and shifting to tests designed to assure both adverseness and a check on the administrative process, the courts would be offered the opportunity to better safeguard both the public interest and that of private litigants.

IX. JUDICIAL REVIEW—ACTIONS REVIEWABLE

SEC Non-Action Decision Constitutes "Reviewable Order"

In *Medical Committee For Human Rights v. SEC*[1] the United States Court of Appeals for the District of Columbia Circuit held that a Securities and Exchange Commission decision not to object to Dow Chemical Company's[2] exclusion of a stockholder's proposal from proxy materials was a judicially reviewable order. The Medical Committee for Human Rights, a Dow stockholder, had requested that a resolution to amend the Dow charter to bar the sale of napalm, unless assurances were given that it would not be employed to injure humans, be included in the proxy materials sent to stockholders for the 1968 annual meeting. Dow rejected the Medical Committee's request, relying on SEC proxy rules 14a-8(c)(2) and 14a-8(c)(5).[3] The Medical Committee then revised its proposal to resolve that Dow stockholders request that the board of directors consider the

1. 432 F.2d 659 (D.C. Cir. 1970), *cert. granted*, 39 U.S.L.W. 3409 (U.S. Mar. 23, 1971) (No. 1162).

2. In late 1967 the Dow Chemical Company was a target of antiwar demonstrations, directed primarily at Dow recruiters visiting college campuses, as students objected to the company's manufacture of napalm for use in the Vietnam conflict. U.S. NEWS & WORLD REP., Dec. 18, 1967, at 8. Dow faced a different type of protest against its manufacture of napalm when a stockholder proposed an amendment to the company's certificate of incorporation which would have precluded the sale of napalm in the absence of assurance of nonuse against humans. Letter from Quentin D. Young, National Chairman, Medical Committee for Human Rights, to Secretary, Dow Chemical Company, Mar. 11, 1968, *found in* Certificate of Transcript of Record at 1a-3a, Medical Committee v. SEC, 432 F.2d 659 (D.C. Cir. 1970) [hereinafter cited as Record]. The stockholder's objections to the sale of napalm were based primarily on "concerns for human life," but concern was also expressed for the company's business future because of its difficulty in recruiting capable college graduates. *Id.*

3. 17 C.F.R. § 240.14a-8(c) (1970). The Commission's proxy rules provide a procedure for submission of individual stockholder proposals to corporate management for inclusion in the corporation's proxy statement. *Id.* § 240.14a-8. Under these rules an otherwise properly submitted stockholder proposal may be excluded by management when it is submitted "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes," *id.* at 8(c)(2), or when it asks management to "take action with respect to a matter relating to the conduct of the ordinary business operations of the [company]." *Id.* at 8(c)(5). When a company decides to exclude a proposal it must file with the SEC a copy of the proposal, any stockholder statement in support thereof, and management's reasons for exclusion, supported by opinions of counsel when the exclusion is based on matters of law. *Id.* at 8(d).

advisability of adopting an amendment "that the company shall not make napalm";[4] SEC staff review, and oral argument if necessary, was requested if Dow persisted in its position.[5] The SEC Division of Corporation Finance subsequently accepted Dow's interpretation of the proxy rules and recommended no Commission action if Dow excluded the proposal.[6] The Medical Committee renewed its request for Commission review and oral argument.[7] Ultimately the SEC "approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omit the proposals from its proxy statements for the forthcoming meeting of shareholders."[8] The Medical Committee then petitioned the Court of Appeals for the District of Columbia Circuit for review of the SEC response.

Although the federal district courts have exclusive jurisdiction for violations of the Securities Exchange Act of 1934[9] and rules and regulations adopted thereunder,[10] any person "*aggrieved* by an *order* issued by the Commission in a *proceeding* under [the Act] to which such person is a *party* may obtain a review of such order" in the United States courts of appeals.[11] The SEC answered the Medical Committee's petition by contending that the court of appeals lacked jurisdiction to hear the case,[12] while the Medical Committee relied on

4. Letter from Quentin D. Young, General Counsel, Dow Chemical Company, Feb. 3, 1969, *found in* Record 16a.

5. The SEC had received copies of prior communications between the Medical Committee and Dow. *See* Record 1a, 4a, 5a.

6. Letter from Courtney Whitney, Chief Counsel, Division of Corporation Finance, SEC, to Secretary, Dow Chemical Co., Feb. 18, 1969, *found in* Record 20a.

