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The Public's "Right to Know": Disclosure in the Major American Corporation

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I. INTRODUCTION

The American corporation has emerged as one of the primary sources of power in the society, with profound impact on the lives and fortunes of those subject to its influence. It has become a major political and social, as well as economic, institution inseparably inter-related with the fundamental problems in the society. Corporate social responsibility—a burden of immense, but still unknown dimensions—has become generally accepted, and participation of the large corporation in the solution of social and environmental problems is a recognized aspect of corporate affairs. In brief, "private" has become "public." With corporate activities regarded as matters of public not merely private concern, it is not surprising that powerful pressures have developed for increasing the influence of the public in the corporate decisionmaking process and for substantially increased disclosure of aspects of corporate conduct in which concerns of public policy are involved.

Commencing with Campaign GM Round I in 1970, the so-called "public interest proxy contest" has become a frequently used technique utilizing stockholder action for the mobilization of public pressures to influence corporate conduct.¹ In the three "proxy seasons" in which corporations have faced increasing reform pressures in this form, stockholder proposals for disclosure have played a significant role and may be expected to play an even more important role in the future.

As Professor Bowman points out, disclosure, although a less ambitious objective than proposals for organic reform in corporate structure or substantive change in corporate policy, is a more salable idea that tends to attract more institutional support.² Institutions not prepared to vote against management on shareholder proposals pertaining to substantive matters will support pro-

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1. See, Blumberg, *The Politicalization of the Corporation*, 26 THE BUSINESS LAWYER 1551 (1971); Schwartz, *The Public Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 421 (1971).

2. BOWMAN, CORPORATE SOCIAL RESPONSIBILITY AND THE INVESTOR 27-28 (European Institute for Advanced Studies in Management, Working Paper 72-37, Nov. 1972).

posals for increased disclosure. Thus, Harvard, Ford Foundation, Rockefeller Foundation, College Equities Retirement Fund, and First Pennsylvania Banking and Trust Company, among other major institutions, have supported disclosure proposals, while voting against substantive shareholder proposals.³

Disclosure serves two major purposes. As Brandeis pointed out almost 60 years ago: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁴ Conduct that will prove embarrassing, if disclosed, is avoided; the possibility of future disclosure constitutes a major element in shaping prudent current decision. Further, greater dissemination of the facts inevitably leads to the development of more informed public opinion and more effective public pressures. Disclosure is not only a preventive but is an essential element in the public evaluation of corporate performance and in the determination of appropriate objectives for reform.

In view of the importance of disclosure and its increased prominence in the activities of social reform groups, this paper inquires into the stockholder's "right to know" with respect to the policies of the major American corporations in areas of social, environmental or moral concern; both his right as an individual holder and the right of stockholders as a whole to obtain information about corporate activities. As will be seen, the question becomes a part of the larger question of the public's "right to know," reflecting the emergence of the large corporation as an institution of vital public importance and concern.

II. STOCKHOLDER PROPOSALS AND DISCLOSURE

The most dramatic example of the pressures of public groups to obtain information about corporate activities in the areas of social, environmental, or moral concern has been the development of the "public interest proxy contest" utilizing stockholder proposals under Rule 14a-8 of the Securities and

3. See, Wall St. J., May 2, 1972, at 17, col. 2; May 5, 1971, at 4, col. 2; Apr. 14, 1971, at 11, col. 5; N.Y. Times, May 1, 1971, at 68, col. 1; HARVARD TODAY, May 1972, at 15; PROJECT ON CORPORATE RESPONSIBILITY, NEWS AND THOUGHTS 3 (Summer 1972).

The May, 1972 statement of the President and Fellows of Harvard College illustrates the basis of institutional support for disclosure:

"We support disclosure resolutions that are reasonable in scope because we believe that companies, their shareholders and the public will benefit from the dissemination of information on corporate actions relating to issues of broad public concern." The statement continued "that they will, as a general procedure on disclosure resolutions, review the information which the company or others have made public and that unless they are 'satisfied that the information is reasonably complete . . . they will vote for disclosure.'" HARVARD TODAY, May 1972, at 15. Similarly, Mr. McGeorge Bundy, President of the Ford Foundation, has stated:

"... we believe, in general, that proposals for disclosure should be supported except when they involve an area where confidentiality is reasonable for reasons relating to fair competition or legitimate personal privacy."

(Address to Investment Company Institute, Washington, D.C., May 19, 1972.)

4. L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (Nat'l Home Library ed. 1933).

Exchange Commission. The "public interest" stockholder proposal is intended to utilize the proxy solicitation process as a device to develop high public interest in a public policy issue and to intensify public pressures on the large corporation in order to influence corporate conduct in the social or environmental area.

The reform groups are not content simply to mobilize public pressures and achieve some success in obtaining disclosure of material information in areas of public concern. Their final objective is to have such information receive wide dissemination through distribution to stockholders at corporate expense because of a view that the corporate activities are of major social or moral significance and may also have an adverse long range impact on the corporation or corporations generally.

In a sense, such stockholder proposals may be viewed as a compression into a single step of the more traditional procedure whereby the stockholder first seeks to inspect corporate books and records to obtain information to serve as a basis for communication with other stockholders and then uses the information obtained to solicit the support of other stockholders. In the process, the stockholder has shifted to the corporation the burden of the identification and compilation of the information in question as well as the burden of communication to all stockholders.

A. SEC Rule 14a-8

SEC Rule 14a-8⁵ requires corporations subject to the Securities and Exchange Act of 1934 ("the 1934 Act") to include proposals and supporting statements not in excess of 200 words from stockholders in the management proxy statement distributed at corporate expense to stockholders in connection with stockholder meetings.

Effective January 1, 1973, Rule 14a-8(c) provides that shareholder proposals may be omitted:

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

(2) If the proposal:

(i) relates to . . . a personal claim or . . . grievance . . . ; or

(ii) consists of a recommendation, request or mandate that action be taken with respect to any matter including a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer; or

(NOTE. Proposals not within an issuer's control are those which are beyond its power to effectuate.)

(5) If the proposal consists of a recommendation or request that the

* * *

5. 17 C.F.R. § 240.14a-8 (1972).

management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.⁶

Rule 14a-8(c) does not constitute an effective barrier to stockholder proposals solely related to disclosure:

(1) *Subparagraph (1)* presents no problems. As will be seen, stockholder resolutions calling for disclosure can be readily drafted in a form which will qualify as a "proper subject" for stockholder action under state law. The Commission has apparently concluded that a disclosure proposal, otherwise a "proper subject" for stockholder action, may be omitted if it would involve disclosure of information that might impair the corporation's competitive position. Thus, in Campaign GM Round I, the Commission required that the proposal providing for the establishment of a Shareholders Committee for Corporate Responsibility be amended to "restrict the information to be made available to the Committee to areas which the Board of Directors did not deem privileged for business or competitive reasons." The Commission minute states that the amendment was deemed necessary in the opinion of the Office of General Counsel to qualify under subparagraph (1).⁷ Whether this conclusion is sound may be debatable, but the limitation is not a significant restriction.

(2) *Subparagraph (2)* is also not a bar. Although subparagraph (2)(i) relating to "personal grievances" will in appropriate cases result in omission of disclosure, as well as of other, stockholder proposals,⁸ this problem is not apt to arise in a "public interest" proposal. Further, disclosure of corporate data obviously constitutes matter that is "significantly related to the business" of the corporation and "within the control" of the corporation as required by subparagraph 2(ii).

(3) *Subparagraph (5)* creates a possible hurdle. Where the stockholders request that management disclose information about an aspect of the ordinary corporate business, this might be barred by the reference of the subparagraph to a "recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations." Under this construction, the question would involve the relative importance of the subject of the disclosure. Thus, the Commission has insisted on the inclusion of a shareholder proposal requesting "that a detailed statement of the investments, income and expenses of maintaining the Pension Fund be furnished . . . in our Annual Report."⁹ An alternative construction is that subparagraph (5) relates only to "action" and does not include disclosure at all.

6. SEC Exchange Act Release No. 9784, CCH FED. SEC. L. REP. ¶ 78,997; FED. REG., Oct. 31, 1972, at 32179.

7. SEC Minute, General Motors, Inc. (sic), File 1-143, Mar. 18, 1970.

8. SEC Minute, Gains Guaranty Corp., File 0-938, Nov. 14, 1967.

9. SEC Minute, Atlas Chemical Industries, Inc., File 1-177, Feb. 18, 1965.

In any event, the numerous "public interest" shareholder proposals for disclosure in 1971 and 1972 proxy statements demonstrate that neither subparagraph (5) nor the other subparagraphs impose a significant obstacle and that properly drafted disclosure proposals cannot be omitted by management.

B. "Public Interest" Stockholder Proposals Relating to Disclosure

(1) *The General Motors 1971 Annual Meeting.*

Stockholder action on the four stockholder proposals before the General Motors 1971 Annual Meeting illustrates how a stockholder proposal relating to disclosure could attract greater support than proposals pertaining to substantive matters or changes in corporate structure. Campaign GM Round II presented three proposals, of which one involved disclosure in the Annual Report of detailed information pertaining to minority employment, pollution, and automobile and plant safety. The Episcopal Church submitted a fourth proposal that General Motors cease manufacturing in South Africa.¹⁰

Although none of proposals attracted widespread support, the disclosure proposal received support from a number of major institutions and received 2.36% of the votes cast. The other two Campaign GM proposals received only 1.36% and 1.11% respectively and the Episcopal Church proposal 1.29% of the vote and were not supported by a number of the prominent institutions that had favored the disclosure resolution.¹¹

The Dreyfus Leverage Fund, holding 25,000 shares of General Motors, polled its 127,000 stockholders on their recommendation on the voting of the shares on the four stockholder proposals. This poll also showed significantly greater support for the disclosure proposal. With 28,580 stockholders of the Fund responding, the surprising total of 45% approved the disclosure proposal in contrast to 39% and 30% support for the other Campaign GM proposals and only 22% for the Episcopal Church proposal.¹²

(2) *The 1972 Proxy Season.*

Apparently encouraged by results such as these, disclosure proposals played a central role in the 1972 Proxy Season. Various reform groups placed at least 34 stockholder proposals on the management proxy statements of 22 major corporations. Disclosure proposals constituted 18 of the 34 proposals and involved 15 of the 22 corporations in question, including American Metal Climax, Bristol Myers, Chrysler, Eli Lilly, Ford Motor, General Motors, Goodyear Tire and Rubber, Gulf Oil, Honeywell, International Telephone and Telegraph, Jewel Companies, Merck, Newmont Mining, Smith, Kline

10. GENERAL MOTORS CORP., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 31-41 (Apr. 5, 1971).

11. GENERAL MOTORS CORP., REPORT OF THE 63RD GENERAL MOTORS STOCKHOLDERS MEETING 7-11 (1971).

12. Dreyfus Leverage Fund, Inc., Press Release, May 21, 1971.

and French Laboratories, Standard Oil of California, and Warner Lambert.

