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Phillip Blumberg

*University of Connecticut School of Law*

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# Introduction to the Politicalization of the Corporation

By PHILLIP I. BLUMBERG

The increasing politicalization of the large American corporation is primarily the product of changing concepts as to the role of business in the society set against a background of profound unresolved problems in the society itself. It is a process that reflects a number of important elements that have made the large public corporation an appealing and vulnerable target for groups interested in social reform who hope to utilize the corporation as an instrument of social progress and the corporate voting process as a vehicle to dramatize their objectives and to force public debate.

We are concerned with the development of a view of the corporation that is political, not legal, that looks upon the corporation as a social institution to be subjected to social controls not as an economic organization to be operated to achieve economic objectives for shareholders.

## *THE MANIFESTATIONS OF POLITICALIZATION*

Politicalization of the large public corporation is the involvement of the corporation in issues of high public visibility assuring the controversy a prominent place in the press, radio and television. These issues are essentially social, moral or political in their nature, do not promote and may instead impair the profitability of corporate operations, and are of interest to the proponents primarily as citizens, rather than as shareholders.

Politicalization of the corporation is reflected in a variety of ways:

- (a) Angry confrontations or disruptions at shareholder meetings.
- (b) Picketing, sit-ins, demonstrations, and boycotts.
- (c) Bombings, sabotage and burnings.
- (d) Harassment and interference with recruiters. Dow, for example, was the subject of 221 major demonstrations on American campuses in 4 years.<sup>1</sup>
- (e) Demands for the election of blacks, women, and other minority group representatives on Boards of Directors.
- (f) Organization of public interest groups, in some cases financed by

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*Editor's Note:* The author is Professor of Law, Boston University Law School and the author of "Corporate Responsibility and the Social Crisis," 50 B.U.L. Rev. 157 (1970). His lecture was given under the auspices of the Section on Corporate Law Departments, Clarence E. Galston, Chairman; the Section on Banking, Corporation and Business Law, Henry Harfield, Chairman and the Committee on Corporation Law, Gordon D. Henderson, Chairman.

tax-exempt foundations, investigating the extent of corporate recognition of social factors in their business operations.

- (g) Increasing use of the proxy machinery to attempt to compel management under S.E.C. Rule 14a-8 to include social questions or proposals for change in the organic corporate structure in the corporate proxy statements.

One knowledgeable observer of developments in this area has pointed out that this movement in the corporate world could become the most significant political development of the 1970s.<sup>2</sup>

As a major factor in the society, the corporation cannot escape involvement in the urgent problems of the country. It is necessarily profoundly influenced by widespread dissatisfaction on the part of significant elements of the American society as reflected in the violence of the social scene, the intensity of concern engendered by the war in Viet-Nam, the pre-occupation with problems of environmental abuse, the development of "consumerism," the alienation of many younger persons from traditional values, and the existence of "revolutionary" movements for "liberation" of blacks and women. These factors have set in motion vital social forces, together with energetic, highly articulate, fiercely motivated persons, prepared to devote their energies to the movement. 1970 has thus been described as the year of "the corporate guerilla fighter."<sup>3</sup> The state is regarded as the corporate state, and the corporation is a prime target.

There are at least eight major factors contributing to the current re-examination of the fundamentals of the role of American business.

### 1. *The Failure of Business Leadership*

The basic explanation for the strength of this movement is the simple fact that many of the demands are morally sound and that business leadership, along with the rest of the society, has been unpardonable slow to respond. The intensity of the country's social and environmental problems, the extent to which corporations have caused them, the limited response of corporations to their solution—in brief, the failure of business leadership—have accelerated the forces for politicalization.

As Mr. Dan Lufkin has put it: "in almost every sphere of social concern, the corporation which is so bright and capable in its field of technical competence has been sluggish, inept, and unresponsive."<sup>4</sup>

### 2. *Changing Concepts as to the Role of Business in Society*

The movement for politicalization is inescapably intertwined with the widespread acceptance by businessmen themselves, as well as by the public generally, of the concept of corporate social responsibility.

Indeed, one of the most significant developments on the recent American scene has been the increased public expectations and demands on American

business with respect to its role in the society, the increased involvement of the large public corporation in social problem solving, and the widespread emergence, both among businessmen generally and among the critics of business, of a changing concept of business objectives. A simple overriding objective to make money for shareholders is increasingly being replaced by business affirmations that the basic role of business is to serve society as well as to make money. Increasingly, the emphasis is on service to the society.<sup>5</sup>

One may of course, inquire whether the felicitous rhetoric is intended to serve more of a public relations function than an accurate definition of corporate priorities. The fact remains, however, that businessmen—prominent and powerful—are increasingly speaking in such terms. The vital significance of such statements is that the objective of service to the society which such business spokesmen are applying to business inevitably will become the objective which the public generally will first accept as an appropriate role for business, subsequently come to expect, and ultimately to demand.<sup>6</sup>

Common factors thus create pressures both for corporate social responsibility and the politicalization of the corporation. This does not mean, however, that if business ignored public expectations and demands and refused to involve itself in the solution of social problems that the pressures for politicalization would disappear. Quite the contrary. If there is any factor that is contributing strength to the position of management in resisting efforts to politicalize the corporation, it is the ability to point to a record—albeit limited—of social participation.

### 3. *The Lack of Accountability of Management*

Increased public concern also arises from the essential lack of accountability of corporate management reflecting the effective separation of ownership and control in the typical large public corporation.<sup>7</sup> For practical purposes, Boards of Directors are self-perpetuating trustees only theoretically responsible to shareholders not in a position to assert effectively the control allocated to them under corporate law. Concern has developed as to the legitimacy of corporate power which is not realistically derived from the consent of shareholders. This lack of standing also makes it difficult for management to speak with effectiveness on behalf of the owners of the enterprise. Further, the theoretical owners, the shareholders, have typically become temporary investors strongly inclined in the face of problems to sell their shares.

Accountability by management to shareholders would clearly not end the matter, but lack of accountability to shareholders or anyone else renders even more troublesome an already difficult problem.

