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Securities Regulation—Securities Exchange Act of 1934—Voting Trust Regulated Under Section 14(a).—Greater Iowa Corp. v. McLendon

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takes the form of an issuance of stock by the surviving corporation. The issuance of stock in conjunction with a merger fulfills the requirements of *Ruckle* and *Hooper*, and results in a securities act "sale." Thus the long form merger involves a "sale" of securities so as to afford an injured party a remedy under the antifraud provisions of the securities acts.

The foregoing analysis has revealed that a technical "sale" exists in both the long form and the short form merger. In neither of the noted cases did the court feel such an analysis was necessary to the decision, choosing instead to rely upon the congressional intent manifested in the legislative history of the securities acts. Although these courts probably reached a result which was consistent with the equities of the cases, such a method of dealing with this important securities law issue is an unsatisfactory method of developing a stable body of law. Until the courts face the problem of whether merger involves a "sale" in a manner which is consistent with corporate law and the financial realities of merger transactions, the freedom of judges to interpret legislative history will remain unimpaired and the rights and responsibilities of the financial community and the investing public under the securities laws will be uncertain.

PETER W. BROWN

Securities Regulation—Securities Exchange Act of 1934—Voting Trust Regulated Under Section 14(a).—*Greater Iowa Corp. v. McLendon*.¹

—A group of shareholders of Greater Iowa Corporation organized a voting trust² with the objective of controlling the corporation or gaining a voice in its management. The voting-trust organizers, dissatisfied with the corporation's management apparently because of poor earnings and a decline in stock value, solicited memberships for the "Iowa Trust" from 45 of the 12,000 Greater Iowa Corporation shareholders. Solicitation was carried out mainly on a person-to-person basis in Iowa, but memberships were also sought by mail and telephone from shareholders in other states.

Plaintiffs, Greater Iowa Corporation, its directors and three shareholders purporting to represent the class of all shareholders in the corporation, brought an action to enjoin all further activity of the trust.³ According to plaintiffs, the Iowa Trust had failed to register its securities⁴ with the Securities and Exchange Commission,⁵ had made deceptive statements in its

¹ 378 F.2d 783 (8th Cir. 1967).

² In general, the voting trust is a device for concentrating the voting power of several shareholders into one party so that the latter may control or have partial control of the corporation. To participate in a voting trust, the shareholder transfers his shares in the corporation to trustees. The trustees then become holders of legal title to the shares, with power to vote them at shareholders' meetings.

³ Brief for Appellant at 5, 378 F.2d 783 (8th Cir. 1967).

⁴ Under the Securities Act of 1933 § 2(1), 15 U.S.C. § 77b(1) (1964), a voting-trust certificate is defined as a "security," so that it is regulated under the securities acts. A voting trust issues such certificates to its participating shareholders to indicate the number of shares delivered to it by the shareholder.

⁵ As required by the Securities Act of 1933 § 5(a), 15 U.S.C. § 77e(a) (1964), and the Investment Company Act of 1940 § 7(a)(1), 15 U.S.C. § 80a-7(a)(1) (1964).

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solicitation materials,⁶ and had failed to comply with SEC proxy-solicitation rules. These rules require submission of solicitation materials to the Commission before sending such materials to shareholders,⁷ require the sending of a standard "proxy statement" to shareholders,⁸ and prohibit false or misleading statements in solicitation materials.⁹ They are promulgated under Section 14(a) of the Securities Exchange Act of 1934 which provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce . . . , in contravention of such rules and regulations as the Commission may prescribe . . . for the protection of investors, to solicit . . . any proxy or consent or authorization in respect of any [registered] security¹⁰

The trial court granted summary judgment to defendants, holding that a voting trust could not be a "proxy or consent or authorization" within the Act.¹¹ On appeal, the Eighth Circuit HELD: Reversed. A voting trust may constitute a "proxy or consent or authorization" within the meaning of section 14(a). The court further stated that section 14(a) and rules promulgated under it should apply "when[ever] any group, regardless of the label attached, has as its [sic] goal the influencing or control of a registered corporation, and through organized, widespread solicitation seeks to secure the voting rights of shareholders, reserving in these shareholders a beneficial interest in the registered corporation"¹² The case was remanded for trial on

⁶ Plaintiffs charged that defendants had violated the Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (1964), the Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1964), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1967), all of which prohibit the use of manipulative or deceptive devices in connection with the purchase or sale of a registered security.

