

Michigan Law Review

Volume 65 | Issue 3

1967

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Michigan Law Review

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Recommended Citation

Michigan Law Review, *Securities-Stocklist Authorizations-Solicitation of Stocklist Authorizations Is Within the Proxy Regulations of the Securities Exchange Act-*Studebaker--Corp. v. Gittlin**, 65 MICH. L. REV. 582 (1967).

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**SECURITIES—STOCKLIST AUTHORIZATIONS—
Solicitation of Stocklist Authorizations Is
Within the Proxy Regulations of the
Securities Exchange Act—*Studebaker
Corp. v. Gittlin****

Gittlin, a shareholder of the Studebaker Corporation, planned to solicit proxies for the election of directors in opposition to the existing management. As an initial step in the implementation of this plan, he sought to obtain a stockholder's list and accordingly initiated proceedings in a New York court under section 1315(a)

* 360 F.2d 692 (2d Cir. 1966) [hereinafter cited as principal case].

of the New York Business Corporation Law which grants a right of access to a shareholder who has obtained authorizations in writing from the holders of at least five per cent of the outstanding shares of the corporation.¹ In order to meet the five per cent requirement, Gittlin had solicited and obtained authorizations from forty-two shareholders. Stuebaker appeared before the Federal District Court for the Southern District of New York to secure an injunction against the use of these authorizations in the state court, and the injunction was issued since the court found that Gittlin had obtained the authorizations without complying with Securities Exchange Act Regulations 14a-3² and 14a-6³. Gittlin, asserting that these proxy regulations do not apply to authorizations to obtain a stocklist in a state court proceeding, appealed to the Court of Appeals for the Second Circuit. On appeal, *held*, affirmed. Since the authorizations were obtained as a part of a continuous plan intended to end in the solicitation of proxies, and were designed to prepare the way for such a solicitation, they are within the scope of the proxy regulations and therefore, absent compliance therewith, they are invalid.

Section 14(a) of the Securities Exchange Act⁴ authorizes the Securities and Exchange Commission (SEC) to regulate communications with shareholders when the purpose of such communications is to solicit any proxy, consent or authorization relating to any security registered under the Act. The courts, in order to further the broad purposes of the Act, have generally given a liberal interpretation to the SEC's proxy regulation powers. The leading case illustrating this position is *SEC v. Okin*,⁵ which arose under a similar grant of authority to the Commission to regulate proxies, the source of this grant however being section 12(e) of the Public Utility Holding Company Act of 1935.⁶ In *Okin*, a defendant who was

1. The statute also provides that if the shareholder himself owns 5% of the outstanding shares, or if he has been a holder of record for more than six months, he qualifies for the same right of access.

2. 17 C.F.R. § 240.14a-3 (Supp. 1966). This regulation prohibits solicitation in the absence of a proxy statement containing specified information.

3. 17 C.F.R. § 240.14a-6(c) (1964), as amended, 17 C.F.R. § 240.14a-6(c) (Supp. 1966). This regulation requires that preliminary copies of the proxy material be filed with the SEC at least ten days prior to the date that definitive copies of such material are first sent or given to security holders, unless the Commission authorizes a shorter period. See note 31 *infra* and accompanying text.

4. 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 78l of this title.

48 Stat. 895 (1934), as amended, 15 U.S.C. § 78n(a) (Supp. 1965).

5. 132 F.2d 784 (2d Cir. 1943).

6. It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by the use of the mails or any means or instrumentality of

planning to solicit proxies had sent a false and misleading letter to shareholders asking them not to sign any proxies for the company and to revoke any that had already been signed. The court rejected a possible narrow interpretation of the SEC's power—one that would have limited the application of the SEC regulations promulgated under section 12(e) only to solicitations of a proxy, authorization, consent, or power of attorney—and instead extended the regulatory power of the SEC to cover any writings which are a "part of a continuous plan ending in solicitation and which prepare the way for its success."⁷ This interpretation of the SEC's power under section 12(e) was subsequently deemed equally valid as to the power granted by section 14(a) of the Exchange Act. In *SEC v. Topping*,⁸ on facts similar to *Okin*, the court found the question moot, but nonetheless indicated that in a proper case it would apply the *Okin* standards to section 14(a) so that it could prevent a person planning to solicit proxies from distributing, without complying with the proxy rules, letters allegedly containing false and misleading information.

