NOTES

PERMISSIBLE SCOPE OF STOCKHOLDER PROPOSALS UNDER SEC PROXY RULES*

Today's corporate proxy statement, potentially a ballot, a newspaper, and a suggestion box, represents the closest tie between a large corporation's management and the widely scattered stockholders. To regulate its use, the proxy section of the Securities Exchange Act of 1934¹ grants to the Securities and Exchange Commission discretionary power in the most general terms to prescribe rules "necessary or appropriate in the public interest or for the protection of investors." ²

Extending the full disclosure principle of the Act, the Securities and Exchange Commission in Rule X-14A-8³ has gone beyond specification of the minima of information which must be included in proxy statements ⁴ in order

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2. The section makes it unlawful for any person to use the mails or instrumentalities of interstate commerce "to solicit any proxy . . . in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe . . . in the public interest or for the protection of investors." No rules have as yet been promulgated under § 14(b), which provides for regulation of the proxies of members of exchanges, brokers and dealers.

3. Prior to the latest revision of the proxy rules, Sec. Exch. Act Release No. 4037, Dec. 17, 1947, 12 Fed. Reg. 8768 (1947), replacing 17 CODE FED. REGS. § 240.14a-1 through § 240.14a-9 (Cum. Supp. 1944), this rule was denominated X-14A-7, and was substantially similar. See 17 CODE FED. REGS. § 240.14a-7 (Cum. Supp. 1944). Although the Transamerica case arose under the old rules, references in this note will be to the rule numbers of the new regulation, since the changes do not affect the matters herein discussed.

The rules apply to those companies regulated by the Securities Exchange Act, which comprise those corporations whose securities are listed on national securities exchanges, and also companies subject to the Public Utility Holding Company Act of 1935 by § 12, 49 STAT. 823 (1935), 15 U.S.C. § 791(e) (1940), and the Investment Company Act of 1940 by § 20 (a), 54 STAT. 822 (1940), 15 U.S.C. § 80a-20(a) (1940).

4. Rule X-14A-3 and Schedule 14A prescribe the information to be included in the proxy statements, while Rule X-14A-5 outlines how the information shall be presented, and Rule X-14A-9 prohibits false or misleading information. On each matter to be acted upon, means by which the stockholders can specify their vote must be provided, under Rule X-14A-4. Rule X-14A-7 specifies the information which must be mailed to a security holder at his request, and the communications and solicitations to be mailed to stockholders
to aid the stockholder himself in initiating proposals for collective action. In effect, the rule permits an enterprising security holder to make use of the management's proxy statement to set his own ideas before a stockholders' meeting, provided his proposals are "proper subjects" for action by the security holders.\(^5\)

Choosing not to define the subjects which are "proper," the Commission has stated in a public release that propriety is to be determined by the law of the state of incorporation.\(^6\) Since under state law the stockholder's right to propose from the floor is frequently an empty one, litigation regarding the right has been rare. Where undertaken the results have not been signally favorable to the lone stockholder, unsupported by administrative regulation.\(^7\) The consequences of referring the scope of this new federal remedy to state law unprepared for the issue in this context are indicated in the first case to arise under Rule X–14A–8, *SEC v. Transamerica Corp.*\(^8\)

A stockholder proposed elimination of an existing by-law provision requiring that notice of any proposed by-law amendment be contained in the notice of the stockholders' meeting; the provision had been used by the management, the stockholder charged, to screen out arbitrarily proposals which it opposed.\(^9\) In addition, he proposed a by-law amendment providing for independent, stockholder-elected auditors and a resolution demanding that reports of the proceedings of the annual meetings be sent to the stockholders at the instance and expense of any stockholder, while Rule X–14A–8 requires the publication of stockholder proposals by the corporation.

5. Rule X–14A–8 provides: "(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer a reasonable time before such meeting a proposal which is a proper subject for action by the security holders and which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify the proposal in its form of proxy and provide means by which security holders can make the specification provided for by Rule X–14A–4 (a) . . . [see note 4 supra]

"(b) If the management opposes such proposal, it shall also, at the request of the security holder, include in its proxy statement the name and address of the security holder and a statement of the security holder setting forth, in not more than one hundred words, the reasons advanced by him in support of the proposal . . . Neither the management nor the issuer shall be responsible for such statement."

6. Sec. Exch. Act Release No. 3638 (1945), 11 Fed. Reg. 10995, § 271.735 (1946). The release consists of a letter of the Commission to a company, stating that the latter was not required to put before the stockholders certain proposals of a political nature, and stating that proper subjects were to be determined by state law.


9. The proposed amendment was to be introduced only if the management resorted to what the stockholder considered "the extremely undemocratic method of trying to avoid a vote, for approval or rejection, of the other resolutions, by ruling them out of order." See Appellant's Appendix and Addendum, p. 11a, *SEC v. Transamerica Corp.*, 163 F.2d 511 (C.C.A. 3d 1947).
ers. When Transamerica balked at including the proposals in the proxy statements, the SEC sued to enjoin the solicitation of proxies for the annual meeting until the proposals should be included. The Circuit Court of Appeals, modifying the district court judgment, determined that all three proposals were proper.

Both courts, considering themselves bound by the Commission's interpretation of its own rule, referred to state law to determine as best they could the propriety of the proposals. Under Delaware statutes stockholders may have power to amend by-laws, and the principal question as to the proposed amendments was whether the notice provision in the by-laws could be used by Transamerica's management to affect this power. The Circuit Court, in finding that it could not, apparently had to rely both on the statute and on the fortuitous inclusion of a provision in Transamerica's own charter confirming the stockholders' power to amend. As to the resolution to send reports to the stockholders, the Court, finding no applicable precedent in

10. The stockholder also proposed that the meeting place be changed from Delaware to California. The directors' compliance with the request rendered moot the question of its propriety.

11. The extent of the remedy allowable was one of the issues in the case, but is outside the scope of this note. The District Court was held to have power, under § 27 of the Act, 48 Stat. 902 (1934), 15 U.S.C. § 78aa (1940), to enjoin all threatened violations of the Act, and to compel resolicitation of all stockholders on the proposals in the case. SEC v. Transamerica Corp., 163 F.2d 511, 518 (1947).