Support for the disclosure proposals ranged from a high of 5.50% at Standard Oil of California to a low of 0.5% at Eli Lilly & Co.¹³ It should be noted that the use of percentages understates the extent of support. For example, holders of approximately \$450,000,000 market value of General Motors stock voted in favor of a proposal on disclosure of its involvement in South Africa, even though this represented only 2.34% of the votes cast.¹⁴

Generally speaking, the 1972 disclosure proposals attracted more support than other "public interest" proposals on the same ballot although this was not invariably true. In the case of Chrysler Corporation, for example, a proposal to broaden the composition of the Board received 4.91% of the votes in comparison with 4.45% for a disclosure proposal.¹⁵

The numbers of shares held by the reform group submitting the stockholder proposal ranged from the 12,574 shares of General Motors (with a market value of approximately \$1,000,000) held by the Episcopal Church group submitting the South African disclosure proposal¹⁶ to a mere 10 shares held by the same group in American Metal Climax, Inc. in which it also submitted a proposal.¹⁷ Other groups held but a single share.¹⁸ There does not appear to be any correlation between the number of shares held by the sponsor and the votes cast for the proposal. It would thus seem that the fact that the sponsor of the proposal is acting on behalf of the "public interest" and not in support of an economic interest as a stockholder does not make a significant difference in the reaction of other stockholders to the proposal.

(3) *Voluntary Corporate Disclosure as an Alternative to Stockholder Proposals.*

The year 1972 saw a significant development in this area. Three major corporations faced with "public interest" stockholder proposals calling for disclosure agreed to disclose much of the information requested to induce the sponsor to withdraw the proposal.

(a) Church groups submitted shareholder proposals to General Motors,

13. ECONOMIC PRIORITIES REPORT, July-Aug. 1972, at 49-50; KENNECOTT COPPER CORPORATION, NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 8-9 (Apr. 4, 1972); SUMMARY REPORT OF THE ANNUAL MEETING 4 (1972); N.Y. Times, Apr. 28, 1972, at 55, col. 4.

14. GENERAL MOTORS CORP., REPORT OF THE 64TH GENERAL MOTORS STOCKHOLDERS MEETING 17 (1972).

15. ECONOMIC PRIORITIES REPORT, July-Aug. 1972, at 49.

16. GENERAL MOTORS CORP., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 44-47 (Apr. 12, 1972).

17. AMERICAN METAL CLIMAX, INC., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 19 (Apr. 6, 1972).

18. E.g., FORD MOTOR CO., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 20 (Apr. 7, 1972); CHRYSLER CORP., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 25 (Apr. 18, 1972); MERCK & CO., INC., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 17 (Apr. 27, 1972).

Goodyear Tire and Rubber, Gulf Oil, International Business Machines, Mobil Oil and Newmont Mining calling for extensive disclosure with respect to corporate activities in Southern Africa.

International Business Machines and Mobil Oil voluntarily agreed to supply most of the information requested, and the proposals submitted to these two corporations were withdrawn. *Business & Society* described the subsequent Mobil report as "a very valuable document" that "provides(s) good hard data on which evaluations and comparisons can be made."¹⁹ Reaction to the IBM study was less favorable.²⁰

(b) The Project for Corporate Responsibility submitted identical stockholder proposals calling for studies pertaining to the relation between drug advertising and drug abuse to American Cyanamid, Bristol Myers, Eli Lilly, Merck, Smith, Kline and French, and Warner-Lambert. American Cyanamid agreed to do a study acceptable to the Project, which thereupon withdrew the proposal.²¹

Two aspects of the foregoing developments are significant. Firstly, they represent part of a new pattern of negotiation between "public interest" or church groups and major corporations leading to a "settlement" of demands with respect to issues of public policy concern. Three instances involving very large corporations and stockholder proposals have been noted above. Other instances of the same phenomenon include "discussions" between black groups and major corporations including General Foods Corp. and Jos. Schlitz Brewing Co.²² on black employment and promotion, and in the case of WABC-TV and WNBC-TV in New York on the content of broadcast programs as well as employment practices.²³ It is of interest that these confrontations have been described by management as "amicable" and "instructive."²⁴ Although the latent threat of boycott or more violent disruption implicit in the latter instances may not be present in the case of the negotiations over stockholder proposals, the same basic pressures are at work: the corporation is seeking to accommodate itself to the climate of public opinion to which it must adapt.

Secondly, the "public interest" or church groups are not simply interested in disclosure of the underlying information. They want the information to reach the public and therefore press not only for disclosure but for distribution to all stockholders as well.

19. *Bus. & Soc'y*, Aug 1, 1972 at 1, The Board for World Ministries of the United Church of Christ was "pleased with the clarity and comprehensiveness of the report." CORPORATE INFORMATION CENTER, CORP. EXAMINER, Aug. 1972, at 4.

20. *See*, Wall St. J., Jan. 17, 1973, at 5, col. 2.

21. *See*, ECONOMIC PRIORITIES REPORT, July-Aug. 1972, at 51.

22. *See*, *Bus. & Soc'y*, Dec. 26, 1972 at 3; CORPORATE INFORMATION CENTER, CORPORATE EXAMINER, June 1972, at 6; Wall St. J., May 12, 1972, at 14, col. 3.

23. *See*, N.Y. Times, May 19, 1972, at 59, col. 1.

24. *See*, Wall St. J., May 12, 1972, at 14, col. 3.

It may be expected that such negotiations and settlements will increase in the future. So long as social and environmental problems are matters of vital concern to the public, the large corporation will inevitably be swept up in public controversy.

(4) *1973 Developments.*

Thus, already in 1973, the Project on Corporate Responsibility has announced that it is submitting disclosure proposals relating to political contributions and to communications with White House administrative or congressional officials to Eastman Kodak Company, General Motors Corporation, International Telephone and Telegraph Corporation, and Union Oil Co. of California.²⁵ Similarly, the National Council of Churches and five other Protestant church organizations have filed stockholder resolutions pertaining to disclosure of activities in South Africa with 13 corporations, including Burroughs Corporation, Caterpillar Tractor Company, Chrysler Corporation, Eastman Kodak Company, First National City Bank of New York, General Electric Company, International Business Machines Corporation, International Telephone and Telegraph Corporation, Minnesota Mining and Manufacturing Company, Texaco, Inc. and Xerox Corporation.²⁶

Burroughs Corporation has agreed to provide the information requested and the stockholder proposal has been withdrawn. General Motors Corporation has also agreed to mail to all stockholders a booklet "including full disclosure of the company's involvement in South Africa."²⁷ This increases to five the number of major corporations entering into disclosure "settlements." This is an impressive achievement for reform groups which illustrates that the size of the vote on the stockholder proposal is not a fair measure of the success of the "public interest" proxy contest. Its real significance lies in its ability to make corporate policies matters of deep public concern and thereby to involve the public itself in the corporate decision-making process. Similarly, it inescapably confronts large institutional holders—particularly non-profit institutions such as churches, universities, and foundations—with issues which must be resolved in a manner satisfactory to the constituents of the institution. The "public interest" proxy technique has thus been responsible for a great increase in institutional concern with issues of corporate social responsibility.

Where in response to such confrontations, large institutional holders decide to support stockholder proposals, an important new element has been introduced into the balance of forces. Since institutions are clearly more inclined to support proposals for disclosure than proposals calling for corporate substantive action or organic change, increasing utilization of proposals involving disclosure by "public interest" and church groups has resulted.

25. See, Wall St. J., Jan. 31, 1973, at 9, col. 2.

26. See, N.Y. Times, Jan. 17, 1973, at 4, col. 2; Wall St. J., Jan. 17, 1973, at 6, col. 2.

27. See, Wall St. J., Jan. 17, 1973, at 5, col. 2.

III. DISCLOSURE THROUGH INTERROGATION OF MANAGEMENT AT THE ANNUAL MEETING

Although the annual meeting for stockholders has been described as a "farce" or a "ritual" or a "rubber stamp,"²⁸ it serves a number of important purposes. One of these is to provide an opportunity for interrogation of corporate officers and directors. This plays a useful role in broadening the channels and extent of corporate disclosure and could play an even more effective role in the future. In reviewing Campaign GM, *Business Week* concluded that it could convert the shareholders' meetings "into forums to debate questions of public policy."²⁹

A. The Background

Where a corporation is not prominently associated with issues of public policy concern, the attendance will likely be restricted to isolated stockholders and security analysts. Thus, at the 1972 Fuqua Industries, Inc. Annual Meeting attended by only 12 stockholders, a management proposal that the annual meeting be abolished and that stockholder action be taken by consent via the mails as permitted by Section 228 of the Delaware General Corporation Law was adopted with 8% of the shares opposed.³⁰

In contrast, where the social and environmental concerns of the corporation have achieved a certain level of public visibility, the annual meeting can be a crowded, turbulent, and even violent affair.

Approximately 1,800 persons crowded Cobo Hall in Detroit for the 1971 Annual Meeting of General Motors and approximately 1,200 attended the 1972 Annual Meeting.³¹ Professor Eisenberg properly reminds us that one cannot generalize on the experience of General Motors and use it as a model for corporate America as a whole.³² Nevertheless, the experience of Dow

28. See, L.C.B. GOWER, *PRINCIPLES OF MODERN COMPANY LAW* 500 (3d ed. 1969); H. BALLANTINE, *CORPORATIONS* 412 (rev. ed. 1946). Rostow, *To Whom and For What Ends Is Corporate Management Responsible?* in E. MASON, ed., *THE CORPORATION IN MODERN SOCIETY* 54 (1959).

29. *BUS. WEEK*, May 30, 1971, at 84. See *Comment, Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals*, 80 *YALE L.J.* 845, 852 (1971); POWERS, ed., *PEOPLE PROFITS—THE ETHICS OF INVESTMENT* 17 (1972).

30. FUQUA INDUSTRIES, NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 6-8 (March 6, 1972). See, *N.Y. Times*, Apr. 18, 1972, at 65, col. 2; *N.Y. Times*, Apr. 23, 1972, § 3, at 1, col. 3. The resolution was conditioned upon approval from the New York Stock Exchange, which has not been given. Chairman James J. Needham has recently reaffirmed the policy of the Exchange that all listed companies will be expected to hold annual meetings. Needham, *Corporate Responsibility toward the Central Market System* 9, Address to Corporate Presidents, Chicago, Ill., Dec. 7, 1972.

31. GENERAL MOTORS CORP., REPORT OF THE 63RD GENERAL MOTORS STOCKHOLDERS MEETING, at inside front cover (1971); REPORT OF THE 64TH GENERAL MOTORS STOCKHOLDERS MEETING, at inside front cover (1972); *Wall St J.*, May 22, 1972, at 4, col. 2. (1971 attendance, 1,884; 1972 attendance, 1,228.)

32. Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 *CALIF. L. REV.* 1, 44-46 (1969).

Chemical, Honeywell, FMC Corporation, Gulf Oil, Bank of America, and countless other companies that have been the subject of tumultuous inquiry at annual meetings by "public interest" groups protesting their social or environmental policies confirms the extent of confrontation and publicity which the annual meeting can achieve.³³ Indeed, it is this very potential for public attention that makes the proxy machinery culminating in the annual meeting such a useful technique for the corporate activist. Aside from "public interest" and social reform groups, Lewis and John Gilbert, Wilma Soss and Evelyn Davis have demonstrated how persons can achieve national prominence simply through manipulation of the publicity potentials of the annual meeting.

Insofar as disclosure is concerned, the annual meeting presents an unique opportunity to obtain an immediate answer to inquiries about social and environmental activities of the corporation. Thus, such information otherwise not publicly available, such as the amount of corporate contributions to charitable and educational institutions, amount of expenditures for environmental purposes, extent of black and other minority employment and similar matters, have been elicited through the direct question at the Annual Meeting. It is evident that oral responses of this nature are no substitute for the detailed and comprehensive information required for proper evaluation of corporate performance. Nevertheless, this technique possesses interesting potential.