### 4. *The Concentration of Corporate Economic Power*

In 1968, the 500 largest industrial corporations represented approximately 64% of the total sales and 74.4% of the total net profits of all industrial companies.<sup>8</sup> Large business has become so powerful that it is not realistic for

persons concerned with social change to consider programs which do not either involve business participation or a change in business objectives. This combination of great economic power exercised by management that is essentially unaccountable to shareholders has made the large public corporation particularly vulnerable. It is a major social force subject to insufficient external controls.

### 5. *The Communications Revolution*

The technological revolution in communications is of major importance. With the development of television, activities which in the past might have remained obscure, today achieve national and even international prominence. It provides instant publicity for "confrontation" politics or "corporate guerilla" activities. Public exposure is essential for such tactics, and public exposure is a particularly effective weapon against business which regards good public relations as an area of fundamental importance and to which a "bad press" is a matter of deep concern.<sup>9</sup> Publicity is the primary objective of such forces and one that is readily attained.

### 6. *Lack of Responsiveness of the Political System*

The political institutions of the society have successfully resisted in many aspects the impact of social reform groups. Persons disappointed with the inability of left of center forces to develop a major voice in party machinery and the electoral process generally have been influenced to turn elsewhere. Increasingly, as the result of the search for a more vulnerable target, the corporation, rather than the political structure, has become the recipient of the political goals and pressures of various youth, anti-war, anti-pollution, anti-racist, and consumer-oriented organizations.

At a conference of social activists held at Carnegie Mellon University in April 1970, the keynote speaker, Professor Staughton Lynd, summarized: "Our inevitable enemy in the coming years is the corporation"; Business Week reported that "the underlying theme of the gathering was that the corporation is replacing the university and the government as the scapegoat of radical dissatisfaction with American society."<sup>10</sup>

### 7. *Changing Values*

Changing views of the nature and role of the corporation unquestionably are derived as well from changing personal and social values, particularly among younger people. Hostility by many young people to the large corporations and to the values which they represent is a well known development on the American scene. It is thus not an accident that most of the persons active in Campaign GM and other campaigns for politicalization of the corporation are surprisingly young. As Anthony Athos points out in his Harvard Business Review article entitled, *Is the Corporation Next to Fall?*:

"The young, with their radical perception of the world, are destined to shake business, as they are shaking other institutions."<sup>11</sup>

#### *8. Development of a Socially-Oriented Shareholder Power Base*

In recent years, there has been a tremendous accumulation of stock ownership by non-profit institutions—churches, foundations, and universities—which by their nature are particularly sensitive to social issues and non-economic values. There has been a similar accumulation of stock ownership by other institutional investors who are becoming increasingly aware of changing concepts as to the nature of their responsibilities in voting their shares. Finally, the widespread diversification of stock ownership among 31.9 million Americans,<sup>12</sup> most of whom have a very small economic interest in the companies in which they hold shares, clearly embraces many individuals who will be ready to respond to social appeals. In the aggregate, the foregoing groups present a formidable base of potential support for social reform movements.

#### *CAMPAIGN GM ROUND I*

Campaign GM Round I represents the decisive event in the politicalization of the corporation.<sup>13</sup> With proposals that it considered only "symbolic," Campaign GM Round I made its appeal to the shareholder as a citizen, not as a shareholder. It was an appeal based on what was alleged to be good for the country, not on what was good for General Motors, as well as a frank recognition that what was good for the country might not be good for General Motors, at least in the short-run and perhaps not even in the long-run. Campaign GM contended that the shareholder's interest as a citizen in the underlying social problems transcended his interest in General Motors and that he should vote as citizen, not as shareholder. Finally, Campaign GM represented the view that the decision on social reform proposals should not be made solely by shareholders and that "the [non-shareholder] public should be part of the decision making process."<sup>14</sup>

As illustrated by Campaign GM, the tactics of the so-called public interest proxy contest are intended to attract public attention and provoke public debate, in an effort to arouse public interest to a level of intensity that will force corporate management to respond. It is a battle for publicity waged primarily in the communications media to influence the state of mind of citizens generally. The corporate electoral process in and of itself is not decisive. Its basic usefulness is to provide a platform for public presentation of the point of view of the protesting group and a device for obtaining public exposure.

A basic difficulty of the social reform proposals is that they are made to attract public attention to social problems and have little relation to the advancement of the interests of the corporation or its shareholders (at least in their role as shareholders). Further, they are often made, as in the case of

Campaign GM Round I, by groups who have become stockholders solely for the purpose of raising the issue.<sup>15</sup>

Campaign GM Round I must be regarded as a considerable success. It dramatized once and for all the potentialities of the public interest proxy contest. Further, it shattered for all time the pattern of institutional neutrality under which the institutional shareholder, particularly the non-profit institution, automatically voted its shares for management. As a result of Campaign GM, American corporate electoral processes have become fundamentally changed.

### *CHANGES IN THE ORGANIC STRUCTURE OF THE CORPORATION*

The demands of the corporate activists have not been confined to the role of the corporation in society. They have also been directed toward radical change in the organic structure of the corporation itself. Thus, the original demand for a shareholders committee for corporate responsibility in Campaign GM Round I has been followed by a similar proposal to Honeywell and by proposals to Honeywell,<sup>16</sup> American Telephone,<sup>16A</sup> and Gulf Oil<sup>17</sup> as well as in Campaign GM Round II<sup>18</sup> calling for broadening the Board to include representation of special interest groups—employees, consumers, suppliers, dealers or the public generally—or otherwise changing Board selection.

Recently, Mr. Ralph Nader called for what he termed the “popularization” of the corporation. He suggested that in the large corporation, 5 of 20 directors be elected directly by the public at large in a national election. The remaining 15 would be elected by shareholders under a proxy system that would permit the submission of management and opposition slates in a single corporate solicitation at corporate expense.<sup>19</sup>

### *THE ELECTORATE OF THE NEW CORPORATE POLITICS*

The electorate of the new corporate politics provides a solid base of potential support for the forces of social reform.

