

The Shareholder Proposal Rule

A System for Shareholder Checks and Corporate Balance

FRANK D. EMERSON*

There is no significant evidence of any abuse of the proposal rule:
... the Rule ... is flagrantly abused, the solution lies in abolishing it.
Unless one does not favor stockholder democracy it is difficult to
conceive any real objection ...:
... the Rule is of doubtful validity, meets no real stockholder demand ...

TO SHAPE THESE OPPOSITES INTO A COUPLET, granted even the utmost of poetic license, obviously requires more than meter and rhyme. Their common subject matter, the Securities & Exchange Commission's shareholder proposal rule, and the proximity of their appearance, summer 1952 and late spring 1953, serve only to heighten the discord. It is irresistibly tempting to add that even one as "versed" as the bard-essayists of some years ago might well feel compelled in the face of so clear a clash to forsake poetry and rhyme for prose and reason.

In any event, the contradictory themes would doubtless prove at least initially striking to many a prosaic American shareholder. To his—ideally speaking—big brother, the trained security analyst, they may, however, be expected, even if initially they should invoke a degree of dismay, almost immediately to pose a challenge to professionally developed powers for fact finding and data evaluation. Moreover, examination of the shareholder proposal rule became an especially timely topic when the SEC released its press summary of September 24, 1953, announcing that it is considering publishing "soon" for public comment two suggestions for amendment of the rule.

The conclusions that the proposal rule is of doubtful validity, meets no real stockholder demand, is flagrantly abused, and should be abolished are contained in the "Report for Consideration of American Society of Corporate Secretaries, Inc., Annual Meeting June 3, 1953." Significantly, the 13-page printed report, submitted by the Society's securities committee, was not adopted by its membership. Robert P. Vanderpoel, financial columnist for the Chicago *Sun-Times*, reported that the membership was

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Franklin C. Latcham, who has worked with the author on a number of articles dealing with the proxy regulation, intended to join with the author in writing this article but could not, owing to other commitments. Mr. Latcham has read the article, however, and is substantially in accord with the viewpoints expressed.

"split wide open" by its committee's report, and that after "two days of hot argument" the membership referred the report to its board of directors for additional consideration instead of adopting it. In some part the committee report purports to be based on a survey of the operation of the rule during 1951, 1952, and the first several months of 1953.

Opposite conclusions to the corporate secretaries' committee report, namely, that there is no significant evidence of any abuse of the proposal rule and that, unless one does not favor stockholder democracy, it is difficult to conceive any real objection, were contained in an article by me and my colleague, Franklin C. Latcham, which appeared in the summer 1952 symposium issue of the University of Chicago *Law Review* devoted to "The Modern Corporation." For the most part the Chicago article was based on a survey of the operation of the proposal rule during the four years 1948 through 1951. Especially since the society's referenced committee report was marked for the attention of its board of directors, a question must remain in the analyst's mind, be he concerned primarily with securities or with other phenomena, whether there were any developments respecting the rule during 1952 and 1953 that account for the quoted diversity of results. Consequently, the 1948-51 survey has been projected to include 1952 and the 1953 "proxy season."

Before we proceed, however, to 1952 and 1953 survey results and comparison of them with the 1948-51 findings and conclusions, an explanatory word is in order concerning the essence of the substantive provisions of the SEC shareholder or proxy proposal rule. Briefly, the rule, designated X-14A-8, merely gives a security holder the privilege of obligating management to include in the management's proxy statement his shareholder proposal, provided it is, as a matter of law, a proper subject for action by security holders.

If the management opposes the shareholder's proposal, its proxy statement must also include the shareholder's statement of not more than 100 words in support of his proposal, together with the shareholder's name and address. Apart from its proxy statement, the management must, under the rule, include in its accompanying proxy form or

ballot appropriate boxes. These boxes enable shareholders solicited by the management to vote as they as shareholders desire, either for or against their fellow shareholder's proposal, instead of being relegated as formerly to having their shares voted only as the management desired, pursuant to management-drafted, discretionary proxy powers. The rest of the rule is devoted to a variety of limitations on its use or abuse by shareholders, including provisions for omission of three categories of proposals, namely: (1) proposals for enforcing personal claims or grievances or for promoting various general causes, (2) proposals previously carried in the management proxy statement but not presented at the shareholders' meeting, and (3) proposals receiving less than 3% of the votes cast on them.