B. The Post-Meeting Report

The information disclosed at the annual meeting is readily available to stockholders and the public as a result of the growing acceptance of the post-meeting report. For many years, the Gilbert brothers pressed management to distribute a summary of the annual meeting to all stockholders. Like so many of the Gilbert proposals, management after delay has recognized the usefulness of such action.³⁴ Such summaries range from extensive reports devoted solely to the meeting to briefer insertions in the first quarter report to stockholders. In either event, the information disclosed is widely disseminated.

C. Absence of Legal Requirement

The readiness to respond to questions at the annual meeting rests on no legal requirement. It reflects the constitutional climate surrounding corporate operations and the traditional concept of management accountability to stockholders for their stewardship. Management does not wish to appear unre-

33. See, e.g., THE CONFERENCE BOARD, HANDLING PROTEST AT ANNUAL MEETINGS (1971); Wall St. J., May 3, 1971, at 6, col. 8, Apr. 2, 1971, at 6, col. 1.

34. See, L. & J. GILBERT, THIRTY-SECOND ANNUAL REPORT OF STOCKHOLDER ACTIVITIES AT CORPORATION MEETINGS DURING 1971; J. LIVINGSTON, THE AMERICAN STOCKHOLDER 88-99 (1958).

sponsive to stockholder inquiries and therefore frequently answers questions it is under no legal obligation to answer and to disclose information it has not volunteered and might prefer to keep confidential.

IV. VOLUNTARY CORPORATE DISCLOSURE IN RESPONSE TO INCREASED PUBLIC AND STOCKHOLDER CONCERN

With increased concern with the social and environmental performance of American corporations, public expectations and demands have developed tremendous pressures on corporations to acknowledge their responsibility for participation in the solution of social problems. Thus, corporate literature increasingly contains discussion of corporate performance in the area of corporate responsibility. Although many of these efforts seem to have little purpose other than a glossy public relations effort, a significant number constitute serious detailed summaries of corporate performance that represent a significant advance in corporate disclosure.

A. Annual Reports

The Annual Report is the corporate publication most widely used for this purpose. It is now a commonplace for corporations to feature their activities in the social and environmental area in the Annual Report and to describe their programs extensively. The pressure to demonstrate that the corporation both recognizes its "social obligations" and is effectively discharging them is reflected in this response. In the process, considerable data on corporate activities becomes available.

B. Special Publications

An increasing number of corporations have deemed the relationship of the corporation to the community a matter of sufficient importance to prepare and distribute special reports of corporate performance in the social or environmental area containing significant detail. General Motors' 75-page "1972 Report on Progress in Areas of Public Concern" and 28-page report on "Policies and Progress" distributed to all stockholders, Dayton Hudson's annual report on its social and charitable activities "Toward Fulfilling Our Social Responsibility"; and Quaker Oats Company's "Social Progress Plan for Fiscal 1972," are examples of this development.

C. Communications with Security Analysts, Investors, and Public Groups

General disclosure of corporate financial information has significantly increased in the past decade, with continuing communication with portfolio companies maintained both by analysts and institutional holders. As a greater and greater proportion of securities is held by institutions, the links between institutional holders and portfolio companies become of increasing importance. Some companies, such as General Motors, conduct major conferences

attended by senior management and representatives of investment institutions, universities and foundations.³⁵

Further, with the tremendous growth of litigation under the 1934 Act pertaining to misuse by insiders of corporate information and to disclosure generally, the pressures on corporate management to maintain a vigorous, continuing release of corporate information are substantial. In the light of the exposure to potential liability in releasing information to one person and not to another, this has inevitably meant a significant increase in the scope and extent of disclosure to the public generally with respect to information deemed material in the valuation of securities. With increasing recognition by the Commission and by institutional holders that the social and environmental policies of a corporation, particularly where statutory or regulatory violations or related litigation are concerned, comprise one of the relevant elements for investment judgment, the content of materiality for security evaluation has significantly widened and may be expected to widen further.

This additional pressure to disclose the financial effect of social and environmental problems, where material, arising under the 1934 Act, will undoubtedly in time have reverberations that will extend to non-financial areas of corporate information as well.

D. "Social Audits" and Corporate and Industry Surveys By "Public Interest" Groups

The culmination of the foregoing forces is an intensive, comprehensive summarization of the performance of the corporation in the social and environmental area generally. This is a process which has begun, has made large strides, and may ultimately be expected to become a generally accepted feature of corporate life.

A number of corporations actively engaged in social or environmental programs, including American Telephone & Telegraph, ARA Services, Inc., Chase Manhattan Bank, Bank America Corp., Exxon, and Eastern Gas and Fuel Associates are making major efforts to develop systems of internal measurement, evaluation, and control of their activities.³⁶ Whether or not dignified by the label of "social audit" and whether or not accomplished on a quantitative or qualitative level, and whether or not made public, these studies represent the early developmental stage of a framework of disclosure that could have important implications in the future.³⁷ The current efforts may well be analogized to Professor Aiken's cumbersome Mark I pioneer computer of 1944 which was the fore-runner of the infinitely more complex modern computer. A number of limited studies of this nature have been made

35. GENERAL MOTORS CORP., 1972 REPORT ON PROGRESS IN AREAS OF PUBLIC CONCERN (Feb. 10, 1972).

36. See, B. LONGSTRETH & H. ROSENBLUM, CORPORATE SOCIAL RESPONSIBILITY AND THE INSTITUTIONAL INVESTOR 24 (1973); BUS. WEEK, Sept. 23, 1972, at 88.

37. See, R. BAUER & D. FENN, THE SOCIAL AUDIT (1972).

public. In time, it may be expected that such studies will generally be public documents and that the primitive social accounting of today will develop and rival the highly sophisticated financial accounting system with which we are all familiar.

While such internal studies are being made, considerable success has been achieved by such external groups as the Council on Economic Priorities to measure social and environmental performance on an industry-wide basis. The 400 odd-page study of the Council entitled *Paper Profits: Pollution in the Paper and Pulp Industry* represented an outstanding level of performance and demonstrated the useful social service that could be rendered by a non-profit group significantly dependent on industry co-operation for the success of its efforts. Less successful studies of individual companies have been attempted by Mr. Nader of DuPont and the First National City Bank of New York.³⁸ It is of interest that the First National City Bank in refusing to co-operate in a second Nader study pointed out that during the first study the Bank had devoted 10,000 man-hours of banktime to cooperate with the Nader staff.³⁹ Another pioneer effort in the direction of additional disclosure was the two-day hearing conducted by the Episcopal Church with respect to a mining venture in Puerto Rico contemplated by Kennecott Copper and American Metal Climax.⁴⁰ Although the corporations chose not to participate in the hearings, the two days of testimony developed considerable information that contributed to a better-informed public judgment on the problem. It is a question how long corporations will feel free, as a practical matter, not to participate in fact-finding exercises of this nature where they are sponsored by respected and responsible agencies.

In the aggregate, these efforts—internal and external alike—presage the day where full disclosure of the social and environmental, as well as financial, policies of major business will be an accepted practice in keeping with the "public" character of major American enterprise.

E. Disclosure by Institutional Investors

Institutional investors have not escaped the pressures which have led portfolio companies to make substantially increased disclosures about their ac-

38. Ms. Alice Tepper Marlin, Executive Director and Founder, Council on Economic Priorities, comments on the study: "Interestingly, when the press reported on our findings, its heaviest criticism was not of the companies with the worst records, though these were certainly heavily criticized. The most adverse commentary was reserved for the companies that refused to discuss their efforts with us honestly . . . the public cannot sympathize with a refusal to disclose information, to discuss problems fully and openly. The public objects to corporate secrecy on social issues." AMERICAN INST. OF CERTIFIED PUB. ACCOUNTANTS, SOCIAL MEASUREMENTS 74 (1972).

39. See, R. NADER, THE COMPANY STATE (1972); N.Y. Times, June 21, 1971, at 1, col. 6; Wall St. J., June 21, 1971, at 2, col. 3, Nov. 30, 1971, at 16, col. 2; E.I. DuPont de Nemours & Co. Inc., Press Release, Dec. 1, 1971; BUS. WEEK, Dec. 4, 1971 at 31; Wall St. J. Oct. 5, 1971, at 18, col. 3.

40. See, BUS. WEEK, Feb. 13, 1971, at 29; N.Y. Times, Feb. 9, 1971; CHURCH PANEL ON COPPER MINING IN PUERTO RICO (1971).

tivities. The potential power of bank trust departments and other institutional investors to influence or control management has been the subject of exhaustive studies by the Patman Sub-Committee of the House Committee on Banking and Currency⁴¹ and by the Securities & Exchange Commission.⁴² Recommendations that banks make more information available have been advanced by the President's Commission on Financial Structure and Regulation as well as by the Commission.

In response to these pressures, major banks—The Bank of America, The Chase Manhattan Bank, First National City Bank, and Morgan Guaranty Trust Company⁴³—have accepted the principle that their activities are a matter of public concern requiring disclosure and have made detailed reports of their portfolio holdings in their trust departments and in some cases their policies in voting shares in portfolio companies. As stated in the report of the Morgan Guaranty Trust Company:

“The continued usefulness of bank trust departments to society requires that they continue to enjoy public confidence and the support of public opinion. These they must merit by responsible behavior and effective performance, adequately communicated to those who are interested.”⁴⁴

V. COMPULSORY CORPORATE DISCLOSURE UNDER THE SECURITIES ACTS

The rules and regulations of the Securities and Exchange Commission under the Securities Act of 1933 (“the 1933 Act”), the Securities and Exchange Act of 1934 (“the 1934 Act”) and the Investment Companies Act of 1940 contain elaborate requirements for corporate disclosure. This regulatory apparatus seeks to accomplish three broad purposes: (a) to protect investors in the purchase and sale of securities; (b) to assure that the proxy machinery and solicitation process of the large corporation is conducted in the interest of the investing public; and (c) to provide investors with relevant information about the policies and operations of mutual funds and other investment companies, including their relation to portfolio companies.

Notwithstanding pressures from “public interest” groups, the Commission has thus far refused to expand its disclosure requirements to include matters pertaining to social and environmental issues, except where the information

41. STAFF OF SUBCOMM. ON DOMESTIC FIN., HOUSE COMM. ON BANKING & CURRENCY, 90TH CONG., 1ST SESS., COMMERCIAL BANKS AND THEIR TRUST ACTIVITIES: EMERGING INFLUENCE ON THE AMERICAN ECONOMY (Comm. Print 1968).

42. SEC, INSTITUTIONAL INVESTOR STUDY REPORT, H.R. DOC. NO. 92-64, 92d Cong., 1st Sess. (1971).

43. BANK AMERICA CORPORATION, ANNUAL REPORT 32 (1972); THE CHASE MANHATTAN BANK, ANNUAL REPORT 2-21 (1971); FIRST NATIONAL CITY BANK OF N.Y., INVESTMENT MANAGEMENT GROUP ANNUAL REPORTS FOR THE YEAR ENDED JUNE 30, 1972; Wall St. J., Apr. 15, 1971, at 7, col. 2; MORGAN GUARANTY TRUST COMPANY, REPORT OF THE TRUST AND INVESTMENT DIVISION (1972).

44. *Id.* at 14.

would have a material effect on the financial condition of the corporation. The existence of widespread public interest in a public policy issue is not considered a relevant basis for compulsory disclosure if the public policy concern does not constitute a material element in investor evaluation of securities.

