15 U.S.C. § 78*o*(b) (1965).
[237] Securities Exchange Act of 1934, § 32, 48 Stat. 904 (1934), 15 U.S.C. § 78 (1958).
[238] *Supra* note 234.
[239] *Ibid.*

other than the Commission authority to bring suit for violations of the proxy rules. Therefore, there has been uncertainty as to whether a private right of action existed for violation of the Commission's proxy rules.

This uncertainty was removed when the Supreme Court of the United States, in the case of *J.I. Case Co. v. Borak*,[240] held that a stockholder had an implied private right of action for damages, both direct and derivative, for violations of the proxy provisions of the Securities Exchange Act of 1934 and the Commission rules thereunder.

In the *Borak* case a corporate merger was approved by a small margin of votes, and the merger was then consummated. The plaintiff, a complaining security holder, alleged that the merger would not have been approved but for the false and misleading statements in the proxy material, and that stockholders were damaged by the merger. The Court concluded that the plaintiff had an implied private action under Section 27 of the Securities Exchange Act of 1934.[241]

Most cases which result in Commission proceedings, criminal sanctions or private actions for proxy violations arise out of false or misleading statements contained in proxy soliciting materials. Under these cases it has been held that the plaintiff must prove the following three essential elements to warrant a recovery: (1) false or misleading statements, (2) a causal relationship between the false or misleading statements and the injury claimed,[242] and (3) that the false or misleading statements were significant and material in that they influenced or reasonably could have influenced security holders to give proxies.[243]

Whether or not statements are false or misleading depends upon the facts and circumstances of each case. However, the Commission has ruled that the following statements may be misleading:

(a) Predictions as to specific future market values, earnings, or dividends.

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[240] 377 U.S. 426 (1964).
[241] *Ibid.*
[242] Barnett v. Anaconda Co., 238 F. Supp. 766 (S.D.N.Y. 1965).
[243] Western Oil Fields, Inc. v. McKnab, 232 F. Supp. 162 (D.C. Colo. 1964).

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.
(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.
(d) Claims made prior to a meeting regarding the results of a solicitation.[244]

Failure of the Commission to object to proxy solicitation materials does not constitute a certification that the statements in such materials are true and complete. Therefore, a security holder's action for alleged false statements in proxy material was not barred when the Commission did not take action with regard to the alleged false materials.[245]

In the case of *Evans v. Armour & Co.*,[246] management omitted from its proxy statement information concerning a potential antitrust suit, statement of a fourteen per cent decline in earnings during the first six months of the corporation's fiscal year, and the limited partnership interest of a director of the corporation in a banking firm which was promoting the merger between the corporation and another corporation. The court held that these omissions were not material and denied the claim. With respect to the potential antitrust suit, the court relied upon an opinion of corporation counsel which stated, in effect, that there were no grounds for any antitrust suit. With regard to the decline in earnings, the court found that the specific earnings information was not available at the time the proxy statement was prepared, and that a drop in earnings was noted in the proxy statement. Finally, with respect to the director's limited partnership in the investment banking firm, the court held that such an omission was not actionable because the director would receive no share in the

[244] SEC Securities Act Release No. 7775, Dec. 22, 1965.
[245] Millimet v. George F. Fuller Co., No. 65 Civ. 1678 (S.D.N.Y. 1965).
[246] 241 F. Supp. 705 (E.D. Pa. 1965).

profits of the investment banking firm from promotion of the merger.

The following statements in proxy materials have also been held not false or misleading: (1) listing as a candidate for director a person who, after solicitation of proxies, resigned (because the corporation had no knowledge that the nominee intended to resign);[247] (2) corporation's omission of cost of maintaining a hotel suite for a corporate officer;[248] (3) management's omission of a statement, in its proposal to increase authorized stock, that limitations on preemptive rights could be removed by the security holders; and (4) management's motives for a proposed action.[249]

Generally speaking, the cases which have held statements to be materially false or misleading, and therefore actionable, have been concerned with failure to furnish information relative to financial backers of insurgents,[250] false statements relative to background of insurgents,[251] failure to give names of former corporate officers who were the leaders of a stockholder committee,[252] materially misleading statements as to earnings, assets and dividends,[253] failure to state an interest in corporation *A* of a person who was nominated as a director in corporation *B* when *A* and *B* corporations proposed a merger between them,[254] and a statement that the corporation generally gave security holders warrants to subscribe to new stock when such warrants were only given on one occasion.[255]

Proxies obtained as a result of materially false or misleading statements may be voted on corporate proposals which were not related to the false or misleading statements. This doctrine is known as the principle of partial validity, and it was invoked by the courts in *SEC v. Transamerica*