1952-53 SURVEY AND COMPARISON WITH 1948-51

As in the 1948-51 survey, there are four principal areas to be covered. One is the matter of proposal frequency and company size. Another concerns the subjects encompassed by the proposals. The third is the identity of the proponents. Finally, results of voting will be considered.

PROPOSAL FREQUENCY AND COMPANY SIZE

During 1952 only 45, or 2.4%, of the 1,803 proxy statements filed with the SEC carried shareholder proposals. These figures are clearly not greatly different from the 1943-52 averages of 1,660 proxy statements and 1.9% containing shareholder proposals. They are likewise quite close to the ten-year medians of 1,665 proxy statements filed with 2.3% presenting shareholder proposals. Speaking numerically, there was a total of 70 proposals in 1952, compared with an average of 56 and a median of 61 during 1943-52.

Inasmuch as the annual number of proposals ranged from but 29 to only 96 in the ten-year period, it is manifestly confusing to state, as does the society's securities committee report, that there was an increase in proposals from 1943-45 to 1951-53 of 55%. And it is even more confusing, if not misleading, to omit to state that from 1943 to 1952 there was a 22% increase in the total number of proxy statements filed, for it obscures the obvious fact that relatively more proposals are under, such circumstances, to be expected. The only thing, therefore, that the proposal frequency figures actually show is moderate growth in shareholder use of the proposal rule.

Just as was pointed out in the 1948-51 survey, the companies whose proxy statements carried shareholder proposals during 1952 and the 1953 proxy season to a very considerable extent included the Nation's largest and most influential corporations, whose management and lawyers in large measure set the pattern of corporate and economic life in the United States. In both 1952 and 1953 fully 10 of the 45 and 43 companies, respectively, whose management proxy statements carried shareholder proposals were among the 66 companies that, as of their fiscal or calendar 1952 year end, carried assets at, at least, \$1 billion.

As a result, 12, or 20%, of the 60 different companies affected in 1952-53 were corporate giants with assets of over \$1 billion. And besides these giants there were many near giants among the companies involved. It is hardly irrelevant to note in passing that the corporate secretaries'

twelve-man committee included among its members three persons associated with a \$1 billion or larger company and two other individuals from companies whose 1952 or 1953 proxy statements carried a management-opposed shareholder proposal.

PROPOSAL SUBJECTS

In 1952 and 1953, as in 1948-51, few indeed of the proposals were actually novel, much less radical, in character. In all instances the most frequently proposed subject was cumulative voting, accounting in 1948-51 for one fifth and in both 1952 and 1953 for very nearly one third of all shareholder proposals. Security analysts will recall that, besides the support cumulative voting receives in the current edition of Graham and Dodd's *Security Analysis*, members of their New York Society in 1947 voted 2 to 1 for cumulative voting.

Moreover, cumulative voting is now mandatory under the corporation codes of 21 states and permissive in 17 others, compelled under the National Banking Act, required in the American Bar Association's Model Corporation Act, and was found in a 1951 Harvard Business School study to be a matter for which a "powerful case" can be made for even "management support of proposals" for its adoption. Essentially, cumulative voting provides for minority representation, and prevents a 51% majority from having 100%, or dictatorial, control of a corporation. Most of the cumulative voting proposals were submitted by Lewis D. and John J. Gilbert.

Second most popular among the shareholder proposals were the so-called Transamerica type, relating to (1) shareholder selection of independent auditors, (2) accessible shareholder meeting places, and (3) postmeeting reports to shareholders. More than one fourth of both the 1952 and the 1953 proposals, compared to one third of the 1948-51 proposals were of the Transamerica type.

