1956

Congressional Investigation of Proxy Regulation: A Case Study of Committee Exploratory Methods and Techniques

Frank D. Emerson

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Business Organizations Law Commons

Recommended Citation
Frank D. Emerson, Congressional Investigation of Proxy Regulation: A Case Study of Committee Exploratory Methods and Techniques, 2 Vill. L. Rev. 75 (1956).
Available at: http://digitalcommons.law.villanova.edu/vlr/vol2/iss1/5

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
NOVEMBER 1956]

CONGRESSIONAL INVESTIGATION OF PROXY REGULATION: A CASE STUDY OF COMMITTEE EXPLORATORY METHODS AND TECHNIQUES

FRANK D. EMERSON

Introduction.

IMPETUS FOR CONGRESSIONAL investigation of proxy regulation developed principally from two immediate sources. One originated in the interval between the proxy contest for the New York Central Railroad in the spring of 1954 and the Montgomery Ward & Company proxy contest of spring 1955, namely, with the filing by Senator Homer E. Capehart on February 1, 1955 of Senate Bill 879 to amend section 16(a) of the Securities Exchange Act of 1934. The amendment proposed for section 16(a) would require reports to the SEC of changes in beneficial ownership, not only, as at present, by officers and directors of stock exchange listed companies, but also by the beneficial owners of more than five per cent of the outstanding equity securities of listed companies, instead of, as at present, merely by those with more than ten per cent beneficial ownership. While neither the bill nor the Senator's press release make any reference to section 14 of the Exchange Act dealing with proxies, it was presumably anticipated that, if the Senator's bill to amend section 16(a) of the Exchange Act should be passed, the SEC would then modify its administrative regulations under section 14 of the act so as to require proxy statement disclosures when beneficial holdings of equity securities exceed five per cent.

The other, and doubtless principal, development pointing to a congressional investigation of proxy regulation was Finding 12 of

* This article was prepared as a paper for a course in “Law and Politics: Congressional Investigations Seminar” given in the 1956 Summer Program for Law Teachers at New York University School of Law by Sidney Davis, Esq., of the New York Bar.

† Professor of Law, University of Cincinnati; A.B., 1938, University of Akron; LL.B., 1940, Western Reserve University; Kenneson Fellow, Summers 1955 & 1956, and Candidate for J.S.D., New York University School of Law.


(75)
the Senate’s “Stock Market Study” released on May 27, 1955. The finding quoted the blanket authority given the Securities and Exchange Commission under section 14 to promulgate rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, and then referred to the Capehart Bill’s objective of requiring additional securities-ownership disclosures regarding listed companies. “This question,” the study declared, “together with the whole subject of modern methods of corporate control, and effective corporate democracy, through the exercise of the right to vote, share in importance.” A Subcommittee, the Securities Subcommittee as a matter of fact, under the chairmanship of Senator Herbert H. Lehman, the study concluded, “would shortly hold public hearings on these subjects.”

The purpose of this paper is to examine the methods and techniques employed to date in the pending congressional investigation of proxy regulation by Senator Lehman’s Subcommittee, particularly the scope and depth of the data presented in the statements submitted by the witnesses called before the Subcommittee. It is proposed to consider the data presented by the five 1955 witnesses and the six 1956 witnesses, making in all a total to date of ten persons inasmuch as Chairman J. Sinclair Armstrong of the SEC appeared as a witness in both 1955 and 1956. Attention will also be given to the proxy solicitation statistics contained in a recent SEC report and supplemental schedules filed by the SEC Chairman during May 1956 in connection with the Fulbright Bill, with the Securities Subcommittee’s parent, the Senate Committee on Banking and Currency. In conclusion, various suggestions regarding the direction and method of developing further subcommittee data and recommendations will be offered.

I.

Witnesses Called and Scope of Their Statements.

The five witnesses who were called and presented statements at the hearings held on June 1, 8, 9, and 15, 1955 dealt almost exclusively with proxy contests proper, rather than other aspects of proxy regu-
tion. Four of the witnesses, Louis E. Wolfson, John A. Barr, Robert R. Young, and William White, confined themselves either to their own experience in the 1954 New York Central Railroad contest, the 1955 Montgomery Ward & Co. contest, or to legislation relating to the broad matters of corporate control and corporate or shareholder democracy. SEC Chairman J. Sinclair Armstrong confined his testimony to proxy contests alone, making only the briefest passing reference to what he characterized as "the thing called 'corporate democracy,'" and expressly directed himself to no specifically designated contests.13

A. The 1955 Witnesses.

1. Louis E. Wolfson.14 At the outset Mr. Wolfson, the leader of the opposition in the Montgomery Ward contest, affirmed that proxy contests are wholesome, because, similar to public elections, they serve to focus attention on the stewardship of those holding and aspiring to office.15 In the interest of effective corporate democracy he called for: (1) ownership of company's shares by officers and directors; (2) reasonable relationship between officers' salaries and the company's earnings; (3) limitations on officers' and directors' pensions; (4) fair dividend payments; and (5) corporate democracy through a full voice for shareholders in management affairs without limitations by use of the stagger system or the withholding of corporate information.