⁷ 17 C.F.R. § 240.14a-6 (1967).

⁸ *Id.* § 240.14a-3.

⁹ *Id.* § 240.14a-9.

¹⁰ 15 U.S.C. § 78n(a) (1964). This note will consider only whether solicitation for a voting trust should be regulated as solicitation of a proxy under § 14(a). Both the trial court and the appellate court held that a corporation does not have standing to enjoin violations of the securities acts' registration and antifraud provisions. Whether a corporation should have standing to enforce these provisions has been discussed elsewhere. See Comment, Private Enforcement Under Rule 10b-5: An Injunction for a Corporate Issuer? 115 U. Pa. L. Rev. 618 (1967). Federal jurisdiction attached in *Greater Iowa* because defendants used the mails and solicited memberships across state boundaries. Once federal jurisdiction attaches in a securities case, all requirements of the securities acts are applicable. *Creswell-Keith, Inc. v. Willingham*, 264 F.2d 76 (8th Cir. 1959). Iowa law requires registration of securities issued there, Iowa Code Ann. § 502.7 (1949), and a voting trust seems to be included in the definition of "security" included in Iowa Code Ann. § 502.3(1) (1949). The requirements of fair and honest disclosure to the investor contained in the Iowa Code are much like those of the federal securities acts. Iowa Code Ann. §§ 502.7, -10 (1949). Plaintiffs' allegations of violations of state law were not considered in either the district court's summary judgment or the circuit court's opinion, but will be taken up on retrial. 378 F.2d at 799.

¹¹ *Greater Iowa Corp. v. McLendon*, Civil No. 66-C-511-EC (N.D. Iowa, Dec. 2, 1966).

¹² 378 F.2d at 798.

whether solicitation of membership in the Iowa Trust amounted to solicitation of a proxy, consent or authorization.¹³

Because section 14(a) explicitly mentions a "proxy" but not a "voting trust," a comparison of the two devices will be necessary in determining whether the latter falls within the statute's ambit. "Proxy" means the grant of authority by a stockholder to another person to vote the former's shares.¹⁴ The shareholder specifies the extent of authority granted and generally reserves the power to revoke the authority at any time.¹⁵ The general proxy, which is the most frequently used, empowers the proxy holder to vote on all ordinary business but not on such unusual transactions as a fundamental change in the corporate charter or dissolution.¹⁶ The proxy could not, for instance, vote to transfer all of the corporation's assets to another corporation.¹⁷ Nor could the proxy normally vote for reorganization of the corporation.¹⁸ A proxy is usually given for a short period of time—commonly for a particular meeting or purpose.¹⁹

The proxy has become a necessary device by which voting rights are exercised in large, publicly held corporations. Most states require that a quorum constituting a majority of voting shares be present at a shareholders' meeting. In large corporations, it would be practically impossible to accommodate this majority at a meeting. Further, shareholders may fail to attend because of lack of interest or a feeling that they are incapable of understanding business at a meeting. Thus the proxy system provides a necessary method of assuring that a quorum will be present or represented.

Unlike the proxy, the voting trust is not an ordinary means of exercising voting rights. Instead, the voting trust has developed as a method of binding shareholders' votes into a cohesive block in order to meet a particular need.²⁰ To participate, the shareholder delivers his stock certificates to the voting trustees.²¹ The trust then issues voting-trust certificates to the shareholder as evidence of his beneficial interest in the trust.²² The trustees are given

¹³ The court declined to rule as a matter of law that defendants' voting trust came within the proscription of § 14(a) since there had been no trial on the merits. *Id.*

¹⁴ 5 Z. Cavitch, *Business Organizations* 1071 (1967). Other usages of the term "proxy" are: (1) the instrument by which authority is granted; (2) the agent to whom authority is granted; and (3) the manner of voting through an agent.

