Towards the Development of an Implied Right of Action under Rule 14A-8 of the Securities Exchange Act of 1934

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TOWARDS THE DEVELOPMENT OF AN IMPLIED RIGHT OF ACTION UNDER RULE 14A-8 OF THE SECURITIES EXCHANGE ACT OF 1934

In Kixmiller v. SEC the Court of Appeals for the District of Columbia Circuit held that no-action determinations made by the SEC's Division of Corporation Finance concerning the includability on management's proxy statement of a shareholder proposal submitted pursuant to rule 14a-8 were not reviewable unless first reviewed by the Commission itself. Because the Commission frequently fails to review the decisions rendered by the Division of Corporation Finance, express recognition of an implied right of action under rule 14a-8 to test management's decision to exclude is imperative. The Supreme Court, however, has recently adopted a very restrictive posture toward implied private rights of action which could jeopardize actions under rule 14a-8 as well. The author is of the view that the Court's general disinclination toward recognition of new implied private rights of action should not be extended to rule 14a-8 because of the unique nature of the right the rule was drafted to protect.

I. INTRODUCTION

Securities and Exchange Commission (SEC) rule 14a-8,1 promulgated pursuant to section 14(a) of the Securities Exchange Act of 1934,2 affords shareholders of qualifying corporations3 an opportunity to have their proposals included on management's proxy statement and thereby to have their fellow shareholders consider those proposals before voting upon them.4 Because shareholders who are unable to attend the meeting at which the proposals are considered frequently vote by giving management a

2. 15 U.S.C. § 78n(a) (1970) [hereinafter cited as Exchange Act]. Section 14(a) provides:
It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this [Act].
3. Section 14(a) extends the proxy rules to corporations registered on a national securities exchange pursuant to section 12(b), 15 U.S.C. § 78l(b) (1970), and to those required to register under section 12(g), 15 U.S.C. § 78l(g) (1970), of the Exchange Act. Section 12(g)(1)(B) presently requires the registration of the securities of "[e]very issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce" where such issuer has total assets exceeding $1,000,000 and equity securities held by 500 or more owners of record. 15 U.S.C. § 78l(g)(1)(B) (1970).
4. Specifically, rule 14a-8(a) provides in pertinent part:
If any security holder of an issuer notifies the management of the issuer of his intention to present a proposal for action at a forthcoming meeting of the issuer's security holders, the management shall set forth the proposal in its proxy statement and identify it in its form of proxy and provide means by which security holders can make the specification required by Rule 14a-4(b).
17 C.F.R. § 240.14a-8(a) (1976).
general proxy, any proposal which is not included in the proxy statement is virtually assured of defeat. Management has discretionary authority to vote against proposals introduced from the floor at the meeting and the shareholder's alternative, a proxy solicitation independent of management, is only viable for the affluent. Consequently, rule 14a–8 serves as a substantial boon to corporate democracy.

Provided certain eligibility and procedural requirements are satisfied, the rule establishes a presumption that the proposal submitted is includable.

5. A proposal which does not meet the state law "proper subject" test of includability, see note 10 infra, when worded as a directive or mandate may, however, be acceptable when reframed as a precatory proposal. See 41 Fed. Reg. 53,000 (1976) (amending 17 C.F.R. § 240.14a–8(c)(1) note). Unlike a mandatory proposal, a precatory shareholder proposal, even if passed, would have no binding significance; such proposals merely inform management of shareholder sentiment.

6. 17 C.F.R. § 240.14a–4(c)(4) (1976). This rule is most often relied on in contests for control of a corporation's board of directors; shareholders' nominations for directors are expressly excluded from the coverage of rule 14a–8(a) by rule 14a–8(c)(8). 41 Fed. Reg. 53,000 (corresponds to last sentence of rule 14a–8(a), 17 C.F.R. § 240.14a–8(a) (1976)).

7. But cf. Chilgren, A Plea for Relief From Proxy Rule 14a–8, 19 Bus. Law. 303 (1963) (amending the rule to require a proponent to pay all or a portion of the cost of his proposal would avoid abuse by small shareholders merely seeking publicity). The expression "corporate democracy" refers to the traditional notion that shareholders, as ultimate owners, have the right to participate in corporate affairs to the full extent granted by statute.

9. These requirements are set out in rule 14a–8(a) which provides in pertinent part:

(1) Eligibility. At the time he submits the proposal, the proponent shall be a record or beneficial owner of a security entitled to be voted at the meeting on his proposal, and he shall continue to own such security through the date on which the meeting is held. If the management requests documentary support for a proponent's claim that he is a beneficial owner of a voting security of the issuer, the proponent shall furnish appropriate documentation within 10 business days after receiving the request. In the event the management includes the proponent's proposal in its proxy soliciting materials for the meeting and the proponent fails to comply with the requirement that he continuously be a voting security holder through the meeting date, the management shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

(2) Notice. The proponent shall notify the management in writing of his intention to appear personally at the meeting to present his proposal for action. The proponent shall furnish the requisite notice at the time he submits the proposal, except that if he was unaware of the notice requirement at that time he shall comply with it within 10 business days after being informed of it by the management. If the proponent, after furnishing in good faith the notice required by this provision, subsequently determines that he will be unable to appear personally at the meeting, he shall arrange to have another security holder of the issuer present his proposal on his behalf at the meeting. In the event the proponent or his proxy fails, without good cause, to present the proposal for action at the meeting, the management shall not be required to include any proposals submitted by the proponent in its proxy soliciting materials for any meeting held in the following two calendar years.

(3) Timeliness. The proponent shall submit his proposal sufficiently far in advance of the meeting so that it is received by the management within the following time periods:
To rebut this presumption the corporation is required to demonstrate to the satisfaction of the SEC's Division of Corporation Finance that the proposal falls within the range of issues embraced by one of the several tests for exclusion.\textsuperscript{10} If the Division of Corporation Finance agrees that the proposal is excludable it will issue a no-action letter to that effect. In \textit{Kixmiller v.}

(i) \textit{Annual Meetings.} A proposal to be presented at an annual meeting shall be received by the management at the issuer's principal executive offices not less than 90 days in advance of a date corresponding to the date set forth on the management's proxy statement released to security holders in connection with the previous year's annual meeting of security holders, except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date of the previous year's annual meeting a proposal shall be received by the management a reasonable time before the solicitation is made.

(ii) \textit{Other Meetings.} A proposal to be presented at any meeting other than an annual meeting shall be received a reasonable time before the solicitation is made. 41 Fed. Reg. 53,000 (1976) (amending 17 C.F.R. § 240.14a-8(a) (1976)).

The requirement of a 90 day advance notice is a result of an amendment which became effective May 1, 1977. Prior to that date only 70 days notice was necessary. A similar amendment to rule 14a-8(d) extended the period prior to the filing of preliminary copies of the proxy statement and form of proxy before which the issuer must file its reasons for excluding a shareholder proposal and notify the proponent from 30 to 50 days. 41 Fed. Reg. 53,001 (1976) (amending 17 C.F.R. § 240.14a-8(d) (1976)).