Stock exchanges and government agencies, Mr. Wolfson asserted, should: (1) require reports of all compensation to officers and directors by any company which has reduced or passed a dividend payment; and (2) admit a company's shares to listing only when it has shown itself worthy of trust and its directors have demonstrated an awareness of their role as shareholder trustees.

On the basis of his experience in the Montgomery Ward & Co. proxy contest, Mr. Wolfson made the following suggestions regarding tightening the SEC proxy regulation: (1) clarification of SEC powers concerning proxy contest soliciting material, including pre-proxy

---

13. Ibid.
15. To the same effect see EMERSON & LATCHAM, SHAREHOLDER DEMOCRACY: A BROADER OUTLOOK FOR CORPORATIONS 69-70, 138-44 (1954); and GILBERT, DIVIDENDS AND DEMOCRACY 139-180 (1956).
statement soliciting material; (2) simultaneous release of management and non-management proxy statement soliciting material; (3) restriction on use of the annual report as a vehicle for soliciting material; (4) full disclosure of all activities relating to proxy soliciting, including: purchase of shares; use of employees, suppliers, institutions, and others as proxy solicitors; amounts to be expended by both sides in the contest; and resignation of nominees; (5) prompt SEC clearance of news releases and advertisements; (6) full information regarding nominees; (7) availability of stock lists to bona fide shareholders acting in good faith; and (8) clarification of SEC policy concerning press conferences.

Regarding the broad matter of inter-corporate control, Mr. Wolfson commented on: (1) disclosure of inter-company transactions; (2) holdings of competitors' shares; (3) restrictions on use of unions' shareholdings for bartering in connection with their collective bargaining.

2. John A. Barr. Mr. Barr, called of course, concerning the management view of the Montgomery Ward contest, at once affirmed, as had Mr. Wolfson, that there should be no limitation on the right of shareholders to change the management, but insisted that there should be protection against the sudden intrusion into management of "hidden" financial interests. He then made specific reference to the circumstance that apparently "over 700,000 shares of Ward stock . . . [were] owned by unnamed and unidentified members of the Wolfson group." As his second point, Mr. Barr interposed an objection to what he regarded as SEC censorship of proxy soliciting material. Finally, he pointed out that the Capehart Bill would have had no effect on the Montgomery Ward contest, even though it should reduce the beneficial ownership reporting requirements from ten to five per cent, because, as in many other large companies, no one owns even as much as one per cent of Montgomery Ward common stock.

3. William White. Mr. White presented the management view of the New York Central contest. In essence he took the same three
positions as Mr. Barr of Montgomery Ward, and added that: (1) beneficial owners of "street" shares should be required to send to the contesting group they favored evidence of the authority of their broker to vote the shares; and (2) "staggered" terms of directors should be sanctioned and encouraged by law.

4. Robert R. Young. Mr. Young, successful leader of the New York Central opposition group, opened his testimony with an attack on interlocking railroad and bank boards of directors. He followed with six recommendations for encouraging share-ownership and emancipation of management from interlocks, to the betterment of competitive enterprise: (1) provide a secret ballot for shareholders, but require truth and full disclosure for contestants in proxy contests; (2) limit the use of employees for proxy solicitation, and limit the use of corporate funds to a "sum fixed in relation to past normal experience, until approved by stockholders"; (3) prohibit intervention of other corporations, their directors, officers, or employees in proxy contests; (4) separate trust and commercial banking functions; (5) separate investment banking and brokerage firms from their affiliated investment companies if the latter are owned by the public; and (6) prohibit interlocking directorates between banks, investment bankers, investment companies, insurance companies, mutual savings banks, pension funds, endowment funds and foundations with or through other large corporations.

5. J. Sinclair Armstrong. SEC Chairman Armstrong, following introductory material regarding the SEC's statutory authority and administrative procedures, commented on nine of the SEC's more important problems in dealing with a proxy "contest for control." The nine problems referred to were: (1) when does "solicitation" begin in a proxy contest; (2) what constitutes "solicitation"; (3) what standards shall govern the content of soliciting material, with particular attention to: (a) pre-proxy statement soliciting material; and (b) supplemental or post-proxy statement material; (4) what SEC action is required when it appears that soliciting material is incomplete or misleading; (5) disclosure of financial interests and motivation by opposition groups; (6) character and reputation attacks; (7) methods,


21. See Emerson & Latcham, op. cit. supra note 15 at 142 concerning proportional reimbursement of insurgents, successful or unsuccessful.

22. See note 12 supra. See also Address by SEC Chairman Armstrong, New England Group, American Society of Corporate Secretaries, June 1, 1955.
strategy, and tactics of solicitation; (8) deals between opposing sides; and (9) inclusion of soliciting material in the annual report.

Among the various remedies for these problems the SEC Chairman proposed that: (1) the proxy rules should be clarified expressly to permit pre-proxy statement solicitations, upon the conditions that: (a) newly evolved "statements" be filed with the SEC incident to proxy solicitation by "each member and associate of an opposition group and each nominee"; (b) the proxy statement contain such of the "proposed new statements" information as the SEC may by its rules require; and that (2) no solicitation of more than ten persons by an opposition group or by any management may begin, until the newly to be prescribed "statements" had been filed with the SEC. In each instance the suggested "statements" would be required to be filed by each member, associate, and nominee concerning his identity, employment, business experience, stock ownership, date of acquisition, how financed, how owned, corporate connections, and criminal record, if any, for the preceding ten years. In addition to these two proposals, the Chairman made reference to some eight others, most of which would simply codify present and previously existing SEC administrative practice regarding proxy contests.