In the *Transamerica* case the U. S. Court of Appeals for the Third Circuit expressly held in 1947 that the three enumerated shareholder proposals submitted to Transamerica Corporation by John J. Gilbert, as proponent, were proper subjects. In 1948 the U. S. Supreme Court refused a *Transamerica* petition looking to review and reversal of the Third Circuit's decision by denying a petition for a writ of certiorari. To sum up to this point, approximately 55% of the 1948-53 proposals were either of the Transamerica type or for cumulative voting.

Third in rank among shareholder proposals were those relating to remuneration. In 1952 and 1953 they constituted approximately 15 and 18%, respectively, of all shareholder proposals. This, of course, shows little change indeed from their 15% standing during 1948-51.

Admittedly the purse is a sensitive spot, but, with a single exception relating to a proposal to Twentieth Century-Fox Film Corporation for limitation of all remuneration whether salary, bonus, pension, or otherwise to \$100,000 a year, all the 1952-53 proposals, like those of 1948-51, were confined solely to "fringe"-type remuneration, that is, executive bonus and pensions. More than one half of these proposals were made by Lewis D. and John J. Gilbert, described by the corporate secretaries committee report as "hobbyist" proponents. Of the eleven companies involved

Executive remuneration proposals six had assets of over \$100 million, and all but one of the remaining five had over \$50 million in assets.

Exactly half of the twenty-four 1952-53 remuneration proposals sought to put a ceiling of \$25,000 on annual pension benefits payable to retiring executives. Paradoxically, at one of these companies, AT&T, an independent labor union submitted a proposal in each of the two years that AT&T eliminate its practice of reducing pensions of retired rank-and-file employees by one half or any other part of their social security benefits. Two other proposals, presented to du Pont and General Motors, urged that executive bonuses should not exceed 100% of salary, or in any event \$200,000, pointing out that the president and eight vice-presidents of du Pont and the president of GM fell in this illustrious category. With the remuneration proposals noted, or, more precisely, executive-bonus and pension-limitation proposals, fully 70% of both the 1952-53 and the 1948-51 activity has been accounted for.

In view of the initially expressed fear of "crackpot" proposals and proponents, now changed incidentally in the corporate secretaries committee report to the charges of "hobbyist" proponents, it is perhaps desirable to project the subject analysis somewhat further in pursuit of the remaining approximately 30% of 1952-53 proposals submitted by shareholders. Approximately 8.5%, a decline from the 1948-51 figure of about 10.5%, dealt with corporate directors. This classification in most instances called for (1) director ownership of 100 or 1,000 shares of the company's stock, (2) a woman director on the board, or (3) the elimination of the "staggered" system or "classification" of directors, so as to make all directors accountable to shareholders through annual, rather than third-year, elections for their corporate stewardship.

Probably the only other class of proposals of general interest were those relating to dividends. As in 1948-51 and contrary again to widespread contentions about shareholders chief or sole concern, they amounted in 1952 and 1953 to roughly only 3%, a decline from the 5.5% figure that was obtained during 1948-51.

The two 1953 dividend proposals should prove of particular interest here for they were made by a member of the Cleveland Society of Security Analysts. They also follow in the general pattern of the 1948 dividend policy proposal and supporting nonmanagement proxy statement submitted with respect to the New Amsterdam Casualty Company by the Graham-Newman Corporation, as noted in Graham and Dodd's *Security Analysis*. One of the two 1953 dividend proposals the Cleveland analyst submitted, both of which related to Wayne Knitting Mills, stated:

RESOLVED, that the directors give consideration to a statement of dividend policy which will include (1) the approximate proportion of average earnings to be paid out in average dividends, and (2) the dividend policy in relation to fluctuations in annual earnings.