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[247] Kauder v. United Board & Carton Corp., 199 F. Supp. 420 (S.D.N.Y. 1961).
[248] Dunn v. Decca Records, Inc., 120 F. Supp. 1 (S.D.N.Y. 1954).
[249] Doyle v. Milton, 73 F. Supp. 281 (S.D.N.Y. 1947).
[250] SEC v. May, 229 F.2d 123 (2d Cir. 1956).
[251] SEC v. Gondelman, 166 F. Supp. 429 (S.D.N.Y. 1958).
[252] Henwood v. SEC, 298 F.2d 641 (9th Cir. 1962).
[253] SEC v. Okin, 132 F.2d 784 (2d Cir. 1943).
[254] The Pacific Coast Co. v. Coleman, No. 39717 (N.D. Cal. 1961).
[255] Union Elec. Co., Holding Co. Act Release No. 13962 (1959).

Corp.[256] In the *Transamerica* case the Commission complained that management failed to include in the proxy statement proposals by a minority security holder. The court held that the proxies could be voted for the election of directors since the minority shareholder's proposals did not relate to the election of directors.

In *Textron v. American Woolen Co.*,[257] the court held that false or misleading statements as to nominees for offices and directorships did not invalidate the re-election of management when such re-election would have occurred even if the proxies so obtained had been voted in opposition to management re-election.

PROXY SOLICITATION REGULATION IN RESPECT OF REGISTERED HOLDERS WHO ARE NOT BENEFICIAL OWNERS

The New York Stock Exchange has adopted rules regulating the proxy solicitation practices of its members. These rules are designed to control proxy solicitation in respect to securities which are not beneficially owned by Exchange members but which are registered in the names of Exchange members.[258] Therefore, the Exchange proxy rules are applicable to the solicitation of proxies with regard to securities carried in "street name" and they are applicable to members of the Exchange regardless of whether the securities so carried are listed or unlisted.[259] Exchange proxy controls over members are also applicable to allied members, member organizations (partnerships and corporations) and employees of members and member organizations.[260]

The Exchange rules provide that members must transmit to beneficial owners of stock all soliciting materials received from persons soliciting proxies, provided that the person so soliciting agrees to reimburse the member for

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[256] 163 F.2d 511 (3d Cir. 1947), *cert. denied,* 332 U.S. 847 (1948).
[257] 122 F. Supp. 305 (D.C. Mass. 1954).
[258] NYSE CONSTITUTION AND RULES, Rule 450 (1965) (hereinafter cited as RULES).
[259] *Ibid.*
[260] RULES, Rule 455.

expenses.[261] Along with the soliciting material, members must send to beneficial owners either (1) a request for voting instructions, or (2) a signed proxy showing the number of shares held and a "code number" identifying that particular proxy.[262]

A request for voting instructions must contain a statement that, if voting instructions are not received by the tenth day before the shareholder meeting, the proxy may be given at the discretion of the owner of record.[263] However, such a statement may not be included when, under certain circumstances, members may not vote without the instructions of the beneficial owner.[264] If the Exchange member elects to send signed proxies to beneficial owners, he must also transmit a letter to the beneficial owner explaining the necessity of completing the proxy form and returning it to the person soliciting the proxy.[265]

Annual reports, interim reports and all other materials must be transmitted to beneficial owners in the same manner that proxy statements and forms are distributed.[266] First class mail must be used to transmit the proxy material, and Exchange members must transmit the materials even though the beneficial owners may have instructed them not to do so.[267]

Exchange members are required to advise the soliciting party of the number of proxies sent to customers and of identifying "code numbers." [268] If the soliciting party does not receive completed proxies before the meeting, he may require the Exchange member to send another request.[269]

Members of the New York Stock Exchange must keep accurate records reflecting the number of shares under a single proxy, "code numbers" relating to each proxy, date of receipt of proxy material, and the names of beneficial

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261 RULES, Rule 451.
262 *Ibid.*
263 *Ibid.*
264 *Ibid.*
265 *Ibid.*
266 *Ibid.*
267 RULES.
268 RULES ¶ 2451.30 (1965).
269 *Ibid.*

owners to whom the proxies and materials are sent.[270] The Rules of the Board of Governors require members to retain, for a period of not less than three years, all proxy solicitation records and communications relating to such solicitation.[271]

If the Exchange member has properly transmitted soliciting material and a request for voting instructions but has not received voting instructions within the prescribed time period, the member may vote without instructions from the beneficial owner providing (1) he has no knowledge of a contest relative to the matter scheduled for vote at the meeting, and (2) the matter to be voted upon at the meeting is clearly made known to shareholders and is not a matter which may have substantial effect upon the rights of stockholders.[272]

The Board of Governors has published the following list of matters which may not be voted upon without instructions from the customers:[273]