Summary.

From the synopsis descriptions of the 1955 witnesses' statements to the Subcommittee it is apparent that, except for the SEC Chairman, they confined themselves either to the New York Central or the Montgomery Ward proxy contests or to general expressions of opinion regarding the broad questions of corporate control and corporate or shareholder democracy. In both the New York Central and the Montgomery Ward contests, it may be noted, there was extensive use of pre-proxy statement soliciting material.

The SEC Chairman, on the other hand, limited himself to proxy contests alone, but deliberately did not address himself to any particular contests. Consequently, even if his suggestions for amendments of the proxy regulation growing out of resort to pre-proxy statement solicitation appear on the record developed by the Subcommittee appropriate to contests such as those involving New York Central and Montgomery Ward, they can only be properly applicable to all proxy contests, if all contests are in all respects closely similar to the Central

---

and Ward contests. To express the matter in somewhat different words, the SEC Chairman’s proposals for the later SEC-adopted schedule 14B statements, even if appropriate in contests such as those at Central and Ward, will be fairly applicable to all contests, only if these two contests are typical of proxy contests generally.

The vital question here that, therefore, remains for investigation by the Subcommittee is, are the Central and Ward proxy contests typical? More specifically, why should schedule 14B “statements” be required to be filed, irrespective of whether pre-proxy statement soliciting material is disseminated? Why should such information have to be duplicated in the schedule 14B “statement” and in the proxy statement, particularly where there is no resort in a particular contest to pre-proxy statement soliciting? In how many proxy contests since December 31, 1952 has there been use of pre-proxy statement soliciting material? In how many such contests has there been no use of pre-proxy statement soliciting material? Do both contests for representation and contests for control require schedule 14B statements, especially when no pre-proxy statement solicitation is carried on?

B. The 1956 Witnesses.

1. A. Wilfred May.4 Mr. May, financial columnist for the Commercial and Financial Chronicle, with one exception, limited his statement to a call for repeal of the 1954 limitations imposed by the present SEC on the shareholder proposal rule. Besides urging equal space for shareholder and management supporting statements relating to shareholder proposals, instead of the present one hundred word limitation on shareholders, he requested: (1) that in view of the declines in 1954, 1955 and 1956 in the number of shareholder proposals, there should be abolished the requirement that for a stockholder proposal to be resubmitted it must have received three per cent of the total vote the first time it was submitted, and six and ten per cent respectively, the next two times; (2) rescission of the four year ban on shareholder proposals not drawing the three-six-ten per cent votes; and (3) relief from omission of proposals on the ground that they relate to the “conduct of the ordinary business operations.” In closing his statement Mr. May called for reimbursement of non-management

groups' proxy contest expenses, possibly on the basis of the obtaining of some minimum percentage of the vote less than fifty-one per cent. 26

2. Edward R. Aranow. 26 Mr. Aranow's law firm represented the non-management group that conducted proxy contests for control of Twin City Rapid Transit Co. in 1949, United Cigar-Whelan Stores, Inc., in 1951, and Twentieth Century-Fox Film Corporation in 1953, and also the management of Decca Records, Inc., in 1954. As regards six legal problems arising under the Exchange Act, he advocated amendments to: (1) extend the proxy rules to other than listed companies; (2) require management solicitation of proxies; (3) make clear that private parties as well as the SEC have a right to judicial enforcement of the proxy rules; (4) provide judicial review of SEC action or refusal to act; (5) afford SEC authority to set aside an election for violations of the proxy rules; and (6) empower state court consideration of violations of the proxy rules.

With respect to the proxy rules themselves, Mr. Aranow suggested: (1) "easier" obtainment of a "copy of the stockholders' list"; (2) provision for bona fide compromise of proxy contests; 27 and (3) filing and disclosure of more information regarding proxy contest expenses. As a miscellaneous suggestion, he proposed that a study be made of the effect on corporate elections of investments by union pension funds in corporate securities.

3. Lewis D. Gilbert. 28 Mr. Gilbert, America's leading minority shareholder and author of the recent book Dividends and Democracy, called for four reforms: (1) passing of the Fulbright Bill so as to subject publicly-held over-the-counter companies to the proxy regulation and other requirements of the Exchange Act; (2) amendment of the Fulbright Bill so as to make it applicable to publicly-held banks; (3) amendment of the Exchange Act to require management to solicit proxies; and (4) senatorial investigation into the manner in which

25. Cf. note 21 supra.


27. Cf. supra note 12 at 29-30 concerning disclosure in soliciting material of "Deals between Opposing Sides."

fiduciaries, pension funds, profit sharing plans, and investment trusts and mutual funds are voting proxies for the shares they hold.29

4. Wilma Soss.30 Mrs. Soss, President of the Federation of Women Shareholders in American Business, Inc. urged, among other things: (1) adoption of a secret ballot procedure; (2) study of unmarked proxy practices; and (3) proportional voting of shares in affiliated companies.