7. The Medical Committee's counsel argued that the proposal could not be excluded under SEC rule 14a-8(c)(2), 17 C.F.R. § 240.14a-8(c)(2) (1970), because the primary purpose of the proposal was to aid business and that political purposes were subsidiary. Also, exclusion under rule 14a-8(c)(5) was opposed on the grounds that an amendment to the Certificate of Incorporation could not, under Delaware law, be part of the "ordinary business operations" of the company. Letter from Jeffrey D. Bauman, Counsel, Medical Committee, to SEC, Feb. 28, 1969, *found in* Record 26a.

8. Letters from SEC to Jeffrey D. Bauman, Counsel, Medical Committee, and W.A. Groening, Jr., General Counsel, Dow Chemical Co., Apr. 2, 1969, *found in* Record 44a-45a.

9. 15 U.S.C. § 78aa *et seq.* (1964).

10. *Id.* § 78aa; 17 C.F.R. § 240.14a-1 *et seq.* (1970).

11. 15 U.S.C. § 78y(a) (1964) (emphasis added); *cf.* M.G. Davis & Co. v. Cohen, 256 F. Supp. 128, 131 (S.D.N.Y. 1966), *aff'd*, 369 F.2d 360 (2d Cir. 1966). *See also* Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. V, 1970), the provisions of which have been held applicable to the scope of judicial review of SEC action. *In re* Engineers Public Serv. Co., 221 F.2d 708, 712 (3d Cir. 1955).

12. Answer Brief for Respondent at 10. Because they maintained this position throughout the proceedings, the Commission never argued the merits of the Medical Committee's proposal in any of its briefs.

section 25(a) of the Act to provide jurisdiction, claiming that it was an "aggrieved party" as a result of an SEC "order" allowing Dow to omit the Committee proposal from the proxy solicitation materials. Avoiding express use of the term "order," the District of Columbia Circuit nevertheless implicitly found a reviewable order under section 25(a) by applying concepts of finality, formality, and pragmatism outside the express statutory language.

Pre-*Medical Committee* section 25(a) review cases focused on the existence of an "order" resulting from a "proceeding" and on the issue of exhaustion of administrative remedies. A preliminary decision to hold an investigation was previously held unreviewable because it was not a final order,[13] and an SEC letter denying a request for amendment of certain Commission filing requirements has been held not an order because there was no "proceeding."[14] But in *American Sumatra Tobacco Corp. v. SEC*[15] an SEC denial of confidential treatment to information filed with the agency, after a hearing, was held to be an order reviewable under section 25(a) because it affected only the petitioner and not the public generally.[16] Based upon the provision of the act that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission,"[17] exhaustion of administrative remedies has been held a prerequisite to section 25(a) review.[18] Thus, before *Medical Committee*, the word "order" as used in section 25 has been held to imply some element of administrative finality.[19] In short, section 25(a) had previously been interpreted to

13. SEC v. Andrews, 88 F.2d 441 (2d Cir. 1937). Review was denied on the grounds that the petitioner had sought relief from a district court, which is without jurisdiction to review under section 25(a), and that the order was merely interlocutory and, as such, unreviewable under section 25(a). *Cf.* Guaranty Underwriters, Inc. v. SEC, 131 F.2d 370 (5th Cir. 1942).

14. Third Ave. Ry. v. SEC, 85 F.2d 914 (2d Cir. 1936).

15. 93 F.2d 236 (D.C. Cir. 1937).

16. 93 F.2d at 239. In finding the order to have affected the petitioner particularly—individually—the court distinguished Third Ave. Ry. v. SEC, 85 F.2d 914 (2d Cir. 1936), which affected the petitioner generally—others were similarly affected by certain filing requirements. As to the allegations of irreparable harm, see note 33 *infra*. The court also held that the availability of relief in equity was not a bar to review under section 25(a) when such review might be more convenient to the aggrieved party. See notes 72-84 *infra* and accompanying text.

17. 15 U.S.C. § 78y(a) (1964).

18. *See, e.g.*, Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 800-01 (D.C. Cir. 1965); R.A. Holman & Co. v. SEC, 323 F.2d 284, 287-88 (D.C. Cir.), *cert. denied*, 375 U.S. 943 (1963); The Wolf Corp. v. SEC, 317 F.2d 139, 142-43 (D.C. Cir. 1963); Schwebel v. Orrick, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958).

19. *Cf.* Okin v. SEC, 143 F.2d 960, 961 (2d Cir. 1944); Jones v. SEC, 79 F.2d 617, 619 (2d Cir. 1935), *rev'd on other grounds*, 298 U.S. 1 (1936).

preclude judicial review except for final *orders* resulting from *proceedings* solely affecting individual petitioners.