12. SEC v. Transamerica Corp., 67 F. Supp. 326 (D. Del. 1946). The court, after ruling that by-law amendments could not be made except by full compliance with the notice provision in the by-laws, found it possible to uphold the Commission with respect to the auditor proposal by calling it a "mandate to the directors" rather than a by-law amendment. The resolution asking for reports of annual meetings was disallowed as a matter properly within the discretion of the directors.


14. "The original by-laws of a corporation may be adopted by the incorporators. Thereafter, the power to make, alter, or repeal by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors," Del. Rev. Code § 2044 (1935).

15. In general, where no by-law change is mentioned in the notice of a meeting, a by-law or by-law amendment passed by stockholders at such a meeting is invalid, Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527 (1898). This rule was specifically relied upon by Transamerica. See Affidavit of Harry Heller, Appellant's Appendix and Addendum, p. 40a, SEC v. Transamerica Corp., 163 F.2d 511 (C.C.A. 3d 1947). But see note 9 supra.

16. Article X of the company charter conferred on the directors the power to make by-laws, but provided that "the by-laws made by the directors and the powers so conferred may be altered or repealed by the stockholders." See Appellant's Appendix and Addendum, p. 49a, SEC v. Transamerica Corp., 163 F.2d 511 (C.C.A. 3d 1947). The article, taken in conjunction with the statute, note 14 supra, would seem to be conclusive as to the stockholders' power to amend. Rogers v. Hill, 289 U.S. 582 (1933) (New Jersey statute provided, in almost identical language, what was here provided by statute and charter together). And see 8 Fletcher, Cyclopedia of Corporations § 4178 (1931).
state law, merely asserted that its propriety "seems to us to be scarcely arguable."

In considering the propriety of the resolution for annual meeting reports, the court found no statute or case directly in point. Presumably it considered, but found too general to be decisive, the Delaware statute, common in other states, which provides that the business of corporations shall be managed by the directors, except as may otherwise be provided in statutes or in the articles of incorporation; cases involving different causes of action, such as stockholders' suits, afforded a similarly inadequate criterion for the propriety of proposals under the new rule. With no precedent available, the court took judicial notice of the number and dispersion of the stockholders, and concluded that information about the corporate affairs was necessary if stockholders were to act together in their joint interest. This practical consideration, consonant with the policy of the Securities Exchange Act, seemed determinative, since the court could "perceive no logical basis" for concluding that the proposal was not a proper subject for action. Although a possible inference from the holding is that any proposal not specifically prohibited by state law is proper, the opinion seemed to imply, rather, that where state law left a hiatus, the purpose and spirit of the Act should be invoked to fill the breach.

The proposed by-law amendments, unlike the resolution, presented two initial questions of statutory construction. The first, as to the effect under

17. DEL. REV. CODE § 2041 (1935). Most other states have similar provisions, e.g., CORP. CODE OF CAL. § 800 (1947), replacing CAL. CIVIL CODE § 305 (Deering, 1941); ILL. STAT. ANN. § 157.33 (Smith-Hurd, 1936); IND. STAT. ANN. § 25-208 (Burns, 1933); MASS. ANN. LAWS, tit. 22, c. 156, § 25 (1933); Mich. Stats. ANN. § 21.13 (1937); N.J. STAT. ANN. § 14:7-1 (1939); N.Y. GEN. CORP. LAW § 27 (McKinney, 1943); OHIO GEN. CODE ANN. § 8623-55 (Page, 1938); TEX. CIV. STAT., tit. 32, art. 1327 (Vernon, 1945); Wis. Stat., tit. 17, § 180.13 (1945).

18. Most states have no statute bearing on the point. Two exceptions are California, which requires that minutes be kept, but makes no provision as to reports to stockholders, CORP. CODE OF CAL. § 3000 (1947), replacing CAL. CIVIL CODE § 352 (Deering, 1941), and Illinois, which gives stockholders the statutory right to examine the corporate books, including minutes, ILL. ANN. STAT. § 157.45 (Smith-Hurd, 1936). In the absence of statute, there is no rule of law which requires that a corporation shall even keep a minute book. Woodhaven Bank v. Brooklyn Hills Improvement Co., 69 App. Div. 489, 74 N.Y. Supp. 1023 (2d Dept. 1902).

Were there no federal act overshadowing the issues in the instant case, the court here might have voiced similar sentiments to those expressed in MacCrone v. American Capital Corp., 51 F. Supp. 462 (D. Del. 1943). There a stockholder contended that more compliance with the usual two day meeting notice, where a complicated merger was to be voted on, was insufficient, unreasonable and undemocratic, and the court answered that such a contention was at war with the "dominant purpose of the Delaware Corporation Law to insure simplified corporate practice and procedure by vesting wide discretion in the board of directors."

At least it may be stated that whatever precedent exists under state law as to the resolution here did not compel the ruling. See generally, DORIS AND FRIEDMAN, CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS 1-43 (1941).

19. See note 28 infra.
the Delaware statute of the notice requirement in Transamerica’s by-laws, being determined in favor of the stockholder, there was little doubt here as to the second issue of the general power of a Transamerica stockholder to propose by-law amendments, in view of the corporate charter and the Delaware statute. The holding in this case, however, is far from determinative of the stockholder’s power to propose by-law amendments in other states and for other corporations. In some states by-law amendments are wholly in the hands of directors, and in others they are as clearly within the control of the stockholders.

In these instances, the propriety of amendments as such will depend on the statute itself. In many other states, the statutes permit the individual corporation to decide, by its own charter and by-laws, who shall amend; in these states the permissibility of amendments in general will depend on the particular corporation’s charter or by-laws, at least within the limits of public policy. It is only in the states where statutes make no provision as to who shall amend that the court, guided by whatever case law exists, will have wide discretion.