5. Abraham Weiner.31 Mr. Weiner presented the statement of his partner, Henry Mayer, Esq., counsel for the AT & T independent telephone unions. He attacked the 1954 amendments to the shareholder proposal rule, as had Mr. May, particularly the exclusion of shareholders' pension proposals on the ground of being within the "conduct of the ordinary business operations" and their "galloping" three-sixty per cent resubmission requirement.

6. Leo Brady.32 Mr. Brady, a partner in the New York City law firm that represented the non-management group involved in the 1955 Libby, McNeill & Libby proxy contest, was concerned over purely legal procedures relating to the granting of injunctions against proxy solicitation on a preliminary motion.33

7. J. Sinclair Armstrong.34 In addition to statements regarding a pending new rule relating to broker-dealer nominee voting of customers' shares, the SEC Chairman stated that the new proxy contest rules effective since January 1956 have been "working well" for approximately a dozen proxy contests waged under them. The new rules expressly pertain, among other things, to pre-proxy statement solicitation, and require the filing of schedule 14B statements by any "participant," irrespective of whether pre-proxy statement solicitations

However, as in his testimony of a year earlier, no specific supporting basis for the conclusions expressed was presented by the SEC Chairman.

**Summary.**

There was testimony in 1956, as in 1955, with reference to broad questions of corporate control and corporate and shareholder democracy. Some of the suggestions would require at least amendments to the Exchange Act and others, perhaps, still further legislation. In addition, two of the 1956 witnesses, Mr. May and Mr. Weiner, called for rescission of the 1954 amendments to the shareholder proposal rule. Moreover they supported their specific suggestions for repeal with pertinent data bearing on the operation of the 1954 amendments to the shareholder proposal rule during 1954, 1955, and 1956.

**II. SEC Report to the Senate Banking and Currency Committee.**

While not actually a part of the record developed by the Securities Subcommittee, there is readily available to it recent statistical data relating to proxy regulation, for such material is contained in an SEC report and supporting schedules filed with the parent Committee on Banking and Currency in connection with the pending Fulbright Bill. The data covers: (1) non-solicitation of proxies by managements of listed companies; (2) operation of the 1954 amendments to the shareholder proposal rule; and (3) proxy contests conducted during 1954, 1955, and 1956 to May 18.

As to non-solicitation, briefly, an SEC schedule shows that the ratio of non-soliciting companies to soliciting companies in 1955 was 24.3 per cent or approximately the same as it was in 1952. The supporting data presented by Mr. May and Mr. Weiner in their request for repeal of the shareholder proposal rule's 1954 amendments substantially confirms the serious doubts expressed regarding the amendments and the concern over their adoption, as set out in Bayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule Making Process: The 1954 Amendments*, 40 Va. L. Rev. 387, 427-429 (1954).

---


36. The supporting data presented by Mr. May and Mr. Weiner in their request for repeal of the shareholder proposal rule’s 1954 amendments substantially confirms the serious doubts expressed regarding the amendments and the concern over their adoption, as set out in Bayne, Caplin, Emerson & Latcham, *Proxy Regulation and the Rule Making Process: The 1954 Amendments*, 40 Va. L. Rev. 387, 427-429 (1954).

37. See SEC Report, op. cit. supra note 11.


PROCEDURE STEPS WOULD APPEAR LONG OVERTIME IN ORDER TO BAR NON-SOLICITATION AND PARTIAL SOLICITATION.

CONCERNING SHAREHOLDER PROPOSALS, THE SEC’S SCHEDULES SHOW THAT THE NUMBER OF SHAREHOLDERS WHOSE PROPOSALS WERE CARRIED IN MANAGEMENT PROXIES STATEMENTS IN BOTH 1954 AND 1955, THIRTY-ONE AND THIRTY-SIX, RESPECTIVELY, IN ABSOLUTE TERMS WAS LOWER THAN THE THIRTY-NINE FOR 1953, THE LAST YEAR BEFORE THE 1954 AMENDMENTS TO THE SHAREHOLDER PROPOSAL RULE BECAME EFFECTIVE. Moreover, the number of management proxy statements filed increased in both 1954 and 1955 to 1,846 and 1,973, respectively, from the 1,838 filed in 1953, with the result that, although 2.1 per cent of the 1953 management proxy statements carried shareholder proposals in 1953, only .9 per cent of both the 1954 and 1955 management proxy statements carried shareholder proposals. In addition, excluded shareholder proposals increased in 1954 and 1955 to fifty-four and sixty-two, respectively, and neither of these SEC figures takes into account still other proposals made ineligible for presentation under the amended three-sixten per cent requirements for resubmission. Inasmuch as the number of proposals submitted by the Gilberts increased in 1954 and 1955, it is apparent that proposals submitted by individual shareholders necessarily decreased in 1954 and 1955. These likely results of the 1954 amendments were urged to the present SEC in opposition to adoption of the 1954 amendments. It is now apparent on the basis of the SEC’s own figures that, as the witnesses May and Weiner asserted, the amendments have in effect operated harshly against the individual American shareholder, and that it is entirely appropriate for the Subcommittee to call for their prompt repeal by the SEC.