Judicial interpretations of similar statutes[20] suggest other components of section 25(a) which require consideration. In *FPC v. Metropolitan Edison Co.*[21] the Supreme Court, in analyzing review under the Federal Power Act,[22] limited it to orders of a "definitive character," not "merely procedural," resulting from an evidentiary, fact-finding hearing.[23] Such an exhaustion requirement was deemed to be dictated by the statute's policy against "constant delays . . . for the purpose of reviewing mere procedural requirements or interlocutory directions."[24] A further explanation of the *definitive* versus *procedural* order distinction was provided in *Mallory Coal Co. v. National Bituminous Coal Commission*[25] where judicial review of an order for disclosure of certain confidential information under the Bituminous Coal Act of 1937[26] was denied because the order was deemed a preliminary step in a procedural program for determining rates and marketing provisions for bituminous coal. Since the order was not the type generally preceded by a hearing and supported by findings, it did not warrant review.[27] Subsequent to *Metropolitan*

20. For example, 28 U.S.C. § 1336 (1964), provides for review of petitions brought to enjoin, set aside, or suspend "any order" of the ICC. An examination of Frozen Food Express v. United States, 351 U.S. 40 (1956), CBS v. United States, 316 U.S. 407 (1942), and United States v. Los Angeles R.R., 273 U.S. 299 (1927), decided under this statute and its predecessors, indicates the progression from judicial reliance on formal agency action as a prerequisite to finding a reviewable order, to judicial analysis of the substantial effect of the action on a petitioner. However, in both *CBS* and *Frozen Food* such an analysis was facilitated by the presence of agency action of a more formal nature than in *Medical Committee*. See notes 50-51 *infra* and accompanying text. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 398 (1965) [hereinafter cited as JAFFE].

21. 304 U.S. 375 (1938).

22. 16 U.S.C. § 825*l*(b) (1964). The Act provides that "[a]ny party to a proceeding under [the Act] aggrieved by an order issued by the [Federal Power] Commission in such proceeding may obtain a review of such order. . . ."

23. 304 U.S. at 383-84. The Court felt that review of procedural orders would unnecessarily delay the administrative process. In *Metropolitan Edison Co.* the order at issue provided for a hearing on a certain date in conjunction with an FPC investigation of the petitioner.

24. *Id.* Of course, interlocutory appeals in an ongoing proceeding might save time by convincing an appellant of the futility of continuing to prosecute his action or by revealing fatal flaws in agency policy or procedure without the necessity of completing the full administrative process.

25. 99 F.2d 399 (D.C. Cir. 1938).

26. Act of April 26, 1937, ch. 127, 50 Stat. 72. The portion of that Act under consideration was virtually identical to section 25(a).

27. 99 F.2d at 405-06. However, injunctive relief might be available. *See* Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Shields v. Utah Idaho Cent. R.R., 305 U.S. 177 (1938); Shannahan v. United States, 303 U.S. 596 (1938).

Edison and *Mallory* the consequences of agency action rather than its form or label were accepted as a test for the reviewability of some agency orders.[28] Although the specific criteria of the legal consequences test are difficult to isolate, it is apparent that finality is no longer always required.[29] Under a statute authorizing judicial review of final orders,[30] the District of Columbia Circuit in *Isbrandtsen Co. v. United States*[31] found reviewable an interlocutory, pre-hearing order of the Federal Maritime Board permitting a rate system agreement to become effective within forty-eight hours. A denial of immediate review would have resulted in serious harm to Isbrandtsen. Under cases such as *Isbrandtsen* finality has become a function of the nature of individual legal injury caused by agency action.

The additional statutory requirements of a "proceeding"[32] and an "aggrieved party"[33] have usually been considered secondary to the finding of an "order" since solution of the complex order issue either moots these requirements if no order is found or otherwise facilitates their rationalization. The *Medical Committee* approach to the section 25(a) reviewability question thus appears unique in light of prior analyses of similar statutory language.

In analyzing the reviewability of an SEC decision to take no

28. *Compare* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948); CBS v. United States, 316 U.S. 407 (1942); Cities Service Gas Co. v. FPC, 255 F.2d 860 (10th Cir. 1958); Phillips Petroleum Co. v. FPC, 227 F.2d 470, 474 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Phillips v. SEC, 171 F.2d 180 (2d Cir. 1948), *with* Abbott Labs. v. Gardner, 387 U.S. 136 (1967); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir. 1954).

29. Thus, the test does not require a "final order [to be] the very last order." Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir. 1954).

30. 5 U.S.C. § 1032 (1964).

31. 211 F.2d 51 (D.C. Cir. 1954).

