

"fair play" for anyone who contemplates reaping benefits from extending his activities into states where he does not reside.²⁸

PROXY SOLICITATION DURING CORPORATE DISSOLUTION³³

To eliminate unnecessary complexity in public utility systems, the Public Utility Holding Company Act¹ empowers the SEC to order holding companies to dissolve their subsidiaries.² Part of the dissolution process involves the

28. Where the state is bringing such a suit, the quality rather than the extent of the nonresident's activity is the important factor. This is essentially the principle of *Hess v. Pawloski*, 274 U.S. 352 (1927), *supra* note 7. The commission of even a single or occasional act, because of its nature and quality, is enough to sustain the validity of process if there is reasonable probability that the nonresident defendant will receive actual notice. See also *International Shoe Co. v. Washington*, 326 U.S. 310, 318, 320 (1945); *Wuchter v. Pizzuti*, 276 U.S. 13, 24 (1928). This principle was also stressed in *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), *supra* note 7, where the defendant's dealings in corporate securities were subject to special regulation by the state. *Id.* at 627. *Accord*, *Wilentz v. Edwards*, 134 N.J. Eq. 522, 36 A.2d 423 (Ct. Err. & App. 1944); *Stevens v. Television, Inc.*, 111 N.J. Eq. 306, 162 Atl. 248 (Ch. 1932), 32 Col. L. Rev. 1428, 18 CORNELL L.Q. 435 (1933).

Of course, the act has to give rise to the cause of action. But this is always the case where a state seeks to enforce its laws against a nonresident.

* *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 (2d Cir. 1949), *affirming* 82 F.Supp. 17 (S.D.N.Y. 1948).

1. 49 STAT. 803-38 (1935), 15 U.S.C. § 79 (1946), hereafter cited as 15 U.S.C. § 79.

2. The Act requires the Commission to examine the corporate structure of every holding company registered under the Act and its subsidiaries in order that each holding company system "may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of the securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operation of an integrated public-utility system. . . ." 15 U.S.C. § 79k(a). For the regulations promulgated under the Act, see SECURITIES AND EXCHANGE COMMISSION, GENERAL RULES AND REGULATIONS UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935 (1946); SECURITIES AND EXCHANGE COMMISSION RULES OF PRACTICE (1946).

Under Section 11(b)(1) of the Act, the "death sentence" clause, the Commission is empowered "to require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system. . . . to a single integrated public-utility system. . . ." 15 U.S.C. § 79k(b)(1). Section 11(b)(1) was held constitutional in *North American Co. v. SEC*, 327 U.S. 686 (1946). For a discussion of the operation of Section 11(b)(1), see WATERMAN, ECONOMIC IMPLICATIONS OF PUBLIC UTILITY HOLDING COMPANY OPERATIONS (1941); Meers, *Reorganizations under the Bankruptcy and Holding Company Acts*, 27 TEX. L. REV. 14, 25-40 (1948).

Section 11(b)(2) empowers the Commission to simplify a holding company system in order "to ensure that the corporate structure or continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-

allocation of the subsidiary's assets among its creditors and stockholders. As a result of over-capitalization, the liquidation proceeds which are left after creditors have been paid are often inadequate to satisfy all stockholder classes.³ Therefore, the dissolution proceeding often turns into a mad scramble among conflicting stockholder interests. But to instill as much equity and fairness⁴ as is possible into the proceedings, the Act requires SEC approval of the dissolution plan.⁵ And before the plan is approved, hearings must be held at which the conflicting stockholder claims are weighed.

The solicitation of proxies for representation purposes is one device by which a stockholder group attempts to exert greater influence at the hearings.⁶ By means of these proxies, minority stockholder interests are merged into organized representation committees which may more persuasively contend with powerful majority stockholder groups for portions of the left-over estate.⁷

company system. . . ." 15 U.S.C. § 79k(b)(2). Its constitutionality was upheld in *American Power and Light Co. v. SEC*, 329 U.S. 90 (1946), 95 U. OF PA. L. REV. 551 (1947).

3. See BALLANTINE, CORPORATIONS §§ 301-19 (2d ed. 1946); BROWN, SOME OF THE LEGAL ASPECTS OF THE CONTROL OF SECURITY ISSUES INCLUDING CORPORATE REORGANIZATION 60-75 (1939); DEWING, FINANCIAL POLICY OF CORPORATIONS 1257, 1282-1330 (4th ed. 1941).