The amendments also limit proponents to two proposals of not more than 300 words each, exclusive of supporting statements. 41 Fed. Reg. 53,000 (1976) (amending 17 C.F.R. § 240.14a-8(a)(4) (1976)).

10. As a result of the recent amendments the five grounds for exclusion under rule 14a-8(c) have been replaced by the following thirteen:

(1) the proposal is, under the laws of the issuer's domicile, not a proper subject for action by security holders;

\textsc{Note.}—A proposal that may be improper under the applicable state law when framed as a mandate or directive may be proper when framed as a recommendation or request.

(2) If the proposal would, if implemented, require the issuer to violate any state law or federal law of the United States, or any law of any foreign jurisdiction, to which the issuer is subject, except that this provision shall not apply with respect to any foreign law compliance with which would be violative of any state law or federal law of the United States;

(3) If the proposal or the supporting statement is contrary to any of the Commission's proxy rules and regulations, including Rule 14a-9 (17 CFR 240.14a-9), which prohibits false or misleading statements in proxy soliciting materials;

(4) If the proposal relates to the enforcement of a personal claim or the redress of a personal grievance against the issuer, its management, or any other person;

(5) If the proposal deals with a matter that is not significantly related to the issuer's business;

(6) If the proposal deals with a matter that is beyond the issuer's power to effectuate;

(7) If the proposal deals with a matter relating to the conduct of the ordinary business operations of the issuer;

(8) If the proposal relates to an election to office;

(9) If the proposal is counter to a proposal to be submitted by the management at the meeting;

(10) If the proposal has been rendered moot;

(11) If the proposal is substantially duplicative of a proposal previously submitted to the management by another proponent, which proposal will be included in the management's proxy materials for the meeting;
SEC, a 1974 decision by the Court of Appeals for the District of Columbia Circuit, the court held that unless reviewed by the Commission these staff determinations are not "orders" and hence are not judicially reviewable pursuant to section 25(a).

On at least three occasions in 1976, shareholders who requested Commission review of decisions by the staff of the Division of Corporation Finance upholding the respective corporation's exclusion of their proposals had their requests denied. Although the Commission's refusal may be technically supportable as a matter within its administrative discretion, failure of the Commission to review may effectively foreclose shareholders from relief. This development graphically illustrates the need for recognition of an implied private right of action under rule 14a-8 in favor of shareholders who believe that a proposal has been wrongfully excluded by management. This Note suggests that an implied right of action is not only consistent with the nature of the right the rule was drafted to facilitate, but is also supportable with both precedent and policy.

(12) If substantially the same proposal has previously been submitted to security holders in the management's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the management's proxy materials relating to any meeting of security holders held within 3 calendar years after the latest such previous submission: Provided, That—(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or (ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or (iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; and

(13) If the proposal relates to specific amounts of cash or stock dividends.


11. 492 F. 2d 641 (D.C. Cir. 1974).

12. It was this lack of review that the court used to distinguish its decision in Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972). To support its reasoning the court cited International Paper Co. v. FPC, 438 F.2d 1349 (2d Cir. 1971), which concerned discovery of staff-prepared memoranda under the Freedom of Information Act. 5 U.S.C. § 552(a)(3) (1970) (amended 1974). In International Paper the Commission contended that it could reject the discovery demand absent a showing of compelling need on the ground that the documents specified fell within the exception for both inter-agency and intra-agency memorandums. 5 U.S.C. § 552(b)(5) (1970) (amended 1974). Arguably, these facts are distinguishable from those in Kixmiller. Such "merely preliminary inter-agency memoranda, compiled preparatory to the formulation of the Commission's final decision," 438 F.2d at 1359, would seem to have a significantly lesser degree of finality than no-action letters issued by the SEC's Division of Corporate Finance.


II. JUDICIAL TREATMENT OF IMPLIED PRIVATE RIGHTS

A. J.I. Case Co. v. Borak

Any analysis advocating an implied private right of action in the proxy rules context must begin with an examination of J.I. Case Co. v. Borak. In this case, Borak, a shareholder of J.I. Case Co., sought a judgment to declare the company's merger with American Tractor Corporation void and to award damages to himself and all other shareholders similarly situated. Borak alleged false and misleading statements in the proxy circulated prior to the meeting at which the merger was approved. Because section 14(a) and rule 14a-9, the provisions allegedly violated, did not expressly grant the private plaintiff a cause of action, the Court was forced to consider whether one should be implied.

In concluding that a cause of action should lie, either direct or derivative, the Court focused upon section 27's grant of jurisdiction to the district courts over "all suits in equity and actions at law brought to enforce any liability or duty created by this [Act] or the rules and regulations thereunder." The Court noted that in Deckert v. Independence Shares Corp., it had found corresponding language in the Securities Act of 1933 sufficient to fashion a remedy on the following reasoning:

The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.

17. The Borak court, although recognizing that section 14(a) does not expressly grant a private cause of action, did note that its enactment stemmed from the congressional belief that "[f]air corporation suffrage is an important right that should attach to every equity security bought on a public exchange..." It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which [had] frustrated the free exercise of the voting rights of stockholders." Id. at 431.
20. 377 U.S. at 433-34 quoting 311 U.S. at 288. Note that if the shareholder proposal rule also secures a predominately "federal" right the interesting issue is raised as to how such a right may be reconciled with state corporate statutes which, by means of the "proper subject" tie-in to the rule, severely undermine the strength of the right through erection of procedural barriers. For example, S.B. 531 subtitled "A Bill to Curb the Nuisance Activities of Shareholders," a measure which was narrowly defeated by the 1974 Ohio General Assembly, would have required certain minimum percentage ownership requirements as a prerequisite to the making of any otherwise "proper subject" shareholder proposal. A student note has concluded, however, that the procedural aspects of the federal rules must prevail over any conflicting state requirements by application of the Supremacy Clause, U.S. CONST. art. VI, cl. 2. Note, Proxy Rule 14a-8: Omission of Shareholder Proposals, 84 HARV. L. REV. 700, 704-05 (1971). Cf. SEC v.
The Court also looked to the legislative history of section 14(a) and observed that the broad remedial purposes Congress sought to achieve were reflected in the section’s declaration that conduct “in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors” was illegal. It then reasoned that “[w]hile this language makes no specific reference to a private right of action . . . ‘the protection of investors’ . . . certainly implies the availability of judicial relief where necessary to achieve that result.” Finally, and perhaps most importantly, the Court recognized the need for supplemental enforcement where the Commission, because of its awesome workload, was unable to make an independent examination of the facts contained in the proxy materials.