There has been widespread institutional recognition that the inter-relationship between the large corporation's activities in areas of public policy concern and the public's reaction to such activities constitutes an important "input" element among others in reaching an investment decision.⁴⁵ Thus, the report of the Committee on Business Standards of the Investment Company Institute, *Corporate Responsibility and Mutual Funds* concluded that

"a general qualitative appraisal of management's corporate responsibility . . . could have significant long-term investment implications. Such considerations are simply one additional input into the investment decisionmaking process."⁴⁶

The Committee recommended that funds consider in their investment decisions such issues of concern as "litigation relating to compliance with Federal and State social, environmental, economic, product safety and advertising standards," employment and hiring practices generally, "activities conducted in certain foreign countries," "product safety records," and "advertising practices."

A. Commission Guidelines and Proposed Regulations

The Commission has taken a number of steps in the direction of increased disclosure of social and environmental information by the corporations subject to its jurisdiction.

(1) On July 19, 1971, the Commission issued releases⁴⁷ noting that the Commission's requirements called for disclosure, if material

(a) when compliance with environmental quality or anti-pollution laws may materially affect the earning power of the business or cause material changes in the business;

(b) of proceedings, pending or known to be contemplated, arising under federal, state or local environmental quality or anti-pollution laws;

(c) of legal proceedings, pending or known to be contemplated arising under civil rights statutes, which would result in cancellation of government contracts or termination of government business or other material sanctions.

45. See, BUS. & SOC'Y, Dec. 26, 1972, at 1; E. BOWMAN, UNIVERSITY INVESTING AND CORPORATE RESPONSIBILITY 4-5 (1971); FUOSS, *Churches v. Corporation: The Coming Struggle for Power*, A.D., Feb. 1973, at 39, 40 (14 mutual funds are reported to be using social criteria in portfolio selection).

46. INVESTMENT COMPANY INSTITUTE, *CORPORATE RESPONSIBILITY AND MUTUAL FUNDS* 2 (1971).

47. SEC Securities Act Release No. 5170, SEC Exchange Act Release No. 9252, CCH FED. SEC. L. REP. ¶ 78, 150.

It will be noted that the Commission requires disclosure only when a "material" effect on the corporation's financial condition is involved. The Commission concern is restricted to information of significance in the investment decision.

(2) On December 1, 1971, the Commission announced proposed amendments to the forms prescribed for mutual funds and other investment companies under its jurisdiction to require disclosure of the funds' policies on their involvement in the affairs of portfolio companies.⁴⁸ Areas covered under the proposal include procedures for reviewing proxy materials, soliciting fund shareholder opinions, and general policies concerning voting or support of management.

The proposed amendments reflect the steady increase in the percentage of stock of listed companies held by funds and other investment companies as well as by financial institutions generally. The New York Stock Exchange estimated that in 1971 approximately 28.3% of the equity securities of all corporations listed on the New York Stock Exchange was held by financial institutions as a whole, of which approximately 7% of listed equity securities was held by funds and other investment companies.⁴⁹ The monumental six-volume *Institutional Investor Study Report* released by the Commission in 1971 indicates the extent of concern with the critical importance of the relation of the financial institutions to portfolio companies.

The Commission has not yet taken formal action on the proposed amendments.

(3) On February 16, 1972, the Commission announced proposed amendments to certain registration forms under the 1933 Act and periodic report forms under Section 12 of the 1934 Act which would in part supersede the July 19, 1971, guidelines discussed above in regard to environmental matters.⁵⁰

The proposed amendments would require disclosure of the material effects that compliance with Federal, State and local provisions regarding environmental protection may have upon the capital expenditures, earnings, and competitive position of the corporation and subsidiaries. Further, all administrative and judicial proceedings arising under such Federal, State, and local provisions would have to be disclosed, as well as material proceedings instituted by private parties. The proposed amendments would reduce the test of materiality from 15% to 10% of consolidated current assets.

The proposed amendments are noteworthy in that they depart for the first

48. SEC Investment Companies Act Release No. 6853, SEC Securities Act Release No. 5214, SEC Exchange Act Release No. 9403, CCH FED. SEC. L. REP. ¶ 78,432; N.Y. Times, Dec. 1, 1971, at 69.

49. N.Y. STOCK EXCHANGE, 1972 FACT BOOK 50.

50. SEC Securities Act Release No. 5235, SEC Exchange Act Release No. 9498, CCH FED. SEC. L. REP. ¶ 78,524.

time from the test of materiality as the basis for determining whether disclosure is required. All governmental proceedings must be disclosed without regard to the possible damages involved or the degree of impact on the business. The Commission terms all such proceedings "material," although it is obvious that this is not necessarily true for purposes of security valuation. In this respect, the Commission is giving recognition to the growing interest of investors in the social responsibility of the corporation and its behavior as a "corporate citizen" even though significant financial considerations may not be involved.

The Commission has not yet taken formal action on the proposed amendments.

On January 27, 1972, the California Commissioner of Corporations issued Release No. 25-C requiring disclosure of capital outlays, effect on earning power, and changes in business resulting from compliance with anti-pollution laws as well as of legal proceedings under anti-pollution or civil rights laws in all applications for qualification of securities. The Commissioner noted such disclosure was required by "recent developments recognizing increased corporate social responsibilities and obligations."

B. Reform Proposals

In contrast to the Commission's insistence on the financial materiality of the information, a number of reform proposals have called for disclosure of corporate performance in the social or environmental area because these are areas of concern in which disclosure might help achieve increased response to public expectations and demands.

(1) In June 1971, the Project on Corporate Responsibility and the Natural Resources Defense Council supported by 5 other environmental groups proposed that the Commission increase the disclosure requirements for the sale of securities under the 1933 Act and in the corporate reports under the 1934 Act. The proponents requested that the Commission require disclosure of the nature and extent of material environmental pollution; the feasibility of reducing such pollution under existing technology; plans and prospects for improving such technology; and expenditures for pollution abatement. They also requested disclosure of minority employment policies and a breakdown of employment according to skill; the information would be the same as that required for the Equal Employment Opportunity Commission. The petition stated that without such information on environmental pollution and minority employment, it was "difficult, if not impossible for investors to make either socially responsible or financially sound investment decisions."⁵¹

The Commission, as noted above, took limited action on July 19, 1971, in the direction requested but only insofar as violations of law and litigation

51. *See*, Wall St. J., June 10, 1971, at 22, col. 3.

with a material effect on the corporation's financial condition were concerned. Subsequently, on December 22, 1971, the Commission announced that it would not issue the new rules requested in the petition.⁵²

The statements of Chairman Casey of the Commission made it plain that the Commission was not then prepared to broaden its disclosure requirements to assist investors to make "socially responsible" investment decisions.⁵³

(2) In October 1972, the Commission invited public comment on a petition that the Commission's rules under Section 14 of the 1934 Act be amended to require the disclosure in proxy soliciting materials or annual reports of information required to be filed with the Congress or the Comptroller General under the 1971 Federal Election Campaign Act concerning separate segregated funds to be utilized by corporations for political purposes.⁵⁴

The petition is an attempt to obtain public disclosure via the 1934 Act of corporate information filed with other governmental agencies pursuant to a statute that does not provide for disclosure. It is noteworthy in that it attempts to broaden disclosure in the proxy solicitation materials to information unrelated to the business which will be the subject of the stockholders' meeting. This would be a complete departure from present practice. Further, in the alternative, it proposes that the Commission for the first time require specific disclosure in the annual report. It has been an anomaly that to date the annual report has not been regarded as part of the proxy solicitation materials, and the Commission has not asserted any control over the annual report, except to require that it accompany or precede the management proxy materials. Recent proposals, not involving social or environmental matters, have been made that the Commission change this basic policy, but it has not yet done so.

The Commission has not yet acted on the petition, and it is not considered likely to act favorably.

(3) In 1970 in his review of Campaign GM Round I, Professor Donald Schwartz advocated greater use of the proxy statement as an information-disseminating advice.⁵⁵ He recommended that the proxy rules be amended to permit the use of the proxy statement to serve as a forum for shareholders asking questions and obtaining answers. The proxy statement would then serve a function as a substitute meeting and further "the shareholder's knowledge about the public impact and concerns of his corporation."

The utilization of the Commission's rule-making powers under Section 14 of the 1934 Act with respect to the proxy machinery and proxy solicitation process rests on the Congressional intent to assure more effective voting by stockholders. Unlike the 1933 Act, or Sections 10(b) and, perhaps, 12 of the

52. See, B. LONGSTRETH & H. ROSENBLOOM, *supra* note 36, at 30.

53. See, N.Y. Times, June 18, 1971, at 53, col. 7.

54. SEC Exchange Act Release No. 9822, CCH FED. SEC. L. REP. ¶ 79,068.

55. See, Schwartz *supra* note 1, at 526-57.

1934 Act, Section 14 does not rest on the relation between disclosure and the security valuation process. Professor Schwartz's interesting proposal is clearly within the objectives of Section 14 of the 1934 Act and merits a degree of consideration which it has not yet received.

C. Future Role of the Commission

With the politicalization of the corporation, it seems inevitable that the issue of public control of the large corporation will play an increasing role in the political process generally. Such a development would unquestionably influence the policy considerations determining the Commission's use of its rule-making power.

One can anticipate that the question of whether Commission power should be employed to encourage greater social responsibility on the part of corporations under its jurisdictions or to enable stockholders to take social responsibility considerations into account in investment and voting decisions will become increasingly lively. Further, if federal incorporation or licensing of large corporations becomes a matter of serious consideration, the question of increased disclosure under such legislation or a wider role for the Commission in assuring disclosure in areas of public policy concern will undoubtedly occupy a prominent place on the agenda.⁵⁶

VI. COMPULSORY DISCLOSURE THROUGH INSPECTION OF BOOKS AND RECORDS

Within certain constraints, the common law provided stockholders with substantial rights to corporate information through inspection of corporate books and records.⁵⁷ In almost all jurisdictions, the common-law right of inspection has been supplemented by statutory provisions.⁵⁸ Thus, the stockholder has both common law and statute to support his right of inspection. Enforcement of these rights, however, may involve substantial legal expense and, therefore, not be available to reform groups as a practical matter.

56. See, Shanahan, *Reformer: Urging Business Change*, N.Y. Times, Jan. 24, 1971, § 3, at 1, col. 6; Nader, *The Case for Federal Incorporation* 18, Address at Conference on Corporate Accountability, Wash. D.C., Oct. 30-31, 1971; Mueller, *Corporate Disclosure and Federal Incorporation*, Address at Conference on Corporate Accountability, Wash. D.C. Oct. 30-31, 1971.

57. See, W. FLETCHER, CORPORATIONS §§ 2214-19, 2222 (perm. ed. rev. repl. 1967); Bartels and Flanagan, *Inspection of Corporate Books and Records in New York by Stockholders and Directors*, 38 CORN. L. Q. 289, 292 (1953); 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 116.02 (1972).

58. See, statutes collected in 2 ABA MODEL BUS. CORP. ACT. ANN. 153 (2d ed. 1971). The statutes are generally more restrictive than the common law, which Professor Hornstein describes as "much more extensive." Hornstein, *Rights of Stockholders in the New York Courts*, 56 YALE L. J. 942, 946 (1947).