4. Section 11(e) provides that "If, after notice and opportunity for hearing, the Commission shall find such plan . . . fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan. . . ." 15 U.S.C. § 79k(e). The courts have interpreted "fair and equitable" to mean that each security holder in the order of his priority receives from that which is available for satisfaction of his claim the equitable equivalent of the rights surrendered. *SEC v. Central-Illinois Securities Corp.*, 338 U.S. 96 (1949); *Otis & Co. v. SEC*, 323 U.S. 624, 634 (1945).

5. Section 11(d) of the Act, 15 U.S.C. § 79k(d), provides for plans to be submitted by the Commission or by any person having a "bona fide" interest in the plan. Section 11(e), 15 U.S.C. § 79k(e), provides in addition that any registered holding company or subsidiary thereof may submit a dissolution or reorganization plan for the purpose of enabling such company to comply with Section 11(b). Thus far, in only one case, *International Hydro-Electric System, SEC Holding Company Act Release No. 3679*, July 21, 1942, has a Section 11(d) plan been used. See 11 SEC ANN. REP. 52 (1945). The Commission is reluctant to proceed under Section 11(d). See *The United Light and Power Co.*, 9 S.E.C. 833, 853 (1941).

Even the initial provisions of the plan are not completely discretionary with the corporation, however. In one case the court specifically approved a SEC order requiring the dissolving corporation to retire certain bonds, thus eliminating a lien claim on certain property, and removing a possible loss to stockholders of the company owning that property. The court stated that the power of the SEC is not limited to the order of dissolution, but it may direct how that order is to be obeyed. *In re Laclede Gas Light Co.*, 57 F.Supp. 997, 1005 (D.Mo. 1944), *aff'd sub nom. Massachusetts Mut. Life Ins. Co. v. SEC*, 151 F.2d 424 (8th Cir. 1945), *cert. denied*, 327 U.S. 795 (1946).

6. The SEC stated in its brief on appeal that representation proxies have been used in more than sixty cases involving Section 11(e) plans. Brief for the SEC as Intervener-Appellee, p. 31, *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 (2d Cir. 1949).

7. Although the use of the proxy originally developed as a means of bridging the gap between management control and owner passivity engendered by the large size of corporations, the representation proxy device has been used in recent years as a means for

In a recent case, *North American Utility Securities Corporation v. Posen*,⁸ the majority interests, controlled by the parent corporation, sought to prevent the fusing of a scattered minority by enjoining a proxy solicitation at the hearing stage.

The SEC, under Section 11(b) of the Holding Company Act, had ordered The North American Company to dissolve its control of an investment subsidiary, the North American Utility Securities Corporation (NAUS).⁹ North American, complying with this order, presented a plan to the Commission for retiring NAUS' outstanding securities. Under this plan, North American, as owner of all the preferred stock and eighty per cent of the common, would receive all NAUS' assets, while the holders of the common stock outstanding in the hands of the public would receive nothing. When the SEC scheduled hearings on the plan, a committee of NAUS' minority common stockholders filed with the SEC a proxy solicitation which it proposed to send to other minority stockholders requesting them to authorize the committee to act as their representative at the hearing.¹⁰ SEC approval was granted, but NAUS sought to enjoin any action by the committee, contending that the proxy statement provision of the Act, Section 11(g),¹¹ prohibited solicitations in respect

concentrating stockholder interests, with a view toward exerting greater influence by small stockholder groups. See *Hearings before Committee on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821, and H.R. 2019, 78th Cong., 1st Sess. (1943) passim*; BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 80-90 (1940); *Axe, Corporate Proxies*, 41 MICH. L. REV. 38 (1942).

The SEC has recognized the importance of this second use of the proxy device by distinguishing between "simple" or "preliminary" proxies "in connection with reorganizations"—the "influence" proxies—and solicitations "of consents and dissents." SEC Holding Company Act Release No. 759, July 26, 1937. SEC Rule U-62, a revision of former Rule 12-E-3, deals with solicitations in connection with reorganization. SEC Holding Company Act Release No. 2694, April 21, 1941. For further reference to this dichotomy, see 4 SEC ANN. REP. 71-3 (1938); SEC Holding Company Act Release No. 1900 (SEC Exchange Act Release No. 2394), Jan. 25, 1940; SEC Holding Company Act Release No. 1915, Feb. 6, 1940.

8. 176 F.2d 194 (2d Cir. 1949), *affirming* 82 F.Supp. 17 (S.D.N.Y. 1948).

9. *North American Co.*, 11 S.E.C. 194, 221-3 (1942), *aff'd*, 133 F.2d 148 (2d Cir. 1943), *aff'd* 327 U.S. 686 (1946).

