COMMENTS ON THE PROXY RULES

ADDRESS

OF

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at the

ANNUAL MEETING

of the

AMERICAN SOCIETY OF CORPORATE SECRETARIES, INC.

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This is the first time I have had the privilege of attending one of your meetings and I am very happy to be here this afternoon. Some of you have been kind enough to drop in to see me in Washington from time to time and in that way I have had the pleasure of becoming somewhat acquainted with your organization, as well as some of its members. I am very happy to have an opportunity to know more of your members.

Your Society, which came into being only in 1946, has already achieved an important place among business associations. It numbers among its members officials of many of the outstanding leaders in American industry and finance. The objectives set forth in your charter are worthy of the interest and effort that you are devoting toward their realization.

In your approach to the problems of the Securities and Exchange Commission we have found you fair-minded and restrained in your criticisms. You have also been constructive and helpful in your suggestions. Your comments on our proposed regulations published from time to time have always reflected thoughtful consideration and have always received our careful study, although we have not always been able to reach the same conclusions concerning them.

From time to time various members of the Commission and its staff have had the privilege of addressing your meetings. In many instances the subject discussed has been either recent amendments to the proxy rules or proposed amendments which were then in the offing. Today I would like to dwell only briefly on the present status of the proxy rules, the recent amendments thereto and the possibility of further amendments. After that, I would like to discuss with you the operation of the proxy rules in an effort to give you a somewhat behind-the-scenes review of our experience under them.

In general, I believe that the proxy rules have reached a fairly advanced stage of maturity. No general revision, such as those made during the past few years, is presently contemplated or, indeed, seems to be necessary. I do not mean, of course, that the Commission has explored the full limits of its authority under Section 14(a) of the Act or that changing times and conditions may not at some future date call for a general review of our approach to the regulation of proxy solicitations. However, as far as we can see now any future amendments likely to be made will fall well within the limits of the present rules.

There is one change which was made in the recent amendments to the proxy rules in which some of you were interested and on which we received comments from a number of companies. In view of the wide-spread interest in this particular amendment, I would like to explain briefly why it was adopted and what our experience has been during the past proxy season. The amendment I am referring to is the extension of the definition of the term "associate". This definition was expanded to include certain relatives of directors, nominees and corporate officials who were not previously embraced in the term.

It had been our experience prior to the recent revision that in some cases relatives of officers or directors of the issuer or relatives of their wives held important positions in the over-all enterprise. Because of the limited scope of the former definition, information with respect to their security holdings and other dealings with the enterprise was not set forth in the proxy statement. It was for the purpose of requiring the disclosure of such information that the definition was extended.

Fear was expressed in some quarters that the amended definition would result in undue burden and expense because of the additional investigatory work that would be required to furnish the information. In the light of the experience which we have had during the past proxy season we have concluded that these fears were unjustified. Although there is no express limitation upon the term "relative" as used in the definition, this causes little difficulty because of the fact that the definition refers only to relatives of a specified person or his spouse who have the same home as such person or who are directors or officers of the issuer or any of its parents or subsidiaries. This limits the field in which investigation must be made by restricting it to persons under the same roof or who hold high managerial positions in the enterprise or in the chain of command of related enterprises.

Another provision of the proxy rules which caused some difficulty, both in its amendment and in its subsequent operation, is the term calling for information with respect to remuneration and other transactions with management and others. To the uninitiated it would seem a fairly simple matter to have a single item calling for the compensation of officers and directors. However, the pattern of compensation in the modern corporation takes a variety of forms, such as salaries, bonuses, options, pensions and other types of deferred payments, many of which are the product of the impact of our tax statutes. In fact, deferred remuneration alone assumes a great variety of forms which were either rare or non-existent only a decade ago.

In providing for the disclosure of this information, we have endeavored to strike a happy medium between brevity and explicitness. If we were to spell out in detail the requirements with respect to all possible types the result would be a long and complex requirement. We have tried to keep the item comprehensive but brief with the idea of filling in details in particular cases by interpretation. Even so, I believe it is going to be necessary to clarify the existing item somewhat as soon as it is practicable to do so.

In the main, the proxy rules are pretty well accepted today throughout the business and financial world. As has been the case with much of the legislation of the 1930's, the noise and tumult have died away. Today criticism is usually selective; when objection is raised it is more or less on a technical level.

Some companies, no doubt, would like to be free of the restraint imposed by the proxy rules, but I do not believe that this is the concensus of the majority of listed companies. You may be surprised

to know that a few companies in anticipation of a contest have listed their securities primarily for the purpose of insuring that all proxy material of the opposition be subject to the proxy rules and reviewed by our staff.