While the SEC schedules on shareholder non-solicitation and the shareholder proposal rule are clear enough as to their significance, the data filed by the SEC with the Committee on Banking and Currency concerning 1954, 1955, and 1956 proxy contests is superficial, and should be further investigated by the Subcommittee. The schedule

41. Cf. id. at 14.
42. Ibid. See SEC SCHEDULE, NUMBER OF STOCKHOLDER PROPOSALS EXCLUDED FROM MANAGEMENT PROXY STATEMENTS UNDER REGULATION X-14 OF THE COMMISSION’S RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934.
43. Id. at 2. Cf. Bayne, Caplin, Emerson, and Latcham, supra note 36 at 427.
44. Ibid. See SEC SCHEDULES, SHAREHOLDER PROPOSALS INCLUDED IN MANAGEMENT’S PROXY STATEMENTS UNDER THE COMMISSION’S X-14A-8 OF REGULATION X-14 UNDER THE SECURITIES EXCHANGE ACT OF 1934 FOR (1) 1954, AND (2) 1955.
46. Id. at 430-31.
listing the companies involved in 1954 and 1955 proxy contests should be extended to show, not merely whether the contest was for representation or for control and whether the management or the opposition won, but, to the point of the 1956 amendments requiring schedule 14B statements, the number of pieces of pre-proxy statement soliciting literature filed by the management and the opposition of each of the designated companies. This would also afford an indication as to actual need for the filing of duplicate material in the schedule 14B statements and in proxy statements.47

The schedule of companies involved in 1956 proxy contests should also be extended to make more meaningful the column indicating the number of persons filing as "participants" under schedule 14B.48 There should be a showing of the number of management and the number of opposition "participant" 49 persons filing schedule 14B statements.50 In addition, there should be another column indicating the number of pages of schedule 14B material filed by the management and the opposition participant persons, particularly since in one 1956 proxy contest the opposition filed seventy-two pages of schedule 14B statements, much of which had to be duplicated in the proxy statement of the opposition.51

III.
SUGGESTIONS REGARDING DIRECTION AND METHOD OF DEVELOPING FURTHER SUBCOMMITTEE DATA AND RECOMMENDATIONS.

The matters regarding schedule 14B statements are of grave importance to opposition groups, since the opposition is already placed at a tremendous disadvantage as a consequence of the management being able to draw on the corporate treasury for its proxy contest expenses, while the opposition must provide or advance its own.52

As the Wall Street Journal editorially said at the outset of the Subcommittee's hearings in 1955:


48. SEC SCHEDULE, PRELIMINARY REPORT ON COMPANIES FOR WHICH STATEMENTS UNDER SCHEDULE 14B OF THE COMMISSION'S PROXY RULES WERE FILED IN 1956 CALENDAR YEAR UP TO MAY 18.

49. For the all-inclusive definition in the new rules of the term "participant", see new rule X-14A-11(b).

50. Notes 55, 56 infra.


"There is a little bit of suggestion in the very origin of these hearings that some people are worried not so much about the way proxy fights are fought as about the fact that they might turn out 'badly'—that the equivalent of the political demagogue might be persuasive with the stockholder-voters. The 'wrong' group might win, to the detriment of the company and the stockholders themselves.

"The implication in this is that maybe the Government ought to do something to make proxy fights a little more difficult as a means of protecting the stockholders from marauders.

"We hope the hearings will not lead in this direction. For though there is always a danger from marauders—men who are not interested in long-term good management but just in power or a quick good thing—it is not nearly so great as the danger of hampering the stockholders' final recourse against management policies of which they disapprove."

For as the Wall Street Journal also recognized:

"In practice proxy fights are difficult enough as it is. They can rarely get under way unless there is some reason for dissatisfaction on which the outside group can capitalize. To be successful the outside group has many obstacles to overcome; the incumbent management, unless, it has caused widespread dissatisfaction, has the advantage of tradition and a proven record. To add to the obstacles would only be to lessen the need for managements to be concerned about the satisfaction of their stockholders.

"And the satisfaction of the voters is, of course, the final thing. In any election, public or private, the voters may vote in the way other people think is foolish. But to deprive them of the right to make the wrong decision is to deny them the right to decide."

What has the investigating Subcommittee developed to date? First, statistical data in the hands of the Subcommittee's parent Committee regarding the 1954, 1955, 1956 decline in use of the shareholder proposal rule by individual shareholders confirms the opinions expressed in the statements by the witnesses, A. Wilfred May and Abraham Weiner, Esq., and in the article in the May 1954 Virginia Law Review that the 1954 amendments to the shareholder proposal rule have operated restrictively against individual shareholders, and should be repealed.