Once it is determined, however, that the stockholder has the amending power per se, the tenor of the opinion here does not permit the propriety of his particular proposals for amendment under the SEC rule to be curtailed by procedural blocks imposed by management. Furthermore, the case explicitly holds that the usual statute granting managerial control to directors

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20. See note 14 supra.
24. Judicial limitation of corporate discretion under the mandate of state law is exemplified by People’s Home Savings Bank v. Superior Court, 104 Cal. 649, 38 Pac. 452 (1894). Under a statutory provision that “[a] corporation may by its by-laws, where no other provision is specially made, provide for . . . the mode of voting by proxy,” the corporation had attempted to enforce a by-law stipulating that only stockholders of the corporation could serve as proxies. The court held the by-law invalid, saying that the statute gave to the corporation the power to regulate the exercise of the right, but “no power to so shackle the right as to result in its nullification.” People’s Home Savings Bank v. Superior Court, supra at 654, 38 Pac. at 455.
26. The present status of state law as to the amendment of corporate charters, as it affects stockholder proposals under the rule, is very similar to that obtaining as to by-law amendments. See SEC, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, pt. VII, app. B, 1 (1938); Dodd, Dissenting Stockholders and Amendments to Corporate Charters, 75 U. of Pa. L. Rev. 585, 723 (1927).
does not prohibit such proposals for by-law amendments as the independent auditor proposal here, which are not "peculiarly within the discretion of the directors." Again as to by-law amendments the inference may be drawn that where no specific statute prohibits the proposal, courts should be guided by the purposes of the federal act.\textsuperscript{27}

It is apparent, however, that the intent of Congress as expressed in the Act furnishes less specific if more relevant criteria for determining propriety than does state law: the substantive meaning of the Rule is now merely to be judged by two nebulous standards instead of one. The \textit{Transamerica} case seems to indicate that some further definition of the permissible scope of proposals would be a valuable guide to the courts.\textsuperscript{23} Since the states are not likely to engage in further regulation of their corporations touching on the stockholder-director relationship,\textsuperscript{29} such definition might well be attempted by the Commission to the extent of its statutory powers.

The Commission's power to define proper subjects has not been generally considered to extend, under the Act, to the reallocation of control between stockholders and management.\textsuperscript{29} The proxy section itself does not grant positive power to effect the change; the Committee Reports on the section evidence, rather, a primary intent to inform the stockholder and to allow him to vote fairly on each issue for which stockholder action is necessary.\textsuperscript{21} While a stockholder's understanding of the major questions of policy to be decided at shareholders' meetings is considered important, the Reports do not mention his power to vote as to specific issues.\textsuperscript{22}

\textsuperscript{27} In a dictum the court was more explicit on the point. Assuming \textit{arguendo} that Transamerica's use of the notice by-law was allowed by state law, the court went on to say that the power conferred on the Commission by Congress could not be "frustrated by a corporate by-law." The court had no doubt but what the Commission's rule represented a proper exercise of its authority under a statute which was intended to strike at "the control of great corporations by a very few persons."

\textsuperscript{28} Further definition should also be of some assistance to corporate management in determining which proposals it is required to include in proxy statements. Although it is clear that under the present rule proposals must have some relevance to the corporate enterprise, see note 6 \textit{supra}, the extent of the proposing power cannot be considered clearly delineated. Management has also feared corporate liability in case of inclusion in the proxy statement of defamatory proposals. See \textit{Hearings, supra} note 1, at 105-21.


\textsuperscript{30} As stated by former SEC Chairman Purcell: "... the rights that we are endeavoring to assure to the stockholders are those rights that he has traditionally had under State law to appear at the meeting; to make a proposal; to speak on that proposal at appropriate length; and to have his proposal voted on." \textit{Hearings, supra} note 1, at 172.


\textsuperscript{32} Under state law, it is well settled that matters within the directors' discretion are
Short of outright combat with existing state law, however, there appear to be two feasible policies through which the SEC might at least extend its sphere of influence. Clear articulation of the Commission’s views as to proper subjects for shareholder action would serve as a guide to the courts and the corporations, and as a mere recommendation would be well within the Commission’s power. Since, as indicated in the Transamerica case, the courts may look for federal authority where state law is silent as to the permissible scope of proposals, the Commission might do well to supply that authority in some detail.33

Further expansion of the scope of Rule X-14A-8, moreover, seems justifiable as a means of increasing the shareholder’s understanding of his enterprise. Since stockholder proposals are themselves informative, in that they function as cross-currents of new ideas and information among the security holders, they might be subject to SEC regulation as mere proposals, if not as mandates to the directors. The Commission might, to the extent of practicability, itemize the principal kinds of proposals which it would consider proper subjects for shareholder action, and at least enforce their inclusion in the proxy statement, regardless of state law.34 If under state law the mat-
ter proposed were discretionary with the directors rather than subject to shareholder action, the proposals would have only the force of a recommendation, but the ideas embodied therein would be communicated to the stockholders for their approval or disapproval. Expansion of the rule would not only provide greater protection of the shareholder's equity through a fuller utilization of the proxy statement but would go far toward the establishment of the shareholder body as an advisory council to the corporation.\textsuperscript{35}

**MANAGEMENT TRADING DURING PUBLIC UTILITY REORGANIZATION**\textsuperscript{35}

Administrative regulations of prospective applicability may be considered generally preferable to \textit{ad hoc} decisions.\textsuperscript{1} Recognition of this truism was urged upon the SEC by the Supreme Court in \textit{SEC v. Chenery Corporation}\textsuperscript{2}
in the case, to be dealt with on a national scale, and by a national administrative agency, the presumption is strong, in the absence of a plain indication to the contrary, "that Congress . . . is not making the application of the federal act dependent on state law." NLRB v. Hearst Publications, 322 U.S. 111, 123 (1944) (newsboys held "employees" within meaning of Wagner Act provision, despite state precedent characterizing them as independent contractors). That is, the statute is to be interpreted by the agency with reference to the needs of national policy.

35. "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil." Holmes, J., dissenting in Liggett Co. v. Baldridge, 278 U.S. 105, 114 (1928). The desirability of a greater expression of opinion on the part of the stockholder was suggested in \textit{Sears, The New Place of the Stockholder} 157-3 (1929), while Professors Berle, in \textit{Protection of Non-Voting Stock}, 4 \textit{Harv. Bus. Rev.} 257, 263-4 (1926) and Ripley, in \textit{Main Street and Wall Street} 154 (1929), had urged the creation of permanent committees to represent the stockholders with the management. The unquestionable apathy of the stockholder with regard to his voting rights, noted in \textit{Berle and Means, The Modern Corporation and Private Property} 286, 287 (1932), has led some observers to despair of the effectiveness of the whole system of proxy voting, Rutledge, \textit{supra} note 29, at 296, but it seems at least questionable whether stockholder apathy has not been partially caused by lack of opportunity to vote effectively. In any case, it is clear that the proxy section represents an attempt to nourish the possibly moribund institution of corporate suffrage, and the rules must be viewed in this context.

