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Judicial Review of SEC Rule 14a-8: No Action Decisions

*Andrew A. Markus**

A RECENT DECISION of the United States Court of Appeals for the District of Columbia¹ has focused attention on the dissident stockholders' right to have the courts review the Securities and Exchange Commission's informal acquiescence to management's refusal to include in its proxy statement a proposal of the dissidents. The controversy centers around proxy regulation 14a-8² promulgated pursuant to section 14 of the Securities and Exchange Act of 1934.³

Proposals of Security Holders

The primary purpose of section 14 is the protection of investors through the regulation of proxy statements.⁴ Since it is virtually impossible for all investors to be present at annual meetings to vote their individual shares, the law permits the solicitation of proxies for that purpose. But without effective regulation of such solicitation, the door would be opened to the perpetuation of power by those already holding it—a policy wholly inconsistent with corporate democracy. 14a-8 is designed to further the goal of protecting investors by guaranteeing that any security holder who is entitled to a vote may have a proposal of his own included in management's proxy solicitation;⁵ and if management opposes the proposal, the security holder is also guaranteed a statement of his own, up to 100 words, in favor of the proposal.⁶ The proxy statements are mailed to all shareholders who then have the opportunity to either approve or disapprove the proposal.

However, certain circumstances do exist when management may omit a proposal from its proxy statement. Such circumstances occur when the proposal is determined not to be a proper subject for action by security holders;⁷ when the purpose of the proposal is to promote political, religious, social, or personal causes;⁸ when the proponent

*B.A., University of Pittsburgh; Third-year student, Cleveland State University College of Law.

¹ *Medical Committee for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), cert. granted, 401 U.S. 973 (1971), vacated as moot, remanded to Ct. App. for dismissal U.S.—, 92 S. Ct. 577 (1972).

² 17 C.F.R. § 240.14a-8 (1971).

³ 48 Stat. 895 (1934), 15 U.S.C.A. § 78n (1971).

⁴ *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 672 (D.C. Cir. 1970), cert. granted, 401 U.S. 973 (1971), vacated as moot, remanded to Ct. App. for dismissal, U.S.—, 92 S. Ct. 577 (1972).

⁵ 17 C.F.R. § 240.14a-8(a) (1971).

⁶ *Id.* at § 240.14a-8(b).

⁷ *Id.* at § 240.14a-8(c)(1). What is a proper subject for stockholder action is to be determined by state law, *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948).

⁸ 17 C.F.R. § 240.14a-8(c)(2) (1971).

of the proposal has either failed to come forward and present it, or it has previously failed on its own merits;⁹ or when the proposal relates to the conduct of the ordinary business operations of the issuing corporation.¹⁰

The burden of proving any of these circumstances rests upon management who must submit to the Commission its reasons for exclusion along with opinion of counsel if the reasons are based on matters of law.¹¹ However, in practice this burden is often not met nor is it insisted upon by the Commission with the result that the shareholders may not be able to determine the precise reasons why their proposal was excluded.¹²

Because time is of the essence in a proxy contest, the Commission procedures must of necessity be informal. The rules require that all proxy material, including reasons for exclusion of any shareholder's proposals, must be submitted to the Commission so that it may determine if all the rules are being complied with.¹³ A member of the Division of Corporation Finance examines the material and then writes an informal letter to the parties suggesting any corrections that will make the statement better comply with the rules. This letter is not an administrative order in the strict sense of the word and refusal to comply with it is not *per se* a violation of the proxy rules; but again because time is of the essence, the suggestions in the letter are usually followed.¹⁴

The problem arises when management refuses to include in its proxy statement a shareholder's proposal, and the Commission issues a letter stating that it will take no action with regard to management's position. The general inference to be drawn from such inaction is that the Commission agrees with the reason management has given for exclusion,¹⁵ although section 26 of the Act indicates the contrary.¹⁶ There is little the shareholder can do but acquiesce, as any attempt to have the Commission change its mind would in all likelihood be fruitless. But in the interest of preserving the informal nature of its advisory letters, such action by the Commission is usually

⁹ *Id.* at § 240.14a-8(c)(3)(4).

¹⁰ *Id.* at § 240.14a-8(c)(5).

¹¹ *Id.* at § 240.14a-8(d).

¹² See Note, *The SEC and "No Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 842-44 (1971).

¹³ 17 C.F.R. § 240.14a-6 (1971).