There are some registered companies which do not solicit proxies and, therefore, do not file any proxy material with the Commission. During 1952 there were 445 companies with voting securities registered on a national exchange which filed no proxy material with the Commission. This constituted 24% of all companies having voting securities so registered. Of this number, 138 were non-dividend-paying companies and 23 were Canadian or Cuban companies.

In some instances the failure to solicit proxies results from the concentration of sufficient securities in the hands of the management to make such a solicitation unnecessary. In other cases it results from very low quorum requirements. A third category of cases is represented by companies having boards of directors which continue to hold office until their successors are elected, the election of successors being avoided by the simple device of making no effort to secure a quorum at scheduled annual meetings.

The proxy season is a very busy season for us, as most of you know. The great majority of annual meetings are held in March, April and May. At that time of year we are usually laboring under a load of registration statements under the Securities Act of 1933 which are filed in order to take advantage of the preceding year-end audit. While it would ease our load if annual meetings and, therefore, proxy solicitations could be staggered over a longer period, I fully appreciate the desire of corporations to time their meetings with the distribution of their annual report for the preceding fiscal year and from the point of view of the public interest which is of primary concern to both of us, I believe that this is a desirable procedure.

One portion of the proxy rules in which I know you are particularly interested is that which requires the management to include in its proxy material proposals submitted by stockholders. A year or so ago your organization furnished us with the results of a survey made with respect to the operation of this provision which, as you know, is Rule X-14A-8. I understand that you are now making a further survey with respect to the operation of this rule. We have recently furnished you with some information to assist you in this undertaking and we will be quite interested in the results of the survey when it is completed.

Our records show that during the ten calendar years from 1943 to 1952 the number of management proxy statements containing stockholder proposals ranged from a low of 14 in 1945 to a high of 57 in 1950. The number of individual proposals included ranged from a low of 29 in 1947 to a high of 97 in 1950. The number of stockholders submitting proposals during this period ranged from a low of 9 in 1946 to a high of 29 in 1952. The total number of proxy statements filed each year during this period ranged from approximately 1,500 in 1943 to approximately 1,800 in 1952.

I do not wish to burden you unduly with statistics but I believe you would be interested in a few more figures with respect to the subject matter and frequency of stockholder proposals. During the proxy seasons of 1951, 1952 and 1953 there was a total of 203 proposals submitted to managements for inclusion in their proxy material. Of these, 63 related to cumulative voting. 29 sought to change the place of the annual meeting, to rotate the meeting between two or more cities or to hold regional meetings. Management compensation or management pensions were the subject of 28 proposals. In 23 instances an effort was made to require or improve post-meeting reports to stockholders. The remaining proposals had for their purpose the election of a woman to the board of directors, the elimination of the classification of directors, the election of auditors, requiring the company to bring suit, a change in the company's dividend policy, the granting or modification of employee pensions, requiring directors to own stock in the corporation, and a miscellaneous group of non-recurrent proposals.

In only one instance to my knowledge did management favor a proposal. In six instances the management took no position, either for or against the proposal. In all of the other cases the management either opposed the proposal or stated that unmarked proxies would be voted against it.

In view of the lack of success of stockholders in having their proposals accepted by a majority of their fellow stockholders, you may well ask, as you have in the past, what purpose is served by requiring the management to include these proposals in its proxy material. A few stockholders, but I might add, only a few, have asked the same question. I believe that the rule providing for the inclusion of stockholder proposals serves three principal purposes. In the first place, it provides stockholders with a procedure without which it would for all practical purposes be impossible for them to express their ideas to their fellow stockholders. This involves a principle which has valuable, even if intangible merit, wholly apart from the opinion or reaction of management to the proposal submitted or the reception given it by other stockholders. Secondly, it affords management, among other things, an opportunity to locate dissatisfaction with the ranks of the owners of their businesses and to deal with it. Finally, it represents one small but important aspect of an attitude or approach to investor relations which should be of paramount interest to all of us. It is our conviction that it is to the ultimate good of the public, industry and our capitalistic system that there be the widest possible participation by our people in the ownership of the equities and obligations of our business enterprises and the widest possible public interest, understanding and participation in the processes of our business structure and the methods by which their continued progress is achieved. While stockholder proposals have been conspicuous by their lack of success in the voting results, some managements have later adopted the proposals or modified versions of them, sometimes with and sometimes without submitting them to a vote of stockholders.