A counter argument, to the effect that the rule would bring on a flood of crackpot proposals, was raised by the district court, \textit{SEC v. Transamerica Corp.}, 67 F. Supp. at 326, 332 (D. Del. 1946), as to X-14A-8 in the instant case. Such a fear would appear unrealistic, even in the absence of a high degree of stockholder apathy, for crackpot and other improper proposals could be excluded under the Commission's rule.

as the better method of coping with utility reorganization plans designed to enhance the value of management securities acquired during reorganization.\textsuperscript{3} In that case the Court had ultimately upheld the Commission's rejection of a reorganization plan which evinced a blatant favoritism for officers' securities; \textsuperscript{4} nevertheless the majority twice expressed general disapproval of case-by-case treatment.\textsuperscript{5}

Despite this expression of opinion by the highest tribunal, the SEC has not seen fit to promulgate a prospective regulation, and two recent cases suggest that the Court's good advice has had a curiously unfortunate effect. In the \textit{Matters of Cities Service Company} \textsuperscript{6} and \textit{American States Utilities Corporation},\textsuperscript{7} officers of registered holding companies had bought stock of the corporations after commencement of reorganization proceedings under the Public Utility Holding Company Act. Subsequent to the purchase, the officers submitted proposals for simplification of the corporate structures which called for their securities to be treated on parity with publicly owned shares.


4. Management cornered most of the preferred stock in reorganization trading, and then proposed to the SEC that this class of stock be accorded preferential treatment. The SEC, basing its order on general equitable principles, refused to approve the plan unless the fiduciary holdings acquired during reorganization were surrendered to the corporation at cost. Federal Water Service Corp., 8 S.E.C. 893 (1941). As so amended, the plan subsequently received Commission approval over the objections of several officers. Federal Water Service Corp., 10 S.E.C. 200 (1941). The latter went into the courts and were upheld by the Supreme Court in their contentions that general equity principles do not automatically preclude corporate managers from security trading. SEC v. Chenery Corp., 318 U.S. 80 (1943). Upon remand for further proceedings, the Commission again refused equal participation to management shares, but grounded its decision on the "fair reorganization" goal of §§ 7 and 11 of the Public Utility Holding Company Act and not on general equity doctrines. Federal Water Service Corp., SEC Holding Co. Act Release No. 5584, Feb. 7, 1945. The Court, hearing the case for a second time, supported the Commission's stand. SEC v. Chenery Corp., \textit{supra} note 2.

5. 318 U.S. 80, 92 (1943); 332 U.S. 194, 203 (1947).


The SEC in approving the reorganization plans emphasized the Chenery deprecation of the ad hoc approach. Thus so long as no suitable regulation is enunciated, the Chenery warning serves only to render the SEC chary of striking down reorganization schemes tainted by management trading. Under these circumstances articulation of some general principle seems particularly desirable.

One suggestion involves a simple declaration of policy against management's purchase of securities during reorganization—the question of the good faith behind particular transactions to be reserved for postfacto determination. This approach while differing from the present mode of regulation only in that policy is enunciated by administrative promulgation rather than through case decision is, however, sufficiently compliant with the Chenery warning to permit uninhibited frustration of future questionable plans. But adoption of this proposal does not liquidate difficulties inherent in the present system of control. First, the task of investigating motives behind fiduciary trades places a premium on efforts to disguise unsavory dealings as innocent. Secondly, although subsequent penalization of management shares without a further change in the reorganization plan (as in the Chenery situation) would take the profits out of proscribed trading, it would not necessarily make whole the outside holdings injured by the breach of manage-

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In addition to the emphasis placed on this warning, indeterminate weight was accorded by the SEC to other factors. Particular stress was given to the fact that unlike the Chenery case, the instant cases did not involve a concerted effort by management to acquire control over any class of security. In addition the Commission enumerated, without specific comment, other circumstances urged by the managers in distinguishing the Cities Service reorganization from that of the Chenery case: (1) the solvent conditions of the utilities here being reorganized, (2) the relatively small amount of trading involved, (3) the fact that the company and not the public would benefit if the fiduciary shares were denied equal participation since all public holdings had been paid off in full. SEC Holding Co. Act Release No. 7720, pp. 10–11, 14–15, Sept. 30, 1947. In the American States decision the Commission made reference to this line of reasoning. SEC Holding Co. Act Release No. 7721, p. 11, Oct. 2, 1947.


10. "... [A] determination whether past transactions in securities of companies subject to reorganizations ... were ... influenced by the imminence of a plan, or ... affected ... the terms or timing of the reorganization, are ... practically impossible to make. ... The factors involved are largely subjective. ... Moreover, the painstaking and extensive investigation necessary to sustain ... a correct answer to such questions [of good faith] ... imposes a burden on the administration of the Act that would seriously impair its effective administration." Cities Service Company, SEC Holding Co. Act Release No. 7720, p. 16, Sept. 30, 1947. See also Federal Water Service Corp., SEC Holding Co. Act Release No. 5584, Feb. 7, 1945.

For similar difficulty in ascertaining motives in underwriting transactions, see L. Hand, J., concurring in Morgan Stanley & Co. v. SEC, 126 F.2d 325, 332 (C.C.A. 2d 1942).
ment’s fiduciary duty. It was the prospect of these difficulties which induced the framers of the Bankruptcy Act to abandon a similar rule denying compensation to protective committee members who had traded in debtor corporation securities during reorganization under that statute.

A second rule might forbid management trading which lacked prior approval by the SEC.

Although such a formula has less retroactive effect than the first proposal, the chore of identifying motives is not reduced but merely performed at an earlier date. Most important, approval of prospective trades would not materially assist the Commission in assessing a subsequent reorganization scheme. The temptation to increase the value of management holdings by selfish orientation of the reorganization plan would remain.