In 1956 the SEC amended Regulation 14a-1, and, as amended, the Regulation covers those communications which the holdings in *Okin* and *Topping* indicated were properly within the scope of the SEC's regulatory powers: a "solicitation" now includes "the furnishing of [a] . . . communication to security holders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy."⁹ The Regulation further defines

interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this chapter or the rules, regulations, or orders thereunder.

⁴⁹ Stat. 824 (1935), 15 U.S.C. § 791(e) (1964). While this provision for proxy regulation is somewhat broader in scope than is § 14(a) of the Exchange Act, with respect to the problem here considered it is, in effect, the same. Sinclair Armstrong, chairman of the SEC, testified in 1955 that the Public Utility Holding Company Act of 1935 contained proxy provisions similar to § 14(a), and that the former might properly be considered merely as an application to a specific industry of the general federal power which is contained in the Exchange Act. *Hearings before a Subcommittee of the Senate Committee on Banking and Currency—Stock Market Study*, 84th Cong., 1st Sess. 1508 (1955). *But see* *Halsted v. SEC*, 182 F.2d 660 (D.C. Cir. 1950), in which the court said that the SEC had the power to forbid a stockholder's protective committee from soliciting financial contributions from stockholders whom it represented in a reorganization proceeding under the Public Utility Holding Company Act of 1935. The court stated that the Holding Company Act gave a stricter measure of control to the SEC than did the Exchange Act, and pointed to the language in the Holding Company Act which gives the SEC authority "to prevent the circumvention of the provisions of this title." The *Okin* decision, however, did not refer to this language.

7. 132 F.2d at 786.

8. 85 F. Supp. 63 (S.D.N.Y. 1949).

9. 17 C.F.R. § 240.13a-1(f)(iii) (1964). SEC Securities Exchange Act Release

a "proxy" as including "every proxy, consent or authorization within the meaning of section 14(a) of the Act. The consent or authorization may take the form of failure to object or to dissent."¹⁰ Since the necessity of complying with the other regulations promulgated under section 14(a) depends upon whether the communication in question constitutes a solicitation of a proxy within the meaning of Regulation 14a-1, these definitions are of considerable importance to anyone contemplating a communication with shareholders.

The principal case represents an attempt by the SEC, at the urging of a private party, to extend its regulatory powers over solicitations so as to encompass attempts to obtain shareholders lists. While the policy considerations relevant to securities regulation are generally quite different from those which are relevant to access to stocklists, the SEC has recently taken the position that regulating the dissemination of information to shareholders is of paramount importance and that therefore its expansive attitude is justified, even though it might in some circumstances conflict with other values.¹¹ In the principal case, Gittlin maintained that the

No. 5276, 21 Fed. Reg. 528 (1956), which announced the adoption of the 1956 amendments, commented:

Thus, statements made for the purpose of inducing security holders to give, revoke, or withhold a proxy with respect to a matter to be acted upon by security holders of an issuer, including election of directors, by any person who has solicited or intends to solicit proxies, whether or not such statements are accompanied by an express request to give, revoke, or withhold a proxy may involve a solicitation within the meaning of the regulation, depending upon the particular facts and circumstances.

Prior to 1956, the definition of "solicitation" included:

(1) any request for a proxy whether or not accompanied by or included in a form of proxy, (2) any request to execute or not to execute, or to revoke, a proxy, or (3) the furnishing of a form of proxy to security holders under circumstances reasonably calculated to result in the procurement of a proxy.

17 Fed. Reg. 11431 (1952).

10. 17 C.F.R. § 240.14a-1(d) (1964).

11. The SEC has recently attempted to regulate advertisements by a shareholder organization representing the shareholders of the American Telephone and Telegraph Company. The advertisements, see, e.g., N.Y. Times, Aug. 23, 1966, p. 57, col. 3, appearing in major newspapers, have opposed the Federal Communications Commission's present investigations of AT&T's rates. The advertisements claim that this investigation has adversely affected the market value of AT&T stock on the New York Exchange, and consequently the advertisers wish both to publicize the shareholders' point of view and to solicit contributions and support for the organization. The SEC contends that the material should be cleared with the SEC before publication, since, in its opinion, the organization is at least soliciting from shareholders authority to make representations on their behalf before the FCC. The organization, on the other hand, denies that it is soliciting proxies or has any intention of doing so, and it claims that the attempted regulation challenges its right to free speech and to petition for redress of grievances. See The Wall Street Journal, Sept. 28, 1966, p. 6, col. 2. The most recent advertisements by the organization have specifically stated that a contribution to the organization does not constitute a proxy, consent, or authorization for the present or future, and that any contribution should be regarded simply as an indication that the shareholder wants to use the organization to exercise his "constitutional right to speak out." See, e.g., The Wall Street Journal, Oct. 20, 1966, p. 12, col. 4.