B. Harbingers of a Rejection by the Supreme Court of an Attempt to Extend the Principles of Borak to Rule 14a–8

The sweeping justifications for an implied private right of action under section 14(a) and rule 14a–9 offered by the Court in Borak certainly seem equally supportive of an implied private action under rule 14a–8. In fact, in Kixmiller the Court of Appeals for the District of Columbia Circuit (although its construction of section 25(a) foreclosed judicial review of a staff decision advising that no action would be taken against management if it omitted the shareholder’s proposal) seemed to assume that an implied private right existed in the rule 14a–8 context. Citing Borak and Mills v. Electric Auto-Lite Co., the court in Kixmiller noted that “a dissatisfied stockholder is free to litigate proxy-solicitation questions judicially with or without prior administrative resort to the staff or the Commission.” In the three pri-

Transamerica Corp., 163 F.2d 511 (1947) (notice provision in by-laws giving management discretion to determine which by-law amendments would be presented at meeting not permitted to frustrate congressional intent).


22. Id. The Exchange Act contains three provisions which expressly provide for recovery by private parties, sections 9(e), 16(b), and 18(a). 15 U.S.C. §§ 78i(e), 78p(b), 78r(a) (1970).

23. 377 U.S. at 432. That the supplemental enforcement rationale may be Borak’s principal contribution to the case for an implied private right of action under rule 14a–8 is clearly implied by the Supreme Court’s recent decision in Piper v. Chris-Craft Indus. Inc., 97 S. Ct. 926 (1977). See notes 99, 66–67 infra and accompanying text.

24. 396 U.S. 375 (1970). Mills established the notion that a causal relation between a violation of section 14(a) and rule 14a–9 and injury may be presumed from proof that the misstatement or omission in the proxy materials was material. The Supreme Court’s recent decision in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), has, however, changed the “might have been important to a reasonable investor in deciding how to vote” test of materiality used in that case, 396 U.S. at 384, to one directed at determining whether there existed “a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.” 426 U.S. at 449.

25. 492 F.2d at 645–46.
vate actions which have been brought under rule 14a–8 to challenge management’s exclusion of a proposal from the corporate proxy statement, the district courts also seemed to assume that an implied private right of action existed under rule 14a–8, for none discussed the theoretical underpinnings of the action.\textsuperscript{26} That the SEC is in accord is evident from the boilerplate language appended to its no-action letters\textsuperscript{27} and its commentary on the recent extension of the time period prior to the filing of the copies of the statement and form of proxy before which the corporation must file its reasons for excluding the proposal and notify the proponent.\textsuperscript{28}

However, four recent decisions of the Supreme Court concerning the availability of an implied private right of action do not augur well for prospective 14a–8 plaintiffs. In National Railroad Passenger Corp. \textit{v. National Association of Railroad Passengers},\textsuperscript{29} commonly known as the \textit{Amtrak} deci-

\begin{itemize}
\item \textsuperscript{26} Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D.N.Y. 1969) (court deferred to Commission’s interpretation of state law “proper subject” test in denying shareholder relief); Curtin \textit{v. American Tel. & Tel. Co.}, 124 F. Supp. 197 (S.D.N.Y. 1954), \textit{aff'd per curiam} (2d Cir. April 4, 1954) (unreported) (shareholder-proponent denied injunction to stop meeting); Peck \textit{v. Greyhound Corp.}, 97 F. Supp. 679 (S.D.N.Y. 1951) (omission of shareholder proposal concerning abolition of segregated seating on buses upheld on grounds that shareholder had not exhausted his administrative remedies). See also Peck \textit{v. SEC}, Civil No. 22,289 (2d Cir. Apr. 7, 1952), discussed in 18 \textit{SEC ANN. REP. 75} (1952), which did not involve an alleged misapplication of the rule 14a–8 criteria for includability of a proposal, but rather, like \textit{Kixmiller}, sought to obtain review of the Commission’s refusal to grant an oral hearing.
\item \textsuperscript{27} For instance, the letter issued to Powers Regulator Company on June 17, 1976, provided:
\begin{quote}
The enforcement judgment the staff has reached does not and cannot purport to “adjudicate” the merits of the Company’s posture in this matter. Only a district court can decide whether the company is obligated to include the instant proposal in its proxy materials. Accordingly, our discretionary determination not to recommend enforcement action to the Commission does not preclude the proponents, or any shareholder of the company, from pursuing any rights they may have against the company in a district court, should the management omit this proposal from the company’s proxy material.\end{quote}
\item \textsuperscript{28} The new timeliness deadlines will provide an additional 20 days for proponents to explore all possible alternatives in connection with a management’s intention to omit their proposals. One of these alternatives is to institute an action in U.S. District Court to compel management to include the proposals in the issuer’s proxy materials.
\item \textsuperscript{29} 414 U.S. 453 (1974).\end{itemize}
sion, an action was brought by a private party to enjoin the discontinuance of certain passenger trains on the ground that the cancellations were prohibited by the Rail Passenger Service Act of 1970. By its express terms, however, section 307(a) of the Act permitted the initiation of suits in only two ways: upon petition of the Attorney General or, in a case involving a labor agreement, upon petition of any affected employee. Pointing out that the section purported only "to confer jurisdiction, not to create a cause of action," and that the legislative history disclosed a distinct intention to preclude private causes of action, the Court refused to imply one.

In reaching this conclusion, Justice Stewart also reasoned that the delays occasioned by individual suits, however infrequent, would reduce Amtrak's flexibility in route scheduling and its overall operating efficiency contrary to the purpose of the Act. This natural reluctance to burden a fledging rail system may undermine Amtrak's value for predicting the outcome in a private action under rule 14a-8. Moreover, because the Court was confronted with a potential plaintiff class of sweeping proportions, it is not difficult to see why the "intended beneficiaries" argument which met with success in Borak was not persuasive. Indeed, no directly discernable economic nexus inheres in the concept of "travelling rights" as it does in share ownership.

In Securities Investor Protection Corp. v. Barbour a receiver appointed to wind up the affairs of an insolvent broker-dealer brought an action to compel the Securities Investor Protection Corporation (SIPC), a nonprofit membership corporation established pursuant to the Securities Investor Protection Act of 1970 (SIPA), to exercise its statutory power to conduct a specially designed liquidation proceeding on behalf of a failing member firm. The SIPA provided, however, that the SEC was to have plenary supervisory authority over the SIPC, and under section 7(b) of the Act, the SEC was specifically granted the right to apply to a district court