Institutional investors generally now hold an increasing proportion of the outstanding equity securities of the major American corporations. As of the end of 1970, the New York Stock Exchange estimated that \$161.9 billion or 25.4% of all equity securities of companies listed on the Exchange were held by institutional holders. With unregistered mutual funds, investment partnerships, non-bank trusts, and foreign institutions included, the Exchange estimated that the total of all institutional holdings would exceed 40%.<sup>20</sup>

At the outset in reviewing the impact of moral or social considerations upon the policies of institutional investors, we must distinguish sharply in at least 2 threshold areas.

Firstly, what is the precise question for decision by the institutional investor? Is it a question of the policy for new investments, the sale of existing



investments, or the voting of shares on social reform proposals contained in a proxy solicitation or other participation in the corporate decision-making process?

Secondly, will the social proposal involve any significant economic loss to the subject corporation and its shareholders? In the absence of economic loss for the corporation and therefore of any adverse economic impact on the fiduciary's investment in the corporation, the problem facing the institutional fiduciary is significantly changed.

#### (a) *The Non-Profit Institutional Investor*

Large non-profit institutional holders provide a major base of support for social reform proposals. Churches, foundations, and universities with leadership and constituencies possessing objectives and values quite different from those of business are particularly sensitive to proposals for social reform.

#### (1) *Churches and Foundations*

Achievement of social progress rather than maximization of economic return on investments may readily be regarded as a fulfillment of the objectives of churches and foundations. This is particularly true of those church denominations which have adopted aggressive social action as a major institutional objective. A possible loss of income or decrease in market value of a limited portion of its portfolio may not be regarded as a significant price to pay for immediate association with a social movement of considerable appeal to the leadership and membership of the church.

Until recently, church interest in corporate activities at least on the public level was restricted to isolated incidents. Church groups brought economic pressure on the banks participating in the consortium providing financing to the Government of South Africa.<sup>21</sup> The women's division of the Methodist Board of Missions sold its Dow Chemical shares with a value of \$400,000 in protest over the napalm issue.<sup>22</sup> Church groups also supported FIGHT in its struggle with Eastman Kodak over black employment.<sup>23</sup>

Even as recently as last year, church activity was limited. The sponsors of Campaign GM Round I, can identify only a few church groups holding an aggregate of 11,000 shares<sup>24</sup> among their supporters.

Since then, churches have pushed to the forefront of the corporate activists.

(a) Four resolutions presented by the Southern Africa Task Force of the United Presbyterian Church will appear in the 1971 Gulf Oil proxy statement. These call for review of Gulf's operations in Africa, amendment of Gulf's charter to exclude investment in colonial areas, disclosure of corporate charitable contributions, and the increase of the Gulf Board to include consumer, dealer, and public representatives.<sup>25</sup>

(b) While the United Presbyterian Church as shareholder works within the Gulf corporate machinery, two agencies of the United Church of Christ have urged a consumer boycott of Gulf because of Gulf's operations in Angola.<sup>26</sup> It would be interesting to know whether Gulf shareholder United

Presbyterian Church supports the boycott of Gulf by the United Church of Christ agencies.

(c) Six major Protestant denominations, holding 60,000 shares of American Metal Climax, Inc. and 143,000 shares of Kennecott Copper Corporation have asked the two companies to postpone a proposed copper mining venture in Puerto Rico "until safeguards have been established to protect the economic, social and ecological future" of the island.<sup>27</sup> The church groups, although holding shares with a market value in excess of \$7,500,000, are not seeking to determine what is beneficial to the companies, to themselves and their fellow shareholders in the short run and in the long run. They are looking at the problem in terms of what is deemed desirable for the people of Puerto Rico.

(d) The Episcopal Church holding 12,574 shares has offered a resolution for the General Motors Annual Meeting calling for amendment of the certificate of incorporation to require the company to cease manufacturing in South Africa.<sup>28</sup>

The activity of the churches is not simply related to their appraisal of their own responsibilities in voting their shares. Thus, the appeal to United Presbyterian Church members was not simply to vote shares of Gulf Oil held by them in favor of the resolutions submitted by the church. The Southern African Task Force of the church went further and urged the church affiliates to go out and purchase additional Gulf shares to provide additional support for the proposals.<sup>29</sup> Further, the church has retained the Project for Corporate Responsibility which was responsible for Campaign GM, to run a "major proxy solicitation and educational effort."<sup>30</sup>

Thus, at the present time, various church groups have proposed resolutions relating to social or political questions for consideration at the annual meetings of four major corporations: American Metal Climax, General Motors, Gulf Oil, and Kennecott Copper. This is unprecedented in American corporate history.

Still, other church groups are "evaluating portfolios in terms of such matters as racial and economic justice, peace, and world development"<sup>31</sup> or have accepted "the responsibility . . . to utilize in a strategic way its economic power" to achieve social action.<sup>32</sup>

Church groups speak not only with great prestige. They control substantial funds and can exert considerable economic influence. A church task force has estimated that perhaps \$4 billion dollars of current investments might be changed to reflect "social and public policy views" of the churches.<sup>33</sup> Thus, the Executive Council of the United Church of Christ, has adopted a recommendation to invest "a substantial portion, not less than ten percent" of its unrestricted funds in "high-risk and low-return" investments that will achieve "maximum social impact."<sup>34</sup>

The financial power and moral influence of the church groups clearly represent major factors influencing the climate of opinion in which corporate management must operate.

The activities of foundations in this area have not been as prominent. The Campaign GM Scorecard shows only 2 foundations holding a total of 7830

General Motors shares voting in favor of Campaign GM proposals. The Rockefeller and Carnegie Foundations voted with management with reservations.<sup>35</sup> It is also known that a number of foundations are providing financial support for so-called public interest groups active in promoting the recognition of social and moral factors in the conduct of corporate affairs.<sup>36</sup>

There is no reason to suppose, however, that the concern of foundations with the inter-relation of their investment policies, the voting of their shares, and social reform proposals will not increase, along with the increasing concern of churches and universities. Thus, the Ford Foundation recently announced that it is conducting a comprehensive review of its policies and responsibilities in this area.<sup>37</sup>

## (2) *Universities*

Educational institutions are another powerful source of potential support for political and social demands on corporations. The constituents of these institutions are articulate, alert to public issues, and ready to identify with the objectives of social reform. Thus, it has been pointed out that for students "the University is the most acceptable and vulnerable institution subject to pressure in support of social needs."<sup>38</sup>

Within the universities, the supporters of social protest typically lack any real participation in the decision-making process. This creates at least two forces brought to bear to influence the institutional decision. The campaign to force the university trustees to vote against management on an issue of social reform becomes a useful device for those interested in a re-allocation of power within the university. The target is the university structure with the social issue serving as the rallying point, not as a major end in itself.