The most satisfactory regulation would appear to be one placing an absolute prohibition on all purchases by or for officers during reorganization. Violation of this ban would entail enforced sale of the securities to the corporation at cost or market price, whichever is lower. Even after this disgorg-

11. Whether the outside interests have been injured by fiduciary trading depends on a determination of the treatment they would have received under a plan formulated by a management not influenced by personal investment in certain of the securities. To determine this, the Commission must either engage in sheer speculation or have the plan redrafted by unbiased managers.

12. See testimony of SEC Chairman Douglas in Hearings before Committee on the Judiciary on H.R. 6439, as amended and reported as H.R. 8046, 75th Cong., 1st Sess. 184 (1937).


14. The SEC might require full disclosure of inside information to all security holders as a prerequisite to granting its permission. But “full disclosure . . . would require the management to do the impossible job of bringing the investor up to its own level of knowledge about the system, the course of internal negotiations, the attitude of the SEC staff and the future intentions of the management.” Brief for Appellants, p. 46, SEC v. Chenery Corp., 332 U.S. 194 (1947). Further difficulty inheres in the fact that only the fiduciary knows whether a full disclosure has been made.

The common-law rule, pertaining to security transactions between managers and stockholders when no reorganization proceedings are pending, is that mere failure to disclose information is not breach of a fiduciary relation in the absence of active misleading or fraud. See Note, 84 A.L.R. 615 (1933). Most commentators, however, have supported the minority view that a manager must make disclosures before trading in the corporation’s securities. Yourd, Trading in Securities by Directors, Officers and Stockholders: Section 16 of the Securities Exchange Act, 38 Mich. L. Rev. 133, 140, n.31 (1939). At least one writer has favored the majority rule. Walker, The Duty of Disclosure by a Director Purchasing Stock From His Stockholders, 32 Yale L. J. 637 (1923).


16. For a similar suggestion that protective committee members be prohibited altogether from trading in securities and certificates of deposit subject to their trust, see Note, 46 Yale L. J. 143, 147–8 (1936). At present, § 212 of the Bankruptcy Act gives the court discretion to approve participation of these fiduciary-held securities in the reorganized corporation. 52 Stat. 895 (1938), 11 U.S.C. § 612 (1940). But § 249 absolutely denies compensation for the services of a fiduciary who has traded. See note 20 infra.

17. If the utility lacked immediate funds for such purchases, the fiduciary could still
Commission ratification of the reorganization proposal would hinge on an evaluation of the prejudice to holders of disfavored classes of securities and the time lapse and expense necessitated by a reformulation of the plan. Such a rule would supplement Section 17(b) of the Public Utility Holding Company Act which shunts to affected corporations all profits realized by management from security transactions initiated and completed within any six months' period—whether in a normal or reorganization status.

Blanket prohibitions of the type advanced have been deemed necessary in other situations found dangerous to the integrity of reorganization proceedings. Section 249 of the Bankruptcy Act forbids compensation of fiduciaries who buy or sell securities during reorganization, and SEC Rule U-62 prohibits proxy solicitations regarding securities of utilities undergoing reorganization where the solicitor is trading in those securities. Furthermore, possible necessity of an absolute rule to meet the problem was recognized both by the Commissioners who concurred in the Cities Service decision and by the Supreme Court in the Chenery case. Certainly adoption of the suggested policy would be an important step toward the goal of fair reorganizations.

be compelled to sell to the corporation. The latter would resell to the public and then pay the fiduciary. Naturally, any excess of market price over cost (to the fiduciary) would be retained by the utility. Of course, officers and directors may well cease trading altogether when neither corporation control nor profit is possible. See Brief for American States Utilities Corp. re Purchases and Sales of Stock of Holding Company by Directors and Officers, p. 31, SEC Holding Co. Act Release No. 7721, Oct. 2, 1947.

An exception is made if the security was acquired in good faith for a preexisting debt. Section 16 of the Securities Exchange Act contains a similar provision governing officers or directors of a corporation, the stock of which is listed on a national securities exchange. 48 STAT. 830 (1935), 15 U.S.C. § 79q(b) (1940). An exception is made if the security was acquired in good faith for a preexisting debt. Section 16 of the Securities Exchange Act contains a similar provision governing officers or directors of a corporation, the stock of which is listed on a national securities exchange. 48 STAT. 830 (1935), 15 U.S.C. § 79q(b) (1940).

Since both purchase and sale must be made within the six months' period in order to be covered by § 17(b), sales consummated during reorganization but after six months from the purchase date can be hit only by statutory amendment. The rule suggested in the text would, however, apply to stock held at the reorganization plan date irrespective of when purchased during the reorganization proceedings.


24. The rule cannot injure the honest fiduciary who is on notice of the limitation on his freedom to invest. But even if the rule harshly voids a harmless transaction, that conse-
CORPORATE DEATH AND CHAPTER X: DISSOLUTION
AS A BAR TO REORGANIZATION*

The legal demise of a corporation is not instantaneous. At some point between the lethal blow of charter revocation and ultimate economic expiration the business entity ceases to be a "corporation" subject to bankruptcy jurisdiction. But when?

In Chicago Title and Trust Co. v. 4186 Wilcox Bldg. Corp., the leading case on bankruptcy jurisdiction over a "dissolved corporation," the Supreme Court established the principle that the bankruptcy courts must in determining jurisdiction look to the degree of recognition accorded the "corporation" by state law; and the Court denied reorganization to a petitioning corporation whose charter had been rescinded for other than insolvency reasons. Subse-

*In re Midwest Athletic Club, 161 F.2d 1005 (C.C.A. 7th 1947).

1. By § 106(3) of the Bankruptcy Act, Chapter X is made applicable to "a corporation, as defined in this Act, which could be adjudged a bankrupt under this Act. . . ." 52 Stat. 883 (1938), 11 U.S.C. § 506(3) (1940). Section 1(8) provides that a "'Corporation' shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, . . . unincorporated companies and associations. . . ." 30 Stat. 544 (1898), as amended, 11 U.S.C. § 1(8) (1940).


3. "How long and upon what terms a state created corporation may continue to exist is a matter exclusively of state power. . . . It will hardly be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority." Id. at 127-8.

