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CORPORATIONS - PROXY STATEMENT - NECESSITY FOR DISCLOSURE OF ALTERNATIVE PLANS AND OF MOTIVE IN SOLICITATION

J. R. Mackenzie
University of Michigan Law School

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CORPORATIONS — PROXY STATEMENT — NECESSITY FOR DISCLOSURE OF ALTERNATIVE PLANS AND OF MOTIVE IN SOLICITATION—The management of a corporation solicited proxies to support a proposed recapitalization plan, submitting data from which the inference could be drawn that the plan was designed to perpetuate the management. A stockholder sued to enjoin the holding of a special meeting and the use of the proxies obtained, on the grounds that failure to present possible alternatives to the proposed plan and failure to state that its purpose was to perpetuate the management were violations of Rule X-14A-5 of the Securities and Exchange Commission. *Held*, injunction denied. *Doyle v. Milton*, (D.C. N.Y. 1947) 73 F. Supp. 281.

Rule X-14A-5 forbids solicitations “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. . . .”¹ The rule was partly designed to assure that proxy solicitations would contain “adequate information as to the action proposed to be taken,”² and has been interpreted to require the giving of “information which would enable them [the security holders] to act intelligently in the giving of proxies. . . .”³ While an indication of possible alternative plans may aid the stockholder materially in reaching an intelligent decision as to the proposed plan, it would seem to be expressly required by the Rules only if the management in-

¹ 2 C.C.H. FED. SEC. L. SERV., ¶ 25,605 (Dec. 15, 1942), now Rule X-14A-9, *id.*, ¶ 25,609 (Dec. 18, 1947), promulgated under authority conferred by the Securities Exchange Act of 1934, 48 Stat. L. 895, § 14.

² S.E.C. Release 378(B) (Sept. 24, 1935).

³ S.E.C. v. Okin, (D.C. N.Y. 1944) 58 F. Supp. 20 at 23.

tends to take some action with respect to the alternative plans or knows that they will be presented at the meeting.⁴ The Securities and Exchange Commission submitted a memorandum in the principal case stating that presentation or discussion of every possible plan or alternative was not required.⁵ This position avoids the practical difficulties of requiring presentation of an indefinite number of alternative plans with the possible result of merely confusing the security holders.⁶ At the same time, it is not a complete denial of information. Interested security holders can force disclosure of alternative plans and franchise opportunities with respect to them by notifying the management of intention to propose them at a meeting,⁷ assuming that they are proper matters for consideration at the meeting.⁸ In addition, the management must send to the security holders statements of proposed opposition plans, on payment of reasonable costs, or else must furnish to the opposition a reasonably current list of security holders.⁹ Statement of the purpose of perpetuating the management, or of any other selfish motive behind a proposed plan, is not expressly required by the rules. Criticism of concealing selfish motives is implied in *S.E.C. v. Okin*,¹⁰ and by the expression of congressional intent, when the Securities and Exchange Commission was created, that "managements . . . should not be permitted to perpetuate themselves by the misuse of corporate proxies."¹¹ It is held sufficient in the principal case, however, if data is included from which the inference of selfish motive could be drawn.¹² The court would seem to be on safe ground

⁴ Rule X-14A-9(i) (Dec. 15, 1942) defined the phrase "matters to be acted upon pursuant to the proxy" in part as follows: "Employed in relation to a proxy to be used at a meeting of security holders, the phrase means the matters which the persons making the solicitation intend to present and any matters which (they) are informed other persons intend to present for action at such meeting, in the event the persons making the solicitation intend that the proxy shall be used for purposes of a vote upon such matters or for purposes of a quorum supporting such a vote. . . ." 2 C.C.H. FED. SEC. L. SERV., ¶ 25,609. See also Rule X-14A-7, *id.*, ¶ 25,607 (Dec. 15, 1942); Rule X-14A-8, *id.*, ¶ 25,608 (Dec. 18, 1947).

⁵ Principal case at 285. That the Securities and Exchange Commission's interpretation was entitled to great weight, see footnote by the court at 286; *Bowles v. Mannie & Co.*, (C.C.A. 7th, 1946) 155 F. (2d) 129 at 133.

⁶ Principal case at 285.

⁷ To the effect that the management has a measure of practical control over the award of proxies on matters submitted by the opposition, see James, "Recent Federal Statutes Affecting the Law of Corporations," MICH. L. INST. 80 at 97 (1940).

⁸ Note 4, *supra*. This requires of the security holder a degree of inside information, in order that he may submit alternative plans before the management's proxy material is sent out.

⁹ Rule X-14A-6, 2 C.C.H. FED. SEC. L. SERV., ¶ 25,606 (Dec. 15, 1942); Rule X-14A-7, *id.*, ¶ 25,607 (Dec. 18, 1947).

¹⁰ (C.C.A. 2d, 1943) 132 F. (2d) 784. A stockholder, to prevent a quorum at a meeting, sent letters requesting cancellation of proxies previously given to the management. Failure to state that, if successful in this, he intended to solicit proxies to get himself elected an officer of the company made his letters false and misleading.

¹¹ H.R. Rep. 1383, 73d Cong., 2d sess. (1934).

¹² The holding in *S.E.C. v. Okin*, (C.C.A. 2d, 1943) 132 F. (2d) 784, note 10, *supra*, is susceptible of the same interpretation.

in questioning whether the accuracy of statements of motive, if required, could be determined, and whether they would deter the proposal of plans for selfish ends.¹³

J. R. Mackenzie

¹³ Principal case at 286.