regulations apply only to authorizations relating to corporate decision making, and that therefore the 14a-1 definitions should not encompass authorizations which are obtained for the limited purpose of qualifying under state law to obtain a stocklist; such authorizations do not relate to corporate decision making and are given in advance of any such commitment. In developing his argument, Gittlin contended that "authorization" does not mean *any* kind of authorization, but rather only those conferring the *power to vote*—either negatively or affirmatively.¹² Furthermore, Gittlin urged that the language defining solicitation should not be construed to include a communication to a *small group* of shareholders for the limited purpose of obtaining a shareholder's list, even if the communication is made pursuant to a plan to use the list to secure voting proxies from other shareholders.¹³ On the other hand, the SEC, appearing as amicus curiae, advised the court that it believed that the language of 14(a) and 14a-1 imposes no limitations on the normal meaning of proxy, consent, or authorization, and that the provisions of the proxy rules were designed to reach any situation in which a stockholder is requested to permit another to act for him.¹⁴

The Second Circuit did not adopt either the broad interpretation urged by the SEC or the narrow construction advocated by Gittlin. Instead, it based its decision to uphold the order of the lower court squarely upon the authority and language of *Okin*. The court held that the authorizations in the principal case were "part of 'a continuous plan' intended to end in solicitation."¹⁵ Indeed, the appellant had admitted as much.¹⁶ Therefore, the court reasoned, under *Okin* the investors were entitled to the information required by the proxy rules¹⁷ and to staff review of that information¹⁸ before they could be asked to make a decision, even if the decision related only to stocklist authorizations. Curiously, the deci-

12. Brief for Appellant, pp. 19-20.

13. *Id.* at 19.

14. While the SEC appeared at oral argument in order to express its view that the authorizations in question came within the proxy rules, it did not file a brief. This is apparently because Gittlin's action in the state court, Studebaker's counteraction in the federal district court, and Gittlin's appeal from the injunction granted by the district court, all took place in a little more than a week. Since the case was heard on an accelerated schedule, the SEC had but short notice in advance of argument before the Second Circuit. The SEC, however, later sent the court a letter summarizing the position it had taken at oral argument. It is this letter to which the court refers when it states the SEC's position in footnotes 2 and 5. Principal case at 695-96 n.2, 698 n.5.

15. Principal case at 696.

16. Brief for Appellant, p. 7. The appellant stated explicitly that he was planning to solicit proxies for the election of directors in opposition to management.

17. 17 C.F.R. § 240.14a-3 (Supp. 1966); see note 2 *supra*.

18. 17 C.F.R. § 240.14a-6(c) (1964), as amended, 17 C.F.R. § 240.14a-6(c) (Supp. 1966); see note 3 *supra*.

sion in *Gittlin* was, as far as the parties were concerned, only a matter of academic interest, for the New York court subsequently ruled that Gittlin's common law right to inspect the shareholder's list upon demonstration of proper purpose¹⁹ had not been pre-empted by the New York Business Corporation Law and that Gittlin was qualified under the common law.²⁰ Nonetheless, in other circumstances the *Gittlin* decision might have important consequences.

Nearly all jurisdictions have legislation dealing with access to stocklists. Generally, such legislation represents an attempt to curb unwarranted management resistance to inspection.²¹ Many jurisdictions, like New York, have vested a statutory right to inspect in shareholders who have held corporate securities for a specified period of time or have held a specified percentage of the outstanding shares.²² And, most of these jurisdictions, either by statute²³ or, as

19. *E.g.*, *Matter of Steinway*, 159 N.Y. 250, 265, 53 N.E. 1103, 1107 (1898).

20. *Gittlin v. Studebaker Corp.*, 49 Misc. 2d 964, 268 N.Y.S.2d 897 (Sup. Ct. 1966). The result is consistent with the decision that N.Y. BUS. CORP. LAW § 624, which deals with obtaining stocklists from domestic corporations, did not pre-empt common law. *Sivin v. Schwartz*, 22 App. Div. 2d 822, 254 N.Y.S.2d 914 (1964). N.Y. BUS. CORP. LAW § 1315, deals with foreign corporations, but from the standpoint of pre-emption, the intent of the legislation would appear to be the same in both cases, that is, not to restrict the common law right but rather to supplement it.