32. 414 U.S. at 457.
33. Id. at 457-62. For example, House Committee Hearings revealed that both the Secretary of Transportation, who implemented the law, and labor spokesmen had interpreted the bill as enacted to preclude private actions other than those specifically authorized. The drafting subcommittee, although cognizant of this interpretation, did not act to correct it. Id.
34. Justice Brennan wrote a concurring opinion in which he thought it best to leave open the question of whether a private action for mandamus under 28 U.S.C. § 1361 (1970) might lie against the attorney general should his refusal to act under section 307 constitute a clear abuse of discretion. Id. at 465.
35. Id. at 463-64.
36. See text accompanying notes 21-22 supra.
for an order requiring that the SIPC discharge its statutory obligations. Invoking the Amtrak analysis which "began with the observation that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature [but which recognized that this] implication would yield . . . to 'clear contrary evidence of legislative intent,'" 40 Justice Marshall concluded that a private right of action was not intended. He conceded that the primary purpose in enacting the SIPA and establishing the SIPC was to protect investors, but reasoned that it did not necessarily follow "that an implied private right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose." 41 The Justice then observed that interference with SIPC's policy of deferring intervention until absolutely necessary based upon experience indicating "that more often than not an endangered firm will avoid collapse by infusion of new capital or merger" 42 might unnecessarily engender

the costs of precipitate liquidations—the costs not only of administering the liquidation, but also of consumer illiquidity and additional loss of confidence in the capital markets; . . . the mere filing of an action predicated upon allegations of financial insecurity might often prove fatal. . . . These consequences are too grave, and when unnecessary, too inimical to the purposes of the Act, for the Court to impute to Congress an intent to grant every member of the investing public control over their occurrence. On the contrary, they seem to be the very sorts of considerations that motivated Congress to put the SIPC in the hands of a public board of directors, responsible to an agency experienced in regulation of the securities markets. 43

There is little question that the evils attendant to the publication of a shareholder proposal of questionable propriety—printing fee, and possible loss of attention to other matters discussed at the meeting 44—are not commensurate with those in the SIPC context. Thus, even under the "balancing of evils" approach used by the Court in Barbour to deny a private cause of action under SIPA, the Court could reach a different result in a private action under rule 14a-8. Moreover, as the Court recognized, Borak can be distinguished from Barbour and supported on the grounds that the Exchange Act, unlike the SIPA, provides "standards of conduct that a private action could help to enforce [and a] general grant of jurisdiction to the district courts." 45 Similarly, because rule 14a-8, like 14a-9, the rule at issue

40. 421 U.S. at 419.
41. Id. at 421.
42. Id.
43. Id. at 422-23.
44. See notes 83-87 infra and accompanying text.
45. 421 U.S. at 424.
in Borak, rather clearly provides a standard of conduct for the protection of shareholders' voting rights which a private right of action would help to enforce, the predictive utility of Barbour in a 14a-8 context is limited.

Nevertheless, certain combinations of elements will make the inference of a private right more likely than others. Justice Brennan's recent articulation in Cort v. Ash\(^\text{46}\) of the factors the Court has considered when determining whether to imply a private cause of action makes it likely that any plaintiff bringing a private action under 14a-8 must be prepared to persuade the Court that the inference is warranted largely in terms of these factors:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law?\(^\text{47}\)

The plaintiff in Cort, a shareholder seeking damages in a derivative action for violations of the federal statute prohibiting corporations from making contributions or expenditures in connection with certain specified elections,\(^\text{48}\) was unable to satisfy the Court on these bases as to the need for a private action.\(^\text{49}\) Since Justice Brennan perceived the need to diminish corporate influence peddling as the primary reason for the Act, the protection of ordinary shareholders was deemed "at best a secondary concern."\(^\text{50}\) Thus, the plaintiff was not even able to establish that the statute was designed for his special benefit. Justice Brennan stated that

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46. 422 U.S. 66 (1975).
47. Id. at 78. The proposed Federal Securities Code's standards for implied actions are contained in section 1417, which provides in pertinent part:

A court may recognize a private action based on a violation of a provision of this Code even though it is not expressly created by part XIV (Civil Liability), but only if (1) it is consistent with the conditions or restrictions in any of the actions expressly created, (2) the provision, rule, or order is intended to protect a class of persons against the kind of harm alleged, (3) the plaintiff satisfies the court that under the circumstances the remedy sought and the deterrent effect of recognizing the action would not be disproportionate to the violation.

ALI FED. SEC. CODE § 1417 (Reporter's Revision of Tentative Drafts Nos. 1–3 1974).

50. 422 U.S. at 81.
the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence, and not directly with the internal relations between the corporations and their stockholders. In contrast, in those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a clearly articulated federal right in the plaintiff . . . or a pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard, e.g., J.I. Case Co. v. Borak.51

There is little question but that this dictum reflects favorably upon a private right of action under rule 14a–8. As recognized in Ernst & Ernst v. Hochfelder,52 the securities laws do provide a comprehensive regulatory scheme. However, to suggest that this factor alone persuasively supports a private action is to go too far. On the other hand, the reference to matters of "internal relations" is much more restrictive and seemingly of direct application to the 14a–8 context.53

The Supreme Court has, however, recently dealt another blow to the hopes of potential 14a–8 plaintiffs in Piper v. Chris-Craft Industries, Inc.54 During its unsuccessful tender offer contest with Bangor Punta Corporation for control of Piper, Chris-Craft had brought suit for damages and injunctive relief against the management of the target corporation, its investment advisor, and Bangor Punta alleging, inter alia, violations of section 14(e) of the Exchange Act55 and rule 10b–6.56 After protracted litigation the Second

51. Id. at 82 (emphasis added).
53. See notes 76–80 infra and accompanying text.
55. 15 U.S.C. § 78n(e) (1970). Section 14(e) provides:
   It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.
56. 17 C.F.R. § 240.10b–6 (1976). Rule 10b–6 provides in pertinent part:
   (a) It shall constitute a "manipulative or deceptive device or contrivance" as used in section 10(b) of the act for any person,
      (1) Who is an underwriter or prospective underwriter in a particular distribution of securities, or
      (2) Who is the issuer or other person on whose behalf such a distribution is being made, or
      (3) Who is a broker, dealer, or other person who has agreed to participate or is participating in such a distribution, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, either alone or with one or more other persons, to bid for or purchase for any account in which he has a beneficial interest, any security
Circuit Court of Appeals held that Chris-Craft could maintain an action for damages as a private party under both section 14(e) and rule 10b-6. The Court found that not only had all the defendants violated section 14(e), but that Bangor Punta, the successful competitor, had also violated rule 10b-6. The Supreme Court disagreed, however. Although noting by way of background that its inference of private causes of action from the Exchange Act's antifraud provisions was premised largely upon the need for a supplemental enforcement mechanism, it was unable to glean from the legislative history that a takeover bidder, as such, was an intended beneficiary of section 14(e). In fact, the Court determined that Chris-Craft was simply a member of the class Congress intended to regulate. The Court then observed that a decision to deny Chris-Craft a cause of action for damages on this basis was consistent with the result reached under the Court "relevant factors" analysis.

which is the subject of such distribution, or any security of the same class and series, or any right to purchase any such security, or to attempt to induce any person to purchase any such security or right, until after he has completed his participation in such distribution.


58. 480 F.2d 341 (2d Cir. 1973). The court then remanded the case for a determination of the amount of damages and instructed the district court to enjoin Bangor Punta from voting the unlawfully acquired shares for at least five years. This was done, 384 F. Supp. 507 (S.D.N.Y. 1974), but the Second Circuit again reversed and calculated Chris-Craft's damages without further remand. 516 F.2d 172 (2d Cir. 1975). It is this judgment which was under review by the Supreme Court.