**A. "Proper Purpose" Required for Inspection at Common Law;
Common Law and under Almost All Statutes**

In order to establish his common-law right to inspect, the stockholder must be acting for a "proper purpose."⁵⁹ Statutory relief, except in isolated cases where the right to inspect is absolute, similarly depends on the establishment of "proper purpose" either by the express terms of the statute or as a result of judicial construction. Thus, Section 52 of the Model Business Corporation Act and Section 220 of the Delaware General Corporation Law expressly require "proper purpose." Even where the statutory right of inspection contains no reference to "proper purpose," courts have, nevertheless, made it an essential prerequisite for statutory relief.⁶⁰

To qualify as a "proper purpose," it has been traditionally observed that the stockholder must be seeking the inspection in good faith to protect or promote his interests as a stockholder or to perform his duties as a stockholder. He may not be acting for purposes hostile to or inimical to those of the corporation. Finally, his purpose must be lawful (illegal schemes will not be assisted) and reasonable (repeated inspections will not be permitted).

(1) *The Stock List.* Communication with other stockholders for specific purposes pertaining to the corporation or to stockholder action have been held to constitute a "proper purpose" justifying inspection of the stock list. Examples include communications to solicit proxies, to influence voting, to join in litigation, to oppose a proposed merger, to form a protective committee, or to solicit shares pursuant to a tender offer.⁶¹

(2) *Books and Records Generally.* Examples of a "proper purpose" for inspection of other books and records have included inspections:

- (a) To determine the value of the petitioner's stock;
- (b) To ascertain how the corporation's affairs have been managed, to assist the stockholder in voting for directors or in taking other action as a stockholder;
- (c) To ascertain if the corporation has been mismanaged, or to determine whether litigation or other action should be instituted;
- (d) To determine the advisability of a receivership;
- (e) To ascertain the justification for non-payment of dividends.

(3) *Denial of Inspection.* Inspection has been denied when the purpose has been to aid a competitor, to further the stockholder's personal inter-

59. See, Note, "Proper Purpose" for Inspection of Corporate Stock Ledger, 1970 DUKE L.J. 393; Purposes for which Stockholder or Officer May Exercise Right to Examine Corporate Books and Records, Annot., 15 A.L.R.2d 11 (1951).

60. E.g., *State ex rel Theile v. Cities Service Co.*, 31 Del. 514, 115 A. 773 (1922); *Tate v. Sonotone Corp.*, 272 App. Div. 103, 69 N.Y.S. 2d 535 (1947); *Slay v. Polonia Pub. Co.*, 249 Mich. 609, 229 N.W. 424 (1950).

61. See, Note, "Proper Purpose" for Inspection of Corporate Stock Ledger, 1970 DUKE L.J. 393; Newman, *Inspection of Stock Ledgers and Voting Lists*, 16 Sw. L.J. 439 (1962); Schwartz, *supra* note 1, at 492-94.

ests—such as his speculation in securities or use of the stockholder list for commercial purposes or for advancement of his brokerage business—to assist in personal litigation in which he is involved, to harass or annoy the corporation, or for “idle curiosity.”⁶²

It is apparent that for purposes of “proper purpose,” interest as a stockholder has been traditionally related to the economic aspects of the relationship and of the conduct of the corporation’s business.⁶² This sharply presents the question of whether “proper purpose” may exist if the stockholder’s concern arises out of non-economic considerations. Such a case was presented by the recent *Honeywell* decision.

B. The Honeywell Case

The most recent decision of moment involving the shareholder’s right to inspect and the only decision involving an issue of corporate social responsibility is *State ex rel. Pillsbury v. Honeywell, Inc.*⁶³

In the *Honeywell* case, the petitioner purchased 100 shares with “the sole purpose . . . to give himself a voice in Honeywell’s affairs so he could persuade Honeywell to cease producing munitions.” The 100 shares were registered in the name of a nominee. Upon discovering this, petitioner purchased one additional share in his own name. He also learned that he had a contingent beneficial interest in a trust which held 242 shares.

Petitioner demanded access to the “original shareholder ledger, current shareholder ledger, and all corporate records dealing with weapons and munitions manufacture.” Upon Honeywell’s refusal, petitioner brought a mandamus action in Minnesota. The trial court applied Delaware law, since Honeywell was a Delaware corporation.⁶⁴ Although the petitioner alleged that he desired to inspect the stockholder ledger in order to communicate with other shareholders “to elect a new board of directors” who might represent his viewpoint, the trial court denied inspection both of the stock list and of the corporate records. On appeal, the Supreme Court of Minnesota affirmed. The Court intimated that plaintiff was not entitled to inspection because his stock interest was “quite tenuous” and had been acquired “for the sole purpose of asserting ownership privileges in an effort to force Honeywell to cease [such] production” of anti-personnel weapons.⁶⁵ It held that “petitioner had not demonstrated a proper purpose germane to his interest as a

62. The commentary on Sec. 52 of the Model Business Corporation Act, which does not discuss social responsibility, states: “The right to inspect corporate books and records is given to protect a shareholder’s economic interest in the corporation,” 2 ABA MODEL BUS. CORP. ACT. ANN. 129 (2d ed. 1971).

63. 291 Minn. 322, 191 N.W. 2d 406 (1971), 25 VAND. L. REV. 425 (1972), 46 TUL. L. REV. 1002 (1972).

64. The Supreme Court held that it was not necessary to determine whether Delaware law or Minnesota law applied because the test under Delaware law applied by the trial court was identical with the Minnesota common law. The *Honeywell* brief stated that it is “clear” that Delaware law controls.

65. 291 Minn. at 389, 191 N.W. 2d at 411. This issue is reviewed in the Appendix.

stockholder." The Court based its decision on the finding that petitioner's "sole purpose was to persuade the company to adopt his social and political concerns, irrespective of any economic benefit to himself or Honeywell."⁶⁶

The soundness of the decision that at this stage of the development of American business economic considerations are the sole legitimate concern of stockholders in reviewing the performance of the corporation and in determining their responsibilities as stockholders is very doubtful. It ignores the widespread acceptance of the concept of corporate social responsibility.

The decision, however, rests on a relatively narrow ground. Although a few sentences in his brief referred to petitioner's view that Honeywell's conduct was "bad business," petitioner had not established his concern with the impact of public reaction to Honeywell's manufacture of anti-personnel weapons upon the corporation's economic position. Thus, as institutional investors have come to recognize, the social and environmental policies of a corporation and the public's reaction to such policies are a significant element to be considered in the evaluation of the corporation's securities. The Court was familiar with this development and made it plain that in such event a "proper purpose" for the inspection would exist, stating:

"We do not mean to imply that a shareholder with a bona fide investment interest could not bring this suit if motivated by concern with the long- or short-term economic effects on Honeywell resulting from the production of war munitions."⁶⁷

The *Honeywell* decision is not particularly important because of the narrow base of its holding. If, however, other courts do not read the decision closely, the net effect of the petitioner's crusade for social responsibility may be to create an additional hurdle for other stockholders desiring to inspect books and records for reasons that include concern with issues of public policy.

(1) *Inspection of the Stock List.*

As far as the stock list is concerned, the *Honeywell* decision is plainly wrong in its refusal to grant inspection. The petitioner's purpose to inspect the stock list to be able to communicate with other stockholders for the purpose of election of directors is clearly a "proper purpose" both under Delaware law and common law.⁶⁸ The Court has confused the "purpose" of the inspection—i.e., the intended use of the stock list—with the motivation for petitioner's action. Thus, in a recent decision involving a demand for the stock list to communicate with other stockholders on matters of mutual in-

66. *Id.*

67. 291 Minn. at 330, 191 N.W. 2d at 412.

68. *E.g.*, *Nationwide Corp. v. Northwestern Nat. Life Ins. Co.*, 251 Minn. 255, 87 N.W.2d 671 (1958); *Murchison v. Alleghany Corp.*, 27 Misc. 2d 290, 210 N.Y.S.2d 153 (Sup. Ct. 1960), *aff'd*, 12 App. Div. 2d 753, 210 N.Y.S.2d 975, *app. denied*, 12 App. Div. 2d 903, 212 N.Y.S.2d 997 (1960); *Feist v. Joseph Dixon Crucible Co.*, 30 N.J. Super. 153, 103 A.2d 893 (1954). *See also*, note 61 *supra*, notes 69, 82 *infra*.

terest and to solicit proxies, the Delaware Supreme Court expressly held that to the extent the *Honeywell* case was inconsistent, it was inconsistent with Section 220 "as properly applied."⁶⁹

As for the motivation behind plaintiff's acts or the program of which the inspection forms a part, the cases have made it plain that a petitioner entitled to inspect because of a "proper purpose" is not barred because he may have other purposes as well.⁷⁰

(2) *Inspection of Corporate Records.*

The right of inspection of the books and records "dealing with weapons and munitions manufacture" presents a more difficult question than inspection of the stock list. Although the Delaware statutory provisions are the same (except with respect to the burden of proof), the Court's decision as to the existence of a "proper purpose" may be different because of the different nature of the interests to be balanced. First, there is a dramatic difference in the extent of intrusion into the corporation's affairs and the possible injury to the corporation. Second, unlike the stock list, where a purpose to communicate with the other holders for the election of directors will support the inspection, the right to inspect the books and records generally must rest on the relation of the information resulting from the inspection to the protection or promotion of his interest as a stockholder.

As noted, the interrelationship of Honeywell's manufacture of anti-personnel weapons and the impact of the resulting climate of public opinion—expressed in such economic considerations as consumer resistance and boycotts, difficulties of recruiting and retaining personnel and poor public relations generally—upon its business and the investment value of its shares would provide the basis for inspection, on which petitioner surprisingly did not choose to rely. It may be noted that in order to avoid this difficulty, the 1971 shareholder proposal of Episcopal Bishop Hines that General Motors terminate business operations in South Africa relied on the economic risk to General Motors from possible loss of its investment rather than on moral considerations.⁷¹

With this element removed from the case, the pure question presented in the *Honeywell* case is whether a stockholder has a right to inspect corporate records out of concern for Honeywell's obligations of corporate social responsibility in the operation of its business and for his own social responsibility as a stockholder.

69. *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691, 692 (Del. Sup. Ct. 1972).

70. *General Time Corp. v. Talley Industries, Inc.*, 43 Del. Ch. 531, 533, 240 A.2d 755, 756 (Sup. Ct. 1968); *Kerkorian v. Western Air Lines, Inc.*, 253 A.2d 221, 225 (Del. Ch.), *aff'd*, 254 A.2d 240 (Del. Sup. Ct. 1969); *Crane Co. v. Westinghouse Air Brake Company*, 56 Misc. 2d 538, 288 N.Y.S.2d 984 (Sup. Ct. 1968). *See*, E. FOLK, *DELAWARE GENERAL CORPORATION LAW* 252-53 (1972).

71. *See*, note 10 *supra*, at 39-40 ("Apartheid creates an extreme risk of eventual turmoil and instability in South Africa, which makes investment there excessively risky").

(3) *Inspection for other than Economic Reasons.*

There are apparently only 3 decisions that involve a stockholder's right of inspection for other than economic reasons.

De Rosa v. Terry Steam Turbine Co.,⁷² not mentioned by the *Honeywell* Court (or in the briefs before it), involved a demand to inspect the stock list made by three members of a union negotiating committee who held one share each. The shares had been purchased with union funds, and the union received the dividends on the stock. The purpose of the demand was to enable the union committee to communicate at union expense with stockholders on aspects of the corporation's labor relations policies, including such issues as the absence of an arbitration provision and no-strike clause in the union contract, employee turnover, a cumbersome and costly incentive pay plan, and inefficient production methods.

