



FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION IN ADVISORY OPINION 1980-118

of

COMMISSIONERS THOMAS E. HARRIS and ROBERT O. TIERNAN

We dissent from the majority in Advisory Opinion 1980-118.

On September 23, 1980, the Exchange International Corporation (EIC) requested an advisory opinion concerning the solicitation of shareholders who had executed an irrevocable proxy agreement as a condition precedent to the acquisition of stock.

Specifically, the request asked: "Given the nature of the proxy, does a stockholder of EIC who has given such a proxy...still have sufficient authority 'to direct how that stock shall be voted' to be considered a stockholder pursuant to 11 CFR 114.1(h)?"

Obviously, this request requires an examination of the proxy agreement in order to answer the threshold questions of: (1) Whether the stockholder ever had the right to direct how the stock shall be voted; (2) whether the stockholder still retains the right; and (3) whether the retained rights are "sufficient authority" for directing how the stock shall be voted.

The supplemental information supplied by EIC indicates that the answer to the first question is no. The proxy agreement was entered into before the stock was purchased. Therefore, the purchasers never had the rights which were subject to proxy.

However, the proxy agreement is not total and the purchasers did retain certain rights to vote. The majority opinion does not answer whether these retained rights are sufficient authority to place the purchasers within the definition of "stockholder" as defined in our regulations.

We think not. One of the principal powers of a stockholder is to elect Directors and other primary officers. Fletcher Cyc Corp. (Perm Ed) 5717. In the instant case, this fundamental right was proxied as consideration for the purchase of the stock. Without this present power to vote on board membership, the "stockholder" does not have sufficient authority to direct how the stock shall be voted and, therefore, does not come within the Commission's definition of "stockholder." 11 CFR 114.1(h).