32. See note 11 *supra*.

33. Although there is little authority wherein the absence of an aggrieved party has precluded judicial review of agency action, the extent of the aggrievement appears to have aided courts in finding an "order" warranting review. Frozen Food Express v. United States, 351 U.S. 40 (1956). *See also* Isbrandtsen Co. v. United States, 211 F.2d 51, 56 (D.C. Cir. 1954). In this type of analysis several courts have used the words "irreparable harm" in describing the damage which must be suffered by a party seeking review. CBS v. United States, 316 U.S. 407, 419 (1942); Isbrandtsen Co. v. United States, *supra*; Phillips v. SEC, 171 F.2d 180, 183 (2d Cir. 1948); American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236, 239 (D.C. Cir. 1937). *But see* Mallory Coal Co. v. National Bituminous Coal Comm'n, 99 F.2d 399, 407 (D.C. Cir. 1938). In fact, the SEC argued that the absence of irreparable harm to Medical Committee should preclude review. Respondent's Reply to Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss at 12. However the court preferred the statutory term "aggrieved" and there is no authority to depart from the statutory language and require the apparently stricter standard of "irreparable harm." 432 F.2d at 667-68.

action if a corporation refused to include a stockholder proposal in proxy materials,[34] the court resorted to "general principles and analogies"[35] because of ambiguous precedent and legislative history.[36] Reviewability was predicated on a balancing of three factors: finality, formality, and pragmatic considerations. Such a test apparently departs from previous tests discussed above. What remains to be seen is whether such abandonment is actual, and, if so, its future impact.

A presumption of reviewability, allowing judicial review of administrative action except where there is specific congressional intent to the contrary,[37] pervades the *Medical Committee* opinion. The extent to which the presumption becomes a predisposition for review is difficult to determine and may not be detrimental to efficient agency action if the court's reviewability criteria are sound and properly applied. Whether termed exhaustion of remedies or ripeness, the principle of finality withholds judicial review except for those controversies which are administratively complete.[38] Such a policy theoretically assures a more complete, justiciable case for judicial review and an efficient administrative process.[39] Further, reviewing

34. The court first disposed of a challenge to the timeliness of the filing of the petition. Section 25(a) requires that a petition for review be filed "within sixty days (60) after the entry" of a Commission order. 15 U.S.C. § 78y(a) (1964). Sixty-six days elapsed between the entry of the minute reflecting the Commission's decision and the filing of the petition by the Medical Committee. However, the Medical Committee did not receive written notification of the Commission's decision until some time after the minute entry and a copy of the minutes was received even later. Relying on the need for a party to have "adequate notice of the substance of the decision, and sufficient time to prepare his petition," the court refused to bar the petition for untimeliness, 432 F.2d at 663-65.

35. 432 F.2d at 665. See note 11 *supra* and accompanying text.

36. What authority does exist offers only an assumption of nonreviewability of such decisions but no real discussion of the issue. *See, e.g.*, Klastorin v. Roth, 353 F.2d 182, 183 n.2 (2d Cir. 1965). *See also* Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N.D. LAWYER 13, 17 (1964) [hereinafter cited as Clusserath]. The absence of any indication of congressional intent to preclude review facilitates applying authority refusing to deny review. Rusk v. Cort, 369 U.S. 367 (1962); Leedom v. Kyne, 358 U.S. 184 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); Brownell v. Tom We Shung, 352 U.S. 180 (1956); Heikkila v. Barber, 345 U.S. 229 (1953); Board of Governors v. Agnew, 329 U.S. 441 (1947).

37. *See, e.g.*, Lane v. Hoglund, 244 U.S. 174 (1917); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); *cf.* Schilling v. Rogers, 363 U.S. 666 (1960). See cases cited in note 36 *supra*. Professor Davis discusses this presumption in terms of a common law of reviewability rebuttable by Congress, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.07 (1958), and in a similar manner Professor Jaffe calls it "a basic right [and] a traditional power" subject to congressional elimination. JAFFE 346.

38. *But see* Abbott Labs. v. Gardner, 387 U.S. 136 (1967), where pre-enforcement review of regulations issued by the Commissioner of Food and Drugs was authorized.

39. Some commentators would suggest that the case finally presented is then too complete and leaves the court with an immense project of reviewing a lengthy record and a very technical

only final actions facilitates early disposition of controversies through the use of informal procedures rather than less effective "trial-type" hearings.[40] To a large extent finality is a "case or controversy" problem similar to the constitutional inquiry required where parties appeal to the federal judicial system for resolution of differences; therefore, usable finality criteria are essential. In examining the finality of the SEC's action in *Medical Committee,* the court acknowledged that the agency's administrative process had "run its course" and noted that a possibility of a private collateral action[41] against Dow did not negate any "aggrievement" suffered by the Medical Committee from the SEC's decision.[42] The court recognized that time, the critical element in a proxy contest, militated against such remedy. Further, in such an action the Medical Committee, having lost in the more complete SEC proceedings, would face judicial deference to Commission construction of its own proxy rules.[43] The SEC's argument that no irreparable harm had been suffered by Medical Committee since such a private action was available was thereby rejected.