The Connecticut statute made the stock list available for inspection

by any shareholder . . . for any proper purpose in the interest of the shareholder as such or of the corporation and not for speculative or trading purposes or for any purpose inimical to the interest of the corporation or its shareholders.⁷³

The demand of the union committee members incorporated the statutory language. The Court granted inspection, holding that the labor relations issues were "matters of interest and legitimate concern to the shareholders and to the company."⁷⁴ The purpose was held proper and not inimical to the interest of the corporation or of its shareholders notwithstanding the relation of the three petitioners to the union and their single shares of stock.

In the *Honeywell* case, the Court denied relief because petitioner's "sole purpose was to persuade the company to adopt his social and political concerns, irrespective of any economic benefit to himself or Honeywell." In the *De Rosa* case, it is clear that the union men were not seeking to benefit themselves as stockholders, but were acting on behalf of the union members generally. Similarly, although it may be argued that the communication with the shareholders may lead to better labor relations which may benefit the corporation, it is equally clear that the union men were advancing union interests and not concerned with economic benefit to the corporation. The *De Rosa* decision is inconsistent with the *Honeywell* case. Although it involves inspection of the stock list, the decision upholding inspection although it would not further the economic interests of the corporation or applicants as stockholders obviously supports inspection of the books and records as well.

*Wolozyn v. Begarek*⁷⁵ involved a religious corporation in which a demand for inspection was based on dissatisfaction with the dogma, doctrines and

72. 26 Conn. Supp. 131, 214 A.2d 684 (Conn. Super. Ct. 1965).

73. 26 Conn. Supp. at 134-35, 214 A.2d at 687.

74. 26 Conn. Supp. at 138, 214 A.2d at 688.

75. 378 P.2d 1007 (Okla. 1963).

form of religious services of the dominant faction within the church. The Court assumed that the Oklahoma Business Corporation law applied. It held that inspection was not for a proper purpose under the statute because it was unrelated to any realistic suspicion of mismanagement of church funds or property and involved questions of religious belief and practice more suited for church tribunals than for the courts. Although this decision is consistent with the theory that "proper purpose" must rest on economic considerations, it is questionable whether it may be applied outside of the church area.

Finally, in *McMahon v. Dispatch Printing Co.*,⁷⁶ the Court denied inspection of books and records where the petitioner was motivated by a "political feud" with the President of the corporation who was also Secretary of State of New Jersey. The Court found that the petitioner's purpose was to defeat the President in the political arena, even if the corporation was harmed in the process and that inspection was unrelated to his interest as a shareholder.

Although the issue presents relatively new ground for decision, courts may ultimately have to decide whether in the present climate of public opinion, moral or social considerations—where, if ever, they can be isolated and divorced from investment considerations—are fundamental matters of legitimate concern for stockholders and management alike. In this area, the *Honeywell* court has misread the significance of the recent decades in American economic life. As long ago as 1953, the Supreme Court of New Jersey in the well known decision in *A.C. Smith Mfg. Co. v. Barlow*, stated: "Modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."⁷⁷

More recently, in *Medical Committee for Human Rights v. Securities and Exchange Commission*,⁷⁸ the Court of Appeals for the District of Columbia noted that the decision by the Dow management to manufacture napalm did not rest on economic considerations. It pointed out that "management in essence decided to pursue a course of activity, which generated little profit for the shareholders and actively impaired the company's public relations and recruitment activities because management considered this action morally and politically desirable."⁷⁹ May not moral and political considerations govern the actions of stockholders as well as of management?

This question relates to the modern role of stockholders in the corporation as well as to the corporation itself. Indeed, the traditional concept of the right to inspect rests not only on the promotion of the stockholder's interest as a

76. 129 A. 425 (Sup. Ct. N.J. 1925).

77. 13 N.J. Eq. 145, 154, 98 A.2d 581, 586 (1953), *appeal dismissed*, 364 U.S. 86 (1953).

78. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

79. *Id.* at 681.

stockholder but to enable the stockholder to discharge his function as a stockholder.⁸⁰ The question thus becomes whether, in the present climate of opinion, stockholders may legitimately rely on a sense of social responsibility as a criterion for their action as stockholders without regard to economic considerations. Are social or moral concerns in themselves sufficient?

In this connection, it may be noted that the Committee on Economic Development has reported, that according to a relatively recent poll, two-thirds of the American public believed that "business now has a moral obligation to help other major institutions to achieve social progress, even at the expense of profitability."⁸¹

Although extreme examples may be of limited usefulness, it may be helpful to view the issue in a somewhat different context. Let us assume a case in which corporate management has decided to broaden the business of the corporation to include the conduct of gambling or prostitution in jurisdictions where such conduct is lawful (and indeed may be encouraged by the local government) because of the short and long-term profits which are anticipated. Does a stockholder opposed to such conduct purely for moral reasons have the right to inspect the stock list to communicate with other holders in order to elect directors committed to another policy or to inspect the corporate records to obtain complete disclosure of the facts with respect to such operations? Are moral values in and of themselves in this area of the law a relevant guide to the conduct of modern man? In brief, this is the narrow issue in the *Honeywell* case.

At the risk of repetition, it is worth repeating that these issues are rarely matters solely of moral concern. Where corporate conduct involving moral, social or environmental issues becomes a matter of public controversy, the impact on the corporation has economic significance, of concern to management and investors alike. Sales, employee recruiting, morale, and turnover, investor psychology and ultimately valuation of the corporation's shares are all affected. Social and moral concerns are no longer the only factors to be taken into account. At this point, as even the *Honeywell* Court recognized, traditional rights of inspection are clearly available to stockholders.

C. The Future of the Right of Inspection

The effective, timely right to inspect the stockholder list in the large corporation is now firmly established as a result of the recent decisions in Delaware.⁸² In view of the importance to the stockholder, the lack of inconve-

80. See, *State ex rel. Watkins v. Cassell*, 294 S.W.2d 647, 652 (Mo. App. 1956); *State ex rel. McClure v. Malleable Iron Range Co.*, 177 Wis. 582, 187 N.W. 646, 648 (1922); *Stone v. Kellogg*, 165 Ill. 192, 46 N.E. 222, 226 (1896).

81. COMM. FOR ECONOMIC DEVELOPMENT, SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS 16 (1971).

82. E.g., *Mite Corp v. Heli-Coil Corp.*, 256 A.2d 855 (Del. Ch. 1969); *General Time Corp. v. Talley Industries, Inc.*, 43 Del. Ch. 531, 240 A.2d 755 (Sup. Ct. 1968); *Kerkorian v. Western Air Lines, Inc.*, 253 A.2d 221 (Del. Ch.), *aff'd*, 254 A.2d 240 (Del. Sup. Ct. 1969).

nience to the corporation, and the absence of any threat to legitimate corporate interests, this result is eminently sensible. One may expect that further litigation over the right to inspect the stock list will dwindle.

The future development of the right to inspect books and records on the other hand may be quite different insofar as the large publicly held corporation is concerned.

In the closely held corporation, the stockholder's right of inspection of books and records is an essential component of the constitutional structure of the enterprise.⁸³ It provides an important safeguard against oppression of minority stockholders without presenting a significant danger to the normal functioning of the corporation. The number of stockholders will generally be so small that implementation of the inspection right will not threaten corporate operations.

The large publicly held corporation presents a sharp contrast that represents a difference in kind not merely a difference in degree. The numbers of stockholders in the large corporation are so large that even the slightest change in stockholder patterns of enforcing the right of inspection could present serious problems for the corporation. Thus, the 50 most widely held corporations listed on the New York Stock Exchange, as of early 1972, had more than 121,000 stockholders of record ranging from the largest, American Telephone and Telegraph, with 3,010,000 holders of record, to the fiftieth, R.J. Reynolds Industries, with 121,000 holders as follows:⁸⁴

<i>Number of Shareholders of Record</i>	<i>Number of Corporations</i>
1,000,000 or more	2
500,000 to 999,999	3
250,000 to 499,999	8
150,000 to 249,999	21
121,000 to 149,999	16
	<hr/> 50

In view of the significant number of nominee and "street name" holders of record, the number of beneficial owners is obviously substantially larger than the holders of record.

It is evident that a relatively small number of stockholders seeking to enforce their right of inspection of books and records of the major American corporations could create serious difficulties. Thus, as was pointed out in *Cooke v. Outland*:

"Considering the huge size of many modern corporations and the

83. See, 1 F. O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE § 3.63 (1972 Supp.); *Galler v. Galler*, 45 Ill. App. 2d 452, 465-66, 196 N.E.2d 5, 12 (1964), *Modified*, 32 Ill. 2d 16, 203 N.E.2d 577 (1965) ("It is even more important in the close corporation . . . that every shareholder should be able to compel an inspection of corporate records. . .").

84. N.Y. STOCK EXCHANGE, 1972 FACT BOOK, at 31.

necessarily complicated nature of their bookkeeping, it is plain that to permit their thousands of stockholders to roam at will through their records would render impossible not only any attempt to keep their records efficiently, but the proper carrying on of their business.”⁸⁵

Corporate counsel might be able to limit the impact of any such development by persuading the courts that shareholder efforts of this nature, particularly where they reflected concerted action, constituted a form of harassment and therefore did not have a “proper purpose.” The spectre nevertheless, arises that the system is simply unworkable in the large corporation with its tens of thousands of stockholders. It is somewhat surprising that corporate critics eager to challenge the major corporation on public policy issues have not attempted this tactic.

Properly drafted demands by stockholders of indisputable standing to inspect the books and records of major corporations to review their activities in areas of public policy concern which have become matters of significant public interest obviously could create administrative problems of major proportions. On the corporate level, a possible response might well be a significant increase in voluntary disclosure and in cooperation with social reform groups pressing for further information in an effort to avoid the problem. On the legislative level, encouraged by corporate management, or on the judicial level, another possible reaction to such a movement might be the creation of additional restraints on the right of inspection to render the system workable.

VII. COMPULSORY DISCLOSURE THROUGH RESOLUTIONS ADOPTED AT STOCKHOLDERS' MEETINGS

Quite distinct from the right of the individual stockholder to inspect books and records is the right of the stockholders as a body to corporate disclosure. The power of stockholders as a body to compel disclosure by resolution adopted at a meeting of stockholders called upon proper notice and with a quorum in attendance involves the fundamental allocation of powers among the various organs of the corporation—stockholders, directors, and officers—under corporation law. In brief, is a stockholder resolution to obtain disclosure a “proper subject” for stockholder action under state law? This is a question of corporate constitutionalism.

There is remarkably little judicial guidance on the meaning of “proper subject.”⁸⁶ The question has rarely been litigated.

In the leading case of *Matter of Auer v. Dressel*, the New York Court of

85. 265 N.C. 601, 611, 144 S.E.2d 835, 842 (1965).

86. E.g., *Matter of Auer v. Dressel*, 306 N.Y. 427, 118 N.E.2d 590 (1954); *SEC v. Transamerica Corp.* 163 F.2d 511 (3d Cir. 1947). See, Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME LAW. 13, 17-26 (1964).

Appeals held that a recommendation by shareholders to the directors with respect to a matter on which shareholders could not act—the election of a President—nevertheless, constituted a “proper subject.” Similarly, a request by stockholders for information which would serve as the basis for recommendations to the Board would also appear to constitute a “proper subject” for stockholder action.