Further, the students, faculty, or alumni have no immediate responsibility for the financial conduct of the university and are consequently insensitive to the significance of the possible economic impact of the decision on the institution. The issue is presented as a political question affecting the American society generally and is so received and evaluated by the constituents of the university, who respond to the political appeal on the political level.

Thus, in Campaign GM Round I, the details of the proposals, their relation to the fulfillment of the objectives of General Motors, their impact on General Motors and on its shareholders, and their relationship to the financial posture of the university received little consideration in the discussions of students and faculty. They were essentially irrelevant in terms of the political considerations involved.

In significant part in response to student pressure, 12 colleges and universities including Amherst, Antioch, Boston University, Brown, Iowa State, Lincoln, Oregon, and Tufts holding approximately 65,000 shares voted in favor of one or both Campaign GM proposals, and 5 others, including Rockefeller, Stanford, Swarthmore, Williams, and Yale holding approximately 196,000 shares abstained.<sup>39</sup>

The problem for universities is of serious proportions in view of the intensity of student and faculty pressure. This is well recognized by university administrators at Harvard, Yale, Princeton and elsewhere.

At Harvard, President Pusey appointed a committee of distinguished scholars, headed by Professor Robert W. Austin, and including Professors Louis Loss and A. James Casner, among others, to advise the university in this area. The report of the Harvard Committee calls essentially for initial investment to achieve maximum economic return (excluding only investments that might best be avoided on moral grounds). Where the university was an investor, the Committee concluded that the university could not remain passive since abstention in most cases was a vote for management, nor should it sell its shares. The committee advised that the university—like any other institutional investor

“may properly, and sometimes should, attempt to influence management in directions . . . considered to be socially desirable. . . . Certainly the university should vote its stock on occasion in favor of changes for the symbolic effect of a great university’s taking a position on a social problem.”<sup>40</sup>

At the same time, the committee called for appointment of a non-financial advisor to review social implications of the university’s investment policies.<sup>41</sup> The net effect of the Harvard Committee report is to recognize the responsibility of the university to review social reform proposals on their merits, to respond to social values in its dealings with management, without, however, providing any standards to guide the university or its advisor on these matters other than to observe that drawing a policy line is difficult, as indeed it is.

Professors Malkiel and Quandt of Princeton agree that the university must invest for maximum return, subject to moral limitations, should participate in corporate affairs rather than sell its shares, and cannot avoid social and moral values in the voting of its shares and other participation in corporate affairs.<sup>42</sup>

Assuming that an investment survives moral scrutiny, what decision does the university make on proposals relating to matters “considered to be socially desirable,” in the language of the Austin Committee at Harvard, or on proposals pertaining to the organic structure of the corporation? The issue of whether employee, consumer, supplier, or dealer members should be added to the Boards of Directors of General Motors or Gulf Oil or American Telephone is clearly a political not a moral issue. What standards should apply? Through what process, and by whom is the decision made? What sort of administrative apparatus will be required to collect relevant information, to ascertain the views of the educational community, and to emerge with a recommendation? What distraction will this create from the basic function of the university? What abrasive controversy will arise within the educational community? What impact will the proposal have on the economic prospects of the investment? What impact will the university action have on the public?

In reviewing the different contexts in which this problem may arise, it is apparent that the major area calling for an institutional response to a social

reform proposal is when the issue has been thrust upon the institution by others who have placed the social reform proposal on the corporate proxy statement, and the university cannot escape a decision. It may vote in favor, or oppose, or abstain, or sell its shares, but a decision of some sort is inevitable. This is entirely different from the suggestion that the university utilize a portion of its endowment by making new investments to achieve social purposes. It is also entirely different from the question when, if ever, the university may itself initiate, either alone or with others, proposals for social reform pertaining to the corporations in which it owns shares.

These are interesting and troubling questions. The university can no longer escape its responsibility in facing up to them. The Austin Committee at Harvard has recognized this responsibility and in effect has said that the university must weigh each social reform proposal on the merits in determining its action. The patterns of the past have been shattered. The institution no longer automatically votes its shares for management. This is a decisive contrast to the attitudes of yesteryear. It is a remarkable demonstration of the success of efforts such as Campaign GM to change the basic pattern of institutional response. It is a confirmation that politicalization of the corporation has occurred in significant measure and is with us to stay.

### (3) *Retirement Funds*

The foregoing discussion has involved the relation between social proposals and the non-profit institution with respect to the investment of the institution's unrestricted funds. In many cases, however, the non-profit institution holds additional funds—of which retirement funds are a prime example—for the benefit of participants.

In those cases where the obligation is to pay a pension in a fixed amount, irrespective of the yield of the retirement fund portfolio, the problem in effect becomes merged with the overall financial problems of the institution. In other cases, however, the amount of the pension may be measured by the performance of the retirement fund portfolio. Here, the economic costs of the social proposal—if there be any—will be borne by the participants not by the institution.

A church investment committee may be prepared for a reduced return on its investment in order to achieve social objectives deemed of importance to the church. Is it prepared to take the same action with pension funds if this means a reduction in pensions to retired ministers? Is it prepared to decide the question itself or would it prefer to refer the question to the participants on some sort of pass-through voting? Is it prepared to permit a majority of participants to approve an action which conceivably could mean the reduction in pensions of all concerned, including an opposing minority?<sup>43</sup>

The Pension Boards of the United Church of Christ are considering an interesting solution to this dilemma. They are exploring a proposal that retirement funds be divided into two separate funds. One fund would seek "to provide the best return over the long run consistent with the preservation of principal." The other would consist of "investments which might be made to maximize social impact" involving "lower yields or greater risk."