¹⁵ H. Ballantine, *Corporations* 407, 409 (rev. ed. 1946). To grant a proxy is to create a principal-agent relationship.

¹⁶ *Id.* at 407.

¹⁷ *Rossing v. State Bank of Bode*, 181 Iowa 1013, 1018-19, 165 N.W. 254, 256-57 (1917).

¹⁸ *Farish v. Cieneguita Copper Co.*, 12 Ariz. 235, 241, 100 P. 781, 783 (1909).

¹⁹ H. Ballantine, *supra* note 15, at 411; 5 Z. Cavitch, *supra* note 14, at 1082-83 n.27. The shareholder giving the proxy may fix its duration. Some state statutes limit the proxy's duration unless the instrument provides otherwise. E.g., N.Y. Gen. Corp. Law § 19(3) (McKinney Supp. 1967), which limits the duration of the proxy to eleven months unless otherwise provided for in the agreement.

²⁰ Comment, *The Voting Trust*, 34 N.Y.U.L. Rev. 290-92 (1959).

²¹ In most cases the voting trustees then surrender the stock certificates to the corporation; a transfer is made on the books of the corporation; and new shares are issued in the name of the trustees. 5 Z. Cavitch, *supra* note 14, at 1154-55. This step is not required by Iowa law. Iowa Code Ann. § 496A.33 (1962).

²² 5 Z. Cavitch, *supra* note 14, at 1155. "The holders of voting trust certificates are

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authority to vote on all ordinary business coming before shareholders and all unusual business which the contract specifies may be voted on by the trustees.²³ The trust constitutes a contract for a stated period,²⁴ the shareholder usually retaining no power to withdraw his shares, or, at best, a limited power.²⁵ An unlimited power of withdrawal, while possible, would seem to defeat the usual purpose of binding voting power into a united block. Protecting unorganized minority shareholders by combining their votes into a strong block is one of the normal uses of the voting trust,²⁶ and was no doubt contemplated by the organizers of the Iowa Trust.

A shareholder who participates in a voting trust gives up a much greater parcel of voting rights than one who authorizes a proxy. The grant of voting rights to the trustees is usually irrevocable and the scope of the right given is practically unlimited. The time for which it is given is usually substantial. In reality, once he has given his stock to the voting trustees, the shareholder loses all power to manage his shares or business coming before corporate shareholders.²⁷ Nevertheless, the devices are similar to the degree that they both deprive the shareholder of his right to vote. Whether the shareholder has power to revoke the authority given seems secondary to the essential feature of both devices: that the shareholder confers power to another to vote his shares for some period of time.

Whether a voting trust is a "proxy or consent or authorization" under section 14(a) should be determined in the light of the essential similarity of the proxy and voting trust as means of exercising the corporate franchise. The *Greater Iowa* court held that the provisions of section 14(a) should be construed broadly to cover solicitation for a voting trust. The established trend in statutory construction of the securities acts supports that holding. The court relied on reasoning in *SEC v. C. M. Joiner Leasing Corp.*,²⁸ a securities

often spoken of as 'equitable owners' of shares of stock." They are equitable tenants in common with contract rights to receive dividends and to have transferred back to them a specified number of shares on termination of the trust. H. Ballantine, *supra* note 15, at 431.

²³ 5 Z. Cavitch, *supra* note 14, at 1182.

²⁴ The Iowa Trust agreement did not specify the duration of the trust. It was "expected" to endure for five years, but the duration was left to the discretion of the trustees. The Iowa Trust 9. Under Iowa law a voting trust could continue for 20 years. Iowa Code Ann. § 496A.33 (1962). Most states limit by statute the duration of a voting trust. The average period is 10 years, but the period may vary from 5 to 21 years. 5 Z. Cavitch, *supra* note 14, at 1168-69.

²⁵ In the Iowa Trust agreement, the trustees, at their discretion, could pay the shareholder in cash at any time prior to dissolution of the trust, rather than return the shares of Greater Iowa Corporation stock. The Iowa Trust 9.