4. In the Wilcox case an Illinois corporation had been dissolved by the state for failure to file annual reports and to pay franchise taxes. Illinois statutes granted an additional two year period during which corporate existence continued for purposes of winding up and provided further that expiration of this extension need not terminate suits against the corporation initiated within the two year period if brought to enforce liability incurred prior to dissolution. Ill. Rev. Stat. Ann., c. 32, §§ 14, 79 (Smith-Hurd, 1929). The corporation had filed a voluntary petition after the lapse of the two year period but while still defending against such actions. The majority held the corporation non-existent for all purposes but that of defending its pending suit; the dissent emphasized that the retention of any corporate powers should be enough to bring the business unit within the bankruptcy definition of a "corporation." Previous circuit court decisions had split on the issue. Compare Vassar Foundry Co. v. Whiting Corp., 2 F.2d 240 (C.C.A. 6th 1924), affirming In re Vassar Foundry Co., 293 Fed. 248 (D.C. Mich. 1923) (in accord with the
reorganized under Section 723. The majority in the Wilcox case seemed undeniably influenced by the common law notion which analogized dissolved corporations to deceased persons unable to sue or be sued: See Greet v. Smith, 10 Fed. Cas. 1075, No. 5,748 (C.C.D. Me. 1845); Ballantine, Corporations 722 (1946); Stevens, Corporations 893 (1936); Marcus, Stability of Dissolved Corporations, 58 Harv. L. Rev. 675, 676 (1945).


5. The court in the Wilcox case had specifically declined to pass upon previous federal decisions dealing with involuntary proceedings. 302 U.S. 120, 124 (1937). For cases sustaining involuntary petitions against corporations dissolved for non-compliance with state statutes, see In re 211 East Delaware Place Bldg. Corp., 76 F.2d 834 (C.C.A. 7th 1935); In re Surf Bldg. Corp., 11 F. Supp. 295 (E.D. Ill. 1934) (petitions under 77B allowed after expiration of winding up period provided by state law); In re Double Star Brick Co., 210 Fed. 980 (N.D. Cal. 1913) (petition in bankruptcy allowed where statute permitted trustees to settle affairs of dissolved corporations; no corporate existence continued). Cf. Old Fort Improvement Co. v. Lea, 89 N.E. 1 (N.D. Ind. 1910) (petition in bankruptcy allowed where statute permitted trustees to settle affairs of dissolved corporations; no corporate existence continued). In re Booth's Drug Store, 19 Fed. 286 (C.C.A. 4th 1937) (petition under 77B entertained where state statute permitted indefinite corporate retention of powers after dissolution to settle affairs); In re US. Va. 1937; In re Munger Vehicle Tire Co., 159 Fed. 901 (C.C.A. 2d 1908) (petition in bankruptcy allowed under similar statute).


See, in general, 6 Collier, Bankruptcy 1404 et seq. (Moore's ed. 1947); 1 id. 624 et seq.; Finletter, The Law of Bankruptcy Reorganization 104 n.24 (1939); de Funiak, Forfeiture, Dissolution or Inactivity of Corporation as Affecting Right of Reorganization under 77B, 11 Corp. Reorg. & Am. Bankr. Rev. 216 (1938); 1 Geede, Corporate Reorganizations § 54 (1936); Bird, Financial Associations Which May Be Reorganized Under Section 77B of the Bankruptcy Act, 15 Tex. L. Rev. 65 (1936);
Peer Manor cases to refuse a creditors' petition against a corporation similarly stripped of its charter. But ouster from a corporate franchise neither destroys assets nor satisfies the claims of creditors. And on this premise, the same court held, in later Peer Manor litigation, that though a corporation might have lost de jure capacity, if, as was the case here, some or all of the original shareholders had by "joint action" continued the business as before dissolution, the business entity could still qualify for bankruptcy jurisdiction as an "unincorporated association" within the Act's definition of "corporation."

That which Peer Manor number one took away from the creditors of the "corporation," Peer Manor number two retendered to creditors of the "unincorporated company or association."

But this pragmatic approach to the problem of the dissolved corporation seems recently to have been abandoned by the court of its authorship, for


In extending the Wilcox doctrine to cover involuntary petitions, Peer Manor number one specifically overruled In re 211 East Delaware Bldg. Corp., 76 F.2d 834 (C.C.A. 7th 1935), and In re Park Beach Hotel Bldg. Corp., 96 F.2d 886 (C.C.A. 7th 1938), cert. denied sub nom. Pancoc v. Southman, Trustee, 305 U.S. 638 (1938) (involuntary petition entertained after expiration of winding up period where mortgage foreclosure proceedings continued), finding itself compelled to do so by the "positive implications of law" in the Wilcox case. In re Peer Manor Bldg. Corp., supra at 841. However, it did not see fit to overrule In re 69th and Crandon Bldg. Corp., 97 F.2d 392 (C.C.A. 7th 1938), cert. denied sub nom. Easthom-Melvin Co. v. Hoffman, 305 U.S. 629 (1938) (involuntary reorganization petition permitted after expiration of Illinois extension period where involuntary bankruptcy petition previously filed during this time).

Undeniably a logical extension of the Wilcox rationale in that it recognized the essential similarity of voluntary and involuntary petitions for jurisdictional purposes, the first Peer Manor case nevertheless carries questionable weight: of the three man court, one judge dissented and another declined to rule on the jurisdictional issue.

7. In re Peer Manor Bldg. Corp., 143 F.2d 769 (C.C.A. 7th 1944). In new reorganization proceedings concerning the identical dissolved corporation as in the first Peer Manor case, the circuit court held, in granting jurisdiction, that the earlier decision was neither res judicata nor binding as "law of the case."

8. Under Illinois law a corporation may be deprived of its de jure capacity for failure to pay franchise taxes or to file annual reports. See Ill. Stat. Ann., c. 32, §§ 157.83-5, 157.95, 157.126 (Smith-Hurd, 1934). Despite a split of authority on whether a corporation remains de facto after forfeiture of its charter, Judge Evans in his dissent in the first Peer Manor case stated that the corporation was de facto insofar as creditors' attempts to reach its assets were concerned. In re Peer Manor Bldg. Corp., 134 F.2d 839, 843 (C.C.A. 7th 1943). This rationale appears to have been adopted by the second Peer Manor case.