As we have said many times, Rule X-14A-8 was never intended to be used as a means of harassing management and, as you know, we have adopted amendments designed to minimize its use in such a fashion. However, I realize that many persons still feel that there are too many stockholder proposals, that they are repeated too often and that, in view of their lack of success, they serve no useful purpose. For the reasons set forth above, I disagree with the latter contention. But we are always willing to re-examine our position and we intend to do so with respect to this rule. I cannot, of course, promise you at this time what our ultimate conclusion will be but we will take the matter up again after we have received the results of the survey which you are now making.

Every proxy season brings a number of proxy contests. By "proxy contests" I mean a solicitation of proxies in opposition to the management. In some instances these contests grow out of friction within the management; for example, the directors may disagree among themselves with the result that certain members of the board will break with the other members and seek to elect their own slate of directors. In other cases, a stockholder or group of stockholders may become dissatisfied with the management and seek to replace the entire board or at least place on the board one or more representatives who will look after their interests and seek to give effect to their views.

Proxy contests are usually undertaken only when there seems to be a good chance for their success. In this respect they are less frequent than the submission of proposals under Rule X-14A-8. They are, however, more successful. For one thing, the solicitation material is more complete than any 100-word statement made under Rule X-14A-8 and there is thus a better presentation of the issues. In addition, such contests usually involve more intensive campaigning by the opposing parties and the use of additional follow-up material.

Most contests center around the election of directors. As indicated above, in some cases the contest is an effort to replace the entire board, or at least a majority of the board, and thus secure control of the company. In other cases the opposing group is satisfied to secure representation on the board. Displacing an entire board is usually a difficult task and there have been only a few cases where the entire board has been displaced by the opposition. However, when the management is threatened with defeat, it frequently compromises with the opposition, sometimes even to the point of being reduced to a minority of the board. More frequently, the opposition is able, through cumulative voting, to secure a minority representation on the board.

During the 1951, 1952 and 1953 proxy seasons, there was a total of 53 contests in companies subject to our jurisdiction under the proxy rules. The majority of these involved the election of directors. However, many of them involved a variety of other matters. In some cases the opposition sought to have the company dispose of a portion of its assets, amend the charter or by-laws or take some other action. In other cases proxies were solicited in opposition to various types of mergers, recapitalization plans and other management projects. In

some instances the opposing parties sought to get control of the company for the privilege of doing business with it. In one case the opposition consisted of a lawyer who wanted the company's legal business and an insurance broker who wanted the insurance business. In another case, an accountant sought to oust the management of a company. Thinking that perhaps he was seeking the accounting work of the company, he was required by the staff to include a statement in the proxy material as to whether or not such was the case. He included a statement to the effect that he was not seeking the company's accounting business. This proved to be an underestimate on our part of his ultimate aims because shortly after the annual meeting, in which he succeeded in ousting the previous management, he was elected president of the company.

The Commission's role in these contests is similar to that of a referee in that we endeavor to see to it that there is full compliance with the proxy rules by all parties involved. This is sometimes difficult when the contest waxes hot and charges and counter-charges fly thick and fast. In such cases we try to retain our quasi-judicial calm and impartiality, even in the face of complaints that we are favoring one side or the other. Sometimes we are simultaneously accused by each side of favoring the other. When this occurs, we feel fairly sure that we are preserving some degree of impartiality, notwithstanding the impossibility of maintaining judicial calm when in the last stages of a fight each side submits last minute appeals at a rapid pace.

You are all familiar, of course, with the manner in which proxy statements and other proxy solicitation material are filed with and processed by the Commission. Our views are expressed in the form of letters of comment which are supplemented in some cases by personal conferences. For the most part, our comments and suggestions are accepted in good grace and are followed by persons making a solicitation. Occasionally, however, there are sharp differences of opinion between the staff and representatives of the issuer. Even here an agreement is usually reached without resort to other than persuasive methods.

Occasionally it has been necessary for the Commission to resort to the courts to require compliance with the proxy rules. Such cases, I am glad to say, have been comparatively rare. There have been only about a dozen in all. In most of these cases the Commission has instituted suit to enjoin a violation of the proxy rules; in others it has intervened as amicus curiae in a private suit, either at the request of the court or upon its own motion.

Since the enactment of the Securities Exchange Act of 1934, there has been a steady growth in the number of companies which solicit proxies. This has been paralleled by a similar steady growth in the attendance of stockholders at annual meetings. We have also noted a marked improvement in annual reports sent to stockholders. These are all worthwhile achievements. The Commission believes that your organization has had a hand in bringing them about and hopes it will continue to promote progress along these lines in the future. We have enjoyed our relations with all of you heretofore and look forward to future cooperation with you to the benefit of all concerned.

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