²⁶ Comment, *The Voting Trust*, *supra* note 20, at 291-92. A voting trust is also used to secure stable management for the corporation and to prevent competing corporations from buying up control of the corporation.

²⁷ [T]he beneficial owner ceases to be recognized as a shareholder of record and may be deprived not only of any right to vote for directors, but also of any right to inspection, notice or information as against the corporation or any voice in making most fundamental changes, such as mergers and consolidations, sales of entire assets . . . , and by-law and charter amendments which may adversely affect him.

H. Ballentine, *supra* note 15, at 431.

²⁸ 320 U.S. 344 (1943).

case involving an analogous statutory construction problem, in which the Supreme Court set forth the classic expression of this trend:

[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.²⁹

In *Joiner*, the Court considered whether an assignment of an oil lease on property surrounding a test oil well was a sale of an investment contract or security within the definitions of Section 2(1) of the Securities Act of 1933.³⁰ Though using a standard real property form of assignment of an oil lease, the defendants were, in effect, raising capital for their test drilling. Defendants showed that an assignment of an oil lease was unlike any of the specific types of security mentioned in section 2(1), which provides:

“[S]ecurity” means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, . . . investment contract, . . . fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a “security”

They then argued that the general term “any interest or instrument commonly known as a ‘security,’ ” following a series of terms of specific meaning, should not be given its full and general meaning, but that it should be held to apply only to securities of the same kind as those that preceded it. Defendants concluded that section 2(1) did not cover an assignment of an oil lease. The Court rejected defendants’ argument, saying, “We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents.”³¹ It held that if the lease assignment transferred an economic interest in the enterprise of drilling for oil and was widely dealt in in a manner which established its character as a security, then it was to be regulated as a security.³² Such regulation was adjudged appropriate, although an assignment of an oil lease was not mentioned specifically in section 2(1), because “trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end.”³³ The Court, in effect, gave each

²⁹ *Id.* at 350-51. In short, the court first determines legislative purpose, then in light of this purpose interprets the literal statutory provisions in the particular case.

We can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such purpose, would have dealt with it, if it had been presented to them at the time. To say that that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable.

Borella v. Borden Co., 145 F.2d 63, 64-65 (2d Cir. 1944) (L. Hand, J.), *aff’d*, 325 U.S. 679 (1945).

³⁰ 15 U.S.C. § 77b(1) (1964).

³¹ 320 U.S. at 351.

³² *Id.* at 349, 351.

³³ *Id.* at 349.

substantive term in section 2(1) a full and unrestricted meaning. Application of the *Joiner* method of statutory construction to section 14(a) would bring a voting trust within its purview. Section 14(a) provides that it shall be unlawful to solicit "any proxy or consent or authorization" without compliance with SEC rules. The first question in interpreting this provision is whether the general terms "consent" and "authorization" are limited by the specific term "proxy" which precedes them. It is submitted that the general terms should not be so limited. The three categories are grouped disjunctively by the word "or" indicating an apparent intent to give each term equal force.³⁴ If disjunctive interpretation is given to these categories, the general terms could not be influenced by the specific and the general term "authorization" might then be given its common meaning—a grant or endowment with power or authority.³⁵ This meaning is sufficient to cover a voting trust or any device in which the shareholder authorizes or endows a party with power to vote his shares.

One may argue and some cases have held that "or" is often used in legislation as a substitute for the conjunctive "and"³⁶ lending support to the position that section 14(a) deals only with the proxy and that "consent" and "authorization" are used only to describe acts involved in granting a proxy. But it appears that only a disjunctive interpretation is appropriate for section 14(a). Generally, courts have varied from the usual disjunctive meaning of "or" where it is clear from the context that the legislature intended the conjunctive meaning to apply or where it is necessary to make the provision conform with legislative history or purpose on the subject matter.³⁷ But there is no reason, from the legislative history of section 14(a), to give a conjunctive meaning to "or."³⁸ On the contrary, in context the phrase "proxy or consent or authorization" (Emphasis added.) rather than "proxy, consent or authorization" exhibits a purposeful attempt to keep each of the categories separate. Further, *Dunning v. Rafton*,³⁹ a recent district court case, has construed section 14(a) to give independent meaning to each of these categories. There, the court declined to limit the term "consent" by the term "proxy" preceding it.⁴⁰ By the applicable canons of statutory construc-

³⁴ "Or" is commonly used as a disjunctive. *State v. Dennis*, 150 Conn. 245, 248, 188 A.2d 65, 66-67 (1963); *State ex rel. Finigan v. Norfolk Live Stock Sales Co.*, 178 Neb. 87, 89, 132 N.W.2d 302, 304 (1964).