59. 97 S. Ct. at 941. Specifically, the Court stated that where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute. Indeed, the Court in Borak carefully noted that because of practical limitations upon the SEC's enforcement capabilities, "[p]rivate enforcement provides a necessary supplement to Commission action." Similarly, the Court's opinion in Blue Chip Stamps v. Manor Drug Stores, in reaffirming the availability of a private right of action under § 10(b), specifically alluded to the language in Borak concerning the necessity for supplemental private remedies without which congressional protection of shareholders would be defeated.

Id., quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (emphasis added by the Court).

60. Id. at 941-47.

61. Id. at 942.

62. The absence of legislative history indicative of an intention to afford tender offerors protection resulted in a negative response to the first two factors. Id. at 947. These factors are quoted in the text accompanying note 47 supra. With respect to the third and fourth considerations, the Court concluded that awarding damages to a regulated party was not consistent with the purposes of the statute and, notwithstanding the pervasiveness of the securities laws, Chris-Craft had a sufficient cause of action pursuant to common law principles of interference with prospective commercial advantage. Id. at 948-49.

The Court was careful to limit its holding. It expressly declined to offer its views on the question of whether shareholder-offerees, the class Congress intended to protect, or the target corporation might have been able to bring the action. Id. at 949 n.28. It also limited its holding to actions for damages. Id. at 952 n.33.
With respect to the plaintiffs claim under rule 10b-6, the Court reached the same result.\textsuperscript{63} The purpose of that rule, it observed, was to maintain "an orderly market for the distribution of securities free from artificial or manipulative influences,"\textsuperscript{64} not to police contests for corporate control. Since Chris-Craft was not suing as a shareholder of the target corporation whose stock had been influenced in price by the 10b-6 violation, it was simply outside the specific concern of the rule.

In view of rule 14a-8's purpose to help simulate a shareholders' meeting at which all are present,\textsuperscript{65} there seems to be little doubt that all of a corporation's shareholders are the intended beneficiaries of the rule. Recognition of this fact would preclude, of course, the problems Chris-Craft encountered. It would not, however, overcome the argument that the aid-to-enforcement rationale of \textit{Borak}, the principal justification for implying a private cause of action in an antifraud context, does not appear to apply in the rule 14a-8 context. As observed by one commentator:\textsuperscript{66}

An aid to enforcement rationale might be justified in this instance if the Commission's "no-action" decision were based—at least in part—upon tactical, political, or manpower considerations and not on the merits of the dispute. The SEC, however, has never indicated that it takes such prosecutorial factors into consideration at all in rule 14a-8 decisions. To the contrary, at least the decision of the staff of the Division of Corporation Finance is purportedly based exclusively on the substantive disqualifying objections to the proposal proffered by management. Moreover, in contrast to the situation in rule 14a-9 cases, there is no statute or rule provision which creates a legal impediment to treating the Division or Commission decision as, in effect, a finding that omission under the rule is either proper or improper. Thus, the affected parties might well maintain the SEC's "no-action" decision is an authoritative determination that the proposal can be properly omitted under the provisions of the rule.

In this context, it is impossible to interpret a subsequent shareholder effort to obtain a favorable judicial decision which is contrary to the agency's interpretation of the rule as supplemental to the SEC's administrative function. To the extent that the court agrees with the shareholder, and therefore rejects the agency position, the SEC is indirectly reversed on the merits of the case. Unlike actions brought under rule 14a-9, then, the private action under rule 14a-8 does not serve an interstitial function, since the

\textsuperscript{63} Again, the Court was careful to limit its holding to the circumstances before it. \textit{Id.} at 951.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} See notes 76–80 infra and accompanying text.

"reviewing" court considers primarily the same factors relied on by
the agency in its resolution of the case.\textsuperscript{67}

The statutory tort concept, however, may exist as a viable alternative
rationale for inferring a private action from rule 14a–8. This concept assumes
that an administrative regulation may implicitly authorize imposition of civil
liability where the plaintiff and the interests which have been harmed are
within the scope of the provision’s protection.\textsuperscript{68} It seems clear that a pri-
vate action under rule 14a–8 based on management’s failure to fulfill its duty
under the rule to include all proposals meeting its procedural and substanc-
tive requirements could easily be rationalized on this basis.

Notably, the Supreme Court appears to have recognized on at least one
occasion that the statutory tort concept supports the inference of a private
right of action. In \textit{Wyandotte Transportation Co. v. United States},\textsuperscript{69} the
Court cited \textit{Borak} and \textit{Texas & Pacific Railway Co. v. Rigsby}\textsuperscript{70} as support
for the proposition that provision of a criminal penalty does not necessarily
preclude implication of a private cause of action for damages.\textsuperscript{71} It then
observed:

In those cases we concluded that criminal liability was inadequate
to ensure the full effectiveness of the statute which Congress had
intended. Because the interest of the plaintiffs in those cases fell
within the class that the statute was intended to protect, and be-
cause the harm that had occurred was of the type that the statute
was intended to forestall, we held that civil actions were proper.
That conclusion was in accordance with a general rule of the law of
torts.\textsuperscript{72}

In view of the Commission’s frequent failure to review the Division of Cor-
poration Finance’s no-action determinations and the \textit{Kixmiller} holding that
absent such review, judicial review is unavailable, an attempt to invoke the
statutory tort doctrine in support of an implied private right of action under
rule 14a–8 appears justified. Indeed, wrongful omission of shareholder pro-
posals is so serious a deprivation that even a deliberate oversight of the
problems surrounding use of the supplemental enforcement rationale may be
condoned. Of course, one need not resort to this tactic if the staff’s decision

\textsuperscript{67} \textit{Id.} at 850–52 (footnotes omitted).
\textsuperscript{68} \textit{RESTATEMENT (SECOND) OF TORTS} § 286 (1965).
\textsuperscript{69} 389 U.S. 191 (1967).
\textsuperscript{70} 241 U.S. 33 (1916).
\textsuperscript{71} 389 U.S. at 202.
\textsuperscript{72} \textit{Id.}, citing \textit{RESTATEMENT (SECOND) OF TORTS} § 286 (1965). It appears that Professor
Loss believes the statutory tort doctrine to be analytically superior to the supplemental en-
forcement rationale. 2 \textit{L. Loss, SECURITIES REGULATION} 932–46 (2d ed. 1961); 5 \textit{L. Loss, id.},
is based upon factors other than the merit of the dispute. The fact remains, however, that the foregoing cases, along with *Rondeau v. Mosinee Paper Corp.* and *Blue Chip Stamps v. Manor Drug Stores*, clearly suggest that Supreme Court sanction of an implied private right of action under rule 14a–8 is not as probable today as it would have been immediately after *Borak* thirteen years ago. This is true despite the intervening development of a long list of private actions brought pursuant to section 10(b) and rule 10b–5. Nevertheless, the potential for recognition of a similar action under rule 14a–8 in the lower courts remains great. Furthermore, lower court opinions demonstrating the consistency of a private 14a–8 action with legislative intent and a thorough consideration of supportive policy could dissuade the Court from its restrictive approach toward implied private actions.