(1) mergers or consolidations;
(2) rights of appraisal;
(3) mortgaging of property;
(4) creation or alteration of indebtedness;
(5) creation or alteration of any kind or class of security or rights relating to securities;
(6) waiver or modification of preemptive rights;
(7) changes in quorum requirements;
(8) matters which are contested;
(9) certain matters relating to profit-sharing, retirement or similar plans;
(10) material changes in the purposes and powers of a company;
(11) sale or other disposition of certain assets;
(12) certain transactions not in the ordinary course of business;
(13) substantial reductions in earned surplus;

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[270] RULES ¶ 2452.16 (1965).
[271] RULES ¶ 2452.20 (1965).
[272] RULES ¶ 2452.10 (1965).
[273] RULES ¶ 2452.11 (1965).

(14) matters which are not transmitted to shareholders in a proxy statement similar to that required in the rules of the Securities and Exchange Commission.

The Exchange publishes a weekly bulletin which contains a list of stockholder meetings. Each meeting is labelled with a symbol which indicates that members may vote without instructions from customers, that specific matters may not be voted upon without such instructions, or that the member may not vote upon any matter on the proxy without such instructions.[274]

With regard to the prohibition against Exchange members voting upon contested matters when uninstructed by beneficial owners, the court in *Dyer v. SEC*[275] held that mere opposition by stockholders to management proposals without counter-solicitation is not a contest. Therefore, under such circumstances, brokers may give proxies in support of management's proposals.

Exchange members and certain persons associated with them may not participate in a proxy contest of a company if such member is a specialist in the stock of that company.[276] Other Exchange members may engage in proxy contests or make demands on management in companies, subject to the rules of the Securities and Exchange Commission, if they file with the Exchange certain required information.[277]

In addition to the New York Stock Exchange several of the thirteen registered securities exchanges[278] have adopted formal proxy solicitation rules. The rules adopted by the American, Midwest and Philadelphia-Baltimore-Washington Stock Exchanges are identical, in most re-

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[274] *Ibid.*

[275] Dyer v. SEC, 266 F.2d 33, 42 (8th Cir.), *cert. denied,* 361 U.S. 835 (1959).

[276] RULES ¶ 2460 (1965).

[277] RULES ¶¶ 2457-58 (1965).

[278] The registered securities exchanges are as follows: American, Boston, Cincinnati, Detroit, Midwest, New York, National, Pacific Coast, Philadelphia-Baltimore-Washington, Pittsburgh, Salt Lake, and Spokane. The Chicago Board of Trade is a registered securities exchange, but has had no securities transactions since September 22, 1953.

spects, with the proxy rules of the New York Stock Exchange.[279]

Those exchanges which do not have formal proxy solicitation rules for their members have informal rules requiring the distribution of proxy materials to beneficial holders by members of the Exchange who are record holders.[280] Furthermore, many members of the regional exchanges are also members of the New York Stock Exchange, and such dual members are governed by New York Stock Exchange proxy solicitation rules even when functioning as a member of a regional exchange which has no formal proxy solicitation rules.

Section 14(b) of the Securities Exchange Act of 1934 governs the giving or failing to give proxies by brokers or dealers with respect to securities carried in the name of the broker for a customer. That section provides as follows:

> It shall be unlawful for any member of a national securities exchange, or any broker or dealer registered under this title, 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, to give, or to refrain from giving a proxy, consent or authorization in respect of any security registered pursuant to Section 12 of this title and carried for the account of a customer.[281]

No rules have been adopted by the Commission under section 14(b) regulating the giving of proxies by brokers or dealers with respect to securities carried for the account of customers. Although rule 14(c)-7 [282] requires the soliciting company to supply record holders with proxy materials, that rule does not require the distribution of such materials to beneficial owners by record holders.

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[279] AMERICAN STOCK EXCHANGE CONSTITUTION AND RULES, Rules 575-81 (1965); PHILADELPHIA-BALTIMORE-WASHINGTON RULES OF THE BOARD, Rules 851-60 (1965); MWSE RULES, Rules 1-8.

[280] This information is not documented, but it is believed to be on reliable authority.

[281] 48 Stat. 895 (1964), 15 U.S.C. § 78n(b) (1965).

[282] SEC Securities Act Release No. 7774, Dec. 30, 1965.

Similarly, rule 14(a)-2[283] exempts solicitations by record holders from the Commission rules if such holders receive no compensation for the solicitation, promptly furnish all soliciting materials to the beneficial owner, and do no more than impartially instruct the beneficial owner to give a proxy or direction for voting; but that rule does not specifically require distribution of proxy materials to beneficial owners.