Apart from the problem of the state statute's pre-empting of the common law, another question which might have been asked is whether the common law or the state statute or both had been pre-empted by Regulation 14a-7 of the Proxy Rules, 17 C.F.R. § 240.14a-7 (1964), which specifies that if management has made or intends to make any solicitation within the meaning of the rules it must either (1) furnish a list of the names and addresses of the holders of the particular security promptly upon the written request of any security holder entitled to vote on the matter, or (2) mail the proxy material for him. It appears that state rights to inspect stocklists have not been pre-empted by Regulation 14a-7. *Alabama Gas v. Morrow*, 265 Ala. 604, 93 So. 2d 515 (1957); *Application of Ditisheim*, 96 N.Y.S.2d 622 (Sup. Ct. 1950). If Regulation 14a-7 did pre-empt state law dealing with access to stocklists, then, unless management had solicited or intended to solicit proxies with respect to a *particular matter*, a stockholder could be effectively prevented from communicating with other stockholders about the issue in question. *Smith v. Republic Pictures*, 144 N.Y.S.2d 142, 143 (Sup. Ct. 1955). Also, if management elected to mail the opponent shareholder's proxy material, it would not have to mail that material prior to the time it mailed its own, and thus it would have the opportunity both to see what the opponent's position was, and to neutralize it with its own communications. There appear to be no comparable inroads made upon the rights of an insurgent under the law of any state. It has been held that to override the express savings provision contained in § 28(a) of the Exchange Act, 48 Stat. 903 (1934), 15 U.S.C. § 78bb (1963), legislative intent to this effect should be definitely expressed. See *Crosby v. Weil*, 382 Ill. 538, 546-48, 48 N.E.2d 386, 390-91 (1943). Since there is no indication that Congress did intend to pre-empt the law relating to stocklists, it would seem that Regulation 14a-7 has properly been regarded as not pre-empting such state law.

21. This is the conclusion reached by the editors of the annotated Model Act in a comment which states the reason underlying the legislation relating to access to corporate books and records. 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 46, ¶ 4 (1960). The same view is stated in Newman, *Inspection of Stock Ledgers and Voting Lists*, 16 Sw. L.J. 439, 441 (1962).

22. *E.g.*, ABA-ALI MODEL BUS. CORP. ACT § 46 (1953); ILL. REV. STAT. ch. 32, § 157.45 (Supp. 1965); TEXAS BUS. CORP. ACT ANN. art. 2.44 (1956).

23. *Ibid.*

in New York, by judicial decision, have even determined that access to stocklists is not necessarily to be limited to statutorily qualified shareholders—upon proof of proper purpose, other shareholders may also obtain the stocklists.²⁴ However, in a few jurisdictions, access does appear to be restricted to applicants who can qualify under the statutes.²⁵ Furthermore, most jurisdictions have concluded that qualified shareholders, in spite of the apparently unconditional language of the statutes, do not have an absolute right of access to the lists.²⁶ These developments suggest that the burdens and privileges of shareholders who do not qualify under

24. See cases cited Annot., 174 A.L.R. 262, 269-71 (1948). Another way in which shareholders who are not qualified under the statute may obtain access is by aggregation. While some statutes do expressly specify that a shareholder may satisfy the requirement by aggregating authorizations from other shareholders, e.g., FLA. STAT. ANN. § 608.39 (1955); LA. REV. STAT. ANN. § 12:38 (1950); MD. ANN. CODE art 23, § 51 (1957); N.Y. BUS. CORP. LAW § 1315(a), other statutes make no reference to aggregation, e.g., ILL. REV. STAT. ch. 32, 157.45 (Supp. 1965); MICH. COMP. LAWS § 450.45 (1948); TEXAS BUS. CORP. ACT ANN. art. 2.44 (1956); WIS. STAT. § 180.43 (1957). In jurisdictions of the latter type, aggregation has sometimes been allowed by judicial decision. In *Tornga v. Michigan Gas & Elec. Co.*, 4 Mich. App. 113, 144 N.W.2d 640 (1966), the court allowed Tornga to qualify for access under the Michigan statute on the basis of stock which he held for the express purpose of making a demand for inspection, but in which he had no beneficial interest.