### III. THE DEVELOPMENT OF THE SHAREHOLDER PROPOSAL RULE AS SUPPORTIVE OF AN IMPLIED PRIVATE RIGHT OF ACTION

The original shareholder proposal rule was developed after introduction of the proxy device. Prior to its adoption the proxy enfranchised absent shareholders, but only to the extent of granting them the right to vote on proposals proffered by management. The other common law rights afforded those shareholders who attended the meeting—the right to make proposals or to communicate their views concerning them—were not afforded to absent shareholders. Thus, in explaining the purpose of the shareholder proposal rule, lower courts have been considerably more freehanded in sanctioning the use of this enforcement mechanism. See, e.g., *Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156 (9th Cir. 1976); *De Jesus Chavez v. LTV Aerospace Corp.*, 412 F. Supp. 4 (N.D. Tex. 1976); *Evans v. Kerbs & Co.*, 411 F. Supp. 616 (S.D.N.Y. 1976); *Collins v. PBW Stock Exch.*, Inc., 408 F. Supp. 1344 (E.D. Pa. 1976); *Rauch v. United Instruments*, 405 F. Supp. 435 (E.D. Pa. 1975); *Cass v. Prior*, 404 F. Supp. 780 (D. Minn. 1975). But see *Polasky v. Trans World Airlines*, Inc., 523 F.2d 332 (3d Cir. 1975); *Meer v. United Brands Co.*, [Current] FED SEC. L. REP. (CCH) ¶ 95,648 (S.D.N.Y. 1976); *Kroungold v. Triester*, 407 F. Supp. 414 (E.D. Pa. 1975).


74. 421 U.S. 723 (1975) (persons who neither purchase nor sell securities not entitled to maintain private right of action for violations of rule 10b–5, 17 C.F.R. § 240.10b–5 (1976)).


76. Whereas formerly . . . a stockholder might appear at the meeting and address his fellow stockholders . . . today he can only address the assembled proxies which are lying at the head of the table. The only opportunity that the stockholder has today of expressing his judgment comes at the time he considers the execution of his proxy form.

proposition rule, X-14A-7, prior to its adoption, Chairman Purcell observed: "[T]he rights that we are endeavoring to assure to the stockholders are those rights 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." 77

This desire to approximate the widely attended town meeting type of forum characteristic of the days when nearly all corporations were closely held and geographically limited has been reiterated by the Chairman of the Commission as recently as 1970. 78 More importantly, it has been recognized by the judiciary that "[i]t was the intent of Congress to require fair opportunity for the operation of corporate suffrage." 79 Clearly, rule 14a-8 implements both of these objectives by regulating the character of corporate-shareholder relations and the exercise of suffrage rights. There-

The common law rights afforded to those in attendance at shareholders' meetings were indigenous to the model of the modern corporation developed in 17th century England. For the classic summation of the condition of the early corporation, see A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 125-26 (rev. ed. 1968), from which the following summary paragraph was taken:

We have the picture of a group of owners, necessarily delegating certain powers of management, protected in their property rights by a series of fixed rules under which the management had a relatively limited play. The management of the corporation indeed was thought of as a set of agents running a business for a set of owners; and while they could and did have wider powers than most agents, they were strictly accountable and were in a position to be governed in all matters of general policy by the owners.


78. It seems to me that the heart of the problem lies in the failure of corporate practice to reproduce through the proxy medium an annual meeting substantially equivalent to the old town meeting in person. I know that the old-fashioned meeting cannot be revived. Admittedly, that is impossible. It is not impossible, however, to utilize the proxy machinery to approximate the conditions of the old-fashioned meeting.


79. SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948) (footnote omitted). Similarly, the court in Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 676 (D.C. Cir. 1970) recognized that "[i]t is obvious to the point of banality . . . that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy."
fore, as Justice Brennan's dictum in *Cort v. Ash* 80 suggests, an implied private right of action may more readily lie in this context than in those the Court has recently considered.

IV. POLICY CONSIDERATIONS

In *Blue Chip Stamps v. Manor Drug Stores* 81 the Supreme Court observed that when "dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question . . . practical factors . . . are entitled to a great deal of weight." 82 It would also appear true that in determining whether a private cause of action should be inferred at all, courts are free to weigh policy considerations. Therefore, the ramifications of granting private litigants the right to sue under rule 14a–8 must be examined.

There is little doubt that the specter of a private right of action would change the issuer's bias from that of exclusion to inclusion in close cases. This inducement to voluntary inclusion would relieve the SEC of the burden of reviewing the questioned proposal, but it would increase certain burdens on the corporation. Principal among these would be increased expenditure of corporate funds and a risk of losing shareholders' attention to other matters presented on the proxy statement and at the meeting proper. Yet in reality, these burdens do not appear to be inordinately great.

With respect to the corporate costs of shareholder proposals, the principal sources of expenditure are printing and counsel fees. It costs approximately $7,240 to print 100,000 copies of an eight-page proxy statement. 83 This breaks down to a per page cost of $905. In view of the word limitations on shareholder proposals (300) and supporting statements (200), 84 it is unlikely that more than a single page would be necessary for their presentation. Thus, it is difficult to argue that the issuer will be unduly burdened. As for counsel fees, it seems reasonable to assume that the principal corporate targets of shareholder proposals employ house counsel capable of preparing statements of opposition. Although such opposing statements must be filed with the SEC and/or included on the proxy statement, expenses above and beyond those already budgeted for proxy preparation will not be large. 85

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80. See text accompanying note 51 *supra*.
82. *Id.* at 749.
83. This figure is an estimate given by Judson-Brooks Company, Cleveland, Ohio, for a once revised 7½" x 9" proxy statement.
84. 41 Fed. Reg. 53,000 (1976) (amending 17 C.F.R. § 240.14a–8(b) (1976)).
With respect to loss of shareholder attention, it is certainly arguable that if a shareholder is presented with a plethora of proposals he may lose sight of more important matters or abdicate the voting process altogether.\textsuperscript{86} Statistics suggest, however, that the number of proposals is highly unlikely to reach the point where the dulling of discriminatory powers will occur with any frequency.\textsuperscript{87}

Proxy statement inclusion of a broader range of shareholder proposals prompted by the threat of private actions may actually be beneficial to the corporation.\textsuperscript{88} Because rapid growth of institutional ownership has caused a