Second, a rather clear case has already been made by the SEC's figures indicating a non-solicitation ratio of approximately twenty-five

---

54. Ibid. For a journalistic account of nine major proxy contests, see KARR, FIGHT FOR CONTROL (1956).
per cent. They would seem strongly to suggest that here an early amendment to the Exchange Act is needed, as it has been since 1952. It is to be noted, however, that SEC Chairman Armstrong testified on July 6, 1956 that an SEC study of the matter would be necessary. Perhaps, the basis for the Chairman’s reticence to recommend corrective legislation forthwith should be inquired into by the Subcommittee. This is a matter of importance for, as former SEC Commissioner Adams pointed out in his 1953 speech at the Hot Springs, Virginia, annual meeting of the American Society of Corporate Secretaries, Inc.:

“During 1952 there were 445 companies which filed no proxy material with the Commission. This constituted 24% of all companies having voting securities so registered. Of this number, 138 [or 31%: (138 ÷ 445 = 31%)] were nondividend-paying companies and 23 were Canadian or Cuban companies.”

It is therefore obvious that not only have twenty-four per cent of the companies subject to the SEC’s proxy regulation been disenfranchising their shareholders by non-solicitation, but that 31 per cent of the 24 per cent or about 7.5 per cent of all corporations subject to the proxy regulation are hiding their non-dividend records behind a non-soliciting policy thus perpetuating their own management position. Moreover, since the non-soliciting figure in 1955 remained at twenty-five per cent, it seems likely that the incidence of non-dividends among non-solicitors has continued as high as was noted in 1953. This loophole should be plugged at once.

Thirdly, the SEC should be required by the Subcommittee to extend the 1954, 1955, and 1956 proxy contest data-schedules, as suggested above, and to develop all further relevant material as to the asserted necessity for duplicating the 14B material in the proxy statement. Inasmuch as management enjoys, since the 1954 amendments, a $30,000 exclusion from each of several remuneration sub-items of Item 7 of schedule 14A, consideration ought also be given to increasing substantially the $500 solicitation-financing exclusion provided by the 1956 amendments respecting participants who must otherwise file schedule 14B statements.

56. For comment deploring the non-solicitation loophole, see Gilbert, Dividends and Democracy 222-25 (1956); Emerson & Latcham, Shareholder Democracy: A Broader Outlook for Corporations 48-49, 137, 138, 145, 167 (1954); Bayne, Around and Beyond the SEC—The Defranchised Stockholder, 26 Ind. L.J. 207 (1951).
57. See note 47 supra.
58. Schedule 14A, Item 7(a), (d), (f).
59. New SEC Rule X-14A-11(b)(4). See also X-14A-11(b)(5) which affords no exclusion whatever based on dollar amounts involved.
If as a corollary to further probing regarding the unnecessary burden posed by the new schedule 14B statements, the Subcommittee desires to determine why there recently have been, not substantially more proxy contests but proxy contests for substantially larger companies, the Subcommittee, with little need for seeking further facts, might take notice of the two publicly recorded phenomena. First, until the appearance of the next to last volume of the Federal Supplement published in 1950, there was no reported case that realistically could be regarded as any sort of explicit precedent for reimbursing even successful opposition groups, and therefore almost no one had the courage to risk as relatively nominal a sum as upwards of $6,000, his health, and his career, as did John J. Smith, since 1950 president of Sparks-Withington, even for control of a medium or smaller-sized publicly-held corporation. However, with the official reporting of the Steinberg case late in 1950 and the litigation that followed over the Fairchild case it became increasingly apparent after 1950 and during

60. "While men in the financial position of Mr. [Leopold D.] Silberstein, Robert R. Young, and Louis E. Wolfson can probably meet such requirements with little more difficulty than corporate management, the position of the small stockholder who may desire representation on or control of a corporate board is vastly different in terms of time and money.

"These burdensome new proxy contest rules are especially unfortunate since recent surveys of the few listed companies involved in proxy contests have established that in most instances the corporations facing opposition solicitations suffered from decadent management. As a result the new rules protect decadent and ineffective management and deter shareholder activity as well. Further and broader objection involves economic considerations. As corporations grow in size, maintenance of effective competition among them has become increasingly difficult. In addition, the entry of large new firms, because of the amounts of capital needed, has been sharply reduced. The proxy contest, because it may act to remove decadent management, can make new "entries" possible by supplying established corporations with new management. A mitigation, by means of the proxy contest, of the dangers inherent in the lack of new corporate entries would probably result in substantial benefits to society, the shareholder, and the public. Moreover, the possibility of a contest inspires incumbent management to more vigorous and faithful efforts. The weakening of the proxy rules is therefore disappointing. The individual shareholder would plainly be benefited by more representation in the administrative, as well as the legislative, process. Emerson & Latcham, Law and the Future: A Symposium: Corporation Law, 51 Nw. U. L. Rev. 196, 202-03 (1956).

61. The number of proxy contests has been declining steadily. In 1954 there were 22 such solicitations (See SEC Schedule, Non-Management Solicitations Under the Commission's Proxy Rules Involving the Election of Directors, Calendar Year 1954), in 1955 18 such solicitations (See SEC Schedule, Non-Management Solicitations Under the Commission's Proxy Rules Involving the Election of Directors), and in 1956 to May 18, and therefore covering practically all of the 1956 proxy season, 14 such solicitations (See SEC Schedule, Preliminary Report on Companies for Which Statement Under Schedule 14B of the Commission's Proxy Rules Were Filed in the 1956 Calendar Year up to May 18).