A participant would be allowed to allocate "some portion of current contributions" for his account to the second fund. The highly restricted nature of the proposal confirms that at least this church agency is not prepared to achieve social gain by imposing an involuntary sacrifice upon pensioners.<sup>44</sup>

The same type of problem arises in the case of fiduciaries managing pension funds unassociated with any particular institution, such as the College Retirement Equities Fund ("CREF") with over \$1.3 billion dollars of equity securities in its portfolio as of December 31, 1969.<sup>45</sup> It is worthy of note that the trustees of CREF voted its 608,000 shares of General Motors in favor of management and against the two Campaign GM Round I proposals by the narrow vote of 9 to 7.<sup>46</sup> Neither of such proposals, it should be emphasized, involved any immediate economic loss to General Motors. One may inquire whether CREF trustees would have felt free to support those Campaign GM Round I proposals omitted from the corporate proxy statement which would have involved significant economic loss to General Motors.

One may also inquire whether the beneficiaries of CREF would have reached a 9 to 7 division if they had been polled on the matter.

When we move from the retirement plans of non-profit institutions to the pension or profit sharing plans of business corporations, significant differences may be noted. The trustee, institutional or otherwise, has been hand-picked by the Board of Directors of the company in question, which customarily retains the power to remove the trustee and designate its successor. The views of the trustee thus are apt to reflect in some degree the values of the Board of Directors of the employer. Contrast this posture with the eight trustees of CREF who have been elected by the faculty participants in the plan and therefore reflect faculty attitudes on a representative basis.

Further, in the case of the industrial pension fund, the results of the operation of the trust portfolio will increase or decrease the current and future contributions by employers. The benefit of performance enures to the employer, and the pressure will clearly be for economic rather than social performance. Similarly, where the industrial fund is a profit-sharing fund, the amount of the ultimate distributions to beneficiaries will reflect the economic performance of the fund, and the trustees will be under pressure to maximize return.

The question of pass-through voting by beneficiaries deserves at least brief mention. Messrs. Lewis and John Gilbert list no less than 41 well-known corporations that are using pass-through voting procedures for company shares held under pension, profit-sharing, stock-purchase, thrift and similar plans.<sup>47</sup> These examples pertain only to the voting of the shares of the company establishing the plan, and not to the entire portfolio. The pass-through practice is obviously designed to eliminate the conflict of interest inherent in direct or indirect management influence on the voting of the shares held under such plans with respect to their own election as directors or other management proposals.

This widespread development illustrates the feasibility of the pass-through voting system as a general matter. However, its use in the cases mentioned above rests essentially on the disqualification of the trustees in view of the inherent conflict of interest involved. The question remains whether trustees

may abdicate their responsibilities and properly permit decisions in the social reform area to be made by the beneficiaries, where they are not so disqualified.

(b) *Mutual Funds and Insurance Companies*

Other institutional investors, such as mutual funds and stock insurance companies, are organized with economic, rather than non-profit, objectives.

In the case of mutual funds, a number of factors make them unlikely sources of support for social reform. The interest of management and shareholder alike in performance records necessarily emphasizes short-run economic considerations. Appeals to shareholders, as citizens rather than as shareholders, will be less effective. Further, since the funds are investors in other businesses and not directly conducting industrial or commercial operations themselves, they are effectively insulated from participation in the sensitive areas of social and environmental concern. Their activities do not produce issues of high public visibility. Finally, we are dealing with boards which, as a practical matter, are even less accountable to shareholders than the companies in which they invest, because of the reduced significance of institutional shareholders. Thus, the ultimate decision is likely to reflect the personal predilections of the Board. At the same time, one can visualize a limited number of funds deliberately appealing to socially conscious investors through well publicized plans to invest with social considerations as one of the major elements influencing investment decision.<sup>48</sup>

It is also possible to envisage the development of an awareness among institutional investors that management sensitivity to social issues may constitute an index of the superior businessman, whose decisions in other areas may also be expected to reflect long-range vision. The company that displays social responsibility may thus attract future professional investor support because of anticipated performance in the basic economic aspects of the business arising from the broader horizons demonstrated in the social area.

Insurance companies present a different problem because they are essentially public institutions embracing millions of policy holders. They will find it increasingly difficult to avoid responding to public pressures, particularly in the case of prominent public interest confrontations. Mutual insurance companies are especially vulnerable in this regard. Indeed, it is not difficult to visualize the politicalization of the mutual life insurance company itself. If this were to occur, mutual life insurance companies could play a leading role in this area.

(c) *Political Figures and Governmental Trust Funds*

Another obvious source of support in the politicalization of the corporation is the traditional political process itself. Political figures recognizing the mass appeal of the social proposals hasten to participate. Thus, in Campaign GM Round I, Mayor Lindsay of New York City instructed the trustees of New York City pension funds to vote their 162,000 General Motors shares in favor of the Campaign GM proposals. Other political support came from Mayor White of Boston, the San Francisco city pension fund and from Wis-

consin and Iowa state funds. Six United States Senators and 22 Congressmen also endorsed Campaign GM Round I.<sup>49</sup> Recently, Senator Metcalf of Montana who had not endorsed Campaign GM Round I, criticized the failure of universities to try to influence racial, environmental safety, and pricing policies of the corporations in which they held shares in terms which followed closely the arguments of Campaign GM.<sup>50</sup>

(d) *The Small Shareholder*

We have already pointed out that the widespread distribution and fragmentation of equity ownership has created a class of 31.9 million shareholders, most of whom have a relatively petty economic stake in the enterprise in which they are theoretically part-owners.<sup>50A</sup> For such small holders, emphasis on social, rather than economic, corporate objectives will not realistically result in any significant economic impact upon them as individuals, even in those cases where the proposal involves economic cost to the corporation. This is not to suggest that these small holders may not in significant numbers regard themselves as owners and may not indeed identify psychologically with the giant corporations in which they may hold a few shares. Nevertheless, as social attitudes change, increasing numbers of small investors may find their own attitudes changing, and since their own economic position will be for practical purposes unaffected, may be more responsive to such appeals on the political level as those being made by Campaign GM and by the church groups.

By themselves, the small shareholders are unorganized and ineffective. With the leadership and organization of public interest groups and the participation of church, university and other institutional holders, small investors in the future may play an increasingly important role.