9. The court, recognizing a going business, turned to the traditional definition of an unincorporated company as "a number of persons united for carrying on anything jointly" to bring it within the meaning of "unincorporated association" in § 1(8). In re Peer Manor Bldg. Corp., 143 F.2d 769 (C.C.A. 7th 1944). See In re Tidewater Coal Exchange, 280 Fed. 638, 643 (C.C.A. 2d 1922).
in *In re Midwest Athletic Club,*\(^1\) the Court of Appeals for the Seventh Circuit has resorted to essentially conceptual grounds to deny a creditors' petition for reorganization. A state receiver was appointed for the Midwest Athletic Club under mortgage foreclosure proceedings in 1930, and the membership dispersed. No sale of the assets was ever consummated and although in 1938 the corporate charter was revoked for failure to file an annual report,\(^2\) Midwest continued to operate profitably. In 1946, five first mortgage bondholders petitioned for reorganization of this "corporation";\(^3\) the district court took jurisdiction\(^4\) and enjoined further action by the state receiver. Although, as in the second *Peer Manor* case, commercial operation of the property was continuing substantially unchanged, the Circuit Court of Appeals employed dictionary definitions to reverse the district court, distinguishing the second *Peer Manor* case on the ground that a foreclosure receiver does not sufficiently represent the shareholders to satisfy the requirement of "joint action."\(^5\)

The distinction drawn seems tenuous. A foreclosure receiver is representative of shareholders at least to the extent of accumulating surplus for their benefit.\(^6\) To draw a comparison, a statutory liquidation receiver under Illinois

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10. See note 1 supra.
12. See note 8 supra.
13. The property was thus operated for sixteen years in the possession of the receiver. No reason for this unusual delay appears except that tax liens of one million dollars were not compromised until three years prior to the petition. Transcript of Record, p. 76, *In re Midwest Athletic Club*, 161 F.2d 1005 (C.C.A. 7th 1947). The bondholder's committee, furthermore, had been unable to finance payment to non-depositing bondholders. Id. at 162.
14. Although the club was chartered as a not-for-profit corporation the district court had found it to be sufficiently engaged in a commercial enterprise to be subject to reorganization. *Id.* at 163. See note 22 infra.
15. "As we held in the second *Peer Manor* case, to constitute the stockholders of a dissolved corporation an unincorporated company, such stockholders, or some of them, must continue the business. They must act jointly in doing business under the corporate name. Congress did not intend by Chapter X to provide for the reorganization of pieces of property held by several persons with a community of interest." *In re Midwest Athletic Club*, 161 F.2d 1005, 1008 (C.C.A. 7th 1947). Nor could the receiver, "a mere custodial officer of the court . . . be considered as operating the corporation property for the corporation or its members . . ." *Id.* at 1009. See Chicago City Ry. v. People of Ill. *ex rel.* Hall, 116 Ill. App. 633, 640 (1904). For its interpretation of "an unincorporated company or association" the court relied on Webster's Dictionary and the definition of *In re Tide-water Coal Exchange*, 280 Fed. 638, 643 (C.C.A. 2d 1922), which in turn quoted the Century Dictionary. *In re Midwest Athletic Club*, supra at 1008.

The Court assumed, in the absence of Illinois authority, that title was vested in the members as tenants in common. *Id.* at 1008. This proposition seems well established law elsewhere. See Gardner v. Automatic Arms Co., 275 Fed. 697, 700 (N.D.N.Y. 1921); *In re Welch's Estate*, 243 Ala. 337, 342, 10 So.2d 5, 10 (1942); Stone v. Edwards, 32 Ga. App. 479, 485, 124 S.E. 54, 56 (1924). A remaining issue in the case, the district court's finding of good faith in filing the petition, was not passed upon by the circuit court of appeals.
16. The receiver appears to represent the mortgagor in that he is preserving the property while applying the rents and profits to payment of the indebtedness. See Bo-
law represents both creditors and shareholders insofar as any beneficial interest is concerned. Although distinctions between foreclosure and liquidation receivers may be justified in other instances, it is difficult to perceive any functional difference as to representative capacity. Though the court glossed over the fact, the club members were effectively prevented by appointment of a state receiver from maintaining "joint action." Under such circumstances denial of relief to creditors on a nuance of the law of receivers seems unwarranted.

The Midwest emphasis upon doctrinal at the expense of economic considerations stems, however, from the Wilcox case. If, for purposes of the Bankruptcy Act, a corporation had been construed not in terms of state law, but rather in terms of continuation of commercial activities, the "joint action" de-
vice of the second Peer Manor decision need not have been invoked. Under the Wilcox rule, the business could have been adjudicated a bankrupt during the two year winding up period provided by Illinois law following dissolution, when it could sue and be sued in its corporate name. But the lapse of this statutory period worked no change in the actual position of the business as a going enterprise. Since the corporate entity is fundamentally a vehicle for the assembly and operation of massed capital—the real unit for all practical purposes—and since the Bankruptcy Act indicates an intention to treat as an entity whatever association may be so regarded in business contemplation, it would seem to follow that jurisdiction might be invoked as to the remaining assets wherever the business is an active economic unit for which reorganization is commercially feasible. Extension of the benefits of Chapter X to its furthest reasonable limits is particularly desirable where it is found, as in the Midwest case, that state court proceedings provide an inadequate remedy.

21. Ill. Stat. Ann., c. 32, §157.94 (Smith-Hurd, Supp. 1947). This present statute goes further than the statute in effect when the Wilcox case was decided in that it permits suits by as well as against the corporation to be continued after the two year period if initiated within it. This further indicium of corporate capacity might have been used to distinguish the Wilcox case.

That a dissolved corporation could have been declared a bankrupt if proceedings were instituted within the two year period was indicated, but not specifically passed on, by the Wilcox case. In re International Sugar Feed Co., 23 F. Supp. 197 (D. Minn. 1938), subsequently held that a voluntary petition filed within the extension period could be entertained.