63. Id. at 51-70.


the first half of 1954 that insurgents' proxy contests expenses could be recovered if they were successful. Considered in this perspective it is not surprising to find that as a matter of fact a principal feature of the 1954 "proxy season" was the substantially larger size of the companies involved in proxy contests. As a result, even though contrary to popular opinion, there was an actual decline in the number of companies involved in proxy contests in 1953 and 1954, the total assets of companies experiencing proxy contest increased in those years, and so did the total sales figures for the reduced number of companies. With proxy contest expenses recoverable, more money could be ventured and larger companies sought. It is believed that a survey currently underway will clearly show that this trend to proxy contests for larger companies continued during 1955 and 1956 to date.

A second relevant question at this point for Subcommittee consideration is: how is it that with prospects for recovery of insurgents' expenses only if the contest is won, insurgents, since the initial publicity early in 1954 regarding the Fairchild case, have been willing to expend such huge sums in proxy contests, ranging up to the more than the one million dollars spent by Robert R. Young and his associates in the New York Central contest of 1954? The answer is to be found in: (1) new technique employed in proxy contests since early 1954 with increasing frequency, namely, the insurgents' purchase of blocks of shares of the company involved as well as the solicitation of proxies; (2) the circumstance that, due to the almost invariable presence of "decadent management" which was either ousted or roused by the contest, the market price of the company's stock almost invariably went up after the contest; and finally, (3) that the purchased stock could therefore be resold and at profits subject to the often lower capital gains, rather than the frequently higher ordinary

66. Ibid.


68. See note 61, supra.


70. The writer and his colleague are currently surveying in detail 1954, 1955, and 1956 proxy contest with a view to publishing the results in an article which will be ready for publication early in 1957.


72. See note 60 supra.

73. "I can't think offhand where the stockholder was not better off, in dividend yield or in market value, after the fight than he was before." Perham, Revolt of the Stockholder, Barron's, April 26, 1954, p. 3.
income, income tax rates. Even if one was not able to earn both control and capital gains as Mr. Young did by winning the New York Central, he might as Mr. Wolfson could, even though he lost the Montgomery Ward contest, still pay his proxy contest expenses out of his capital gains on the Montgomery Ward stock he and his group had purchased and still hold a tidy profit. As a result, even when the "battle by proxy" is lost, the stock purchase "war" may be won. Under these circumstances the real wonder is indeed that there are so few, not as some seem or purport to think, so many proxy contests.

As this consequence of the capital gains tax very substantially helps to offset the proxy contest disadvantages of insurgents, as compared to management, it provides at least one argument for retention of the present capital gains tax differential rates.

Except in the three areas relating to the proxy regulation, the data so far developed by the Subcommittee has provided only leads, though important ones, for further detailed study and investigation. But not to be overlooked are the many valuable suggestions made by the subcommittee witnesses with a view to extending generally freedom from the yoke of corporate control and encouragement of the development of corporate or shareholder democracy. While the suggestions received by the investigating Subcommittee may by some be thought of as witnesses' "speech-making," many of the suggestions warrant careful attention. Moreover, in the area of administrative law most closely allied to the field of congressional investigations, the quasi-legislative technique of "rule-making," "speech-making" is a recognized helpful procedure. However, thoughtful consideration of these broader outlooks will entail, as suggested by certain of the witnesses, a number of important and detailed "studies," and conferences, as well as further public hearings.

---


75. "What surprises me, in view of how easy it is to start a proxy fight these days, is not how many there are, but how few." Perham, note 73, supra, quoting Mr. George R. Squires of Squires & Co., a proxy soliciting firm.

76. As to rule-making generally, see Davis, Administrative Law 229-72 (1951). As to proxy rule-making, in the instance of the 1954 amendments to the shareholders proposal rule, see Bayne, Caplin, Emerson, and Latcham, note 36 supra.

77. The "speech-making" technique in administrative rule-making is discussed in Davis op. cit. supra note 76, at 238-40.

78. For a description of a "study technique," which may precede or at least partially substitute for expensive and extensive public hearings, namely, use of research techniques normally used by industry and government, see statement of Roscoe L. Barrow on June 27, 1956, Hearings Before the House Judiciary Anti-Trust Subcommittee, 84th Cong., 2d Sess. at 15-16 (1956).

79. As to the conference technique, see Davis op. cit. supra note 76 at 238-40, and Statement of Roscoe L. Barrow, note 78 supra at 16-18.
It should be noted that following the close of the taking of the testimony of the 1956 witnesses early in July it was reported, apparently on the advice of the Subcommittee, that the parent Senate Banking and Currency Committee had decided in effect to delay consideration of proxy contests’ legislation until next year. The parent committee also reportedly voted to defer consideration of any legislation until after replies have been received to a large number of questions directed to the SEC, and not expected to be returned by the SEC to the Subcommittee until late in 1956. It may be hoped that included in the questionnaires, or to be included in supplemental questionnaires, are probing inquiries regarding the universal need implicit in the SEC’s new 1956 proxy contest rules for schedule 14B statements and concerning the basis for further delay in closing the non-solicitation and partial solicitation loophole. It is also to be noted that, about ten days after the appearance of the item regarding the deferring of further legislative consideration, it was reported that Chairman Lehman of the Securities Subcommittee had asked his staff to make a study of corporate proxy practices and other methods used to acquire control of publicly-held corporations. This, it may also be hoped, is to be only a brief excursion from the larger and more immediate tasks already sketched, for it tends to confirm the Wall Street Journal’s fears of June 1955 that the inquiry might proceed on the theory that “maybe the Government ought to do something to make proxy fights a little more difficult as a means of protecting the stockholders from marauders.”