The potential base of support for social reform proposals is thus substantial. Whether or not a successful combination can ever be assembled to out-poll management<sup>51</sup> is not really the point. If social reformers can achieve significant support in the balloting process, management will be forced to respond to shareholder, as distinct from public, pressure. As time goes on, the use of the corporate balloting process as a method of determining corporate policy may ultimately emerge as an end in itself, and not simply as an interstitial publicity device in a campaign to influence public opinion.

*THE SIGNIFICANCE OF S.E.C. RULE 14a-8(c)*

Rule 14a-8(c)<sup>52</sup> determines what shareholder proposals may be omitted by management from its proxy solicitation and would appear to be destined as one of the major legal battlegrounds in the struggle to politicalize the corporation. The decision of the Commission in Campaign GM Round I including 2 proposals and excluding 7 illustrated the crucial significance of the Rule, which Judge Tamm's opinion in the *Medical Committee for Human Rights*<sup>53</sup> case has catapulted into the forefront of legal attention.

In November 1970, then Chairman Budge of the Commission announced



that the Commission was studying possible changes in Rule 14a-8.<sup>54</sup> Its ultimate decision in this matter will fix the ground rules for future public interest proxy contests.

### *THE ALTERNATIVES OPEN TO MANAGEMENT*

What can management do to reduce the impact of the politicalization of the corporation. The basic answer for business is to recognize the moral soundness of most of the demands for social reform and the wisdom of responding vigorously to the social and environmental crisis. This must be the basic objective of business. Such tactical measures as studies of the types of security measures to be adopted to prevent disruption of the Annual Meeting possess only secondary importance.<sup>55</sup>

Business is already doing much and must do much more in the solution of the major social and environmental problems of the times, in the struggle to deal with urban problems, poverty, race relations, product safety and environmental abuse. I will restrict myself to four brief examples of priority areas for management: A sharp increase in financial support for social and philanthropic agencies; minority group representation on the Board; the role of "outside" directors; and response to the environmental crisis.

1. *Increase in Philanthropic Support.* Few companies expend the 5% of pre-tax net income which the Internal Revenue Code permits corporations to deduct for qualified philanthropic contributions. Contributions of this nature enable business to support the entire spectrum of agencies that are dealing with social needs, as well as traditional areas such as higher education. In 1968, the average for all corporate taxpayers was only 1.06% of pre-tax net income,<sup>56</sup> and it is apparent that in the area of philanthropic efforts, most business is still not prepared to expend amounts that will significantly reduce earnings per share. In view of the magnitude of the problems of society, the campaign to raise average corporate contributions to a figure closer to the 5% of pre-tax income deductible under the tax laws is one of the great challenges facing business leadership. This is a matter of the general attitude of business with respect to what constitutes an acceptable level of social costs. If enough businessmen of courage will take the lead, business will be demonstrating its concern for social betterment in unmistakable terms that will provide it with a considerably stronger position from which to respond to the social reformers who would seek to alter the structure of business itself.

There may be concern as to the designation of recipients as well as the control exerted by business over the recipients, particularly if contributions increased significantly. Concern of this nature has been particularly expressed with respect to business support for higher education.<sup>57</sup> One answer to such concern is the "matching gift" where the recipient is chosen by the employee, not the employer. Extension of the "matching gift" principle to all tax-exempt philanthropic activities and extending it to shareholders, as well as to employees, would be a dramatic acknowledgement of corporate responsibility for participation in the solution of social problems.

2. *Minority Group Representation.* In the area of race relations, the absence of blacks and other minority group persons on the Boards of Directors of major corporations presents a serious social problem. Thus, a recent report entitled, "Corporate Apartheid—California, U.S.A. Style," bitterly criticized California's 67 largest corporations, pointing out that not one of the 1,008 members of their Boards of Directors was black or Mexican-American and that only 6 were women.<sup>58</sup>

Similarly, in its recent report to President Nixon, the National Advisory Council on Minority Business called for appointment of persons from minority groups to the boards of directors of the largest corporations.<sup>59</sup>

This view is a long overdue recognition of the legitimate aspirations of deprived groups of Americans to participate in the important decision-making centers of power in the American society. It is a conservative effort to widen the stake of deprived groups in the existing order.

It is gratifying to note that leading corporations are responding and that the pattern of American corporate life is changing, with the election of black members to the Boards of such leading corporations as

Chase Manhattan Bank  
Columbia Broadcasting  
Commonwealth Edison  
Equitable Life Assurance Society  
First National City Bank  
General Motors  
Girard Trust Bank  
Great Atlantic & Pacific Tea  
Michigan Consolidated Gas  
Pan American Airways  
Prudential Life Insurance Company  
Standard Oil of Ohio  
Westinghouse Broadcasting  
W. T. Grant<sup>60</sup>

Major American business is beginning to correct the injustices of the past, but it is obvious that the process has just commenced.

3. *The Role of "Outside" Directors.* As noted, a significant number of the social reform proposals relate to the organic structure of the corporation, involving such suggestions as shareholder committees for corporate responsibility, the election of directors nominated by or representing employees, suppliers, consumers, or dealers or the inclusion of competing slates of directors in the corporate proxy solicitation. These proposals highlight the importance of the "outside" director on the Board, and the ultimate strength of proposals of this nature, will depend on the extent to which so-called "outside" directors introduce a different perspective into board deliberations and decisions, and in practice as well as theory, function as public directors. Where such "outside" directors are not truly independent of management—as in the case of counsel, or investment bankers, or commercial bankers—all vitally interested in preserving business opportunities for their own firms

and not in a position to tangle with management, they are not free to represent the public, either the limited public of the shareholder or the wider public of the community generally.

Business must recognize these wider responsibilities and have genuine "outside" directors free to represent public attitudes and expectations. If it fails to do so, it may face increasing pressure for "outside" directors who would represent not the interests of public shareholders or the general public, but the specialized interests of employees, consumers, suppliers, or dealers or similar groups.