¹⁴ See E. ARANOW & H. EINHORN, *PROXY CONTESTS FOR CORPORATE CONTROL* 138-46 (2d ed. (1968)).

¹⁵ See *Mack v. Mishkin*, 172 F. Supp. 885, 888 (S.D.N.Y. 1959).

¹⁶ "No action or failure to act by the Commission . . . in the administration of this chapter shall be construed to mean that the particular authority has in any way passed upon the merits of, or given approval to any security or any transaction or transactions therein, nor shall such action or failure to act with regard to any statement or report filed with or examined by such authority pursuant to this chapter or rules and regulations thereunder, be deemed a finding by such authority that such statement or report is true and accurate on its face or that it is not false or misleading." 48 Stat. 902 (1934), 15 U.S.C.A. § 78z (1971).

justified. Since the shareholder can get no relief from the Commission, the question then is can he go to the courts for such relief?

The Law Prior to *Medical Committee*

Section 25(a) of the Securities and Exchange Act provides that any person aggrieved by an order of the Commission may have that order reviewed in the Court of Appeals.¹⁷ Because the "no action" letter is not a formal order of the Commission, it has been historically held that the courts do not have jurisdiction to review within the meaning of section 25(a).¹⁸ The shareholder has therefore been in the position of having the Commission's "no action" letter take on every aspect of a final order as to him and yet not having it recognized as such by the courts.

The most the shareholder could hope to have examined is simply whether the Commission had abused its discretion in refusing to grant a hearing on the matter.¹⁹ But because the Commission is in a better position to evaluate all the evidence and can benefit from its vast experience in such matters, the courts are inclined to give great deference to such "no action" letters even though they are in no way formal orders.²⁰ These letters take the effect of an interpretation by the Commission that the proxy rules have not been violated; and unless this interpretation is clearly erroneous or inconsistent with the regulation, it becomes of controlling weight.²¹ Although instances have occurred when the courts have substituted their own interpretation of the proxy rules for that of the Commission,²² the great deference given by the courts to the Commission's interpretation of the proxy rules is best exemplified by the case of *Peck v. Greyhound Corp.*²³ In this case, a security holder in the defendant corporation sought to have included in the proxy statement a proposal for abolishing segregated seating on buses in the South. The defendant corporation refused to include it under rule 14a-8 as not being a proper subject for action by stockholders. The Division of Corporation Finance

¹⁷ 48 Stat. 901 (1934), 15 U.S.C.A. § 78y(a) (1971).

¹⁸ *Third Ave. Ry. Co. v. SEC*, 85 F.2d 914 (2d Cir. 1936); *Guaranty Underwriters, Inc. v. SEC*, 131 F.2d 370 (5th Cir. 1942); but cf. Comment: *Medical Committee For Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules*, 57 VA. L. REV. 331 at 343 (1971), "Section 25(a) does not specifically preclude judicial review of nonorders but merely assures review of actual orders."

¹⁹ *Dyer v. SEC*, 290 F.2d 541, 544 (8th Cir. 1961); see also *Leighton v. SEC*, 221 F.2d 91 (D.C. Cir. 1955), cert. denied, 350 U.S. 825 (1955). Both cases found no abuse of discretion, and *Leighton*, in fact, declared that even if the Commission's refusal to investigate the shareholder's complaint constituted an order, it would be one within his discretion and not reviewable. *Leighton v. SEC*, supra at 91.

²⁰ *Doyle v. Milton*, 73 F.Supp. 281, 285-86 (S.D.N.Y. 1947); *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 681 (S.D.N.Y. 1951); *Weeks v. Alpert*, 131 F. Supp. 608 (D. Mass. 1955); *Brooks v. Standard Oil Co.*, 308 F. Supp. 810, 813 (S.D.N.Y. 1969).

²¹ *Brooks v. Standard Oil Co.*, 308 F. Supp. 810, 813 (S.D.N.Y. 1969).

²² *SEC v. May*, 134 F. Supp. 247 (S.D.N.Y. 1955), aff'd, 229 F.2d 123 (2d Cir. 1956); see also E. ARANOW & E. EINHORN, supra note 14, at 467-70.