His supporting 100 words were:

For seven years the annual dividend has changed in both directions and amount every year. Such fluctuations give the impression of a highly uncertain business and little dividend security. By announcing a dividend policy the stockholders would learn what dividend the directors consider fair, relative

to earnings, and the extent to which dividends might be maintained or increased as earnings fluctuate. Wayne has longer-term plans for management compensation, labor contracts, pensions. Why shouldn't the stockholders be included in financial planning? If new conditions require a different policy, the stockholders should be informed of the change.

The second of the 1953 proposals the Cleveland analyst had included in the Wayne Knitting Mills proxy statement was:

RESOLVED, that the Directors give consideration to a regular quarterly dividend which, on an annual basis, would approximate at least two-thirds of average earnings.

The 100-word supporting statement read:

Wayne sells lower in relation to earnings than most comparable companies. Larger, more dependable dividends improve investment standing. Leaders like General Motors, du Pont, Van Raalte pay over two-thirds of average earnings in dividends.

Per share average earnings should exceed the depressed \$3.50-\$3.75 recent level, making \$2.40 a conservative dividend. Quarterly dividends of \$0.60 are worth more than uncertain year end extras. Since depreciation approximates capital expenditures and working capital substantially exceeds requirements, finances are abundant. Relatively, prior capital was larger, working capital smaller, growth more rapid in 1937-1941, when Wayne paid two-thirds of earnings in dividends.

Various proposals dealing with miscellaneous matters remain, only two of which are even slightly of novel nature. They were contained in the 1953 du Pont and in the 1953 GM proxy statements. One, submitted by the Gilberts and others sought a so-called "spin-off" or distribution to du Pont shareholders, as permitted on a tax-exempt basis by Section 112(b)(11) of the Federal Internal Revenue Code, of GM shares held by du Pont. Its objective was to anticipate and avoid possible losses to shareholders resulting from any divestment court decision sustaining the Department of Justice's alleged and pending charges of antitrust violations by du Pont, General Motors, and their affiliates.

The other urged the GM directors to appoint a non-employee special committee to study and report on the advisability of breaking up GM into either two or three companies, provided it could be done on a nontaxable basis. The supporting statement pointed to the 1911 antitrust "breakup" of the former Standard Oil Company "with time proving that the shareholders benefited very much."

The subject analysis of the 1952 and 1953 proposals is, of course, a consideration of basic importance to intelligent regard of the use and claimed abuse of the proposed rule. Yet it received the scantiest attention in the corporate secretaries adverse committee report. Little more than limited enumeration of proposal subjects was included.

On the basis of the 1948-51 survey, it was concluded in the 1952 Chicago article that "subject matters of the proposals were such that they serve to vindicate faith in stockholder democracy and rejection of the asserted fear that the proposal rule would provide a field day for crackpot ideas." It was added that, "far from being of the crackpot variety," they were "at the least most stimulating and, in fact, almost invariably had intrinsic substance." It is submitted that these conclusions also afford an abundantly fair and even modest summary of the subject matter of the 1952-53 pro-

posals subjects. From this it necessarily follows that an analyst or other observer must look elsewhere if he is to account for the contrasts in results reflected in the corporate secretaries 1953 committee report and my and my colleague's 1952 Chicago article.

PROponents' IDENTITY

The Chicago article disclosed that, although the 286 proposals it encompassed were made by 50 different proponents, 45 of the proponents made only 27% of the proposals, and two brothers, Lewis D. and John J. Gilbert, submitted 137, or 47%, of them. It was then noted that, among other things, Lewis Gilbert has been referred to as "The Talking Stockholder," "The Stockholders' Sir Galahad," "The Conscience of American Big Business," and it was added that he was perhaps entitled to share the Chicago article's subtitle, "The Corporate Gadfly."