10. This group was a self-constituted protective committee for holders of the plaintiff's publicly held common stock. 176 F.2d 194, 195 (2d Cir. 1949). The proposed authorization blank reads:

"You are hereby authorized to act for and represent the undersigned as owners of said common stock in connection with a certain plan of dissolution dated June 21, 1948 filed by the North American Company . . . pending before the Securities and Exchange Commission, . . . and to appear before the . . . Commission or any court or other commission or other regulatory body in connection with such proceeding." 176 F.2d 194, 195 n.3. The authorization is unconditionally revocable without expense to the signer. *Id.* at 195.

11. This section reads as follows:

"It shall be unlawful for any person to solicit or permit the use of his or its name to solicit . . . any proxy consent, authorization, power of attorney, deposit, or dissent in respect of any reorganization plan of a registered holding company or subsidiary company thereof under this section, . . . or in respect of any plan under this section for

of any reorganization plan unless preceded or accompanied by the SEC report on the plan.¹² The effect of this interpretation would be to prohibit representation proxies at this stage of the proceedings since a report cannot be written until after the hearing is completed. To get around the prohibition in 11(g), the committee and the SEC, which intervened in the suit,¹³ argued that 11(g) did not apply to solicitations for representation purposes.¹⁴ The district court accepted this position and dismissed the complaint.¹⁵ On appeal the Second Circuit affirmed in a 2-1 decision with Judge Learned Hand dissenting.¹⁶

The majority refused to interpret the statute literally. A narrow interpretation, they felt, would produce a result which was inconsistent with the legislators' plain intent, articulated throughout the statute, to require the SEC to give to the stockholder every opportunity to be heard.¹⁷ Implicit in the

the divestment of control, securities, or other assets, or for the dissolution of any registered holding company or any subsidiary company thereof, unless—

"(1) the plan has been proposed by the Commission or the plan and such information regarding it and its sponsor as the Commission may deem necessary or appropriate in the public interest . . . has been submitted to the Commission by a person having a bona fide interest . . . in such reorganization;

"(2) each such solicitation is accompanied or preceded by a copy of a report on the plan which shall be made by the Commission after an opportunity for hearing on the plan . . . and

"(3) each such solicitation is made not in contravention of such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers.

"Nothing in this subsection or the rules and regulations thereunder shall prevent any person from appearing before the Commission or any court through an attorney or proxy." 15 U.S.C. § 79k(g).

12. Plaintiff contended that the "unequivocal language of the statute" prohibited such solicitations, urging that both Congressional intent and the statute on its face prohibited solicitations arising out of any Section 11(e) plan which did not meet the statutory requirements. Brief for Appellants, pp. 7-14, *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 (2d Cir. 1949).

13. The district court permitted the SEC to intervene as an agency administering a federal statute relied upon as a ground of defense by a party to the original suit, pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

14. The defendants also attempted to avoid the prohibition of 11(g) by relying on 12(e), 15 U.S.C. § 79 1(e). This section empowers the SEC to make rules regulating the proxy process. The defendants contended that any solicitation was permitted which conformed to SEC rules and received SEC approval. And since 1937, the SEC has approved solicitations for representation purposes. SEC Holding Company Act Release No. 759, July 26, 1937; SEC Holding Company Act Release No. 2694, April 21, 1941. Cf. *In the Matter of Thomas J. Walsh*, SEC Holding Company Act Release No. 5595, Feb. 8, 1945.

15. 82 F.Supp. 17 (S.D.N.Y. 1948).

16. 176 F.2d 194 (2d Cir. 1949).

17. There is a provision for hearings in the following sections: 11(b) (hearing before holding company system operations are limited); 11(f) (hearing before Commission is appointed a trustee in any dissolution proceeding under court order); 11(g)(2) (hearing before report on plan is issued). For additional evidence of Congressional intent to provide adequate notice and opportunity for hearing, see SEN. REP. No. 621, 74th Cong., 1st Sess. 33-4 (1935); Note, 21 TEMP. L. Q. 406 (1948).

court's opinion was the thought that an individual stockholder's interest might be so small, his information as to management plans so scanty, or his place or residence so distant from the place of the hearings, that he might be unable to take personal advantage of his right to be heard.¹⁸

Though not denying the force of the majority's argument, Judge Hand felt that the court was bound by the wording of Section 11(g), forbidding solicitations until a report had been issued.¹⁹ The net result of such an interpretation, however, would be to require the SEC to hold two hearings on every plan. Upon issuance of a dissolution order, the SEC usually requires the parent or subsidiary corporation to present a plan by which dissolution can be effected. The Commission then holds hearings on this plan, giving all interested parties opportunity to appear and present their arguments, introduce evidence, and cross-examine witnesses.²⁰ If the "report" referred to in 11(g) is made at all, it is not made until after the hearings are completed.²¹ Thus, under Judge Hand's interpretation, if 11(g) is to give representation committees a right to oppose the plan, there must be another hearing after the SEC report is made. Presumably, the Commission would have to reconsider the plan in the light of this second hearing. Aside from the waste motion and expense involved, the effect of excluding committees until one set of hearings has been completed and a report issued would probably be to discourage stockholder participation at a most crucial stage of the dissolution.