Further, stockholders are the owners of the enterprise. They constitute the ultimate plenary source of power of the corporation,⁸⁷ except where power has been allocated to the directors by statute or by the certificate or by-laws. (A prime example is the traditional statutory provision allocating to the Board of Directors the power “to manage the business and affairs of the corporation.”⁸⁸) The power to demand information about the business of the corporation is clearly within the plenary powers of shareholders.

Since such power to demand information rests with the stockholders as a body and may be exercised only by a majority vote at a meeting, it would be solely of academic interest in the large public corporation, but for its inter-relationship with Rule 14a-8 of the Securities and Exchange Commission. The fact that a demand for information is a “proper subject” for stockholder action under state law is the foundation for stockholder disclosure proposals under the Rule.

VIII. COMPARISON OF THE STOCKHOLDER'S RIGHT OF INSPECTION AND STOCKHOLDER PROPOSALS INVOLVING DISCLOSURE

There are fundamental differences between the right of inspection and the stockholder disclosure proposal.

(a) As noted, the right of inspection is a right that pertains to the individual stockholder, while the stockholder disclosure proposal rests on the plenary right of the stockholders as a whole to take action they believe to be in their best interests.

(b) The process is different. The right of inspection means physical access to the corporate records by the stockholder, accompanied by attorneys, accountants, clerks, and secretaries.⁸⁹ It inevitably results in disruption of the corporation's operations through the temporary unavailability of records undergoing inspection and of personnel to supervise the “outsiders” involved in the inspection.

Further, it undoubtedly means the disclosure of some information unre-

87. See, L.C.B. GOWER, *supra* note 28, at 474, 501; Z. CAVITCH, *supra* note 57, § 116.01, at 363 n.8, 371 n.15.

88. E.g., Del. Gen. Corp. Law § 141; N.Y. BUS. CORP. LAW § 701; ABA-ALI MODEL BUS. CORP. ACT § 35.

89. E.g., *Conerty v. Butler County Oil Ref. Co.*, 301 Pa. 417, 152 A. 672 (1930); *Shea v. Parker*, 234 Mass. 592, 126 N.E. 47 (1920); *Commonwealth ex rel. Wilde v. Pennsylvania Silk Co.*, 267 Pa. 331, 110 A. 157 (1920); *Ellsworth v. Dorwart*, 95 Iowa 108, 63 N.W. 588 (1895).

lated to the subject for which inspection was granted, as well as the possibility of disclosure of trade secrets, confidential data, or information damaging to the corporation's competitive position.⁹⁰ In contrast, as noted, the Commission staff has restricted the scope of stockholder disclosure proposals to areas not deemed "privileged for business or competitive reasons." These limitations are undoubtedly more restrictive than the limitations imposed by judicial order in an inspection proceeding.

Finally, it involves the release of information to a particular applicant for his own use rather than for dissemination to stockholders generally and thus to the public. None of the foregoing considerations is present under the stockholder disclosure proposal where management prepares the compilations and summaries of data required without interruption or intrusion by "outside" persons and where the information is distributed to the stockholders as a whole.

(c) The right of inspection rests on the "standing" and the "purpose" of the particular stockholder instituting the action. As noted, this renders the right of inspection dependent, among other matters, on the nature of the stockholder's stock interest, his association with competing firms, his purpose in seeking the information, and possible injury to the corporation. In contrast, the stockholder disclosure proposal involves the power of the stockholders as a whole to demand information about aspects of the business of which they are the owners.

In summary, the right of inspection depends on a balancing of considerations reflecting the inspection process itself and the individual stockholder seeking to assert the right. Thus, the right of inspection in a particular case may be doubtful or perhaps not even exist at all by reason of factors which may have no relation whatsoever to the nature of the information for which disclosure is sought.

IX. OTHER AVENUES OF COMPULSORY DISCLOSURE

The individual shareholder may obtain disclosure through other avenues in addition to his common-law and statutory right to inspect the books and records of the corporation.

A. Pre-trial Procedures Incident to Litigation Against the Corporation

Where the stockholder institutes litigation against the corporation, he is entitled as a litigant to extensive pre-trial discovery proceedings to prepare for trial. Such proceedings extend a right to information which transcends the limitations and prerequisites pertaining to the stockholder's common law or statutory right to inspect books and records. Thus, Rule 26 of the Federal

90. Cf., e.g., *State ex rel. Gwinn v. Bucklin*, 83 Wash. 23, 145 P. 58 (1914); *Nationwide Corp. v. Northwestern Nat. Life Ins. Co.*, 87 N.W.2d 671 (Minn. 1958); 28 U. CIN. L. REV. 116 (1959).

Rules of Civil Procedure pertaining to discovery goes far beyond the traditional right to inspect.⁹¹

B. Statutory Access to Filed Information

Statutes requiring the filing of corporate reports or submission of other information may make the information available to stockholders or the public. This can supplement other opportunities for access to corporate information.

(1) *Tax Returns*. Although federal corporate tax returns are confidential, Section 6103(e) of the Internal Revenue Code makes them available upon request to any holder or holders of one (1%) percent or more of the outstanding common shares. Further, the Securities and Exchange Commission has recently proposed that the financial reports to the Commission under the 1934 Act and registration statements under the 1933 Act explain any significant differences between the preparation of financial statements for book purposes and use in the federal corporate tax return.⁹² With these reports available for public inspection, this disclosure will enable stockholders and other interested analysts to reconstruct the tax return in significant measure.

(2) *Other Statutes*. Numerous federal statutes and administrative regulations contain elaborate reporting and filing requirements. The Securities and Exchange Commission, for example, requires extensive disclosure of financial information and transactions involving insiders as part of its statutory mandate to protect investors. These elaborate disclosures under the 1933 Act with respect to any "public offering" of securities and under Sections 12 and 14 of the 1934 Act with respect to quarterly, semi-annual and annual reports to the Commission, as well as to proxy statements, are available to the public. Indeed, through its micro-fiche program instituted a number of years ago, all such information pertaining to a designated company will be automatically forwarded by the Commission to interested persons on a subscription basis immediately.⁹³ Similarly, in the various regulatory agencies seeking to impose uniform accounting practices on the industries within their jurisdiction, such as the Interstate Commerce Commission, Federal Power Commission, Federal Communications Commission, and Civil Aeronautics Board, detailed corporate reports are available for public inspection.

Many other federal regulatory programs require the filing of detailed reports on relevant aspects of the corporation's business but provide that such filings be kept confidential by the agency. Such examples include the Employer Information Report EEO-1 on minority employment practices filed

91. See, 6 Z. CAVITCH, *supra* note 57, at § 116.01, at 364 n. 12 ("inspection under pre-trial discovery is far broader and much more comprehensive").

92. SEC Securities Act Release No. 5344, SEC Exchange Act Release No. 9915, CCH FED. SEC. L. REP. ¶ 79,145.

93. SEC Exchange Act Release No. 8345, CCH FED. SEC. L. REP. ¶ 77,571.

with the Federal Equal Employment Opportunity Commission, the Affirmative Action Compliance Program filed with the Office of Federal Contract Compliance, the water pollution data filed under the Federal Water Pollution Control Act, and many of the reports on work-related deaths, injuries and illnesses under the Federal Occupational Safety and Health Act.

These are all relatively new enactments and the provisions for confidentiality of corporate information reflect an accommodation with corporate antagonism to the programs. This should be regarded as only the initial phase. As the programs become accepted, it may be expected that much of this information will ultimately become available to the public.

C. Disclosure Through Stock Exchange Regulation

The stock exchanges exert substantial regulatory control over the relationship between listed corporations and their shareholders. Thus, in a number of important respects, either by formal requirement in the listing agreement or through influence, the New York Stock Exchange and the American Stock Exchange have established standards for corporate operation safeguarding stockholder rights that transcend the requirements of state corporation law. Thus, the New York Stock Exchange has effectively prohibited the use of non-voting common stock, required stockholder approval for the issuance of new shares exceeding 20% of the outstanding shares or issued in connection with a "change of control," required stockholder approval of acquisitions from insiders and stock options for executives, and has pressed for the election of at least two "outside" directors on the Board.⁹⁴

With the election of public governors by both exchanges, this highly salutary trend may be expected to increase. Any increased regulation of listed corporations will undoubtedly embrace increased disclosure. Thus, Mr. Theodore Cross, a newly elected public governor of the American Stock Exchange, has already suggested that the exchanges (and the National Association of Securities Dealers) require listed corporations (or corporations with shares traded over-the-counter) to disclose their federal Equal Employment Opportunities Commission Statements of compliance with anti-discrimination statutes.⁹⁵

X. UNAUTHORIZED DISCLOSURE BY CORPORATE EMPLOYEES

With increasing expression of a new view of the large American corporation as a social institution to achieve social objectives, rather than as an economic institution to be operated solely for economic objectives for the benefit of stockholders, it is inevitable that new views will also emerge with respect to the changing relation between the corporation and its employees. Tradi-

94. N.Y. STOCK EXCH., MANUAL, at A-95, A-118, A-280, A-284; N.Y. STOCK EXCH., THE CORPORATE DIRECTOR AND THE INVESTING PUBLIC 7 (1965).

95. Cross, *Closing Down Markets for Discrimination*, BUS. & SOC'Y REV. (Winter, 1973).

tional concepts of the duties of loyalty and obedience of the employee to his employer, firmly recognized in the law of agency, seem to be breaking down. Numerous recent developments have illustrated the pressures on the employee of the large corporation to take action adverse to the interests of his employer by unauthorized disclosure or other means in response to the employee's view as to the proper social responsibility of his corporate employer. The corporate "leak" has joined the government "leak" as an established aspect of American life.

Thus, Mr. Ralph Nader has established a Clearing House for Professional Responsibility to solicit and receive disclosures from employees of large corporations, as well as of government, of information about their "employers' policies or practices that they consider harmful to public or consumer interests."⁹⁶ Mr. Nader has termed this "whistle-blowing" and urges such unauthorized disclosure whenever the employee concludes his "responsibility to society transcends responsibility to his organization."⁹⁷

As employees respond to pressures such as these, important additional sources of disclosure about the social and environmental activities of large corporations will become available.

This development, which obviously presents serious problems and will require the establishment of new legal rules to reflect changing social values is discussed at length in Blumberg, "Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry," 24 *Okla. L. Rev.* 279 (1971).

XI. CONCLUSION

Disclosure of corporate activities in the social and environmental sphere as a means of influencing or controlling corporate conduct is a constraint on corporate power in the American tradition. The outer limits on corporate behavior have in large measure been determined by a sense of what is regarded as socially acceptable conduct, as much as by law. The climate of public opinion is an almost irresistible pressure in the long run. Increased disclosure is obviously a powerful element in the formation of public opinion and in the development of public pressures to accomplish social objectives. It is, therefore, an important component of the present scene which can play a major role in determining the form of the changing rules of the game under which the large public corporation will have to operate in the future.

96. N.Y. Times, Jan. 27, 1971, at 32, col. 3.

97. N.Y. Times, Mar. 21, 1971, § 6, col. 5. See, R. NADER, P. PETKAS & K. BLACKWELL, eds., *WHISTLE BLOWING* (1972).

Appendix

The Honeywell Case and the Stockholder's Standing to Assert a Right of Inspection

In the *Honeywell* case, the petitioner was the owner of record of only one share. In addition, he was the beneficial owner of 100 shares, with a cost of approximately \$13,000, held in the name of his nominee and had a contingent remainder interest in a trust owning 240 shares. This poses the following questions:

(a) Does ownership of one share of record qualify petitioner for relief under the Delaware statute, assuming it is applicable?