²³ *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

agreed, and the Commission took no action. In an unsuccessful action by plaintiff shareholder to enjoin solicitation, the court said:

Rules and regulations adopted by administrative agencies pursuant to Congressional authorization are best interpreted, in the first instance, by the agency which has been entrusted with the power and authority to write them.²⁴

The Commission by statute has the power to both enjoin a threatened violation of the proxy rules in the district courts²⁵ or to seek a writ of mandamus to compel persons to comply with the rules.²⁶ But when the Commission has failed to do so, or when the courts because of the great deference given to the Commission's interpretation of the proxy rules have found no abuse of discretion, or when they simply have declared that the "no action" letter is not subject to review, there is only one avenue of relief opened to the shareholder.

The Private Action

Private action is not sanctioned by the Act, but the private investor's right to sue for enforcement of the proxy rules has long been recognized in most jurisdictions.²⁷ If the shareholder has been injured by defendant's violation of the proxy rules, it has also been held that ". . . he does not have to wait for the SEC to bring the action for him."²⁸ The shareholder need not have been directly injured, for a right of action is available even if he is a member of a class of shareholders who have been injured.²⁹

In 1964, the Supreme Court in *J. I. Case Co. v. Borak*³⁰ recognized for the first time the private right of action not only for direct causes but for derivative causes as well. The Court felt that the private action was a necessary supplement to agency action.³¹ It further stated that the remedies available need not be limited to declaratory or prospective relief, for the federal courts are fully capable of providing any remedy to carry out the congressional purpose of protecting investors.³²

Due process of law requires that the individual shareholder be given a private right of action also. This is so because the shareholder is at a disadvantage at the outset. If the Commission advises management that its proxy materials do not comply with the rules, management may secure a judicial test of this determination by sim-

²⁴ *Id.* at 681.

²⁵ 48 Stat. 899, 900 (1934), 15 U.S.C.A. § 78u(e) (1971).

²⁶ 48 Stat. 899, 900 (1934), 15 U.S.C.A. § 78u(f) (1971).

²⁷ *Phillips v. SEC*, 171 F.2d 180 (2d Cir. 1948); see also *E. ARANOW & E. EINHORN*, *supra* note 14, at 463-80.

²⁸ *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 209 (6th Cir. 1961).

²⁹ *Id.*

³⁰ *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

³¹ *Id.* at 432.

³² *Id.* at 434-35.

ply disregarding the Commission's advice and defending against an injunction action. But when no further administrative procedure is left for the shareholder, there is no way he can have a judicial determination of whether or not there has been a violation of the rules by management unless the private action is available.³³

However, in the final analysis, the private right of action is not the answer either. The need for judicial review is essential not merely for the protection of individual rights but also for the protection of the public as a whole, for "as long as only private actions may be brought following administrative action, the agency process will remain insulated from needed judicial scrutiny and supervision."³⁴

Right of Review

Before a shareholder who has become the victim of a "no action" letter can even hope to get judicial review of his problem, he must show that he has overcome ". . . the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."³⁵ This is a necessary rule of law that cannot be denied. Administrative agencies are created to fulfill a certain need in society, a need to control certain aspects of society that are either too big or too complex for Congress or the courts to do an effective job of controlling. Agencies are specialized branches of the government which relieve the Congress and the courts of this onus. Were it not for the rule of exhaustion of administrative remedies, the agencies' entire purpose would be thwarted, for aggrieved parties would be seeking the aid of the courts for every agency ruling that did not agree with them. The effect on the administration of justice would be catastrophic.

But what administrative remedy is left to the shareholder in this situation? Though the Commission has not issued what may be termed a final order, yet its action has every effect of being one for the shareholder. The shareholder cannot get relief from the Commission, for the Commission has refused to grant even a review and has adhered to its position that no action for violation of the proxy rules is in order. The only recourse is an expensive private action which many shareholders cannot afford, so that in the end they have no relief at all.

But the fact that only final orders are said to be reviewable should not deter the shareholder. As the Court of Appeals for the District of Columbia said in *Isbrandtsen Co. v. U.S.*:³⁶

³³ Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1045 (1960).

³⁴ Note *The SEC and "No Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, *supra* note 12, at 856.

³⁵ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

³⁶ *Isbrandtsen Co. v. U.S.*, 211 F.2d 51, 55 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954); *see also* *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970), and *Independent*

(Continued on next page)

Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action.

The court in this case did, in fact, review a nonfinal order and grant the plaintiff injunctive relief against the Federal Maritime Board's unfavorable action.