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
Year & Proposals Included & Number of Proponents & Number of Companies & Proposals Omitted & Number of Proponents Omitted & Number of Companies Omitted \\
\hline
1967 & 192 & 45 & 127 & 93 & 42 & 39 \\
1968 & 162 & 34 & 115 & 92 & 34 & 38 \\
1969 & 173 & 27 & 118 & 48 & 21 & 19 \\
1970 & 241 & 25 & 150 & 52 & 24 & 31 \\
1971 & 489 & 46 & 204 & 113 & 28 & 48 \\
1972 & 411 & 53 & 193 & 234 & 50 & 63 \\
1973 & 401 & 56 & 224 & 264 & 87 & 117 \\
1974 & 434 & 69 & 227 & 161 & 78 & 71 \\
1975 & 370 & 68 & 198 & 185 & 87 & 90 \\
1976 & 477 & 121 & 242 & 268 & 91 & 133 \\
\hline
\end{tabular}
\caption{Fiscal Year Proposals Included Number of Proponents Number of Companies Number of Proposals Omitted Number of Proponents Omitted Number of Companies Omitted}
\end{table}


\textsuperscript{87} Fiscal Proposals Number of Number of Proposals Number of Number of

\textsuperscript{88} Of no small significance is the fact that the development of an implied private right of action under rule 14a-8 would serve to flesh out the very scant precedent on what constitutes a "proper subject" for shareholder action under the typical vaguely worded state management statutes. \textit{See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (Supp. 1975): "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as may be provided in this chapter or in its certificate of incorporation."}

There appear to have been only three cases on this point. In the seminal case of Auer v. Dressel, 306 N.Y. 427, 118 N.E.2d 590 (1954), the Court of Appeals of New York held that shareholders, although lacking the power to bind the corporation on a particular matter, could submit a proposal expressing their sentiments. Shortly thereafter, however, the holding of \textit{Auer} was limited when the "ordinary business" test was adopted by the Commission.

In Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D.N.Y. 1969), the "ordinary business operations" test was used to exclude a shareholder proposal calling for Standard Oil of New Jersey to intensify its effort to encourage exploration of petroleum reserves beneath the continental shelves. The third case is Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), \textit{vacated as moot}, 404 U.S. 403 (1972). The SEC staff agreed with Dow's position that a proposal calling for Dow's board of directors to consider the advisability of amending the certificate of incorporation to prohibit manufacture of napalm was not includable. The Commission endorsed this view upon review, but the Court of Appeals for the District of Columbia Circuit found the original proposal to be an includable one. Although napalm was being used extensively in Viet Nam at that time, the Court held that the proposal was not
concomitant decrease in the supply of input sources, increasing shareholder input through a more “open” proxy statement naturally increases chances that a truly “good” proposal will be submitted. A more open proxy statement may also act as a safety valve against shareholder expression in less desirable forums. Similarly, a more open proxy may serve a valuable public relations function by cloaking an increasingly criticized business form with a mantle of legitimacy.

The fact that shareholders with relatively small holdings may be the ones most likely to take advantage of management’s switch to an inclusionary bias should not be used as the basis for an argument that a disproportionate amount of corporate funds would be used on their behalf: the large shareholder is likely to have at his command more direct channels of communication and influence, such as representation on the board of directors or a sympathetic ear inside corporate headquarters. Moreover, the mere fact that a shareholder does not own a great number of shares does not mean that his proposal is likely to be a “bad” one. If self-interest is regarded as the principal generating force behind “good” shareholder proposals, and if the small shareholder has a greater percentage of his total wealth at stake than does the holder of a more sizable block, it follows that “good” proposals may actually be more likely to come from these small holders.

excludable for dealing with a general political or social cause because it dealt with “a matter that is completely within the accepted sphere of corporate activity and control.” Id. at 681.

In actually implementing the shareholder proposal rule, the paucity of state law on proper subject necessitated the Commission’s independent development of a limited body of “federal common law” on proper subject. While state courts are of course not obligated to accept the SEC interpretation, it serves some signal value: “It is perhaps equally likely that this body of ‘common law’ will influence the state courts themselves when the rare case comes to them.” In re L. Loss, SECURITIES REGULATION 906 (2d ed. 1961). But cf. Carter v. Portland Cement Co., 227 Ore. 401, 362 P.2d 766 (1961) (Oregon Supreme Court begged off extending rule 14a-8 by analogy in the case of a “non-qualifying” corporation).

The question of whether the SEC is bound by the state law ordinary business test has been raised in several forms but never squarely answered. There are indications that the SEC is now avoiding attempts to “divine” state law and will accept proposals on any subject matter not expressly outlawed. See Allen, Shareholder Proposals, 8 REV. SEC. REG. 951, 955 (1975); Caplin, Proxies, Annual Meetings and Corporate Democracy, 37 VA. L. REV. 653, 679-80 (1951); Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decision-Making, 57 CAL. L. REV. 1 (1969); Note, Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals, 80 YALE L.J. 845 (1971).


90. On the assumption that widespread use is a reliable indication of a “good” proposal, two examples are shareholder selection or ratification of the company’s auditors and rotation of annual meeting sites.


V. PROBLEMS WITH RELIEF

In Rondeau v. Mosinee Paper Corp.93 Chief Justice Burger observed that Mills v. Electric Auto-Lite Co.94 "could not be plainer in holding that the questions of liability and relief are separate in private actions under the securities laws."95 Thus, unless shareholder-plaintiffs are able to show that relief is warranted, recognition of an implied private right of action under rule 14a–8 will be of little practical significance.

That mere infringement upon shareholders’ rights to submit proposals and to have them considered and voted upon is a sufficient harm to warrant recovery seems clear from the purpose of rule 14a–8—simulation of a town meeting.96 Judge Lord's dismissal of a count based upon violation of section 14(a) in In re Penn Central Securities Litigation97 because no injury to corporate suffrage rights was alleged98 impliedly supports this suggestion.99 Moreover, the converse notion that whenever a proposal is improperly excluded the corporation is harmed because it is deprived of the views of its shareholders can be gleaned from Laurenzano v. Einbender.100 Laurenzano also suggests that this harm may exist despite the fact that the proposal was likely to be defeated—that shareholder votes are not legally predetermined simply because a sufficient number of votes are very likely to be voted either for or against the proposal.101 Indeed, the court observed:

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93. 422 U.S. 49 (1975).
95. 422 U.S. at 64.
96. See notes 77–79 supra and accompanying text.
98. Id. at 1342. Judge Lord also relied on the plaintiffs’ failure to allege "injury resulting from a corporate transaction approved on the basis of misleading proxy material." Id.
101. Even if a shareholder proposal gains less than the number of votes needed to implement it, management may choose to implement its substance voluntarily as a concession to shareholder dissidents or because, upon further consideration, they believe the substance of the proposal comports with newly revised managerial policy. Therefore, omission of a proposal worded in mandatory terms results in "lost opportunity" to the corporation because management is not likely to effectuate the omitted proposal. The corporation may also be said to suffer a degree of harm if it wrongfully excludes a nonmandatory shareholder proposal. Management's omission of nonmandatory proposals, which serve only as an advisory estimate of shareholder sentiment, denies the corporation access to shareholder consensus.
If proxies are solicited, the stockholders have a statutory right to a truthful proxy statement. Misleading proxy material impeaches the validity of the meeting, its efficacy as a meeting. A majority stockholding cannot legitimate a meeting based on misleading information by reference to its possession of votes that would suffice to end debate. The misleading proxy material deprives the meeting, and the majority stockholder, of the expressions of view and the votes that would have ensued upon truthful disclosure; it is not legally possible to decide what legal consequences flow from the informational defects in the meeting by asserting that the meeting would have ended in the same resolutions no matter what the views or votes of the minority. That is not necessarily the fact and it cannot be the resolving principle of law.102

There remains, however, the question of whether an appropriate remedy is available. Postmeeting relief in the form of damages clearly presents a substantial quantification problem. Frequently, the price of the stock will not have decreased after the wrongful exclusion and any attempt to ascertain a causative link between exclusion of the proposal and some other adverse impact on the company will be pure speculation.