The court deemed the alleged strong public interest in judicial review of corporate democracy questions supportive of a finding of aggrievement. But instead of noting authority acknowledging such a public interest,[44] the court simply cited other public interests previously held by the court to merit expeditious judicial review.[45] The addition of this substantial public interest test seemingly acknowledged a discretionary element in reviewability somewhat akin to review on certiorari before the Supreme Court.[46] The fact that the SEC rendered a "no action" decision did not impede the court's finding of aggrievement. While administrative refusal to act once precluded judicial review,[47] the so-called "negative-action" theory has

problem in a field unfamiliar to the court. Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N.Y.U.L. REV. 201 (1970).

40. *See* 432 F.2d at 668-69.

41. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

42. 432 F.2d at 667.

43. *Id. See, e.g.,* Dyer v. SEC, 266 F.2d 33 (8th Cir.), *cert. denied,* 361 U.S. 835 (1969); Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951).

44. *See* S. 4003, 91st Cong., 2d Sess. (1970) (Corporation Participation Bill introducted by Senators Muskie and Eagleton).

45. *See, e.g.,* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

46. *Cf.* Prettyman, *Petitioning the United States Supreme Court—A Primer for Hopeful Neophytes,* 51 VA. L. REV. 582, 597-98 (1965).

47. *See* Proctor & Gamble Co. v. United States, 225 U.S. 282 (1912).

been so repudiated[48] that even administrative delay has come under review.[49] By finding both negative action and delay reviewable, courts have done no more than acknowledge the practical effect of such administrative conduct.[50] The aggrievement requirement is not reduced by concluding that non-action can determine rights or injure a party as finally and effectively as affirmative action. Even though the SEC decision was only "no-action," practically it has as much final effect on the Medical Committee as an affirmative decision declaring the Dow exclusionary policy legitimate.

Analysis of the formality of the SEC decision in *Medical Committee* presented difficult questions involving the type of administrative action sufficient to warrant judicial review. Administrative orders which follow formal, evidentiary, adversary-type hearings preserved in transcripts present a more manageable, clearly defined controversy for judicial review. But as already noted, such a hearing is not necessarily a prerequisite to judicial review under statutes similar to section 25(a).[51] Therefore, although a formality requirement may superficially appear to resurrect the definitive-procedural order test of *Metropolitan Edison* and *Mallory*,[52] it need not go so far.[53] Absent a minimum formality requirement, agencies might be discouraged from rendering informal advice for fear of judicial review.

Formality presents problems of degree, particularly concerning agency proceedings short of a full hearing. Although a term such as "judicial orders" may be used to indicate the type of action which is reviewable,[54] it offers no help in determining the minimum formality required for such an order. The formality factor is perhaps best understood as related to the more precise determination of what is a final order. The court seems to say that the more an agency decision possesses formality characteristics, albeit short of a full hearing, the more likely it is to be characterized as a judicially reviewable order. A discussion of formality cannot be isolated from the court's discussion of finality, but it is through formality that the court discusses the

48. *See* Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939).

49. Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1098-100 (D.C. Cir. 1970).

50. *See* FPC v. Pacific Power & Light Co., 307 U.S. 156 (1939).

51. See note 28 *supra* and accompanying text.

52. See notes 21-27 *supra* and accompanying text.

53. *Cf.* Helco Prod. Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236 (D.C. Cir. 1937); JAFFE 419.

54. See note 15 *supra* and accompanying text.

following aspects of the final order determination: the availability of a hearing when dealing with proxy statements; the formality characteristics of the SEC decision; and the nature of proxy rule 14a-8(d). The Act itself contains provisions for evidentiary hearings,[55] although not in the proxy section.[56] While the SEC did not argue that only orders preceded by formal evidentiary hearings are reviewable under section 25(a), it did maintain that only agency action for which such a hearing has been *authorized* is reviewable.[57] Since the SEC proxy rules adopted pursuant to the Act's proxy section, particularly rule 14a-8(d) dealing with management exclusion of stockholder proposals, do not authorize a hearing, the SEC argued that agency action predicated on them is not reviewable. The language of section 25(a) does not expressly condition judicial review on the holding of a prior hearing or its availability,[58] and reading such a requirement into it appears strained. To require that a hearing be authorized, although not necessarily used, to permit review has little rational basis and appears to be only an attempt to salvage indirectly the *Metropolitan Edison* requirement of an actual hearing.[59]

Under SEC rules distinguishing between formal and informal proceedings[60] the Commission argued that the proposal rejection was

55. *See, e.g.*, 15 U.S.C. § 78f (1964) (grant or denial of registration as a national securities exchange); *id.* § 78*l*(f) (termination or suspension of unlisted trading privileges on a national securities exchange); *id.* § 78o(b)(5) (denial or revocation of registration as a broker-dealer); *id.* § 78s(a)(1) (suspension or withdrawal of registration of a national securities exchange).