18. The majority felt further that the SEC's interpretation of 11(g) should be given great weight since the Commission was charged with the duty of administering the Act. The second circuit had previously held that the interpretation of the Public Utility Holding Company Act by the SEC should control unless plainly erroneous. *SEC v. Associated Gas & Electric Co.*, 99 F.2d 795 (2d Cir. 1938). Cf. *SEC v. Chinese Consol. Benev. Ass'n*, 120 F.2d 738, 741 (2d Cir. 1941); *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943).

Where administrative rulings are involved, the "ultimate criterion is the administrative interpretation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Gray v. Powell*, 314 U.S. 402, 413 (1941).

19. 176 F.2d 194, 198 (2d Cir. 1949).

20. For the procedure at SEC hearings see *SECURITIES AND EXCHANGE COMMISSION RULES OF PRACTICE* (1946).

21. Communication to the *YALE LAW JOURNAL* from Myron S. Isaacs, Special Counsel, Securities and Exchange Commission, Oct. 18, 1949, in Yale Law Library. After a hearing on a Section 11(e) plan, and upon SEC approval, the plan may be carried into execution in one of three ways:

1. Mere corporate action.

2. A vote of the stockholders if this is part of the plan. The Second Circuit has held that a stockholder vote is not required before a Section 11(e) plan can be put into execution. *Phillips v. SEC*, 153 F.2d 27 (2d Cir. 1946), *cert. denied*, 328 U.S. 860 (1945).

3. District court enforcement. Under Section 11(e), the proponent alone may request that the plan be made compulsory through district court enforcement proceedings. This method has been the one predominantly used. Communication to the *YALE LAW JOURNAL*, *supra*. The federal district court has jurisdiction of the holding company and subject matter involved in a proceeding by the SEC to enforce and carry out a plan for the corporate simplification of the company. 15 U.S.C. § 79k(e); § 79r(f); § 79x. *In re Community Light & Power Co.*, 33 F.Supp. 901 (S.D.N.Y. 1940).

Since the *Posen* case extends the boundaries of representation proxies, steps should now be taken to see that the stockholder solicited is fully informed of the committee's position with respect to the plan. Under present SEC regulations, a signed proxy held by the committee does not necessarily reflect an informed opinion on the part of the stockholder.²² The disclosure rules do not require the committee to inform the stockholder of any concrete contentions against a plan. All that must be disclosed is the names of the committee members, the amount of their stock interests in the dissolving corporation, their present business relationship to the corporation, and any plans for their employment by the parent company after dissolution is effected.²³ Additional information is supplied at the committee's option.²⁴ Thus the stockholder may have no basis for ascertaining whether his interest is really aligned with the committee's position. Since in this type of situation some significance may well attend strength of numbers, a committee's objections may be given more weight than is warranted by an analysis on the merits. Moreover, there is a danger of unwarranted nuisance solicitations instigated by lawyers seeking to establish the claim to a fee. This places an unnecessary financial burden on the corporation inasmuch as the costs of solicitations and attorneys' fees are charged to the dissolving estate.²⁵

22. Few stockholders are inclined to seek out any information not given them. See Note, *State Regulation of Corporate Procedure for Electing Directors*, 58 YALE L.J. 795, 796 (1949).

23. SEC Rule U-62(c) requires that proposed solicitations made under the Public Utility Holding Company Act be submitted to the Commission for approval on form U-R-1. SECURITIES AND EXCHANGE COMMISSION GENERAL RULES AND REGULATIONS UNDER THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, 402 (1946). This form requires the declarant to file a copy of the proposed letter of solicitation, containing the "names and addresses of declarants; . . . their principal business connection; . . . their interest in the reorganization (including the nature and amount of securities and claims beneficially owned or otherwise controlled by each such person); . . . all important relations now existing or which have existed within five years prior to the filing of the declaration between each such person and the company affected by the plan; . . . and all plans or arrangements . . . that have been made for the employment of any such person by the company in reorganization, . . . or for the compensation of such person. . . ." SEC Form U-R-1, p.1. For a summary of SEC experience under this rule, see Purcell, Foster, & Hill, *Enforcing the Accountability of Corporate Management and Related Activities of the S.E.C.*, 32 VA. L. REV. 497 (1946).