Piper v. Chris-Craft Industries, Inc.103 intimates that these problems may threaten the very existence of an implied private right of action for damages under rule 14a–8. Although the Court expressed its intention not to intimate any view on the question of whether a takeover bidder seeking injunctive relief rather than damages might have an implied cause of action under section 14(e),104 it observed that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'"105 The suggestion is clear that the Piper decision was motivated at least in part by the type of relief sought.

The foregoing problems might be avoided by a statutory civil penalty. Professor Coffey has suggested this as a possible solution to the analogous problems with relief subsequent to corporate reorganizations or contests for

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Although shareholder proposals rarely, if ever, are passed in the face of management opposition, Speech by Al Sommer, former Commissioner, SEC, at Case Western Reserve University Law School, Cleveland, Ohio (Apr. 2, 1975), it is not necessarily true that these proposals are affirmatively defeated because unmarked proxies are voted by management, invariably against the shareholder's proposal. A surprisingly large percentage of proxies are returned unmarked. For instance, approximately 47% of the proxies for the 1975 annual meeting of General Motors were returned unmarked, 27% of Ford's and 25% of AT&T's. L. GILBERT & J. GILBERT, REPORT OF STOCKHOLDER ACTIVITIES AT CORPORATION MEETINGS DURING 1975 203 (1976).

102. 264 F. Supp. at 362.
104. Id. at 952 n.33.
105. Id. at 949, quoting Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969).
control which have been tainted by securities law violations.\textsuperscript{106} Alternatively, a plaintiff might at least be permitted to recover attorney's fees and other expenses incurred in the litigation.\textsuperscript{107}

Nonetheless, because equitable relief resulting in the proposal being considered by the shareholders can be fashioned even after the meeting, it seems certainly to be preferred over an attempted assessment of damages. Prior to the meeting, the court could issue an injunction preventing the proxy statements from being printed, preventing them from being mailed if already printed, requiring resolicitation if they are already printed and mailed, or preventing the meeting from commencing on the date set therefore.\textsuperscript{108} If the meeting had already begun the court could order adjournment. After the meeting, relief might include ordering a special meeting to consider the wrongfully omitted proposal,\textsuperscript{109} or automatic inclusion of that proposal on the next proxy statement. That all of these remedies are available to the court appears unquestionable in view of Borak's directive to the federal courts "to adjust their remedies so as to grant the necessary relief" whenever federally secured rights are invaded."\textsuperscript{110}

\textsuperscript{106} Coffey, Post-Acquisition Relief, 3 REV. SEC. REG. 907 (1970).
\textsuperscript{110} 377 U.S. at 433. In the Borak spirit, the proposed Federal Securities Code exhibits a creative approach to fashioning relief for proxy solicitation violations. A court may:
(1) enjoin a violation or further violation, (2) require compliance, (3) enjoin the use of proxies solicited or given in violation or the consummation of action authorized by their use, (4) set aside action so consummated, (5) award damages against the violator for any loss caused by the violation, or (6) grant other appropriate relief (preliminary or final), including a combination of the types of relief here specified.
ALI FED. SEC. CODE § 1412 (Reporter's Revision of Tent. Drafts Nos. 1–3, 1974).

Consequential damages for wrongful exclusion of a shareholder proposal do not appear beyond the drafters' conception of damages. In a comment to section 1417 the drafters state that the federal common law of consequential damages will apply. For example, costs of investigating the issuer before buying the securities were deemed awardable by the drafters. In the case of a wrongfully omitted shareholder proposal, consequential damages could conceivably embrace the case where a third party refuses to deal with the corporation. An example is a loss of a substantial contract with a company which strongly supports Israel and knows that the corporation did not include a shareholder proposal resolving that the issuer participate in an Arab boycott. Such a proposal was common during the 1976 proxy season.
To avoid having to argue the existence of an implied private right of action under rule 14a–8, those shareholders who have had their proposals excluded might notify the corporation that notwithstanding its exclusion of the proposal they intend to raise the matter at the meeting. Then, if management includes the recital that it is unaware of any other business to come before the meeting provided for in rule 14a–4(c)(1) or seeks discretionary authority to vote on omitted proposals under rule 14a–4(c)(4), the shareholder could file suit on the basis of a misleading proxy statement in contravention of rule 14a–9(a). Such a course of action was recognized prior to adoption of the original shareholder proposal rule, rule X–14A–7, under rule 14a–9(a)'s predecessor, rule X–14A–5. Professor Loss has observed that this theory is still viable where the shareholder has not relied on the mechanism provided by rule 14a–8. There appears to be little reason why a shareholder who has relied should be afforded different treatment.

VI. CONCLUSION

Should the Kixmiller court's refusal to review no-action determinations concerning the includability of shareholder proposals in corporate proxy statements absent review by the full Commission become established precedent it would seem imperative that an implied private right of action under rule 14a–8 be recognized. The court in Kixmiller assumed that such an action exists; so have a few district courts and the SEC. Nevertheless, recent Supreme Court pronouncements on the subject of implied private rights of action evidence a clear bias against this enforcement mechanism.

This disinclination toward recognition of new implied private rights of action should not, however, extend to rule 14a–8. Without some recourse

113. 17 C.F.R. § 240.14a–9(a) (1976). Rule 14a–9(a) provides:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

117. 2 L. Loss, SECURITIES REGULATION 900 n.173 (2d ed. 1961).
118. In either context the corporation is faced with the difficult task of determining just how much disclosure is required.
for shareholders, the purpose of Congress to simulate the traditional “town meeting” type of shareholder meeting is insufficiently protected. This is especially true if, as suspected, the Division of Corporation Finance permits tactical, political, or manpower considerations to enter into its determinations. The fact that the inducement to inclusion caused by recognition of an implied private right of action will not result in a significant burden on the corporation, and may actually benefit it, provides further support for recognition of that action. Finally, although problems would exist in ascertaining damages where the action is brought after the meeting, this should not preclude actions for equitable relief. Indeed, equitable relief can be fashioned before, during, or after the meeting to fulfill the objective of rule 14a–8: to present for consideration by shareholders every shareholder proposal which satisfies the rule’s substantive and procedural prerequisites for inclusion in the corporation’s proxy statement.

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