56. *See* E. ARANOW & H. EINHORN, PROXY CONTESTS FOR CORPORATE CONTROL 450 (2d ed. 1968). (The Commission attempts to utilize "informal methods to secure compliance with the Proxy Rules.")

57. Respondent's Supplementary Memorandum In Response to the Reply Brief Filed by the Petitioner at 7-8. The Commission relied on FPC v. Metropolitan Edison Co., 304 U.S. 375 (1938). See notes 31-39 *supra* and accompanying text. The SEC argued that "only those definitive types of agency action are reviewable as to which an evidentiary hearing, if necessary, would be appropriate under applicable law. . . ."

58. The section does contain language referring to findings of fact which might imply the requirement of such a hearing:

> The *finding* of the Commission *as to the facts*, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce *additional* evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the *hearing* before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the *hearing* . . . . 15 U.S.C. § 78y(a) (1964) (emphasis added).

59. See note 23 *supra* and accompanying text.

60. 17 C.F.R. § 202.1 (1970). The Commission has concluded that opinions obtained through informal procedures "do not constitute an official expression of the Commission's views," but in some instances may "be relied upon as representing the views of [an SEC] division." *Id.* § 202.1(d).

characterized by informality. Although the SEC decision is reflected only by a minute in the Commission records[61]—a factor downgraded by the Commission as the mere acceptance of a staff recommendation not to act,[62] an advisory opinion,[63] or the mere "courtesy of a response to a complaining person"[64]—it is difficult to understand how the Commission could seriously characterize its decision as informal after the events transpiring between the Medical Committee, Dow, and the Commission. Moreover, the Commission ignores the binding nature of its "opinions" concerning stockholder proposals.[65]

Some authority exists for characterizing SEC action under proxy rule 14a-8(d) informal and non-reviewable in a federal court of appeals.[66] Presumably the product of such action constitutes unreviewable advice or information given merely to assist corporate management.[67] The authority cited by the court offers little justification for terming proxy statement decisions informal; courts have simply allowed the SEC to operate in this area free of judicial restraint. While judicial reluctance to explore the esoteric field of proxies and deference for Commission expertise is understandable, such reluctance cannot be squared with the literal language of section 25(a) providing relief for parties aggrieved. Without any clear authority the court extracted from rule 14a-8(d) an "adversariness" test to determine the necessary formality for judicial review.[68] The

61. Record, *supra* note 4, at 46a.

62. Respondent's Supplementary Memorandum In Response to the Reply Brief Filed by the Petitioner at 3.

63. Respondent's Answering Brief at 34-35.

64. *Id.* at 19.

65. *See* 432 F.2d at 667.

66. The court in Klastorin v. Roth, 353 F.2d 182, 183 n.2 (2d Cir. 1965), said "review by the Commission of the material is informal in nature." Klastorin had sought to enjoin use of a proxy statement for alleged violation of section 14(a) of the Securities Exchange Act of 1934. One commentator has described rule 14a-8 decisions as "*informal* administrative determinations not directly subject to review by Courts of Appeals." Clusserath, *supra* note 36, at 17.

67. *See, e.g.*, Letter from Director, Division of Corporation Finance, to plaintiff's counsel, Mar. 4, 1954, *in* Curtin v. American Tel. & Tel. Co., [1952-1956 Transfer Binder] CCH FED. SEC. L. REP. ¶ 90,659, at 91,999, 92,002 (SEC 1954). The letter takes the position that an SEC decision to take no action regarding management exclusion of a stockholder proposal does not take place in a "proceeding" and gives the impression that presentation of both points of view—stockholder and management—is at the good graces of the Commission and involves only a nonreviewable opinion-giving process and not an order. *Id.* at 92,003.

68. Apparently "adversariness" is intended to be an element of the court's formality factor. It is again difficult to confine such a discussion to formality when the degree of "adversariness" may well contribute to finality. It is perhaps best to think in terms of final order and the contribution "adversariness" makes thereto in spite of the court's organization.

Commission argued that since rule 14a-8(d) does not explicitly require a stockholder to file a statement with the SEC in support of a request for inclusion of a proposal, two opposing views are not presented and no "adversariness" exists. But the rule certainly anticipates that the controversy will have reached a stage where management and stockholder have exchanged opposing viewpoints and have reached an impasse, and implies the presentation of both viewpoints since it requires management to file with the stockholder proposal "any statement in support thereof as received from the security holder."[69] When the procedure is fully utilized by both sides making a complete presentation of their positions, as here, there is sufficient adversariness to satisfy the reviewability test.