Here again the situation remained essentially the same in 1952-53. Of the 142 proposals submitted, 53% were submitted by the Gilberts. It was for this that the Gilberts were characterized by the corporate secretaries committee as "hobbyists," as were the proponents associated with the Federation of Women Shareholders in American Business, who actually submitted only 10, or 7%, of the 1952-53 proposals. Obscured by the committee report, however, is the circumstance that, whereas in the four years 1948-51 there were 45 "other" shareholder proponents, proposals were independently submitted by 34 others in the considerably shorter period covered by the 1952-53 survey. Although the present rule requires that, if management opposes a proposal, the name and address of the proponent must be included in the management proxy statement with his proposal and supporting statement, the SEC, according to its September 24, 1953, press summary, is considering a suggestion that the name and address of the proponent may be omitted, apparently because "personal publicity motivates the submission of some proposals."

A brief word about Gilbert seems required, however. Having inherited a portfolio of securities, and received a formal "notice of meeting," Gilbert attended his first security holders meeting in 1933. He was "horrified" at the proceedings, including the fact that, as he arose to ask an initial question, a company officer sitting in the back of the room made a motion to adjourn, which was immediately seconded and passed. In the succeeding twenty years, Gilbert, described as "a bachelor of independent means and temperament," has made his sole occupation, aside from military service, the attendance of annual meetings and submitting of proposals.

His activities have been conceded by many corporate executives to be constructive and worth while. Much of his program, postmeeting reports, accessible meeting places, election or approval of independent auditors by shareholders, director ownership of at least 100 shares, in particular, and even cumulative voting, pre-emptive rights, and bonus limitations, have in the past twenty years gained increasingly wider acceptance by enlightened, forward-looking managements. Yet a hard core, which includes some of the Nation's largest and most powerful corporations, persists in its old ways, even to the point of objecting to the proposal rule on the ground that "hobbyists" abuse the rule,

to an extent requiring its repeal, by resubmitting in successive years essentially the same proposals where widely accepted corporate policies.

By way of summary of the so-called "hobbyists" proponents, it is to be noted that Kenneth Boulding in his book, *The Organizational Revolution*, a result of a study sponsored by the National Council of Churches, points out that an outstanding phenomenon of our era is the presence and need of organizations and organizational efforts in our highly specialized, rapidly changing, and extremely complex society. The editors of *Fortune* and Russell Davenport in their recent book, *U.S.A.: The Permanent Revolution*, have also stressed the importance of potent committees, associations, and causes of a wide variety.

Business itself is organized through the medium of the corporation and various associations. Labor is organized through associations known as unions. Consumers are to some extent organizing into associations and corporations known as consumers' unions and co-operatives. Farmers are likewise organized in this fashion, and these and other groups are managing to express their stake through organizational representatives much as in our political democracy the people are represented in the governmental processes.

In effect, such efforts also provide a system of checks which may be expected to provide potent forces for greater economic and corporate balance. The American public shareholder, of all people, because he is widely dispersed geographically, usually has but a relatively small personal monetary interest as represented by his typically few shares, and, without information on corporate affairs for more than a century under a policy of "implicity" that obtained until less than twenty years ago, desperately needs representatives who are able to attend shareholder meetings and submit proposals for him respecting his interests as the true owner of the corporation. Considering our representative and organizational institutions and the shareholder's plight, it is to be expected that he would come to rely, as he has done, on the Gilberts and others so situated, as being able to afford him the representation he has not had but to which he is democratically entitled. If this results in so-called "hobbyists," what better hobby, one may ask, could there possibly be in our capitalistic democracy than this demonstration for shareholders of the potentials of democracy?

RESULTS OF VOTING

Here, too, the findings are much the same as in 1948-51. Of the 105 proposals of 1948-53, for which results of voting were obtained, only one carried. It received 97% of the shares voted, having been favored by the management, Twentieth Century-Fox Film Corporation, who at the time, spring 1953, were involved in a proxy contest with a non-management group seeking representation on the board.