4. *The Environment.* In the environmental field, the intensity of public demand for corrective action has reached such overwhelming proportions that business has lost much of its freedom of choice. It must respond vigorously.<sup>60A</sup> In this area, Weyerhaeuser provides an example of what may be accomplished by businessmen with the long view. Operating in the paper and pulp industry, which faces some of the most difficult air and water pollution problems in the American economy, Weyerhaeuser has received outstanding recognition for its affirmative efforts to deal with the problem. Organizations as diverse as Business Week in its 1970 Awards for Business Citizenship,<sup>61</sup> The Council on Economic Priorities in its study of the paper and pulp industry,<sup>62</sup> and the Sports Foundation<sup>63</sup> have singled it out for commendation. This illustrates how business cannot only prevail in the battle for public opinion, but can achieve favorable recognition.

May I conclude with a reference to the statement of the Board of Trustees of The Rockefeller Foundation issued in explanation of its position on the Campaign GM Round I proposals. This deserves the most serious attention, both because of its eloquence and because of the composition of the Board including such distinguished representatives of the business community as John D. Rockefeller III, C. Douglas Dillon, Robert Roosa, Frank Stanton, and Thomas Watson.

The Rockefeller Foundation trustees stated that:

"The corporations of America must assert an unprecedented order of leadership in helping to solve the social problems of our time. . . . What is needed from business today is leadership which is courageous, wise and compassionate, which is enlightened in its own and the public's interest and which greets change with an open mind."<sup>64</sup>

An extensive degree of politicalization of the corporation has already occurred. The pressures for further politicalization will continue to increase and may ultimately change the structure and objectives of American corporate enterprise unless business has the wisdom and strength to respond to the moral imperatives of our times and to display in the language of the Rockefeller Foundation trustees an "unprecedented order of leadership in helping to solve the social problems of our time."

#### FOOTNOTES

<sup>1</sup> C. Gerstacker, Chairman of Dow Chemical Co., Address to N.Y. Financial Writers, at 1 (June 3, 1970).

<sup>2</sup> See Henderson, *Politics By Other Means*, THE NATION, Dec. 14, 1970, at 617.

<sup>3</sup> See Schwartz, *The Public Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 421 (1971); N.Y. Times, May 22, 1970 at 18, col. 3.

<sup>4</sup> Lufkin, *Is the Corporation Dead?*, quoted in CONSERVATION LEADER, March 1971, at 6.

<sup>5</sup> See e.g., B. R. Dorsey, Chairman of Gulf Oil Corp.: "Today, maximum financial gain, the historical number one objective, is forced into second place whenever it conflicts with the well being of society" (Address to Pittsburgh Chapter of National Association of Accountants) quoted in BUS. & SOCIETY, Aug. 25, 1970 at 3; J. M. Roche, Chairman of General Motors Corp.: "This corporation and every other must serve the society in which it operates. General Motors responds to society's expectations." General Motors Corp., *Progress in Areas of Public Concern*, 33 Feb. 1971); TIME, July 20, 1970 at 62-68.

<sup>6</sup> See Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U.L. REV. 157, 706 (1970).

<sup>7</sup> A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

<sup>8</sup> FORTUNE, May 15, 1969, at 166.

<sup>9</sup> See Henderson, *supra* note 2, at 618.

<sup>10</sup> BUS. WEEK, April 11, 1970, at 23.

<sup>11</sup> Athos, *Is the Corporation Next to Fall?*, HARV. BUS. REV. Jan.-Feb. 1970, at 49.

<sup>12</sup> N.Y. Times, March 22, 1971, at 49, col. 1.

<sup>13</sup> A comprehensive review of Campaign GM Round I by its counsel appears in Schwartz, *supra* note 3.

<sup>14</sup> See Schwartz, *supra* note 3, at 485.

<sup>15</sup> See letter from Prof. Donald E. Schwartz (Counsel to Campaign GM) to Securities and Exchange Commission, dated March 10, 1970, in support of Campaign GM proposals, at 2n. The Project for Corporate Responsibility purchased its 12 shares of General Motors on January 29, 1970 to have standing to submit proposals for the May 1970 Annual Meeting. Dow Chemical Company notes that the Medical Committee for Human Rights, which proposed a resolution pertaining to amendment of the Dow certificate of incorporation to prohibit the making of napalm, bought its 5 shares of Dow stock 2 years after Dow's manufacture of napalm became a matter of common knowledge. See proxy statement dated Mar. 16, 1971 for Dow Chemical 1971, Annual Meeting, 10.

<sup>16</sup> Proposals of Council for Corporate Review submitted Jan. 6, 1971 to Honeywell, Inc.; Wall St. Journal, Mar. 18, 1971, at 25, col. 3.

<sup>16A</sup> Proxy statement dated May 3, 1971 for American Telephone and Telegraph Co. 1971 Annual Meeting, 12-13.

<sup>17</sup> BUS. WEEK, Feb. 13, 1971, at 87; Feb. 27, 1971 at 39.

<sup>18</sup> PROJECT ON CORPORATE RESPONSIBILITY, CAMPAIGN GM ROUND II PROXY STATEMENT dated Nov. 19, 1970, at 8-12.

<sup>19</sup> N.Y. Times, Jan. 24, 1971, §3, at 1, col. 3.

<sup>20</sup> Wall St. Journal, March 1, 1971, at 3, col. 6.

<sup>21</sup> N.Y. Times, Feb. 11, 1968, at 24, col. 1. See United Church of Christ, Report of Committee on Financial Investments, *Investing Church Funds for Maximum Social Impact* (Oct. 13, 1970), at 14.

<sup>22</sup> TIME, Feb. 15, 1971, at 57.

<sup>23</sup> See Dietsch, *Whose Business Is Business?* THE NEW REPUBLIC, April 25, 1970.

<sup>24</sup> PROJECT ON CORPORATE RESPONSIBILITY, CAMPAIGN GM SCORECARD, 1.

<sup>25</sup> BUS. WEEK, Feb. 13, 1971, at 87, Feb. 27, 1971, at 39.

<sup>26</sup> N.Y. Times, Dec. 5, 1970; UNITED CHURCH HERALD, Dec. 1970, at 47.

<sup>27</sup> TIME, Feb. 15, 1971, at 57; N.Y. Times, Feb. 9, 1971; N.Y. Times, Feb. 11, 1971.