(b) Does such ownership of one share of record together with beneficial ownership of 100 shares in nominee name and a remote equitable interest in the 240 shares held by the trust qualify petitioner for relief at common law?

(c) Is petitioner barred from relief either under the statute or at common law because the 100 shares in nominee name and the one share in his own name were purchased solely for the purpose of obtaining the right of inspection in question?

A. Small Size of the Holding

(1) *The Delaware Statute.* Since the Delaware statute, Section 220 of the General Corporation Law, extends only to stockholders "of record," petitioner's case under the statute must rest on the record ownership of a *single* share purchased to obtain the right of inspection.

This, nevertheless, would not appear to deny petitioner a right to relief under the statute. Section 220 expressly provides for inspection by "[A]ny stockholder" of record. It contains no requirement of a required minimum number of shares or of a minimum time period in which stock must be held for relief. This is particularly significant because of the many state statutes which expressly condition the right of inspection on such prerequisites.⁹⁸ Professor Folk thus concludes that the Delaware statute does not require any minimum number of shares for a stockholder to qualify for inspection.⁹⁹

(2) *The Common Law.* Petitioner's standing to inspect is stronger at common law where it is clear that the right to inspect does not rest on record ownership.¹⁰⁰ The petitioner's position is strengthened by the additional 100 shares held in nominee name; the contingent interest in the 241 shares held in trust is an additional, less persuasive, factor.

98. *E.g.*, N.Y. BUS. CORP. LAW § 624(b); ARK. STAT. ANN. § 64-312; D.C. CODE ANN. § 29-920; La. Rev. Stat. § 12:103; MISS. CODE ANN. § 5309-11.

99. *See*, E. FOLK, *supra* note 70, at 248.

100. *See e.g.*, *Sivin v. Schwartz*, 22 App. Div. 2d 821, 254 N.Y.S.2d 914, 915 (1964); *Levine v. Pat-Plaza Amusements, Inc.*, 324 N.Y.S.2d 145, 148 (Sup. Ct. 1971).

Although the common law authorities are mixed on the nature of the equitable ownership required for inspection,¹⁰¹ the unqualified nature of the beneficial ownership of the owner of shares held in "street" or nominee name would appear to present the strongest possible case for the right of inspection by an equitable owner since such owner possesses the full economic interest, the right to direct the voting of the shares, and the unqualified right to compel registration in his own name. The limited authority on nominee shares supports this conclusion.¹⁰²

Although cases are divided on the right of holders of a beneficial interest in a trust¹⁰³ or of pledgors and pledgees (who are not record owners)¹⁰⁴ or voting trust certificate holders¹⁰⁵ to inspect the corporate books and records, those cases upholding such right obviously support the right of the equitable owner of shares in nominee name. On the other hand, the decisions to the contrary are not controlling since each of these cases involves an owner who lacks full economic ownership or voting rights or both.

The *Honeywell* Court relied on *Chas. A. Day & Co., Inc. v. Booth*,¹⁰⁶ in which inspection of the stock list was denied to a stockholder who held a single share purchased for the purpose of making a demand for the list. The *Booth* decision, however, involved a securities firm which wanted the list for the purpose of using it in its business, and which had made a practice of purchasing single shares as a method of acquiring access to corporate stock lists

101. See, W. FLETCHER, *supra* note 57, at § 2230; Note, *Rights of Equitable Owners of Corporate Shares*, 99 U. PA. L. REV. 999, 1000-03 (1951); 17 U. CHI. L. REV. 194, 197-98 (1948). The right of an unregistered stockholder or the equitable owner of shares to institute a derivative action is well recognized. See, W. CAREY, *CASES AND MATERIALS ON CORPORATIONS* 924 (4th ed. 1969); H. BALLANTINE, *supra* note 28, at 351. If record ownership is not required to maintain an action, it can hardly be asserted as a prerequisite to the exercise of less fundamental rights of ownership such as the right of inspection.

102. *Feist v. Joseph Dixon Crucible Co.*, 30 N.J. Super. 153, 103 A.2d 893 (1954); see, *S.F. Bower & Co. v. State*, 192 Ind. 462, 137 N.E. 57, 58 (1922); *N. LATTIN, CORPORATIONS* 350 (2d ed. 1971). But cf. *State ex rel. Manlin v. Druggists' Addressing Co.*, 113 S.W. 2d 1061 (1922).

103. Compare *Brecker v. Nielson*, 21 Conn. Supp. 33, 143 A.2d 463 (1958) (inspection denied to "trust beneficiaries") with *McGeary v. Brown* 23 S.D. 573, 122 N.W. 605 (1909) (inspection granted to life tenant) and *Texas Infra-Red Radiant Company, Inc. v. Erwin* 397 S.W.2d 491 (Tex. Civ. App. 1965) (inspection granted to former wife with beneficial interest in stock held by trustee pursuant to divorce decree).

104. Compare *Leisner v. Kent Investors, Inc.* 62 Misc. 2d 132, 307 N.Y.S.2d 293 (Sup. Ct. 1970) (pledgor granted inspection); *In re Citizens' Savings & Trust Co.*, 156 Wis. 277, 145 N.W. 646 (1914) and *Newcomer v. Miller*, 166 Md. 675, 172 A. 242 (1934) (pledgees granted inspection) with *In re First Nat. Bank of Brooklyn*, 28 Misc. 662, 59 N.Y.S. 1042 (1899), *aff'd*, 44 App. Div. 635, 60 N.Y. Supp. 1138 (1900) (pledgee denied inspection).

105. Compare *Baczowska v. 2166 Operating Corp.*, 304 N.Y. 811, 109 N.E.2d 470 (1952) and *Webster v. Bartlett Estate Co.* 35 Cal. App. 283, 169 P. 702 (1917) (inspection granted) with *State ex rel. Crowder v. Sperry Corp.*, 41 Del. 84, 15 A.2d 661 (Sup. Ct. 1940) (Mandamus to compel inspection denied although possibility of equitable relief left open).

106. 123 Me. 443, 447, 123 A. 577, 558 (1924).

for use in its business, and of disposing of the shares after obtaining the lists in question. There are a number of such cases, some similarly involving the holder of a single share, which reach the same result.¹⁰⁷ All these cases clearly turn on the petitioner's contemplated improper use of the list rather than on the size of his stock interest.

The Court also relied on two old New York common law cases denying inspection of books and records by stockholders holding what the *Honeywell* Court described as "an insignificant amount of stock."¹⁰⁸ Although these cases do refer to the small size of the stock interest (75 preferred shares in one case, 4 shares in the other), it does not appear that this element was the decisive factor in either case.

In contrast, there are numerous common law cases granting inspection without regard to the number of shares held.¹⁰⁹

It does not seem therefore, that the *Honeywell* Court is sound either under the statute or at common law in implying that the allegedly "tenuous" nature of petitioner's stock interest might disqualify him from any relief.

The authorities, however, largely involve inspection of the stock list which represents a minimum intrusion into corporate affairs. The problems presented by inspection of books and records generally in the large public corporation might well induce courts to conclude that a balancing of the various interests involved should lead to a denial of the right of inspection where minimal stock ownership is involved. In such event, it is likely that the decision would be expressed in terms of "proper purpose" or relation of the inspection to furtherance of the stockholder's interest rather than in terms of standing. The underlying factor, however, would be the smallness of the stockholder's holding.

In the public interest proxy contest, there seems little remaining resistance to the right of the holder of the single share to place a proposal on the proxy statement although it is plain that he is acting on behalf of public concerns rather than for the advancement of stockholder interests. It is not all clear that the same tolerance will be extended to the holder of the single share or even 100 shares desiring a massive inspection of books and records. The authorities upholding inspection of the stock list, notwithstanding the applicant's limited stock interest, should not be regarded as necessarily controlling.

107. *E.g.*, *State ex rel. Theile v. Cities Service Co.*, 31 Del. 514, 115 A. 773 (1922); *Eaton v. Manter*, 114 Me. 259, 95 A. 948 (1915).

108. *People ex rel. Hunter v. National Park Bank*, 122 App. Div. 635, 107 N.Y.S. 369 (1907); *Matter of Pierson*, 28 Misc. 726, 59 N.Y.S. 1003 (Sup. Ct. 1899), *aff'd*, 44 App. Div. 215, 60 N.Y.S. 671 (1899).

109. *E.g.*, *G.S. & M. Co. v. Dixon*, 220 Ga. 329, 138 S.E.2d 662 (1964) (3/4 of share involved); *In re O'Neill*, 47 Misc. 495, 95 N.Y.S. 964 (1905); *see*, *Richmond v. Hill*, 148 Ill. App. 179, 180-81 (1909); *Matter of Steinway*, 159 N.Y. 250, 53 N.E. 1103, 1107 (1899); 28 U. CIN. L. REV. 116, 117 (1959).

B. Acquisition of Shares Solely to Obtain Inspection

The remaining question is whether petitioner is disqualified because he purchased the 101 shares in question solely to obtain the right of inspection.

(1) *The Statute.* As noted, Section 220 contains no requirement that stock must have been held for a minimum period in order to qualify for inspection in contrast to the number of statutes containing such a prerequisite for relief. Accordingly, three recent Delaware decisions make it plain that the fact that the stock was acquired solely to qualify for inspection will not bar relief under the statute.¹¹⁰

In light of these decisions which the Court ignored, petitioner's right to relief under the Delaware statute is not barred by his purchase of stock for the purpose of obtaining the stockholder's right of inspection.

(2) *The Common Law.* The foregoing Delaware decisions may also be regarded as supporting the common law right of inspection of the stockholder who acquired his shares to qualify for inspection. The decisions do not turn on the statutory provisions—although the statutory language clearly supports the result—and reflect the position that a shareholder is a shareholder without regard to the concerns that prompted the acquisition of the shares.

C. The Policy of the Securities and Exchange Commission

The *Honeywell* Court, furthermore, ignored the experience of the Securities and Exchange Commission. Thus, the Commission both in drafting and construing its proxy rules, Regulation 14A, under the 1934 Act, has permitted shareholder proposals by the holder of a single share or by the holder of shares concededly purchased for the purpose of submitting a shareholder proposal for inclusion in the corporate proxy statement.¹¹¹ Although at one time there was an intimation that during its recent review of Rule 14a-8 the Commission was considering a minimum number of shares and a minimum time of holding in order to qualify for submission of a stockholder proposal, the recent amendments to Rule 14a-8 which became effective January 1, 1973 contained no such requirements.

The foregoing review makes it plain that the intimation in the *Honeywell* decision that plaintiff may lack standing is not sound. Nevertheless, social reform groups seeking to obtain inspection of corporate books and records would obviously be well advised to act where possible through stockholders with significant holdings who have owned their shares for some time.

110. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855 (Del. Ch. 1969); *General Time Corp. v. Talley Industries*, 43 Del. Ch. 531, 240 A.2d 755 (Sup. Ct. 1968), 1970 DUKE L. J. 393, 404 n. 73 (1970); *Trans-World Airlines, Inc. v. State ex rel. Porter*, 54 Del. 582, 183 A.2d 174 (1962), 4 B. C. IND. & COM. L. REV. 425 (1963). *But cf.* *Northwest Industries v. B. F. Goodrich Co.*, 260 A.2d 428 (Del. Sup. Ct. 1969).

111. 17 C.F.R. § 240.14 (1972); *see*, note 18 *supra*.