³⁵ See 378 F.2d at 796.

³⁶ See *DeSylva v. Ballantine*, 351 U.S. 570 (1956), in which the Court found that legislative history of an act using "or" indicated that Congress intended the word to be read in a conjunctive sense rather than as a disjunctive.

³⁷ *Id.*; see *Harris v. Egan*, 135 Conn. 102, 105, 60 A.2d 922, 924 (1948). But see *Union Starch & Ref. Co. v. NLRB*, 186 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

³⁸ See *Dunning v. Rafton*, [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,660 (N.D. Cal. 1965). There the court appears not even to consider the possibility that any interpretation other than the disjunctive should be attached to "or." The court in *Greater Iowa* apparently found no necessity to support its position that Congress intended any meaning other than the disjunctive to be applied to the phrase "proxy or consent or authorization." 378 F.2d at 796.

³⁹ [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,660 (N.D. Cal. 1965).

⁴⁰ *Id.* at 95,436.

tion, "or" should be interpreted in the disjunctive, and the substantive terms in subsection (a) should be given full effect. "Authorization" should be given its broadest meaning, and should include a voting trust.

Not only statutory construction, but also the congressional purpose in enacting section 14(a), require the bringing of a voting trust within the compass of the section. The *Greater Iowa* court concluded that section 14(a) was enacted to ensure full, open disclosure of information to shareholders whose voting rights are being sought. Since nondisclosure by a voting trust threatens these rights, the court brought the shareholder solicitation within the act. The securities acts, it reasoned, are remedial; that is, they were enacted to prevent manipulations in securities transactions and the economic ills which resulted therefrom.⁴¹ The Securities Exchange Act of 1934

has four basic purposes: to afford a measure of disclosure to people who buy and sell securities; to prevent and afford remedies for fraud in securities trading and manipulation of the markets; to regulate the securities markets; and to control the amount of the Nation's credit which goes into those markets.⁴²

The remedial purpose of section 14(a) is the protection of "fair corporate suffrage."⁴³ The provisions of section 14(a) and the Commission's proxy rules promote this objective by assuring full and accurate disclosure to the shareholder whose proxy, consent or authorization is sought.⁴⁴ It is a familiar canon of statutory construction that remedial statutes are liberally construed

⁴¹ 378 F.2d at 795. The official purpose of the Securities Act of 1933 is "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . ." 48 Stat. 74 (1933).

The regulation of the securities market has been made necessary by the increasing complexity of the economy, which so diffuses and differentiates the financial interests of the ordinary citizen, that he no longer has any personal contact with the managers of all his interests. The Securities Exchange Act is intended to extend the legal conception of a fiduciary relationship by regulating stock exchanges and the relationships of the investing public to corporations which invite investment by listing on exchanges.

² CCH Fed. Sec. L. Rep. ¶ 21,125, at 15,553 (1966).

⁴² 1 L. Loss, *Securities Regulation* 130-31 (2d ed. 1961).

⁴³ The section stemmed from the congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." *Id.* at 14.

J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964).

⁴⁴ See *SEC v. May*, 229 F.2d 123 (2d Cir. 1956).

Appellants' fundamental complaint appears to be that stockholder disputes should be viewed in the eyes of the law just as are political contests, with each side free to hurl charges with comparative unrestraint, the assumption being that the opposing side is then at liberty to refute and thus effectively deflate the "campaign oratory" of its adversary. Such, however, was not the policy of Congress as enacted in the Securities Exchange Act. There Congress has clearly entrusted to the Commission the duty of protecting the investing public against misleading statements made in the course of a struggle for corporate control.