22. See Glenn, Liquidation §246 (1935). Susceptibility to the Bankruptcy Act is not necessarily determined by the legal status of a business unit, as is exemplified in the case of non-profit enterprises whose operations the courts will explore to determine whether they are actually engaged in a business project. In re Wisconsin Co-operative Milk Pool, 119 F.2d 999 (C.C.A. 7th 1941); In re Roumanian Workers Educational Association of America, 108 F.2d 782 (C.C.A. 6th 1940); In re McKinley Lodge, 4 F. Supp. 280 (S.D. N.Y. 1933).

23. “We think Congress intended to include all business enterprises which were unable to meet their debts and whose creditors had more faith in a reorganization than in a mortgage foreclosure.” Evans, J., in In re Peer Manor Bldg. Corp., 143 F.2d 769, 772 (C.C.A. 7th 1944). The readjustment of secured indebtedness, a principal feature of Chapter X, may be “just as necessary to the various bodies comprised within the broad definition of ‘corporations’ as to corporations in the restricted sense...” Weinstein, Corporations Amenable to Section 77B, 83 U. of Pa. L. Rev. 833, 863 (1935).

It appears that Congress was basically attempting in the 1926 redefinition of “corporation” to reach Massachusetts trusts. See 67 Cong. Rec. 7675 (1926). Specifically included is “any business conducted by a trustee, or trustees, wherein...ownership is evidenced by [a] certificate.” 44 Stat. 662 (1926), as amended, 11 U.S.C. §1(8) (1940). But Congress further provided that the term “corporation” shall include “unincorporated companies and associations,” whereas prior to 1926 only companies with official charters had been amenable to bankruptcy. Surely this addition would indicate an intent to extend bankruptcy jurisdiction to types of business enterprise, otherwise susceptible to the Act, whose legal status might not be clearly defined.

24. A proposed sale of deposited bonds by the bondholder's committee, which would have permitted the purchaser to dominate reorganization outside the federal courts, ap-
The Supreme Court in the Wilcox case, recognizing the principle of federal supremacy in the field of liquidation of debtors' estates, acknowledged that had the decree of corporate dissolution arisen from state insolvency proceedings, the federal court might properly have determined its own jurisdiction without reference to the status of the "corporation" under state law. The Court, however, could discern no conflict with federal bankruptcy powers where the charter revocation arose from other than insolvency proceedings, and avoided what it apparently considered to be an encroachment upon traditional state control of local corporations.

But the policing of corporations is not reserved solely to the state of incorporation, and it is difficult to perceive where state interests are jeopardized by a bankruptcy court's taking jurisdiction of corporate assets to satisfy creditors. In the case of Chapter X, proceedings designed to enable creditors to realize their claims to the fullest extent through reorganization do not appear to conflict with state concern that a corporation must fulfill certain legal requirements. The state has no antagonism to creditors' salvaging what they can from corporate assets, whether through reorganization or liquidation.

By the Wilcox doctrine, corporate amenability to reorganization must be tested by the degree of state recognition rather than the realities of apparently influenced the district court in finding need for Chapter X relief. Transcript of Record, p. 162, In re Midwest Athletic Club, 161 F.2d 1005 (C.C.A. 7th 1947).

25. "While state laws in conflict with the laws of Congress on the subject of bankruptcies are suspended, they are suspended 'only to the extent of actual conflict...'. The dissolution effected under Illinois law is in no way related to a state of insolvency or bankruptcy." Chicago Title & Trust Co. v. 4136 Wilcox Bldg. Corp., 302 U.S. 120, 126 (1937).

26. For example, a corporation doing business in a state, not the state of its origin, can be made subject to a statute continuing its existence after dissolution for purposes of suits. See Clark v. Williard, 292 U.S. 112, 119 (1934); cf. Washington v. Superior Court, 289 U.S. 361 (1933); Trounstine v. Bauer, Pogue & Co., 144 F.2d 379 (C.C.A. 2d 1944). See Marcus, supra note 4, at 692. Some cases, prior to Wilcox, appeared to adopt this dual-responsibility rationale in stating that dissolution of a corporation should not deprive federal courts of paramount power over the distribution of property of an insolvent corporation. See In re 4136 Wilcox Bldg. Corp., 86 F.2d 667, 669 (C.C.A. 7th 1936); Hammond v. Lyon Realty Corp., 59 F.2d 592, 594 (C.C.A. 4th 1934); In re 211 East Delaware Place Bldg. Corp., 76 F.2d 834, 836 (C.C.A. 7th 1935); In re Double Star Brick Co., 210 Fed. 980, 982 (N.D. Cal. 1913).

27. Cardozo pointed out in his dissent to the Wilcox case that any plan of reorganization must necessarily be in conformity with state law or fail and that no real conflict with state policy exists. Chicago Title and Trust Co. v. 4136 Wilcox Bldg. Corp., 302 U.S. 120, 133 (1937). If reorganization is successful, the corporation that emerges must be lawfully chartered by Illinois or some other state; and if not chartered by the state of dissolution, it must obtain a license to do business therein and otherwise must comply with her laws relative to foreign corporations. The intention of the state that the corporation should die is of no significance per se, for the business entity could undoubtedly have been reorganized within the extension period. See 6 Collier, Bankruptcy 1407 (Moore's ed. 1947); Note, 38 Col. L. Rev. 504, 507 (1938).

28. There is even less reason for concern over conflicting interests where the assets are to be administered in ordinary bankruptcy, for revocation of the charter necessarily looks to eventual liquidation. See Note, 23 CORN. L. Q. 440, 442 n.9 (1938).
commercial activity. Created in contemplation of an imaginary conflict with state prerogative, the doctrine has unnecessarily curtailed the scope of the national bankruptcy powers;\(^\text{29}\) has resulted in needless confusion;\(^\text{30}\) and has extended to corporate management the opportunity utilized by the bondholders' committee in the *Midwest* case to avoid the rigorous supervision of federal reorganization by technical non-compliance with state requirements. Discard of the *Wilcox* doctrine is long overdue.

\(^{29}\) The generic *Wilcox* distinction between state-instituted dissolution and dissolution arising out of insolvency appears unrealistic if its specific operation obstructs federal power in one instance as in the other. "... No such simple device as technical dissolution should be allowed to supplant the federal jurisdiction with that of the states." Tondel, *Corporations Eligible for Relief Under 77B*, 21 MINN. L. REV. 144, 161 (1936).