The successful proposal, which called for a woman director, was supported by a 100-word statement pointing out that a large percentage of corporate securities are held by women, that women have been included in the President's Cabinet, that for many years there have been women Senators and Congresswomen, and that a majority of the company's customers were women. The overwhelming vote in favor of the shareholder proposal once again demonstrated,

1948-51, the consequence of management or other support from outside of public shareholder circles. The Chicago article revealed that 85% of the 1948-51 proposals for which results of voting were obtained received more than 3% of the votes cast as required under the proposal rule in order to be eligible for resubmission the next year. For 1952-53, with a smaller percentage of results available, the comparable figures were 74 and 81%, respectively, no substantial change being indicated. Similarly, in 1948-51 approximately 30% of results available showed a less than 5% favorable vote, and approximately 60% disclosed a less than 8% favorable vote. It was also pointed out, somewhat prophetically it would now seem, that suggestions in prior years by the corporate secretaries society that the proposal rule's 3% resubmission requirement be raised to 5 or 8% would have the "result, if not the purpose" of substantially restricting the right to make proposals and would therefore impair considerably the effectiveness of the rule. In 1952-53 of the shareholder proposals 46 and 45% and 66 and 63% received a less than 5 and 8% vote, respectively.

The corporate secretaries society's further suggestion was mentioned, to the effect that an amendment to the rules should be adopted, requiring as a condition for resubmission that a proposal "make progress": apparently, that is, that in a succeeding year it receive an increasingly larger favorable vote. To this proposal serious doubt was expressed whether progress could be defined mathematically, and the distinction between popularity and progress noted. The safest approach, it was concluded, was to keep the resubmission figure low, namely, at 3%, especially since the subject analysis indicated that the proposals, though sometimes controversial, almost invariably had had intrinsic substance. However, one of the two suggestions for amendment of the proposal rule announced in the SEC's press summary of September 24, 1953, as under consideration by the Commission is change of the provision permitting "non-inclusion of proposals which within one year received less than 3% of the votes cast so as to provide a somewhat higher percentage figure."

Apart from the matter of the resubmission restriction, it was admittedly surprising to find that proposals as beneficial to shareholders as were almost all of the 1948-51 proposals should draw a less than 8% favorable vote in approximately 60% of the instances in which results of voting were obtained. Moreover, about the same result, as has just been noted, appears to be indicated for 1952-53.

In the interval between completion of the two proposal surveys, however, the Brookings Institution brought out in June 1952 its report on "Share Ownership in the United States," charting insurance companies and investment companies as owning approximately 13% of the common stock outstanding in the Nation. Legal restrictions on insurance company ownership of common suggested that much of the 13% figure represented investment company ownership. Later in 1952 and also in early 1953 the failure of investment companies to provide any real shareholder leadership was commented on from a number of quarters.

Consequently, my colleague and I, incident to our study of proxy contests, which is currently being published in the

California Law Review, undertook investigation to determine, first, the extent of investment company shareholder leadership, and, also, investment company ownership of companies involved in proxy contests during 1951 and 1952. With the single exception of the National Airlines 1951 proxy contest in which the investment company involved, Investors Mutual, took no known public position on any of the issues raised, an omission in sharp contrast to the participation by members of the New York Society of Security Analysts and Robert P. Vanderpoel, Chicago *Sun-Times* financial columnist, the study revealed that investment companies neither individually nor in the aggregate had any substantial holdings in the companies involved in the 1951-52 proxy contests.

Many of these companies, however, were also found to have had low or no earnings. But the companies to whom proposals are submitted are, as has been seen, among the largest in the Nation, and nearly all have substantial earnings records. It seemed, therefore, that a portion of the investment companies up to 13% ownership position indicated by the Brookings Institution report should include holdings in these companies where proposals generally beneficial to investors in 60% of the available instances were drawing a less than 8% favorable vote. Could it be that the Nation's investment companies, not only were not furnishing any substantial shareholder leadership of any sort, but were in addition failing to vote for shareholder proposals beneficial to American shareholders?