Whatever may be the future direction and emphasis of the Securities Subcommittee inquiries and recommendations that lie ahead, the Subcommittee is definitely to be commended for not permitting itself to be diverted to corporate witch-hunting in quest of corporate subversives. Similar restraint, however, has not been exercised by other committees. Under questioning by Senator Olin D. Johnston at a July, 1956 hearing of the Senate Post Office Committee, SEC Chairman Armstrong stated that “[1]t is possible investment capital from behind the Iron Curtain may be coming secretly into the United States for investment in American concerns,” and Chairman Armstrong indicated, too, “the possibility that Iron Curtain investors might, by proxy, get directors of their choice on United States corporations.” Less than a week later “Mr. Leopold D. Silberstein, New York

82. See note 53 supra.
financier, and two of his associates in the Penn-Texas Corporation were "subpoenaed to appear before" another congressional investigating committee, the Senate Internal Security Subcommittee investigating foreign investments in United States corporations. A Subcommittee spokesman said, "the senators wanted to question the German-born Mr. Silberstein, now a United States citizen, about foreign capital held in the name of Swiss banks and allegedly used in Penn-Texas efforts to gain control of other United States enterprises." Mr. Silberstein promptly issued the following statement:

"The committee informed me four weeks ago that I am one of thirty or forty American businessmen scheduled to be called upon for such information as might be of aid to the Committee. I expect that the Committee will want all the information at my disposal concerning the controlling holding of Canadian Fairbanks-Morse and Company of Chicago in which the Penn-Texas Corporation has a very substantial interest." 85

While there have been no further reports as to what the Internal Security Subcommittee has developed, past ventures in search of political subversives are not an encouraging background against which to ponder the prospects for hunting down corporate subversives. Indeed, to go back some years ago, the experience of a congressional committee of ten to twenty-five years ago in investigating the activities of the Amtorg Trading Corporation affords even less comfort for useful results. 86 In any event, since the Internal Security Subcommittee has pre-empted the field there would seem to be no reason why the Securities Subcommittee should indulge itself in such forays.

**Conclusion.**

It appears in summary that to date in the areas of corporate control and shareholder and corporate democracy, the work of the Subcommittee has been to a considerable extent exploratory, though with excellent preliminary results. It is now time, however, to undertake: (1) recommendations based on specific data at hand regarding:

84. Wall Street Journal, July 23, 1956, p. 7, col. 3. Earlier in 1956 in connection with another attack on Mr. Silberstein, Senator Wayne Morse said he believed "the attack on L. D. Silberstein is totally unwarranted," that Mr. Silberstein had been "bitterly and publicly denounced as a raider" because of his efforts to seek representation on the board of Fairbanks, Morse & Co." See Wall Street Journal, Feb. 20, 1956, p. 3, col. 3.


86. For comment on and references to the Amtorg Trading Corp. investigation, see Massey, Congressional Investigations and Individual Liberties, 25 U. Cin. L. Rev. 323, 327 (1956).
(a) legislative corrections concerning non-solicitation and partial solicitation; and (b) SEC repeal of the 1954 amendments to the shareholder proposal rule; and (2) prompt study of detail on the extent of use in proxy contests of pre-proxy statement soliciting material and duplicate schedule 14B data. After and only after, these matters have been completed, should study of the other indicated aspects of corporate control and corporate or shareholder democracy be commenced.

The interests and rights of the country's more than 8½ million direct shareholders, a figure that amounts to 5.2 per cent of our July 1, 1955 estimated population and that reflects a 33 per cent increase in the number of shareholders since 1952,87 require immediate action wherever it is possible, and, where it is not, careful study to determine what further legislation or recommendations to administrative agencies may be necessary for the protection of investors or in the public interest.88 If one roughly calculates the interests of the nation's indirect shareholders, namely, our bank depositors, our insurance policy holders, annuitants, and pensioners, and others with secondary interests in portfolio securities at, say, double the number of direct holders, or ten per cent, and adds the five per cent direct share ownership, fully fifteen per cent of our population, or about twenty-five million Americans, have more or less immediate investor interest alone.89 Add to this the public interest, and clearly the matters here discussed, have significance.

88. See note 4 supra.
89. This "10%" calculation of the number of indirect shareholders, does not really even qualify as being "rough." It is ridiculously modest, bearing only infinitesimal resemblance to either economic or statistical reality, and at best is merely stimulating. For example, the total number of life insurance policies alone in force in the United States in 1955 was 251,089,000. 1956 Life Insurance Fact Book, 1956, p. 10.