25. LA. REV. STAT. § 12:38 (1950); MD. ANN. CODE art. 23, § 51 (1957); MICH. COMP. LAWS § 450.45 (1948). The reason for this restriction would seem to be to protect corporations from interlopers by barring access to unqualified stockholders who are in effect conclusively presumed to be without good motive. See WILGUS, MICHIGAN CORPORATION LAW 334 (2d ed. 1950). Before a 1941 amendment of the Illinois statute, which amendment provided that, irrespective of the time or percentage requirement, any stockholder could obtain access upon demonstration of proper purpose, 1 Ill. Laws 1941, at 421, § 1, an Illinois court had held that, without fulfilling the time or percentage requirement, a stockholder could not obtain access to corporation records under Illinois law. *Nieman v. Templeton, Kenley & Co.*, 294 Ill. App. 45, 13 N.E.2d 290 (1938).

26. One method which the courts have used to deny access to those who are apparently absolutely qualified is to read into the statute an implied condition that the applicant have a proper purpose. See cases cited Annot., 15 A.L.R.2d 11, 18-20 (1951). Also, since the right to the stocklist is usually enforced by an order in the nature of a writ of mandamus, courts frequently deny qualified shareholders access to the list by reference to the discretionary nature of the remedy. For example, see *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818 (Tex. Comm'n App. 1933), where the court stated that it would not issue a writ of mandamus, although the statutory right was apparently unconditional, where the petitioner was "actuated by corrupt or unlawful motives." In some jurisdictions, however, language may be found to the effect that the right is absolute. In *Henry v. Babcock & Wilcox Co.*, 196 N.Y. 302, 305, 89 N.E. 942, 943 (1909), the court reasoned that while the legislature could have made the stockholder's privilege of inspection dependant upon the motive or purpose for which it is sought, the legislature did not do so, and that, in the absence of any expressly conditional language, the statute should create an absolute right in the stockholder and impose an absolute duty on the corporation. However, later New York cases have recognized that the remedy is discretionary. E.g., *Tate v. Sonotone Corp.*, 272 App. Div. 103, 69 N.Y.S.2d 535 (1947). In *Gittlin*, the New York Supreme Court still speaks of an absolute right, *Gittlin v. Studebaker Corp.*, 49 Misc. 2d 964, 965, 268 N.Y.S.2d 897, 898 (1966), but this would seem to be contrary to the great weight of authority both in New York and elsewhere. See Annot., 15 A.L.R.2d 11, 17-20 (1951).

the statutes remain essentially as they were under the common law and that qualified shareholders are benefited less than might appear from the statutory language; for the latter group, the net effect of the legislation is only to relieve them from the burden of showing, *in the first instance*, that they seek access for a proper purpose.²⁷ The result in *Gittlin* further dilutes the right which the legislature intended to create in qualified shareholders, for it deprives such shareholders of the use of authorizations, unless, in obtaining these authorizations, the shareholders comply with the proxy rules.

Another significant consequence of the *Gittlin* decision is that the Second Circuit, by declining to consider the merits of the SEC's expansive interpretation of the proxy rules, may have done more than merely postpone until another occasion the broad question of the extent of the SEC's power to regulate solicitations and the narrower question of whether the proxy rules cover a solicitation of an authorization for stocklists when the solicitor has no plan which includes proxy solicitations. The practical effect of the decision may well be an affirmation of the SEC's position that all solicitations of stocklist authorizations are covered by the regulations. Indeed, it may, in fact, result in the SEC's having the power to regulate almost all situations involving communications with stockholders.²⁸ Consider the situation in which a stocklist is needed in order to extend tender offers to shareholders. Here, the offeror's plan may be to purchase a controlling interest in the corporation and thereby avoid the necessity of soliciting proxies to obtain control. When he solicits stocklist authorizations, the offeror must decide whether he will comply with the SEC's interpretation that its rules cover any authorization for one person to act on behalf of another, or whether the rules are, in fact, limited by the facts of *Okin* and *Gittlin* to situations involving future plans to solicit proxies. It is recognized that the Commission has only infrequently used the courts to enforce its decision that particular proxy materials do not comply with its rules.²⁹ However, the Commission is usually successful in obtaining compliance with its views through what has been called "the leverage of 'supervisory power.'"³⁰ Certainly in

27. See 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 46, ¶ 4 (1960).

28. The SEC has apparently recognized that certain communications to stockholders do not amount to solicitations. These include the distribution of semi-annual and quarterly reports, communications containing information and comments of a character normally sent to stockholders by the corporate management during the course of the fiscal year, the furnishing of a form of proxy to a stockholder upon his unsolicited request, and the publication of news stories quoting contending parties or containing editorial comments. See 2 LOSS, SECURITIES REGULATION 872-74 (2d ed. 1961).