24. The *Posen* committee stated in [its] original disclosure statement only that "the Committee feels that the plan . . . is unfair to the common stockholders and intends to oppose this plan or any other which does not make adequate provision for the common stockholders. It is the Committee's opinion that the North American Company mismanaged its subsidiary [NAUS], and caused [NAUS] to declare and pay improper dividends in substantial amounts to the North American Company as holder of all the outstanding preferred stock. . . ." Transcript of Record, p. 83, *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 (2d Cir. 1949).

25. Although neither the Act nor Rule U-62 provides specifically for allowance of fees and expenses to a security holders' protective committee, the Commission has held that Section 11 (e) confers on the Commission the power and obligation, in an appropriate case, to require reimbursement from the residuary estate for services rendered in a dis-

The proxy process encourages a more adequate and organized presentation of conflicting claims before the SEC. This function of proxies the *Posen* case protects.²⁶ But proxies might also serve to reflect accurately an informed stockholder opinion. To promote this added function, the Commission must revise its rules to require full disclosure by would-be representation committees.²⁷

solution proceeding. Engineers Public Service Co., SEC Holding Company Act Release No. 7041, Dec. 5, 1946, pp. 37-40; New England Power Association, SEC Holding Company Act Release No. 8751, Dec. 27, 1948; cf. *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S.D.N.Y. 1948) (SEC jurisdiction over fees for services rendered in a Section 11(e) reorganization held inseparable part of its determination whether dissolution plan is fair and equitable).

In a recent case, an attorney for a security holders' committee who had made important contributions to a Section 11(e) proceeding was denied compensation by formal action of the Commission. The SEC felt that the attorney "gave such attention to his personal interests and the fees which he hoped to secure, that his obligation of undivided loyalty to the stockholders whom he represented was not fulfilled." Market Street Railway Co., SEC Holding Company Act Release No. 9376, October 1, 1949, pp. 13-15.

26. Stockholder representation during the hearings stage of dissolution proceedings takes on added importance inasmuch as Congress did not require a vote of stockholders before the SEC makes final an order approving a dissolution plan submitted under 11(e). See *Phillips v. SEC*, *supra* note 21. "Neither Section 11(e) or 11(d) contain requirements for obtaining security holders' approval, and in view of overriding considerations of public policy, it was obviously intended by Congress that a plan found by this Commission and by a federal court to be fair and equitable to persons affected, and necessary and appropriate to effectuate the provisions of Section 11, could be approved and carried out whether or not such assent should be given. . . ." *Great Lakes Utility Co.*, 11 S.E.C. 87, 95 (1942).

27. Perhaps the most important effect the various security regulation acts were supposed to have was to "protect security holders by giving the Commission certain supervisory powers over corporate practices, including the solicitation of proxies, and by supplying significant blocks of voters with sufficient information to enable them to canalize corporate policy by well-directed opposition. . . ." Comment, *Regulation of Proxy Solicitation by the Securities and Exchange Commission*, 33 ILL. L. REV. 914, 915 (1939). Under Section 12(e), the SEC would seem to have the power to require more information than it does at present. The courts have generally accorded the SEC a wide latitude of discretion in its interpretation of the proxy solicitation provisions. Compare the experience under the Securities Exchange Act, 48 STAT. 895 (1934), 15 U.S.C. § 78n (1946), which the Commission enforces by Regulation X-14, SEC Exchange Act Release No. 1823, Aug. 11, 1938, amended by SEC Exchange Act Release No. 3347 (Securities Act Release No. 2887), Dec. 18, 1942, and Rule U-61, SEC Holding Company Act Release No. 3090, Oct. 25, 1941 (applying Regulation X-14 to holding companies registered under the Act when the proxy solicitation is other than in connection with a reorganization). *SEC v. O'Hara Re-Election Committee*, 28 F.Supp 523 (D.Mass. 1939) (SEC has power to invalidate proxies obtained as a result of solicitation containing false and misleading statements); *SEC v. Okin*, 132 F.2d 784 (2d Cir. 1943), 56 HARV. L. REV. 829 (power of SEC extends to writings which form part of plan contemplating solicitation); *SEC v. Okin*, 137 F.2d 862 (2d Cir. 1943) (SEC has power to enjoin the mailing of solicitations containing false and misleading statements); *SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948), 57 YALE L.J. 874 (1948) (SEC power extends to enjoining management's solicitation of proxies for annual stockholder meeting until valid stockholder proposals are included in the proxy statements).