In addition to the surprising absence of implementation rules under section 14(b), that section relates only to brokers and dealers and does not relate to voting trustees, banks and nominees who may hold securities in their names for other persons. Apparently, there is no provision in the act or in the rules of the Commission which requires distribution of proxy materials by these persons to beneficial owners.

The absence of rules requiring distribution of proxy materials to beneficial owners by brokers, dealers, banks, voting trustees and their nominees is a serious gap in the act and the Commission rules. Commission rules should be adopted regulating and specifically compelling record holders of securities to deliver proxy materials to beneficial owners.

In the case of *Walsh v. Peoria & E. Ry.*,[284] the United States District Court inferred in dictum that the Commission rules propounded under section 14(a) are applicable to section 14(b), and that the rules under section 14(a) require distribution of all materials to all beneficial shareholders. Apparently, that case did not receive appellate review. This dictum in *Walsh* was based upon the wording of rule 14(a)-2 which, as stated above, does *not* specifically require distribution of proxy materials to beneficial owners.

This area of proxy solicitation regulation is in need of clarification by the Commission so that the gap in the rules may be filled without the necessity of judicial inference.

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[283] SEC Securities Act Release No. 7566, April 8, 1965.
[284] 222 F. Supp. 516 (S.D.N.Y. 1963).

CONCLUSION

The rules of the Commission with respect to the information which must be disclosed to security holders and the presentation of such information are designed to furnish sufficient facts to permit a knowledgeable and effective voice in corporate affairs. These Commission rules are so extensive that any recommendations for improvement would be in the area of refinement rather than in the area of creation of new rules, and the Commission periodically announces refinements as experience discloses weaknesses. However, the relatively small number of public corporations subject to the Commission's rules reveals a significant weakness in the present scope of federal proxy regulation.

Although the 1964 amendments to the Securities Exchange Act of 1934 extended Commission proxy regulation to certain over-the-counter securities, the great majority of over-the-counter issuers remained without governmental control in this important area of securities regulation. The limited number of over-the-counter issuers covered by the 1964 amendments has been explained on the basis of "the burden on the issuers, the administrative burden on the Commission, and the public interest to be protected." [285]

Based upon the recommendations of the Special Study, it is questionable whether the public interest is being properly protected under the 1964 amendments and whether the coverage of a greater number of over-the-counter issuers would unduly burden the Commission. The Special Study recommended that registration, reporting and proxy regulation be extended to over-the-counter issuers with three hundred or more shareholders. In previous congressional efforts to extend coverage under the Securities Exchange Act of 1934, attempts were made to regulate over-the-counter issuers with fifty,[286] three hundred,[287] and five hundred [288] or more shareholders. It is submitted by the writers that the standard established by the 1964 amendments (five

[285] S. REP. No. 379, 88th Cong., 1st Sess. 20 (1963).
[286] H.R. 7955, 82d Cong., 2d Sess. (1952).
[287] S. 2408, 81st Cong., 2d Sess. (1949).
[288] S. 1860, 82d Cong., 1st Sess. (1951).

hundred or more shareholders) is inadequate in view of the number of publicly held issuers not subject to Commission rules.

With respect to the financial burden on issuers required to comply with Commission proxy rules, the Special Study concluded that issuers with $1,000,000 or more in assets (the second criteria for registration with the Commission by over-the-counter issuers) and three hundred or more shareholders would not be substantially burdened in view of the public interest to be protected. It is the strong feeling of the writers that further amendment of the statute is in order. More specifically, adoption of the criteria recommended by the Special Study would serve to furnish much needed additional investor protection.

The absence of rules controlling the proxy solicitation practices of foreign issuers is another significant weakness in the coverage aspects of the Commission's rules. The Commission recognizes that "American investors in foreign securities should be afforded the same protection as American investors in domestic securities." [289] However, because of the practical problems of enforcement, Commission rules have not yet been adopted to regulate foreign issuers. In the past decade a substantial number of foreign issuers have sold their shares in the American market. For example, the market value as of December 31, 1964, of all shares and certificates representing foreign securities on United States exchanges was $17,000,000.[290] This figure does not include the value of over-the-counter foreign securities owned by United States citizens. It is hoped that regulation of foreign securities will be adopted in the near future.

There is no legislative enactment or Commission rule which requires record holders of securities to distribute proxy materials received by them to beneficial holders. Although the exchanges have adopted rules requiring such distribution, there are many non-exchange member brokers and dealers, banks, voting trustees and other record holders

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[289] SEC, 31ST ANNUAL REPORT 9 (1965).
[290] *Id.* at 46.

who are not compelled to deliver proxy materials to beneficial owners. It is submitted that this situation could be remedied at least in part by Commission adoption of specific rules under section 14(b), and it is the strong recommendation of the writers that such rules be promulgated at an early date.