29. From 1934 to 1955 the SEC appeared as a party litigant in only seventeen cases involving the proxy rules and as an amicus curiae in only eleven. *Hearings on Banking and Currency*, *supra* note 6, at 1543-44.

30. The supervisory power is the power of an administrative agency to coerce

the tender offer situation the solicitor knows that if his tender offers fail and he is therefore forced to resort to a proxy contest to obtain control, he must then deal with the Commission. The rules provide that he must file proxy material with the Commission ten days prior to mailing, but the Commission may, in its discretion, accelerate its review of the material, and often such acceleration is a vital factor in the timing of a proxy campaign.³¹ If the solicitor had failed to comply with the SEC's interpretation that its rules cover authorizations to obtain a stocklist even absent a plan to solicit proxies, the Commission might not be willing to grant his request for an accelerated review. Surely, realization of this possibility would dictate compliance with the Commission's position. An additional reason for compliance is that, since expeditious timing is of great importance, the solicitor cannot risk the delay which might arise because of possible litigation with the Commission or corporate management over the questions left unanswered by the *Gittlin* court. Furthermore, such litigation might be disadvantageous from the standpoint of corporate politics, for even if the court rejected the Commission's interpretation of the coverage of the proxy rules, the court battle might produce allegations and publicity that would cause shareholders to question the motives of the solicitor. An awareness of the fact that his chances for success in a proxy campaign might be diminished by such suspicion would also, in all probability, prompt the solicitor to comply with the SEC's position. The above discussion suggests, at least, that the thesis of extra-legal "supervisory power" is applicable in the present situation, and that the court's failure in the principal case to consider the full breadth of the SEC's interpretation of its powers may well have the effect of enabling the SEC to enforce its position, and indeed even a broader interpretation of its authority, regardless of its legal underpinnings. Moreover, since careful solicitors of authorizations will probably comply with the proxy rules rather than risk litigation, the position of the SEC may long stand untested in the courts.

The net effect of *Gittlin* is that the court may have sacrificed certain rights of a potential insurgent in order to assure other stockholders that they will receive what the SEC considers to be the minimum amount of information which is necessary for the making of decisions relating to stocklist authorizations. But, since these au-

a regulated party by methods other than adjudication of rule making. It is a concomitant of, an outgrowth from, and a substitute for the prosecuting power. In some of the most effective regulatory agencies, perhaps nine tenths or more of the desired results are produced through exertion of the supervisory power.

DAVIS, ADMINISTRATIVE LAW § 4.01 (1959). The "leverage of 'supervisory power'" is discussed by von Mehren and McCarrroll in *The Proxy Rules, A Case Study in the Administrative Process*, 29 LAW & CONTEMP. PROB. 728, 744-45 (1964).

31. See ARANOW & EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 128-29 (1957). See generally DAVIS, *op. cit. supra* note 30, § 4.01.

thorizations neither commit the stockholder nor represent his endorsement of any corporate policy, it is debatable whether stocklist authorizations merit the full protection afforded by the proxy rules. Yet the broad language of *Okin* certainly covers the *Gittlin* facts. A possible basis for distinguishing between *Okin* and the principal case might be that the solicitor in *Okin* apparently communicated with *all* of the shareholders of the corporation, whereas in securing authorizations from holders of more than five per cent of the outstanding shares of Studebaker (which had approximately 110,000 shareholders), *Gittlin* needed to obtain authorizations from only forty-two people. It is not known how many additional persons were solicited unsuccessfully, but undoubtedly the solicitation was highly selective. Arguably this distinction, coupled with the fact that no decision on corporate policy was requested, warrants a result in *Gittlin* contrary to that reached in *Okin*.