As of December 31, 1952, the total assets of investment companies amounted to over \$7¼ billion. The 19 largest open-end and the 13 largest closed-end investment companies as of the same date had assets of over \$5½ billion, or 77% of total investment company assets. Consequently, the holdings of these 32 largest investment companies in the 60 companies whose 1952 and 1953 proxy statement carried shareholder proposals would afford considerable insight into the position of investment companies in the 60 companies. In addition, comparison of their holdings with the shares cast in favor of shareholder proposals would provide answers to the question here posed, namely: Were investment companies failing to vote for proposals of benefit to shareholders, including both shareholders generally and indirectly their own shareholders as well?

Irrespective of whether one takes shares held as of the close of their 1951 or 1952 fiscal or calendar year ends, the recognized corporate statistical services show the investment companies in the aggregate as owning more common shares in Atchison, Topeka & Santa Fe Railroad, Marine Midland Corporation, Middle South Utilities, and Rochester Gas and Electric Corporation than were voted in favor of the shareholder proposals carried in their 1952 proxy statements.

In the instance of Middle South the investment companies owned, in the aggregate, over 5½ times as many shares as were voted in favor of a shareholder proposal, in effect, to extend pre-emptive rights for shareholders to stock issued for property or in a public offering. Massachusetts Investors Trust, the Nation's largest investment company, who, according to Benjamin Graham's *The Intelligent Investor*, in its 1941 annual report stated its deter-

mination to use its influence in the direction of improving managements and otherwise protecting the interests of itself and its fellow stockholders, alone held more shares than were voted for the Middle South shareholder proposal. Moreover, the proposal received only 2.3% of the shares voted, and therefore could not be resubmitted to shareholders in 1953.

Shareholder proposals contained in the 1952 Rochester Gas and Electric proxy statement received the following votes: (1) cumulative voting, 30,257 shares, (2) director ownership of at least 100 shares, 80,597 shares, and (3) extension of pre-emptive rights provisions, 78,668 shares. Depending on whether 1951 or 1952 fiscal or calendar year-end holdings of 107,100 and 217,975 shares are used, the investment companies, for example, owned roughly three to seven times as many shares as were voted for the shareholder proposal for cumulative voting, with lower but similar ratios obtaining for the other two Rochester Gas and Electric shareholder proposals. Again, Massachusetts Investors Trust, and, in this instance, Investors Mutual as well, each owned more shares than were voted in favor of Rochester Gas and Electric shareholder cumulative voting. The 1952 Atchison, Topeka, and the Marine Midland shareholder proposals receiving less share votes than shares held in the aggregate by the investment companies were for more liberal dividends and rotation of the place for convening shareholder meetings.

The record in 1953 has been similar. There have already been six instances in which shares voted for shareholder proposals were less than shares held by investment companies as of their 1952 year ends. Rochester Gas and Electric 1953 shareholder proposals for cumulative voting and extension of pre-emptive rights drew 32,343 and 24,230 shares, respectively; Massachusetts Investors and Investors Mutual owned 35,000 and 55,000 shares, respectively; and the investment companies in the aggregate owned 109,000 shares, or three to four times as many as were voted in favor of the shareholder proposals.

The Gilbert's 1953 Marine Midland shareholder proposals for cumulative voting and rotation of shareholders' annual meeting places drew 164,773 and 193,758 shares, or considerably less than the 288,000 share aggregate holdings of the investment companies, but only 4,773 shares more than the 160,000 share holdings of Investors Mutual. A Gilbert 1953 Southern Pacific shareholder proposal for regional meetings received a favorable vote of 273,000 shares, and investment company holdings were 428,000 shares.

A 1953 shareholder proposal at Florida Power & Light for cumulative voting submitted by James Fuller obtained 118,825 shares, and investment company holdings were 218,500 shares. A 1953 Atchison, Topeka shareholder proposal for eliminating a bond retirement fund, a matter, of course, involving financial judgment, drew 61,969 shares, and investment company holdings were 207,900 shares. Similarly, the Gilbert's 1953 de Rome spin off proposals, though perhaps more controversial than some of the other shareholder proposals, but in any event not inconsistent with the Department of Justice's previous action, received 90,616 and 208,000 shares, and investment company holdings were 230,000 shares.