Id. at 124.

to carry out their remedial purposes.⁴⁵ Insofar as the *wording* of section 14(a) will permit, then, any device which controls the exercise of shareholders' voting rights should be regulated.⁴⁶ A shareholder does give up voting rights when he joins a voting trust. Indeed, he does so even more effectively than when he gives a proxy. Therefore, the congressional purpose of protecting shareholders' voting rights will necessitate a broad statutory reading, including a voting trust under section 14(a).

Courts have given this broad reading to section 14(a) and similar laws. One case, *SEC v. Okin*,⁴⁷ involved a communication sent to shareholders requesting that they withhold or revoke any previously authorized proxies. Such communications are not mentioned in section 14(a). But the court held that this communication was regulated by SEC proxy rules so long as it was part of a continuous plan resulting in solicitation for a proxy and preparing the way for its success. It was reasoned that unless such presolicitation communications were regulated, the purpose of the proxy rules would be defeated since the person seeking to obtain the proxy could spread the misinformation prior to actual solicitation and be free from regulation.⁴⁸

Similarly, the court in *Dunning v. Rafton*,⁴⁹ resorted to the remedial purpose of section 14(a) as a basis for holding that a request that shareholders terminate their membership in a voting trust ought to be regulated as a solicitation of "consent." The court decided that the purpose of the securities acts was to protect shareholders' interests. "Whether this struggle involves solicitation for someone else's proxy or circularizations urging him to vote, himself, in a certain manner, does not lessen the need for protection against misleading statements."⁵⁰ In short, the legislative purpose behind section 14(a), as interpreted by the courts, requires that any solicitation of voting rights, including a voting trust, be regulated under its provisions.

Besides the reasons of statutory interpretation and congressional purpose, practical necessity requires that voting-trust solicitations be covered by securities regulations. If the voting-trust solicitation were not regulated, one would need only to set up a voting trust in lieu of a proxy committee in order to escape regulation. It is true that a voting trust is a more expensive and less attractive device than the proxy for combining votes. Tax⁵¹ and adminis-

⁴⁵ *SEC v. Joiner*, 320 U.S. at 353-55; *Guardian Trust & Deposit Co. v. Fisher*, 200 U.S. 57, 69-70 (1906).

⁴⁶ See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963). The Court held it unnecessary for the SEC to prove all the elements of common law fraud in a case brought under the securities acts' antifraud provisions: "Congress intended the Investment Advisors Act of 1940 [15 U.S.C. §§ 80b-1 to -b-20 (1964)] to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.* at 195.

⁴⁷ 132 F.2d 784 (2d Cir. 1943) (L. Hand, J.) The *Okin* case, involving a utility company, was brought under the Public Utility Holding Company Act of 1935 § 12(e), 15 U.S.C. § 79l(e) (1964), the provisions of which are substantially identical to § 14(a) of the Securities Exchange Act.

⁴⁸ 132 F.2d at 786; accord, *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 696 (2d Cir. 1966).

⁴⁹ [1964-1966 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,660 (N.D. Cal. 1965).

⁵⁰ *Id.* at 95,437.

⁵¹ In New York State, a stock transfer tax is levied on transfers of voting-trust certificates just as on other securities, N.Y. Tax Law § 270(1) (McKinney 1954), as

trative expenses incurred in operating the trust are generally passed on to the shareholder by deducting them from corporative dividends.⁵²

The costs of maintaining a proxy solicitation, on the other hand, are borne by the solicitation committee, not the shareholder.⁵³ The shareholders' dividends will not be affected by a proxy solicitation, except that some judicial decisions have permitted the corporation to assume the expenses of a solicitation committee that succeeds in gaining control of the corporation.⁵⁴ A voting trust, therefore, is generally more expensive to a shareholder than is a proxy. Other factors which make the voting trust less attractive to the shareholder than the proxy are: (1) loss of legal status as shareholder, (2) dependence of his interest on those of the trustees, and (3) inability to revoke the trust.