On the other hand, both the SEC, in its letter to the court in the principal case,³² and Learned Hand, in the *Okin* opinion,³³ maintained that failure to regulate communications to stockholders at an early point in the development of a potential proxy contest might result in a preconditioning of the stockholders and that this influence would be beyond the reach of subsequent regulation and therefore pervade the entire proxy contest. At least in the context of the principal case, this argument appears unconvincing. As an incident of its regulation of actual proxy solicitations, the Commission could require that prior inaccurate statements be corrected.³⁴ This would mean that no party considering engaging in a proxy contest could afford to be inaccurate or dishonest in the first instance, since he would later have to make admissions to the effect that he had deceived or misled stockholders when he solicited their stocklist authorizations.

The policy underlying access to stocklists presents another argument against the application of the *Okin* rationale to the factual situation presented in *Gittlin*. To permit the SEC to exercise its regulatory powers in this area might give irresponsible management additional weapons with which to frustrate the attempts of capable and responsible opposition to gain control of a corporation. Under the *Gittlin* rule, management may maintain that the solicitations for stocklist authorizations are false and misleading or otherwise violative of the rules.³⁵ Hearings on such questions will obviously

32. See note 14 *supra*.

33. SEC v. Okin, 132 F.2d 784, 786 (2d Cir. 1943).

34. Such a requirement would certainly seem to be within the broad sweep of the enabling legislation contained in § 14(a), for it would be "necessary or appropriate . . . for the protection of investors," and the requirement would be imposed in the context of an undisputable solicitation of proxies.

35. The SEC can only exercise effective review of proxy material which on its face or on the basis of the Commission's information evidences a failure of the

create difficulties for an insurgent. Indeed, in some cases, obstacles arising from a requirement that he provide the other stockholders with information may so inhibit well qualified opposition as to destroy his campaign. Furthermore, the *Gittlin* result, while consistent with Congress' intent that the shareholder be informed before giving authorizations,³⁶ apparently conflicts with another of the historical purposes of the proxy rules: the elimination of various abuses perpetrated by self-perpetuating management.³⁷

It would seem, then, that the court might have attempted to distinguish *Gittlin* from *Okin* and thus allow regulation of stocklist authorizations to remain a matter of state law.³⁸ Had it done so, in those jurisdictions where the court has the discretion to order a corporation to open its stocklist but management has the opportunity to prove that a solicitor's motive is improper, management's interest in preventing access to the stocklist would apparently adequately protect the shareholder. In those few jurisdictions where the shareholder's statutory right might be considered absolute, if in fact there are any,³⁹ legislation could be enacted to offer protection to the other shareholders. For example, to prevent abuse by those who have an absolute right, but who, because of their motives, could not have obtained a discretionary order, state legislatures could require that before requesting authorizations, solicitors must post a bond. By analogy to the "security for expenses" statute applicable to derivative suits,⁴⁰ such bonds would be forfeited if the motives

party who has submitted the material to comply with the proxy rules. *Hearings on Banking and Currency*, *supra* note 6, at 1045-46. Consequently, the assistance of the party against whom the communication is directed in bringing information to the attention of the Commission is of considerable importance.

36. In order that the shareholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major considerations of policy which are decided at shareholders meetings. Too often proxies are solicited without explanation to the shareholders of the real nature of the question for which authority to cast his vote is sought. S. REP. No. 792, 73d Cong., 2d Sess. 12 (1934).

37. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. Insiders having little or no substantial interest in the properties they manage have often retained control without an adequate disclosure of their interest and without an adequate explanation of the management policies they intend to pursue. Insiders have at times solicited proxies without fairly informing the stockholders of the purposes for which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage valuable property rights.

H.R. REP. No. 1383, 73d Cong., 2d Sess. 13-14 (1934).

38. *But see* 42 NOTRE DAME LAW 84, 91 (1966), which, without analysis of the particular policies at work in the context of stocklist authorizations, concludes that *Gittlin* should fall within the scope of § 14(a) through an application of the broad principal laid down in *Okin*.

39. See note 26 *supra*.

40. *E.g.*, N.Y. BUS. CORP. ACT § 627.

underlying the request for access were subsequently discovered to be improper.

The *Gittlin* result, requiring that those seeking stocklist authorizations comply with the proxy rules, is neither the sole nor the best means of protecting stockholders. It provides barriers to the exercise of state conferred statutory rights designed to facilitate access to stocklists; it saddles the insurgents with burdens imposed by the agency; and it is in conflict with one of the basic aims of the Securities Exchange Act: to increase the possibility of outsider participation in corporate affairs so as to prevent entrenched management from pursuing policies contrary to the best interests of the stockholders.