With investment companies and other institutional beneficiaries not only providing no significant shareholder leadership but investment companies apparently even failing repeatedly to vote for shareholder proposals, the small favorable shareholder proposal vote becomes considerably more understandable. Nevertheless, even the full mathematical extent of the seeming failure of the investment companies to support shareholder proposals cannot be measured.

For example, Massachusetts Investors alone held substantial blocks of shares in 14 of the 45 and 43 companies who were the subject of 1952 and 1953 shareholder proposals. Similarly, Investors Mutual held large blocks of shares in 16 and 17 of the 45 and 43 companies who were the subject of 1952 and 1953 shareholder proposals. It would be interesting to know, incidentally, whether Investors Mutual voted its 15,000 Wayne Knitting Mills shares in support of the Cleveland security analyst's dividend policy proposals, especially since the approximately 8% votes in their favor amounted to 21,098 and 22,185 shares.

In any event, the investment companies' apparent dismal failure, particularly in view of their unusual opportunity for informed leadership, is immeasurable. Were it not for the activities of the so-called "hobbyists" proponents of shareholder proposals, the position of the American shareholder would be well nigh hopeless from the standpoint of any real practice of shareholder democracy in some of our largest corporations. To repeal the proposal rule or increase its resubmission requirement could, under such circumstances well be a fatal blow.

CONCLUSION

Several of the corporate secretaries committee report's further arguments for abolishing the proposal rule merit perhaps an additional word or so.

1. To contend that the rule contravenes state laws simply ignores the *Transamerica* decision's holding that the rule does not impinge on state law and that the consistent adherence by an administrative agency to a rule or interpretation is as a matter of law entitled to great weight in considering its validity.
2. To assert that philosophically the rule violates democratic procedures reflects unmindfulness of the actual circumstances of the widely dispersed American shareholders and the impact of the rule in affording them more nearly equal opportunity and minority rights.
3. To urge that the rule meets no stockholder demand and is abused is to close one's eyes to the fact that the rule is but a part of the Securities Exchange Act's mandate of full disclosure and publicity and the basic desirability of increased shareholder participation in corporate affairs both directly and on a representative basis.
4. Is it untimely to pretend that there is any longer any serious basis for saying that the rule was adopted by the SEC against the advice of the industry and Congress eleven years ago, when it is considered that, in all the intervening time, the matter has never gotten beyond the preliminary 1942 Congressional hearings and, further, that subsequently there has been but little criticism from any quarter except the society of corporate secretaries.
5. The statement that the SEC has provided no relief is

shown not to be true, for the rule has a variety of express limitations directed to precluding possible shareholder abuse.

6. The complaint that the rule imposes substantial costs is unfounded for the reason that the 100-word statements are necessarily very brief, the proposals themselves usually are short, and the additional expense of including the proposals and supporting statements in the management's proxy statement and placing and tabulating from appro-

priate boxes on its accompanying proxy ballot is negligible for a company that in any event has undertaken to solicit proxies. And certainly the expense is not out of proportion to the stimulus thus provided for shareholder democracy.

As was stated in concluding the 1952 Chicago article: "What is involved is basically the right of a minority to express itself and have an exchange of ideas—all in a business corporate context—but closely related to a fundamental freedom."

* * *

Smyth v. Ames (1898) . . . for public utilities "a fair return upon the value of property that which it employs for the public convenience."

In assuming the task of determining judicially the present fair replacement value of the vast properties of public utilities, courts have been projected into the most speculative undertaking imposed upon them in the entire history of English jurisprudence.

Harlan Stone (dissenting opinion in West v. Telephone Co.)

About 1600 A.D., William Gilbert, Royal physician in Enguand, undertook a series of researches into magnetism that opened the way to the "age of electricity." Like all advances in science, the story of electricity involves the experiments, discoveries and inventions of many men at different times in diverse nations.

Malcolm Keir