It has also become a settled rule of administrative law that "there is no presumption against judicial review and in favor of administrative absolutism, unless that purpose is fairly discernible in the statutory scheme."³⁷ Indeed, as Mr. Justice Douglas said in *Barlow v. Collins*:³⁸

... [J]udicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which plaintiff is a member can be found . . . unless members of the protected class may have judicial review the statutory objectives might not be realized.

Since the purpose of Congress on enacting section 14 of the Securities and Exchange Act is the protection of investors,³⁹ the regulations promulgated thereunder are no less expressive of that intent. This being the case, unless judicial review is granted, the intent of Congress will be defeated since also the shareholder is a member of the class Congress was seeking to protect.

Judicial review should be available to the shareholder on still another ground. Section 702 of the Administrative Procedure Act provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.⁴⁰

And agency action as defined by section 51(13) "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."⁴¹

(Continued from preceding page)

Broker-Dealers' Trade Ass'n. v. SEC, 442 F.2d 132 at 139, (D.C. Cir. 1971) which stated: "The fact that an agency has not issued a command does not mean that the step by which it initiated a procedure, or informal activity, leading up to the exercise of its powers may be relegated to the area of mere unreviewable suggestion."

³⁷ *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 157 (1970); see also *Abbott Laboratories v. Gardner*, 387 U.S. 136 at 140 (1967), "... [J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

³⁸ *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970).

³⁹ See supra note 4.

⁴⁰ 80 Stat. 392 (1966), 5 U.S.C.A. § 702 (1966).

⁴¹ 80 Stat. 381 (1966), 5 U.S.C.A. § 551(13) (1966).

That the shareholder is adversely affected or aggrieved by agency action here cannot be denied. The agency has denied him the qualified right to have his proposal included in the proxy material without anything but the vaguest notion as to why. Further, the "no action" letter qualifies as agency action within the definition, for it is a failure to act. It would be a specious argument to say that the Commission has acted by saying it will not act.

The shareholder in seeking review does not want the court to review the merits of his proposal, this he prefers to leave to the other shareholders. He seeks instead ". . . merely to have the cause remanded so that the Commission, in accord with proper standards, can make an enlightened determination of whether enforcement action would be appropriate."⁴² A letter from the Commission to the effect that it concurs with management action is hardly an enlightening determination that enforcement of the proxy rules is not in order.

On remand, the Commission would be forced to take the evidence of both sides and make findings of fact, and its determination could ultimately turn out the same. This might be viewed as an added unnecessary burden to be placing on an already overburdened agency, but when the rights of shareholders are at issue the interest in more efficient agency administration should yield.⁴³ Besides, with full disclosure of the facts, it might just as well be determined that the proxy rules were violated.

Medical Committee

In 1970, in *Medical Committee for Human Rights v. SEC*,⁴⁴ judicial review of a "no action" letter was finally granted. In this case, the shareholder, Medical Committee for Human Rights, was the owner of several shares of Dow Chemical stock. It had requested that Dow include in its 1968 proxy statement a proposal of the Medical Committee that Dow no longer sell napalm. Dow refused to include the proposal, and the Commission notified Medical Committee that it would take no action with regard to Dow's position.⁴⁵ Though no grounds were given for the Commission's refusal to review Dow's position,⁴⁶ it was Dow's contention that exclusion was justified under rules 14a-8(c) (2) and 14a-8(c) (5) since it felt that the proposal was motivated by political reasons and was a matter relating to the ordinary business operations of the company.⁴⁷ Such a contention

⁴² *Medical Committee for Human Rights v. SEC*, 432 F.2d 659, 672 (D.C. Cir. 1970), cert. granted, 401 U.S. 973 (1971), vacated as moot, remanded to Ct. App. for dismissal,—U.S.—, 92 S. Ct. 577 (1972).

⁴³ *But cf.* Comment, *Medical Committee for Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules*, *supra* note 18, at 339, 342.

⁴⁴ *Medical Committ for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), cert. granted, 401 U.S. 973 (1971), vacated as moot, remanded to Ct. App. for dismissal,—U.S.—, 92 S. Ct. 577 (1972).

⁴⁵ *Id.* at 661-63.

⁴⁶ *Id.* at 676.