In addition to finding sufficient "adversariness" the court determined rule 14a-8(d) mandatory and not permissive[70] and the burden of justifying exclusion of a proposal to be upon management.[71] Thus, the court rejected the SEC's attempts to label its administrative actions and broadly defined formality in terms of the legal consequences of the Commission's decision.[72]

Having satisfied the factors of finality and formality, the court met the SEC's strongest argument with a discussion of pragmatic considerations. As noted previously,[73] in seeking review under section 25(a) the Medical Committee disregarded its opportunity to seek enforcement of the proxy rules in a private action against Dow[74] under section 27 of the Securities Exchange Act.[75] Such an action could have

69. 17 C.F.R. § 240.14a-8(d) (1970). The SEC also argued that rule 14a-8(d) does not require a review or a decision on the part of the Commission. Respondent's Answering Brief at 17. The extent to which absence of such a requirement can preclude review is doubtful when the Commission does in fact render a decision which actually injures a party, and refusal to act may be just as injurious as affirmative action. *See* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

70. 432 F.2d at 670. Management must file the stockholder proposal and both supporting and opposing materials and forward the required information to the stockholders.

71. *Id.*, *citing* 19 *Fed. Reg.* 246 (1954). But the Commission argued that this burden does not apply to "an administrative proceeding before the Commission." Respondent's Reply to Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss at 6. Instead the burden would be on management in an injunction proceeding brought by the stockholder or the Commission. *Id.* The court was apparently not concerned with this argument and certainly the language of the Commission in placing the burden on management is not so restrictive. *Id.* at 246.

72. See note 28 *supra* and accompanying text.

73. See note 41 *supra* and accompanying text.

74. J.I. Case Co. v. Borak, 377 U.S. 426 (1964). *See generally* Comment, *Private Rights and Federal Remedies: Herein of J.I. Case v. Borak*, 12 U.C.L.A.L. REV. 1150 (1965).

75. 15 U.S.C. § 78aa (1964).

resulted in injunctive relief prior to the stockholder meeting or subsequent relief designed to ameliorate the evil done by the company's illegal action.[76] The SEC argued[77] that by refusing to pursue this alternative remedy the Medical Committee failed to satisfy the requirement of being an "aggrieved" party.[78] But the court preferred to analyze the question in terms of the "more appropriate forum."[79] As demonstrated in *Environmental Defense Fund, Inc. v. Hardin,*[80] a district court hearing the case could only remand to the agency for further action, hardly a remedy more appropriate from the standpoint of the timely inclusion of the Medical Committee's proposal. Review under section 25(a) seemed uniquely appropriate since the Committee was only asking for further agency action under the proxy rules, not a complete trial.[81] Furthermore, time and the posture of the Medical Committee in a private action dictated section 25(a) review.

Underlying the court's balancing of pragmatic factors was "an *independent public interest* in having the controversy decided in its present posture rather than in the context of a private action against the company."[82] Viewing the proxy rules as designed principally to protect investors, the court concluded that the SEC should not force the stockholder to attempt through a private action what the SEC was directed by Congress to do through regulation of proxy statements.[83] Requiring private stockholder action would have the practical effect of denying relief from arbitrary management decisions to the individual investor seeking to use proxy procedures. Lengthy post-stockholder meeting litigation, with accompanying expense, would not encourage stockholder participation in corporate affairs. Direct

76. J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964).

77. Respondent's Answering Brief at 19 n.23.

78. See notes 42-43 *supra* and accompanying text.

79. 432 F.2d at 672.

80. 428 F.2d 1093, 1099 (D.C. Cir. 1970).

81. The Medical Committee's petition was framed more in terms of arbitrary agency action than arbitrary private action by Dow, although allegations of both appear. The relief requested was further agency action, not damages against Dow. In addition, there is authority which is critical of the inconvenience and inefficiency of "bifurcation of judicial review" where the existence of a final order is difficult to determine. Foti v. Immigration and Naturalization Serv., 375 U.S. 217, 232 (1963).

82. 432 F.2d at 672 (emphasis added).

83. *Id. See* 15 U.S.C. § 78n (Supp. V, 1970).

84. *Cf.* Hale v. FCC, 425 F.2d 557 (D.C. Cir. 1970); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

review under section 25(a) provides a quicker, less burdensome means of protecting the investor's interests by requiring the Commission to evaluate carefully the validity of management's planned exclusion of a proposal.[84] From a practical standpoint, direct reviewability was essential to vindicate the statutory and regulatory scheme created to promote fair dealing between management and investor.