Despite these general disadvantages, a voting trust could be set up to operate in much the same manner as a proxy. The trust might be drawn to terminate in one or two years. The shareholder might be given the power to revoke his participation. Further advantage would be gained if the voting trust were free from the expense and rigors of complying with SEC rules on disclosure. Then despite the extra expense the shareholder could easily be persuaded to join.⁵⁵ Thus a voting-trust agreement could be executed which would be substantially the same as a proxy, differing only in formalities. To allow circumvention of the proxy rules merely on the basis of form would defeat the congressional objective of protecting shareholders' voting rights.

Statutory interpretation of section 14(a), its general purpose, and practical necessity have been shown to require regulation of a voting-trust solicitation. The problem in *Greater Iowa* may be considered from yet a fourth aspect: could the defendants have received fair notice, in a practical sense, from a reading of the securities acts, that the SEC proxy rules would apply to their solicitation? The specific provisions of section 14(a) do not mention voting trusts. The defense has indicated that a study of the securities acts convinced them that no section applied to the Iowa Trust.⁵⁶

It is submitted, however, that the probability that solicitation for a voting trust is regulated by section 14(a) should be generally apparent to parties organizing the trust. A position that section 14(a) is vague vis-à-vis regulation of voting-trust solicitations neglects several factors: (1) that regulatory statutes are to be read not according to "academic definition[s] of abstract terms" but by "the practical criterion of fair notice to those to

interpreted in *Chicago Great Western Railroad Co. v. State*, 197 App. Div. 742, 743, 189 N.Y.S. 457 (1921), aff'd, 233 N.Y. 661, 662, 135 N.E. 960 (1922), imposing another financial burden on voting trusts in that state.

⁵² 5 Z. Cavitch, supra note 14, at 1160; cf. *The Iowa Trust* 8, providing that the shareholders' interest in the trust "may be reduced in value in proportion to certain necessary charges and expenses as authorized by the terms of [the] instrument . . ."

⁵³ E. Aranow & H. Einhorn, *Proxy Contests for Corporate Control* 10-12 (1957).

⁵⁴ See *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 173, 128 N.E.2d 291, 293 (1955).

⁵⁵ It is significant that of some 40 *Greater Iowa* Corporation shareholders solicited, about 22 joined the trust. That half of the parties solicited would give up their voting rights for up to 20 years perhaps in itself rebuts the argument that the voting trust is too cumbersome and expensive a device to attract wide usage. See note 24 supra.

⁵⁶ Letter from Upton B. Kepford, attorney for the Iowa Trust, October 10, 1967.

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whom the statute is directed;⁵⁷ (2) that the securities acts in general have been interpreted to effectuate the broadest protection of shareholders' interests; and (3) that decisions like *Okin* and *Dunning* have applied this broad interpretation specifically to section 14(a). When the statute is read in the context of its general purpose,⁵⁸ the probability seems clear that solicitation for a voting trust is regulated.

The *Greater Iowa* decision appears, on the whole, to be a proper extension of the trend in statutory construction of the securities acts. The decision does not overestimate congressional purpose nor does it read into the statute meaning which is clearly not there. In the long run the decision will serve to protect shareholders' interests by assuring full and accurate disclosure by parties soliciting memberships for a voting trust of the same information as is required in proxy solicitations. Moreover, it will not leave a gap in control over voting devices on the basis of formal differences.

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⁵⁷ *American Communications Ass'n v. Douds*, 339 U.S. 382, 412 (1950) (Vinson, C.J.).

⁵⁸ *Id.* As a general rule, penal statutes are construed strictly while remedial statutes are construed liberally. *SEC v. Joiner*, 320 U.S. at 353-55 and *Guardian Trust & Deposit Co. v. Fisher*, 200 U.S. at 69-70. The *Greater Iowa* case presents the interesting possibility that the statute would be construed broadly where, as here, a civil remedy is sought, but strictly where criminal penalties sought. A strict construction of § 14(a) might exclude those voting devices which were not specifically mentioned in the statute. But the possibility of criminal action against the Iowa Trust seems remote. The SEC has always enforced its proxy rules by seeking an injunction to be imposed until the defendant complies with its requirements, rather than by prosecution. E. Aranow & H. Einhorn, *supra* note 53, at 412.