⁴⁷ *Id.* at 679.

might have held up under a finding of fact, but none was forthcoming from the Commission. On a petition to review this action of the Commission, the court remanded to the Commission ". . . so that it may reconsider petitioners claim within the proper limits of its discretionary authority . . . and so that the basis for its discretion may appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review."⁴⁸

The court relied on two factors to determine whether or not the "no action" letter was reviewable. These were whether or not the administrative action operated with final effect, and whether or not there was some sort of formal proceeding.⁴⁹ Its conclusion was that the elaborate procedures established by the Commission to carry out the purpose of the Act possessed ". . . sufficient attributes of finality and formality to warrant judicial review."⁵⁰ It did not feel that any significance attached to the fact that the Commission's determination was couched in terms of a "no action" decision rather than in the form of a decree binding the parties to do or refrain from doing a particular act, since the absence of a formal evidentiary hearing would not compel the conclusion that the Commission's decision was unreviewable.⁵¹

As to Dow's contention that the proposal was a matter relating to the ordinary business of the company and therefore properly excluded, the court held that state law controlled as to what matters are ordinary business operations and that here the applicable state law would permit such a proposal.⁵² Finally, as to Dow's contention that the proposal was motivated by political reasons, the court said:

No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.⁵³

Conclusion

With increased concern by stockholders about social issues, proposals such as Medical Committee's will undoubtedly become more commonplace.⁵⁴ When this happens, there will also be a need for

⁴⁸ *Id.* at 682.

⁴⁹ *Id.* at 666-67.

⁵⁰ *Id.* at 671.

⁵¹ *Id.* at 668.

⁵² *Id.* at 680.

⁵³ *Id.* at 681.

⁵⁴ *See, e.g.*, N.Y. Times, April 14, 1971, at 63, col. 8. Campaign General Motors run by the Project on Corporate Responsibility, a group backed by Ralph Nader, has successfully gotten GM to distribute a 49 page book to its 1.3 million stockholders disclosing policies on auto safety, pollution control, and minority hiring.

closer judicial scrutiny of agency actions so that valid, meritorious proposals will not be lost to "no action" letters.

The Supreme Court granted the SEC certiorari in *Medical Committee*⁵⁵ but before the case could be decided, Dow agreed to include the proposal in its 1971 statement.⁵⁶ The proposal received support from less than 3% of all voting shareholders⁵⁷ which means that pursuant to the rules it need not be included again by Dow until three years have passed.⁵⁸ The Court felt that because of the meager support received by the proposal, it probably would not again be excluded by Dow in the interest of saving litigation if the Medical Committee again submitted the proposal.⁵⁹ This being so, the Court held that the case was moot.⁶⁰ It vacated the Court of Appeals judgment and remanded for the purpose of dismissal.⁶¹

Mr. Justice Douglas voiced a strong dissent to the Court's holding in which he felt that the controversy was not moot merely because the Court assumed Dow would no longer oppose the proposal.⁶² He further stated:

The philosophy of our times, I think, requires that such enterprises be held to a higher standard than that of the morals of the marketplace which exalts a single-minded, myopic determination to maximize profits as the traditional be-all and end-all of corporate concern. The public interest in having the legality of the practices settled, militates against a mootness conclusion.⁶³

Judicial review of the "no action" letter thus is yet to receive approval by the Supreme Court. Review should, however, be granted, for any shareholder should be entitled to know the reason for exclusion of his proposal regardless of its merits. Unless this is so, the purpose of the proxy rules in protecting shareholders will be defeated.

As a noted authority on securities regulations has said:

The widespread distribution of corporate securities, with the concomitant separation of ownership and management, puts the entire concept of the stockholders' meeting at the mercy of the proxy instrument. This makes the corporate proxy a tremendous force for good or evil in our economic scheme. Unregulated, it is an open invitation to self-perpetuation and irresponsibility of management. Properly circumscribed, it may well turn out to be the salvation of the modern corporate system.⁶⁴

⁵⁵ SEC v. Medical Committee for Human Rights, 401 U.S. 973 (1971).

⁵⁶ SEC v. Medical Committee for Human Rights,—U.S.—, 92 S. Ct. 577, 579 (1972).

⁵⁷ *Id.*

⁵⁸ 17 C.F.R. § 240.14a-3(c)(4)(i) (1971).

⁵⁹ SEC v. Medical Committee for Human Rights,—U.S.—, 92 S. Ct. 577, 579 (1972).

⁶⁰ *Id.*

⁶¹ *Id.* at 580.

⁶² *Id.*

⁶³ *Id.* at 581.

⁶⁴ 2 LOSS, SECURITIES REGULATIONS 857-58 (1961).