Refusing to accept SEC predictions of the destruction of informal advisory opinions if review were permitted, the court in *Medical Committee* believed it was following congressional intent by conducting limited review when necessary to protect stockholders from arbitrary corporate and Commission action.[85] Spurred by a broad presumption of reviewability and pervasive fear of arbitrary SEC non-action, the court assured individual stockholders that the stockholder proposal rule is an operable element of the Security Exchange Act's concept of "protection of investors." It appears that the court has made reviewable action which, arguably, had previously been committed to agency discretion. In so doing it refused to follow a traditional reviewability analysis oriented toward finding a final order but instead applied certain general factors to determine the existence

85. *See* 432 F.2d at 675. Since the Commission had accepted Dow's reasoning, the substantive basis for exclusion of the Medical Committee's proposal was found in rules 14a-8(c)(2) and (5). See note 3 *supra*. In discussing the merits of the Medical Committee's petition the court was critical of the SEC's blind acceptance of Dow's position, which placed the stockholder in a dilemma and offered no assurance that Dow had sustained its burden of proof. In addition, by excluding the proposal under both rules 14a-8(c)(2) and (5), the stockholder was in effect told that his proposal was at the same time "too general" and "too specific." 432 F.2d at 679. It was apparent to the court that these two rules could be used to exclude virtually all proposals, and SEC use of both rules offered no administrative guidance to the Medical Committee as to how it could appropriately exercise the rights of corporate democracy purportedly available in the stockholder proposal rule. The exclusion of proposals which are "primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes," 17 C.F.R. § 240.14a-8(c)(2) (1970), has been strongly criticized, *see* S. 4003, 91st Cong., 2d Sess. (1970); in any case there was sufficient doubt that this rule could successfully exclude the Medical Committee's proposal concerning napalm. "[T]he proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control," 432 F.2d at 681, unlike other proposals which have been excluded under this rule. *See generally* Emerson & Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U. CHI. L. REV. 807 (1952). The SEC was not presented with a matter calling for preservation of management's freedom to act on ordinary business matters, but rather, possible use of the proxy rules to preclude stockholder involvement in management's personal, moral, and political choices. Expertise in such matters does not necessarily reside in management to any greater extent than in the beneficial owners of the corporation, the stockholders. The court therefore remanded the case to the SEC for discretionary consideration within a proper legal framework—utilizing compatible rules of exclusion—and with directions to make its reasoning sufficiently clear to permit effective review.

of a reviewable order. Thus, the section 25(a) elements of "aggrieved," "order," "proceeding," and "party" were generally ignored, but by necessity all four of the elements had to be satisfied. Portions of the statutory elements are to some extent found in each of the three general factors—finality, formality, and pragmatisim—but the difficulty in determining the amount of each general factor requisite to finding one of the specific statutory elements is a prime source of criticism of the new test. Although the test may substantially liberalize reviewability, it offers no precise guidelines. Moreover, although the court's sense of public interest is commendable, its opinion warrants close scrutiny for the possibility that an absolute right of appeal upon meeting certain standards has been restructured into a discretionary right predicated upon the court of appeals' appraisal of the public interest involved.

Yet there is reason to commend the result in *Medical Committee.* It is altogether too likely that either individually or collectively management and the SEC can arbitrarily act "within the proxy rules" to stifle stockholder proposals and effcctively chill individual participation in corporate democracy in derogation of the intent of the Act. Stockholders have apparently been relievcd of the expense and burden of pursuing their investor rights in private actions against their corporation. Analysis of reviewability in terms of effect on the agency, the courts, and the party seeking a remedy is to be encouraged.[86] More liberal review under the general criteria employed in *Medical Committee* could promote effcctuation of the stockholder proposal rules while conforming to section 25(a) review requirements and should not evoke fear of unwarranted judicial intrusion from an agency which objectively and fairly performs its statutory obligations. But liberal interpretations must still meet statutory requirements. It is imperative for future usage of the *Medical Committee* test that the relationship between finality, formality, and pragmatism and section 25(a)'s review requirements be clarified.

Reviewability of Emergency Suspension Orders Under the Federal Insecticide, Fungicide and Rodenticide Act

The Court of Appeals for the Seventh Circuit and the Court of

86. *See generally* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968). In a case involving review under the administrative procedure act, 5 U.S.C. §§ 702, 704 (Supp. V, 1970), the District of Columbia Circuit has likewise found the "practicalities of administrative involvement" sufficient to warrant judicial review of otherwise informal SEC action. Independent Broker-Dealers Trade Ass'n v. SEC, 39 U.S.L.W. 2506 (D.C. Cir. Mar. 4, 1971).