28 N.Y. Times, Feb. 2, 1971, at 1, col. 7; TIME, Feb. 15, 1971, at 57; Wall St. Journal, Feb. 22, 1971; Boston Globe, Feb. 6, 1971, at 20, col. 1.

29 UNITED CHURCH HERALD, Feb. 1971, at 10-11.

30 BUS. WEEK, Feb. 27, 1971, at 39.

31 Boston Globe, Feb. 13, 1971; See also Boston Globe, Feb. 6, 1970, at 20, col. 1.

32 United Church of Christ, Report of Committee on Financial Investments, *supra* note 21, at 11. See also UNITED CHURCH HERALD, Jan. 1971, at 8; BUS. WEEK, Feb. 13, 1971, at 29.

33 Boston Globe, Feb. 13, 1971.

34 United Church of Christ, Report of Committee on Financial Investments, *supra* note 21, at 51.

35 PROJECT FOR CORPORATE RESPONSIBILITY, CAMPAIGN GM SCORECARD.

36 BUS. WEEK, May 30, 1970.

37 BUS. WEEK, Feb. 13, 1971, at 29.

38 HARVARD COMMITTEE ON GOVERNANCE, HARVARD AND MONEY—A MEMORANDUM ON ISSUES AND CHOICES, 24 (1970).

39 THE CHRONICLE OF HIGHER EDUCATION, June 1, 1970 at 2; PROJECT FOR CORPORATE RESPONSIBILITY, CAMPAIGN GM SCORECARD.

40 Report of the Harvard Committee on University Relations with Corporate Enterprise, 3-4 (1971).

41 *Id.*, at 4. The Committee on Financial Investments of the United Church of Christ had earlier reached the same conclusion. United Church of Christ, Report of Committee on Financial Investments, *supra* note 21 at 47. The desirability of some agency to advise on social responsibility for investors who do not have the time or facility to do so has also been suggested in the financial community itself. See Galston, *Institutional Investors—Their Role as Stockholders of Portfolio Companies Confronting Environmental and Social Problems*, 25 (Address, Dec. 29, 1970 an Annual Meeting of Association of American Law Schools) Landau, *Do Institutional Investors Have A Social Responsibility*, INSTITUTIONAL INVESTOR, July 1970, at 25.

42 Malkiel & Quandt, *Moral Issues in Investment Policy*, HARV. BUS. REV. Mar.-Apr. 1971, at 37.

43 Professors Malkiel and Quandt would permit a majority of the individuals for whose benefit the fund is being operated to decide. See *supra* note 42, at 45. This is a highly doubtful proposition.

44 United Church of Christ, Report of Committee on Financial Investments, *supra* note 22, at 34 n.10. One church figure sadly notes that "clergymen have shown no great interest in having pension funds included in social investment initiatives." Powers, *Reflections on a Crossing*, SOCIAL ACTION, Jan. 1971, at 14, 22-23.

45 Teachers Insurance & Annuity Association—College Retirement Equities Fund, 1969 Annual Report, at 27.

46 PROJECT ON CORPORATE RESPONSIBILITY, CAMPAIGN GM SCORECARD, 9.

47 L. AND J. GILBERT, THIRTY-FIRST ANNUAL REPORT OF STOCKHOLDER ACTIVITIES AT CORPORATION MEETINGS (1970) at 251-55.

48 See BUS. & SOCIETY, Dec. 16, 1969, at 2.

49 PROJECT ON CORPORATE RESPONSIBILITY, CAMPAIGN GM SCORECARD, 1-2.

50 N.Y. Times, Dec. 28, 1970, at 27, col. 2; CONG. REC., Dec. 28, 1970, E10733-57.

50A N.Y. Stock Exchange, Shareownership 1970, at 9, of 30,520,000 shareholders surveyed (out of a total of 30,850,000), 12,509,000 had portfolios worth less than \$5,000, and 6,398,000 had portfolios worth more than \$5,000 but less than \$10,000. Thus, 18,907,000 or 62% had portfolios of less than \$10,000.

<sup>51</sup> Professor Schwartz doubts that this will ever occur. See Schwartz, *supra* note 3, at 530.

<sup>52</sup> 17 C.F.R. §240. 14 a-8(c)(1969).

<sup>53</sup> *Medical Comm. for Human Rights v. SEC.*, 432 F.2d 659 (D.C. Cir. 1970) *cert. granted*, 39 U.S.L.W. 3409 (Mar. 22, 1971).

<sup>54</sup> N.Y. Times, Nov. 7, 1970, at 37.

<sup>55</sup> See Egerton, *Shareholder Proposals as a Vehicle of Protest*, CONFERENCE BOARD RECORD, Apr. 1971, at 48; BUS. WEEK, Feb. 13, 1971, at 86.

<sup>56</sup> Council for Financial Aid to Education, 1968 Survey of Corporation Support for Higher Education. See survey of 78 corporations, Fry Consultants Incorporated, *Social Responsibilities* 4 (1970); C. W. Shaver & Co. Inc., *Financing the Arts* 3-4 (Jan. 1971).

<sup>57</sup> Jackson, Book Review, 68 HARV. L. REV. 1292, 1294 (1955); Manning, Book Review, 67 YALE L.J. 1476, 1494-95 (1958).

<sup>58</sup> RESPONSIBLE CORPORATE ACTION, CORPORATE APARTHEID—CALIFORNIA U.S.A. STYLE, 4, 6, 7 (Feb. 4, 1971).

<sup>59</sup> N.Y. Times, Feb. 21, 1971, §1 at 50, col. 8.

<sup>60</sup> BUS. & SOCIETY, Mar. 4, 1971, at 9.

<sup>60A</sup> See Blumberg, *Corporate Responsibility and the Environment*, CONFERENCE BOARD RECORD, Apr. 1971, at 42-44.

<sup>61</sup> See BUS. WEEK, Mar. 6, 1971, at 51, 54. (Special Report on "Business fights the social ills—in a recession.")

<sup>62</sup> THE COUNCIL ON ECONOMIC PRIORITIES, PAPER PROFITS, POLLUTION.

<sup>63</sup> *Id.*, at X-3.

<sup>64</sup> TIME, June 1, 1970, at 35.